



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**ELC CASE NO.201 OF 2009**

**JOSEPH MUCHIRI NGATIA.....PLAINTIFF**

**VERSUS**

**SIGMA FEEDS LIMITED.....DEFENDANT**

**J U D G M E N T**

1. The Plaintiff claim is set out in amended Plaint dated 10.9.08 as follows-

- a. A mandatory injunction requiring the defendant to forthwith remove the fence blocking the Plaintiff's access to the river within such time as the court will direct and in default the plaintiff be at liberty to remove the fence.
- b. A mandatory injunction requiring the defendant to forthwith remove all erections, construction or any other materials used to dam the river within such time as the court will direct and in default the plaintiff be at liberty to do so.
- c. General damages for trespass.
- d. Any further and other relief that this Honourable court may be pleased to grant.
- e. Costs of the suit.

The Defendant has also filed amended defence dated 30.9.2008 denying the same claim.

2. The matter came up for hearing on 22.10.2014 but the Defendant never attended court despite service of his advocate on 13.10.2014 vide hearing notice dated 9.10.2014. The Plaintiff filed affidavit of service sworn on 15.10.2014 and thus the court allowed Plaintiff to proceed with the hearing as the Defendant and the advocate were absent. The Plaintiff testified that he was the legal representative of Mary Wambui Muchiri deceased who was the registered owner of KJD/Kitengela/1953 which borders Defendants parcels No.KJD/Kitengela/3855, 3856, 3858, 3859, 3860, 3861 and 3862 being sub-divisions of the original land parcel No. KJD/Kitengela/1942.The Plaintiff stated that the border between Plaintiffs and Defendants properties above is the river between them.

3. It is the Plaintiff's evidence that the border of the two parties properties is at the centre of the river between them. The plaintiff produced exhibits 1. Letters of Administration, 2. Copy of title of KJD/Kitengela/1953, 3. Searches of the named plots owned by the Defendant. The Plaintiff testified that the Defendant encroached the Plaintiff's land enclosing the entire river and denying the Plaintiff the

access and user of the same river. The encroachment extended to the Plaintiff's land thus trespassing in his land. He produced exhibit 4 showing photographs of the construction of a dam. The Plaintiff therefore seeks the reliefs sought in the Plaint.

4. The Plaintiff called one witness PW.2 Daniel Ndungu Kago. He confirms that the dam constructed by the defendant has been extended to the Plaintiff's land. He testified that the dam was blocking the river and encroaches Plaintiff's land. He narrated that the 2 sets of land had been sub-divided by the beacons fixed in the river. The defendant did not appear to give the fashion of his case and thus the court is going to rule on the Plaintiff's claim exparte.

5. The Plaintiff deceased wife was and is the registered owner of LR.No.2354 which under Section 26 of Land Registration Act is prima facie evidence of the ownership. The Plaintiff's testimony as corroborated by that of the PW.2 plus the tendered pictures disclose a case of encroachment into the Plaintiff's land. In absence of the evidence to the contrary, the court is inclined to hold that the Plaintiff has proved his case on balance of probability as required by the law.

6. The court therefore makes the following orders:-

1. The County Surveyor Kajiado to indicate the beacons and thus boundary separating Plaintiff's KJD/Kitengela/2334 on one side and 3855, 3856, 3858, 3859, 3860, 3861 and 3862 on the other side.
2. The Defendant to remove fence and any of his materials from the Plaintiff's Land once beacons and boundary are indicated by the Kajiado County Surveyor within 30 days. Failing to remove as above, the Plaintiff to remove the same and recover expenses from the Defendants.
3. Costs to the Plaintiff.
4. There be liberty to apply.
5. Mention in 45 days' time to confirm compliance.

**Dated and Delivered at Machakos this 6<sup>th</sup> day of February, 2015.**

**CHARLES KARIUKI**

**JUDGE**