



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 123 OF 2017

JOSEPHAT THUO GITHACHURI.....PLAINTIFF

=VERSUS=

JOSEPH KIBUI MWITHIGA.....DEFENDANT

JUDGMENT

1. Through a plaint dated 20/2/2017, the plaintiff instituted this suit against the defendant seeking the following orders:

- a) A mandatory injunction restraining the defendant from trespassing onto the plaintiff's parcel of land described as I & J on land parcel LR No Dagoretti/ Ruthimitu/263.*
- b) An order that the defendant demolishes his structures on the land and restores the land to its original status.*
- c) General damages for trespass and nuisance.*
- d) Costs of the suit.*

2. The plaintiff's case is that he is the registered owner of one acre designated as Parts I and J being a portion of all that parcel of land known as **Land Title Number Dagoretti/Ruthimitu/263 (the suit property)**. He acquired the suit property through orders of adverse possession in **Nairobi HCCC No 2364 of 1999 (OS)**. The defendant trespassed on the suit property and started to develop it. Despite several attempts to stop him from trespassing on the land, the defendant continued with the acts of trespass. The defendant's activities have devalued the plaintiff's land. Consequently, the plaintiff seeks the above orders.

3. The defendant did not enter appearance or file a defence to the suit. He was served through the Standard Newspaper on 9/10/2019.

4. The plaintiff testified on 7/11/2019 as PW1. He adopted his written statement dated 8/8/2011 as his sworn evidence-in-chief. His evidence was that, he was the legal owner of one acre designated as Parts I and J, being part of Land Title **Number Dagoretti/ Ruthimitu/263** pursuant to a decree issued in Nairobi HCCC No 2364 of 1999. He was in the process of excising his one acre portion of land when the defendant trespassed onto the said portion, erected a fence would it and laid a foundation for a building. The defendant was not a party in Nairobi HCCC No 2364 of 1999 and therefore he had no interest in the suit property. He contended that the defendant should be restrained from trespassing onto the suit property. He added that he was entitled to general damages and costs. He produced a bundle of 5 documents which included: (i) Decree in HCCC No 2364 of 1999 (OS); (ii) Subdivision plan for Dagoretti/Ruthimitu/263; (iii) amended notice of motion in HCCC No 2364 of 1999 (OS); Official Search dated 9/2/2017;(iv) and Photographs showing the defendant's activities on the suit land.

5. The plaintiff filed written submissions on 13/12/2019 through the firm of Masore Nyangau & Company Advocates. Counsel submitted that the plaintiff had proved his case against the defendant and was, therefore, entitled to the prayers sought. Counsel submitted that an award of Kshs 2,000,000 in general damages was reasonable for the trespass. Reliance was placed on the case of **John Chumia Nganga v The Attorney General & another, Thika ELC No 264 of 2017**.

6. I have considered the pleadings, evidence and submissions placed before the court. This suit is undefended. The defendant was said to have been personally served. The court directed that he be further served through a notice in either the daily Nation or the Standard Newspaper. He was subsequently served through a notice published in the Standard Newspaper Edition of 9/10/2019.

7. The plaintiff's case is that a decree was issued in Nairobi HCCC Number 2364 of 1999 (OS) in which he was awarded one acre out of land Title Number Dagoretti/Ruthimitu/263. In January 2017, the defendant trespassed onto the said portion of the land, erected a fence round it and started laying a foundation for a building. The plaintiff placed before court photographs depicting features of the alleged acts of trespass.

8. The court has considered the totality of the evidential materials placed before it. In the absence of a defence and controverting evidence, the court is satisfied that the plaintiff has proved his case against the defendant on a balance of probabilities. I will grant the plaintiff prayers (a), (b) and (c) as prayed.

9. Counsel for the plaintiff urged the court to grant the plaintiff general damages of Kshs 2,000,000. No evidence was led to assist the court assess general damages. The alleged trespass affected one acre piece of land in Dagoretti. There is no evidence to suggest that the trespass continued after the court issued a temporary restraining order in February 2017. In the circumstances, I will award the plaintiff nominal general damages of Kshs 1,000,000 (One Million) for the trespass.

10. In light of the foregoing, I make the following disposal orders:

a) A permanent injunction is hereby issued restraining the defendant together with his agents/servants against trespassing on the plaintiff's one acre portion of Land Parcel Number Dagoretti/Ruthimitu/263 described as Parts I and J as decreed in Nairobi HCCC No 2364 of 1994 (OS).

b) A mandatory order is hereby issued requiring the defendant to demolish his structures erected on the said property within 30 days. In default, the plaintiff shall be at liberty to demolish the structures.

c) The Officer Commanding the area Police Station shall ensure observance of law and order during the demolition.

d) The plaintiff is awarded nominal general damages in the sum of Kshs 1,000,000 against the defendant

e) The defendant shall bear costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF JUNE 2020.

B M EBOSO

JUDGE

In the presence of: -

June Nafula - Court Clerk