



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 470 OF 2017**

**(FORMERLY MILIMANI ELC NO. 607 OF 2012)**

**HENRY D.N KARIUKI.....PLAINTIFF**

**VERSUS**

**KENYA RURAL ROADS AUTHORITY.....DEFENDANT**

**JUDGMENT**

By a Plaint dated **14<sup>th</sup> September 2012**, the Plaintiff herein filed this suit against the Defendant seeking for orders that;

- 1. An order barring the Defendant from interfering with the Plaintiff's ownership, possession either in part or whole of that parcel of land known as Loc 1/Kirwara/275/30.***
- 2. An order barring the Defendant from demolishing premises erected on land parcel No. Loc 1/Kirwara/275/30***
- 3. Costs of this suit.***

In his statement of claim, the Plaintiff averred that he is the registered owner of the suit property wherein a building was erected in the year **1961**, and has been used as a slaughter house for several years. He averred that around the **26<sup>th</sup> April 2012**, a surveyor acting as an agent on the authority of the Defendant visited the suit premises without giving him notice and condemned the suit premises for demolition after making a finding that the suit premises encroached on the **Kirwara-Kigio Road**.

It was his contention however that the finding is unsubstantiated and wrong. He further averred that he had maps from survey of Kenya and the **County Council of Murang'a** dating back to the year **1961**, which show that the building is erected within the boundaries.

He particularised infringements of his rights by the Defendant as; failure to notify him of the survey process, deliberate attempts to alienate the suit land from him, purporting to shift the boundaries without the authority of the **District Land Registrar**, failing to respect his rights of ownership, and giving him a ridiculously short notice. It was his contention that he wrote a letter to the Defendant, questioning the procedure used and that an earlier survey process done on the suit premises on **20<sup>th</sup> January 2003**, by a surveyor working with the **County Council of Thika**, confirmed that the suit premises as properly constructed within the boundaries of the suit land.

The suit is contested and the Defendant filed a statement of Defence on **18<sup>th</sup> September 2017**, and denied all the allegations made in the Plaint and averred that the suit parcel belongs to **Thika County Council**, and that the Plaintiff's building encroaches on the road reserve. It was its contention that the orders sought are incapable of being granted.

After close of pleadings, the matter proceeded by way of **viva voce** evidence, wherein the Plaintiff gave evidence for himself and closed his case. The Defendant also called one witness and closed its case.

**PLAINTIFF'S CASE**

**PW1 Henry D. N. Kariuki**, adopted his witness statement dated **14<sup>th</sup> September 2012**, and produced his list of documents as Exhibit 1. He testified that he had a **1961**, map for Kirwara and further adopted his supplementary list of documents as Exhibit 2 to 12. It was his testimony that his brother one **Joseph Ndungu Kimani**, transferred the plot to him in the year **2003**, and in the same year on **20<sup>th</sup> January 2003**, he invited a surveyor from the **County Council of Thika** a **Mr. Ngariho** to trace the beacons. It was his evidence that the plot has **5 beacons** and that four of them were intact. However, the **5<sup>th</sup> beacon** had been interfered with by the Road and thus the finding was that the road had encroached on his plot and that was the only beacon that was missing.

He denied the allegations that he had encroached on the road and told the Court that his brother had the plot since 1961. He further testified that the plot was to be a slaughter house, but it was shut down because of the marking on the plot. He confirmed that he did not have evidence that the plot was initially registered in his brother's name but that his father initially owned the plot. It was his testimony that the transfer was done by the **County Council of Thika**, and that documents emanated from the Council. He further testified that there is a building that has been erected since 1961 though he did not have the building plans. It was his evidence that he applied for change of user in 2005, though he did not have any approval for change of user. It was his testimony that he did not have title to the land as the process of title ownership was still ongoing. He confirmed that he did not have the surveyors report and that he did not involve his private surveyor. He further confirmed that the map that was presented before court was not certified.

It was his testimony that he pays land rates for the suit property and that he is in the process of acquiring the lease certificate. He further testified that the beacons are very clear that the road is outside the beacons as there are dotted lines on the maps and that is where the road reserve has encroached on his plot.

## **DEFENCE CASE**

**DW1 Lawi Kariuki Mangu**, testified that he was a Principal Superintendent of Roads and construction of roads office for Gatanga. He adopted his witness statement dated **18<sup>th</sup> September 2017**, and produced the list of documents as **Exhibits 1 to 3**. He testified that the road has never been constructed due to the suit plot which has encroached on the road reserve. It was his evidence that the suit land belonged to the **Thika County Council**, and denied that it had been transferred. It was his evidence that they did a report before the road was improved and the changes were to be accommodated within the road works. He testified that the sketch plan shows the plot had encroached on the road reserve and that while improving the road, the building would hinder the improvements. He further testified that the Sketch plan had been signed by the **District Surveyor, Thika** and that it indicated where the building had encroached on the road. He further testified that the contractor could not pick out the curve on **Thika- Gatura** road due to the building.

The parties were directed to file written submissions and in compliance with the said directives, the parties filed their written submissions which the Court has now carefully read and considered together with all the pleadings and exhibits adduced in Court. The Court finds the issues for determination are;

### ***1. Whether the Plaintiff is the owner of the suit property***

### ***2. Whether the building had encroached on the road reserve***

#### ***1. Whether the Plaintiff is the owner of the suit property***

It is the Plaintiffs contention that he is the owner of the suit property having inherited the same from his brother. Though the Defendant has denied this allegation, and contended that the suit property belongs to the County Council of Thika, this Court has seen various documentation presented to Court as exhibits by the Plaintiff indicating that indeed the **Murang'a County Government** did not oppose the granting of the lease to the Plaintiff. A letter dated **8<sup>th</sup> November 2018**, confirms that there was a recommendation that the Plaintiff should be issued with the lease over the suit property and receipts showing that he has been paying land rents over the suit property. When a person's ownership to property is called into question, it is trite the the said proprietor has to show the root of his ownership. See the case of **Hubert L. Martin & 2 Others ...Vs... Margaret J. Kamar & 5 Others [2016] eKLR**, where the Court held that;

*'A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.'*

In the case of **Munyu Maina..Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, the Appeal Court held that:-

*"We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."*

In this instant case, therefore though the Plaintiff is yet to be registered as the owner of the suit property, the Court is satisfied that he has established the root of ownership over the suit property. This Court therefore holds and finds that the Plaintiff is the lawful owner of the suit property.

### ***2. Whether the building had encroached on the road reserve***

**Section 107(1)** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, which provides:

*'Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.'*

The Plaintiff has contended that the area in which the road is set to pass has encroached on his property. His allegation according to him is based on a survey which he conducted upon taking ownership of the suit property. However the Plaintiff failed to produce any report of the said survey before Court. Further this Court was also presented with a map by the Plaintiff with allegations that the same was evidence that the said map showed that the building was properly in place. However this Court agrees with the Defendant that the map is not certified and therefore there is no evidence that it is the true reflection of the survey of the suit property.

On the other hand the Defendant has produced a letter dated **11<sup>th</sup> October 2012**, by the District Surveyor Thika in which the author **Mr. C.N Kimani**, has attached a certified sketch map which he opined that the same shows that points **HJKL** of the building in the Plaintiff's property being the suit property had encroached on the road reserve. The said sketch map has been certified by the District Surveyor and in the absence of any evidence to the contrary, this Court therefore is satisfied that the building has encroached on a road reserve.

Having carefully considered the available evidence and the submissions herein, the court finds that the Plaintiff has failed to prove his case on the required standard of balance of probabilities and therefore he is not entitled to the orders as sought in the Plaint. Consequently, the Court dismisses the Plaintiff's suit entirely with no orders as to costs.

It is so ordered.

**Dated, signed and Delivered at Thika this 15<sup>th</sup> 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 **15<sup>th</sup> 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**

**No consent for the Defendant**

**L. GACHERU**

**JUDGE**

**15/6/2020**