



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 23 OF 2016**

**KAINGU KALUME MWANONGO.....PLAINTIFF**

**VERSUS**

**BONIFACE WANJE KENGA.....DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. By a Plaintiff dated and filed herein on 15<sup>th</sup> February 2016, Kaingu Kalume Mwanongo prays for Judgment against Boniface Wanje Kenga (the Defendant) for:

*a) General and exemplary damages for inducing breach of contract, on the footing of aggravated damages;*

*b) An order of ejectment of the Defendant and possession of the suit property;*

*c) A permanent injunction to restrain the Defendant by himself, or through his servants, agents, proxies or otherwise howsoever from doing or continuing to do the acts and things set out in paragraphs 4 to 8(of the Plaintiff) and to prevent him from committing a repetition thereof; and*

*d) A permanent injunction to restrain the Defendant from trespassing upon Plot 607 and 618 Watamu, and from continuing the acts of trespass.*

2. The prayers arise from the Plaintiff's contention that he is the lawful allottee of the said properties and that as such, he has alienated the same to a third party who in furtherance of their agreement of sale now wants to take physical possession thereof. The Defendant has however maliciously and without any rights or sufficient cause obstructed ingress on the said property for purposes of survey and the conveyance thereof to the said third party.

3. It is the Plaintiff's case that in consequence of the Defendant's actions, he has been unable to complete the sale to the third party as a result whereof he is likely to suffer grave loss.

4. But in his Statement of Defence dated 31<sup>st</sup> March 2016, the Defendant avers that he has lived on the suit property as an employee of one Andrew Kitsao who purchased the same from the Plaintiff on 8<sup>th</sup> November 2002. It is therefore his case that if the Plaintiff has sold the suit property to a third party, then the same is illegal and of no legal consequence.

5. The Defendant thus denies that he has trespassed into the property and asserts that he had lived on the same since November 2002 when he was employed as a Caretaker by the said Andrew Kitsao.

**The Plaintiff's Case**

6. At the trial herein, the Plaintiff called two witnesses in support of his case.

7. PW1- Kaingu Kalume Mwanongo is the Plaintiff. He testified that the Defendant lives on his Plots Nos 607 and 618 which are adjacent to each other. He told the Court he was allocated the two plots in Watamu by the Municipal Council of Malindi in 1992.

8. PW1 told the Court that the Defendant was brought into his land by one Andrew Katana Kitsao and that he lives thereon without PW1's

permission. PW1 testified that he had sometime in 2012 sold his land to Andrew for Kshs 1.2 million. Andrew did not however complete payments as agreed. PW1 then refunded the sum of Kshs 1,052,000/- that Andrew had paid but the Defendant refused to vacate the land.

9. On cross- examination, PW1 told the Court he had not sued Andrew because he had no issue with him. He had also not asked Andrew to get the Defendant out of the land. He also told the Court he had no evidence from the Bank that Andrew had taken the money he had refunded by way of a Bankers Cheque.

10. PW2- Kaniki Karisa Kaniki is the one to whom the Plaintiff sold the suit property. He told the Court he bought the two plots from the Plaintiff for a sum of Kshs 3 Million in 2011. Since then, the land has however never been transferred as the Defendant stopped him from entering the land shortly after he purchased the same.

11. PW2 testified that he wanted to enter into the land to have beacons placed thereon. The Defendant told him the land belonged to Andrew and that he was a caretaker thereon.

12. On cross-examination, PW2 told the Court he had known the Defendant for about nine years. He saw him on the land after he bought the same. He had not checked to see if there was anyone on the land before he bought it. He told the Court he paid an initial deposit of Kshs 300,000/- and the balance of the purchase price one month later.

13. PW2 conceded that before he came to Court, he had reported the Defendant twice to the Police. The Defendant had initially stopped them from surveying the land but he allowed them to carry out the survey after the matter came to Court.

### **The Defence Case**

14. On his part, the Defendant (DW1) testified as the sole witness in his case. He told the Court he was a caretaker of the two plots in contention having been employed to take care of the same by Andrew Kitsao on 8<sup>th</sup> July 2002. DW1 told the Court that when he first moved to the property, he found an incomplete house thereon with a number of coconut trees. Some four months after his employment, he moved from his place in Kakuyuni and has been residing on the disputed land ever since.

15. DW1 told the Court that initially he worked under one Johnson Moindi but when Johnson retired in 2012, he took over his responsibilities. At the time of retirement, Johnson handed over a power of attorney and a copy of a Sale Agreement which had been in his possession.

16. DW1 told the Court that he knew the Plaintiff as he used to go to the properties while PW2 was a neighbor with houses nearby. At one time, PW2 sent his sons to cut the wire fencing of the two plots and DW1 chased them away. PW2 then went to the land and told DW1 that the land did not belong to him.

17. DW1 testified that the Plaintiff is aware he (DW1) is only an employee taking care of the land. The Plaintiff knew that before he filed the suit but decided to sue him instead of his employer. Before the matter came to Court, the parties went to the Police. DW1 explained he was an employee and the matter was left at that.

18. On cross- examination he told the Court he had been granted a special power of attorney on 1<sup>st</sup> January 2011. By then, he was already on the land. He conceded that the cheques exhibited by the Plaintiff implied that he refunded the money on 15<sup>th</sup> October 2007 before he got the power of attorney and that the Sale Agreement dated 8<sup>th</sup> November 2002 was between the Plaintiff and Andrew but not himself.

19. DW1 further conceded that the Sale Agreement only mentioned Plot No. 618 and that there was no mention of Plot No. 607. He told the Court it was true the Plaintiff had told him in 2011 that he had refunded Andrew his money. DW1 told the Court that he had not believed the Plaintiff. He conceded that he had no claim of his own on the land.

20. DW1 further testified that Andrew comes to Kenya after every three years from the United States where he lives and that they ordinarily speak by phone. Andrew was in Kenya in 2011 when he gave DW1 the first power of attorney. He was also around in 2016 when he gave DW1 the second power of attorney. Andrew told him he did not know to whom the money was refunded.

### **Analysis and Determination**

21. I have perused and considered the pleadings filed herein by the parties, the oral testimonies of the witnesses and the evidence adduced at the trial. I have also benefited from the written submissions and authorities placed before me by the Learned Advocates- Mr. S.M Kimani for the Plaintiff and Mr. Tukero Ole Kina for the Defendant.

22. The Plaintiff instituted this suit on 15<sup>th</sup> February 2016 seeking general and exemplary damages from the Defendant for inducing a breach of contract. The Plaintiff also prays for an order of ejection of the Defendant from the suit property as well as a permanent injunction restraining him from trespassing upon the disputed parcels of land being Plot Nos 607 and 618 Watamu.

23. It was the Plaintiff's case that he was allotted the two parcels of land by the Municipal Council of Malindi in 1992 and that he has since been in possession thereof. He accuses the Defendant of moving into the said properties without his consent and proceeding to put up a permanent structure thereon. It is also his case that the Defendant has without any sufficient cause denied ingress into the property by a third party to whom the Plaintiff has since sold the land.

24. The Defendant on his part does not deny being on the land. Contrary to the Plaintiff's contention that he has trespassed thereon however,

he asserts that he entered into the suit properties by virtue of being an employee of one Katana Andrew Kitsao who had earlier on in the year 2002, purchased the properties from the Plaintiff. It was accordingly the Defendant's case that the Plaintiff could not purport to sell to a third party the same land which he had several years down the line sold to the Defendant's employer who resides abroad in the United States of America.

25. Besides the evidence presented before the Court, the Defendant attacks the Plaintiff's case on the basis lack of locus standi. Arising from the averment by the Plaintiff that he had sold the land to a third party, the Defendant submits that the Plaintiff is no longer the owner of the land and that accordingly, he has no interest in the suit property capable of sustaining a suit in Court. The Defendant submits that the Plaintiff lost any connection to the land when he first sold it to the Defendant's employer and he cannot therefore be granted the reliefs sought on the basis that he lacks the locus standi to do so.

26. The Plaintiff did not address himself to this question in his submissions. At it were, locus standi arises where the party stands to directly and/or personally suffer some harm or injury by the conditions for which they are seeking relief from a Court. A person claiming relief therefore ought to show that his own interest particularly, has been prejudiced or is about to be prejudiced. As Gacheru J observed in **Kibera Blessed Academy –vs- World Missionary Evangelism of Kenya Registered Trustees & 4 Others (2016) eKLR:**

*“....Locus standi is the right to appear and be heard in Court or other proceedings and literally, it means a place of standing. Therefore, if a party is found to have no locus standi, it means he/she cannot be heard even on whether or not he has a case worth listening to. It is therefore evident that if this Court was to find that the Plaintiff has no locus standi, then the Plaintiff cannot be heard and that point may dispose of the suit.”*

27. In the instant matter, the Plaintiff accuses the Defendant of attempting to induce a breach of contract among other things. It is the Plaintiff's case that having acquired the land as aforesaid in 1992, he sold it to the Defendant's said employer Katana Andrew Kitsao vide an agreement of sale dated 3<sup>rd</sup> November 2002. According to the Plaintiff, Andrew defaulted in payment of the purchase price and the Plaintiff refunded him the money he had paid that far and proceeded to sell the property to a third party.

28. The Plaintiff is aggrieved that the Defendant has tried to frustrate the second sale to the third party. In this respect, he accuses the Defendant of maliciously and deliberately refusing to allow him and the third party to ingress upon the land for purposes of taking steps towards concluding the sale agreement, such as surveying and fixing of beacons.

29. With respect, I did not think that in such circumstances, the Plaintiff could be said to have no standing to institute a claim. Where the Court were to find that the Defendant interfered with the contractual relations and there was no basis or justification for such interference, the same would amount to an actionable wrong, more so where the Plaintiff was likely to suffer damages. As it were, there was no evidence placed before me to demonstrate that the suit properties had been transferred to the Defendant's employer and/or the third party in such a manner as to divest him of the interests thereon. Accordingly, I find and hold that the Plaintiff had the necessary locus standi to institute this claim as filed.

30. On the question of trespass, the Defendant did not deny that he occupies the suit property. It was however his case that he occupied the land as a Caretaker of the same for his employer the said Katana Andrew Kitsao. The Defendant told the Court that these facts were well known to the Plaintiff and the third party to whom the Plaintiff re-sold the land prior to the institution of this suit. It was therefore his submission that the Plaintiff's suit as framed was without any foundation and that the same must fail.

31. From the material placed before me, it was also clear that before this suit was filed, the Defendant had been informed that the sale transaction between the Plaintiff and his employer Andrew did not go through. While his employer did not have any title deed in his name over the suit properties, the Defendant insisted that Andrew had bought the land and repeated even before this Court that it is only the said Andrew who could remove him from the land.

32. From the material placed before me, the Plaintiff had sold the land to Andrew vide a Sale Agreement dated 8<sup>th</sup> November 2002. A perusal of the said Agreement produced herein in evidence reveals that the purchase price was Kshs 1.2 Million. On the date of execution, Andrew paid Kshs 100,000/- in cash. A sum of Kshs 400,000/- was to be paid by 8<sup>th</sup> December 2002 while the balance of Kshs 700,000/- was to be liquidated thereafter in monthly instalments of Kshs 50,000/- per month.

33. It would appear that the said arrangements was not adhered to and some five (5) years later, Andrew had only paid Kshs 1,052,000/-. By a letter dated 12<sup>th</sup> September 2007, the Plaintiff through Messrs Khaminwa & Khaminwa Advocates wrote to Andrew rescinding the Agreement and by another letter dated 18<sup>th</sup> October 2007 addressed to Andrew's Advocates Messrs Mouko & Company Advocates he enclosed a Bankers Cheque in favour of Andrew in the said sum of Kshs 1,052,000/-.

34. Thereafter, the Plaintiff proceeded to sell the land to one Kaniki Karisa Kaniki (PW2) vide another Sale Agreement dated 10<sup>th</sup> November 2011 at a consideration of Kshs 3,000,000/-. However, when the new buyer moved in to undertake a survey of the land, the Defendant chased him away from the land. That fact was confirmed by both PW2 and the Defendant herein in their testimony before this Court.

35. Upon being shown a Copy of the Bankers Cheque refunding the money to his employer during his cross-examination herein, the Defendant responded thus:

***“It is true the Plaintiff told me he had refunded money to Andrew. The Plaintiff told me that in 2011. I did not believe him. If I had known all the information I have been shown today, I would not have agreed to be employed. But it is only Andrew who can remove me from the land.*”**

**... ....I do not agree to anyone entering the land.”**

36. The Defendant’s act of preventing any entry into the land and blocking the survey thereof by chasing away PW2 and his agents was without basis and clearly calculated to stop the actualization and enforcement of the sale agreement between the Plaintiff and PW2. The sole driving force was certainly to frustrate the sale of the land to PW2 and thereby compel the Plaintiff to revert to the original sale to the Defendant’s employer.

37. Those actions were as malicious as they were illegal. Having admitted that he had no interest in the land, the Defendant cannot be allowed to interfere with the proprietor’s rights over the same. While he told the Court that his employer always comes to Kenya every three years and that he had been in Kenya during the currency of this suit, he did not summon Andrew to testify as to the basis and scope of authority he had given to him or to vindicate his title to the suit properties.

38. In the premises, it was evident that the Defendant became a trespasser right from the moment his employer was refunded the purchase price. His claim of entitlement to possession of the suitland is misconceived. A servant’s possession is only equal to the possession of his master or principal. He cannot insist on retaining possession of the suitland without committing a wrong and he cannot on his own resist a claim of ejectment based on trespass.

39. As it were, where the Plaintiff proves trespass, he is entitled to recover nominal damages even where he has not suffered any actual loss. Given the circumstances herein, I hereby award the Plaintiff damages in the sum of Kshs 400,000/-.

40. In the end and for the avoidance of doubt, this Court is satisfied that the Plaintiff has proved his case on a balance of probabilities. Judgment is accordingly hereby entered for the Plaintiff against the Defendant as follows:

*a) General damages of Kshs 400,000/- for trespass.*

*b) An order is hereby issued for the ejectment of the Defendant from the suit premises within 45 days from today.*

*c) A permanent injunction is hereby issued to restrain the Defendant by himself, or through his servants, agents or proxies or otherwise from remaining in or trespassing upon the suit property.*

*d) The Defendant shall pay the costs of this suit.*

**Dated, signed and delivered at Malindi this 24<sup>th</sup> day of July, 2020.**

**J.O. OLOLA**

**JUDGE**