



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 745B OF 2017

ALLI JUJA FARMERS CO. LTD.....PLAINTIFF

VERSUS

REV. FRANCIS GATUA.....1ST DEFENDANT

PRESBYTERIAN FOUNDATION.....2ND DEFENDANT

JUDGMENT

By a Plaint dated 18th September, 2017, the Plaintiff herein brought this suit against the Defendants seeking for orders that;

- a) Orders for removal of all structures, buildings and other installations trespassing on the adjacent plots and access roads to the Plaintiff plot.***
- b) An injunction directed at the Defendants to cease the trespass on the neighbouring plots as specified in the survey plans and remove their installations forthwith.***
- c) An award of General Damages against the Defendants and to the legal and equitable beneficiaries of the affected plots.***
- d) Aggravated damages and mesne profits for the blatant trespass leading to the Plaintiff/ shareholders incurring substantial loss.***
- e) Costs of this suit***
- f) Interest on all awards from the time the trespass commenced.***

In its statement of claim, the Plaintiff averred that it is the lawful owner of the property known as **L.R No. 4941**, measuring **150 acres** which has since been subdivided by its Directors and shareholders into about **4900 subdivisions**, wherefore about **40 plots** have been demised on the 2nd Defendant under the auspices of the 1st Defendant and that that the remainder of the plots are held by the Plaintiff and its shareholders. That some of the plots have been encroached upon by the Defendants who have failed to build within their surveyed plots and have trespassed on neighbouring plots and access roads. It was averred that the Plaintiff has made every effort to move the Defendants to stop the trespass without success as owners of the affected plots have found it impossible to develop their plots permanently and have been forced to delay housing development incurring financial incidentals on rental houses.

It was further averred that the Defendants acts have affected the neighbouring plots, access roads, service lines and therefore delaying work and affecting adversely adjacent plots.

The suit is contested and the Defendants filed their statement of Defence dated 13th March 2018 and denied all the allegations made in the Plaint. It was their contention that plans are underway to amalgamate the **40 plots**.

The matter proceeded by way of viva voce evidence wherein the Plaintiff called 2 witness and closed its case and the Defendants called one witness.

THE PLAINTIFF'S CASE

PW1 Micheal Njoroge Gitaka testified that he is the Secretary of the Plaintiff Company having been elected in **1997**. It was his testimony that the Company had **8600** members and two farms of **315 acres** and that the acres were subdivided to the number of members equally. He testified that upon subdivisions, ballot were prepared for the plots. That when the exercise started, **P.C.E.A Thinuka** approached their offices and they were given **40** shares which they acquired for the same number of shares. That some church members requested that the plots be consolidated so that the church can be constructed. That consolidation of the plots was done and they were requested not to encroach on the public road. He further testified that when the Defendants started to construct, they encroached on the public road and fenced the area including the public road.

It was his testimony that though he wrote to the Defendants severally requesting that they do not interfere with the public road, they ignored his request. Further that even after pointing to the Defendants the area of encroachment, they ignored the Plaintiff's request. He further testified that their claim is that the church be demolished so that the public road can be restored. He produced Copies of the titles as Exhibit 1 and letter to the Secretary as exhibit 2.

He further testified that the Defendants had blocked other members from accessing their plots, though he did not have the list of members who had been blocked. It was his evidence that the church had **40 plots** and that the Company did them a favour and consolidated all the **40 plots** so that they could construct the church. However, the Defendants have encroached on the public road.

PW2 Stephen Kimani Kahunyo testified that he is the treasurer of the Plaintiff Company and that he was representing the Chairman who was unwell. He produced the plan for the area and the same was marked as exhibit 3. He further testified that the plan shows four public roads have been affected and that there is a major road of 9 metres long. Further that the church bought the plots after they had been allocated and they were allowed to consolidate but that they needed to respect the public roads. It was his testimony that he was coming to Court for public interest and stated that he did not know if the plots are amalgamated.

DEFENCE CASE

DW 1 Rev. Francis Ndungu Gatua, testified that he is the 1st Defendant and that he also represents the Presbyterian Foundation being the Parish Minister. He adopted his witness statement dated **20th June 2018**, and produced the list of documents as Exhibit 1 to 40 and further produced a copy of the Sketch map as exhibit 41. He testified that the church (2nd Defendant) got the plots from their church members who gave them freely for construction of a Church. He further testified that the 2nd Defendant built the Church in the year **2007**, and that the plots were given in the year **2004**.

It was his further testimony that construction was completed in **2008** and they registered all the plots under the **Presbyterian Foundation**, in the year **2009**. That according to the sketch map, the church is built just adjacent to **plot No. 1506** and **1505**. That they built the Church on the road on that particular place because the plots are small and that since they felt it was wise to build a big sanctuary and further that since the whole block belonged to the Church they could build on the road. He denied that the Defendant had trespassed on any parcel of land.

It was his testimony that if someone was to build on public land, then the County Government would demolish the same. However, in their case, the County Government of Kiambu has not complained. He told the Court that he was posted to the parish in **2017**, and acknowledged that there were correspondences before the former Minister and him over the same matter. He confirmed that he received a note from the Plaintiff over the matter and that they wanted the church to be demolished and built somewhere else since it was on the road reserve. He acknowledged that the Plaintiff just wanted the road to be opened up. It was his evidence that the Plaintiff wanted them to relieve the plots which were near the Kenyatta Road in exchange for the road. He denied that the Defendants have trespassed or blocked anyone. He told the Court that the Defendants are in the process of amalgamating the plots, and then put a perimeter wall all round the church. Further that he did not understand why outsiders would come and dictate to them how they should build on their plots.

He further acknowledged that the Plaintiff has no issue with the **40 plots** and that they built on the road reserve because the whole blocks belongs to the church. That all the plots belong to the church and therefore, the Defendants were not encroaching. He denied that the Defendants had prevented other people from using the said road reserves and that those roads were meant for members within the **40 plots** which plots were sold to the church. That the Defendants had a right to put a perimeter wall around the said plots and that the sanctuary was built on the road reserve for proper planning as they needed to plan their block. Further that the Defendants were not ready to demolish the Sanctuary that was built by the poor congregants. He denied that the Defendants have taken **13** additional plots for free. He confirmed that they are in the process of amalgamating the plots.

After the viva voce evidence, Parties filed their written submissions and on **28th January 2020** in highlighting its submissions, **Mr. Wanyiri** for the Plaintiff submitted that everybody has a right to access the road as there are 800 plots. He submitted that the Plaintiff has followed the right procedure. That the Plaintiff want the access road opened for the Plaintiffs and any other members of public. It was his submissions that the Plaintiffs are not ambiguous.

Mr Kamonjo, Advocate for the Defendants submitted that the Defendants are in the process of amalgamation and that there was no Court order barring them from that process. He submitted that the case is ambiguous and that the order sought cannot be granted with certainty. It was his submission that the Court cannot give orders which are not specific and that trespass cannot be granted as the law is very clear that trespass is on private land. It was his further submission that the Plaintiff did not have the **locus standi** to bring this claim. Further that there are no resolutions that they are suing on behalf of the members and that the Court should not allow a Company that had sold a property to come and reclaim it.

The Court has now carefully read and considered the pleadings by the parties, the written submissions and relevant provisions of law and renders itself as follows.

It is not in doubt that the Plaintiff initially owned **150 acres** of land. Further, the Plaintiff subdivided the said properties into various plots which were given to Directors and shareholders. That the 2nd Defendant's members bought various plots from the Plaintiff and that since the

members wanted to donate the said plot to the church, they sought assistance from the Plaintiff to have their plots which were 40 in number be allocated around the same area as members who had bought the land were required to ballot. Further it is also not in doubt that there are access roads on the said properties and that there around 4900 subdivisions amongst the 40 plots that the Defendants have built their land.

It is also not in dispute that the Defendants have built a Sanctuary and that the said Sanctuary is built on the road reserve. It is the Defendants contention that the road access that they have built their Sanctuary on was meant to serve the members who had bought the 40 plots and that there is no one else who has rights over the said property.

The Court notes that the Defendants have submitted on various issues that were never pleaded. One of them being that the Plaintiff did not have *locus standi* to bring the suit and that there was no resolution from the members to bring in the suit. While *locus standi* goes to the Jurisdiction of this Court to hear and determine the issues at hand, it is the Court's considered view that the issue of resolution was never pleaded and given that the parties are bound by their pleadings, a Party cannot bring new issues during submissions. See the case of Daniel Toroitich Arap Moi & Another ...Vs... Mwangi Stephen Murithi & Another (2014) eKLR where the Court held that:

“Submissions cannot take the place of evidence. The Respondent had failed to prove his claim by evidence what appeared in submissions could not come to his aid--Submissions are generally parties “marketing language....”

Further Parties are bound by their pleadings as was elicited in the case of Joseph Mbuta NziuVs... Kenya Orient Insurance Company Ltd [2015] eKLR where the court referring to a decision of Nigerian Supreme Court stated-“In ADETOUN OLADEJI (NIG) LTD ... Vs... NIGERIA BREWERIES PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. stated as follows;

‘... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.’

These are the issues for determination;

- 1. Whether the Plaintiff has locus standi*
- 2. Whether the Defendants Building on the road reserve is justified*
- 3. Whether the Plaintiff is entitled to the orders sought.*

1. Whether the Plaintiff has locus standi

It is the Defendants contention that the Plaintiffs do not have *locus standi* to bring the suit In the case of Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000, the Court held that ;-

“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of Alfred Njau and Others ..Vs.. City Council of Nairobi (1982) KAR 229, the Court also held that;-

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings.”

The question then begs whether the Plaintiff has any interest in the matter. It is the Plaintiff's contention that the Defendants have trespassed and encroached onto the access roads that are supposed to serve their, members. It is not in doubt that the suit property before subdivision was owned by the Plaintiff and further that the subdivisions have been subdivided amongst the Plaintiff's shareholders who are also its members. It is therefore not in doubt that being the members that may be affected by the actions and or omissions of the Defendants actions, the plaintiff have an interest over the matter.

Therefore, the court finds and holds that the Plaintiff has requisite *locus standi* to file the instant suit.

2. Whether the Defendants Building on the access road is justified.

It is the Defendants contention that the access road that they have built on are part and parcels of their property being that the access roads were supposed to cater to the owners of the 40 properties. The Defendants have further alleged that they are in the process of amalgamating their land and therefore in their opinion demolishing the Sanctuary would cost them and that would be unfair to the poor congregants who had sacrificed their money to ensure that the said sanctuary was built. The Defendants have further relied on various provisions of law including the **Land Registration Act** which Provides under the following Sections;

(6)(4) The office or authority responsible for land survey may, at any time, cause registration sections or blocks to be combined or divided, or cause their boundaries to be varied, and immediately inform the Registrar of the changes.

(16) Power to alter boundary lines and to prepare new editions(1) The office or authority responsible for the survey of land may rectify the line or position of any boundary shown on the cadastral map based on an approved subdivision plan, and such correction shall not be effected except on the instructions of the Registrar, in writing, in the prescribed form, and in accordance with any law relating to subdivision of land that is for the time being in force.

(22) Combinations and subdivisions (1) Subject to authentication of the cadastral map, if contiguous parcels are owned by the same proprietor and are subject in all respects to the same rights and obligations, the Registrar, on application by the proprietor, may combine these parcels by closing the registers relating to them and opening a new register or registers in respect of the parcel or parcels resulting from the combination.

From the above provisions of law, there is no doubt that boundaries may be altered and subdivision may be combined by the Registrar. However, it is also clear that the said alterations may only be done with the instructions of the Registrar and that an application must first be made. Though the Defendants have alleged that they are in the process of amalgamating the said lands, there is no evidence of this process. Further even if the lands were to be combined there, is no certainty that the access roads would be part and parcel of the Defendants property.

Though it is the Defendant's contention that the access roads were to serve the owners of the 40 parcels of land, there is no evidence to this effect. The Court notes that there are around **4900** subdivisions in the said area. That the access roads were made at the point of subdivisions of the land and before the same were allocated to the Defendants. Therefore, unless there is evidence to indicate that they are not necessary, then in the Court finds and holds that the Defendants cannot lay claim to the land.

Section 14 of the **Public Roads and Roads of Access Act** provides that;-

(1) It shall be competent for a board for sufficient cause to order the cancellation or alteration of the alignment of a road of access, provided due notice has been previously given to any person who might be affected by such order.

(2) The board shall have power to make an order for giving effect to any matter or thing over which the board has jurisdiction under this Act, or for the cancellation or alteration of any order previously made: Provided that the provisions of this Act respecting the procedure to be followed and the notices to be given as respects an application to construct a road of access shall apply mutatis mutandis to the cancellation or alteration of any order previously made, and to any other order made under this Act.

It is therefore clear from the said provision of law that though the Board has powers to alter the access road, notices must be sent out to people who are likely to be affected by the said alteration. Any amalgamation of the Defendants properties and combining the same with the access road, is therefore an alteration and in the Court's considered view, that this would require the Board's permission.

For the Plaintiff to create the access road during subdivision then due process was followed and therefore the Defendants cannot just purport to alter the same without following the same due process. Further given that there are around **4900** subdivisions, there is no evidence produced by the Defendants to confirm that other members living in the area do not use this access road. This is so as the access roads were not created by the Defendants but during subdivisions and consequently the Defendants cannot lay claim to the access road. The Defendants have acknowledged having built the sanctuary on the access road. Therefore, the said construction is not justified and not properly in place.

The Court empathies with the Church members who have tirelessly worked to ensure that the Sanctuary was built. However proper procedures were not followed in ensuring that the same was done and the access road having been put to ensure that it serves members who had bought the subdivisions, and therefore the Defendants cannot lay claim to the same as they had only bought the subdivisions and not the access roads which were not part of their property.

Having carefully analysed the available evidence, the court finds and holds that the actions of the Defendants of building the Sanctuary on the access road are not justified and should not be allowed to hold.

3. Whether the Plaintiff is entitled to the orders sought

The Plaintiff has sought for the removal of the structure on the access road by the Defendant. As the Court has already held the Defendants building on the said access road was not justified and therefore the Court holds and finds that the said prayer is merited.

The Plaintiff has also sought for an injunction against the Defendants barring them from trespassing on the other plots. It is trite that whoever alleges must prove. Though the Plaintiff have been able to prove that the Defendants have encroached upon the access roads by the Defendants own admission, here is no evidence that the Defendants have encroached upon the other plots. Trespass has been defined by ***Clerk and Lindsell on Torts, 18th edition at Pg.23*** as;

“any unjustifiable intrusion by one person upon the land in possession.”

It is the Court's considered view that the Plaintiff has not proved any trespass by the Defendants onto other plots, and therefore its prayers for general damages for trespass and injunction are not merited.

Consequently, the Court finds that the Plaintiff is entitled to the prayer of the removal of the structures on the access roads and costs of the suit, the Plaintiff being the successful party.

Having now carefully considered the available evidence and the exhibits thereto, the written submissions, cited authorities and the relevant provisions of law, the Court finds that the Plaintiff has partially proved its case on the required standard of balance of probabilities. For the above reasons, the Court enters Judgment for the Plaintiff against the Defendants jointly and severally in terms of ***prayers No.(a), and (e) only.***

It is so ordered.

Dated, signed and Delivered at Thika this 15th day of June 2020.

L. GACHERU

JUDGE

15/6/2020

Court Assistant - Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By Consent of ;

No consent for the Plaintiff

M/s Kaingati Kamonjo advocates for the Defendants

L. GACHERU

JUDGE

15/6/2020