



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 181 OF 2014

SERAH MUTHIO MBONDO

RICHARD MUEMA MBONDO

(Suing on behalf of the Estate of

ELIJAH MBONDO NTHEKETHA).....PLAINTIFFS

VERSUS

COUNTY GOVERNMENT OF MACHAKOS.....DEFENDANT

JUDGMENT

1. In the Complaint dated 20th November, 2014, the Plaintiffs averred that they are the Administrators of the Estate of the late Elijah Mbondo Ntheketha (*the deceased*); that the deceased was the owner of land known as L.R. No. 11800/93 measuring 3.472 Ha (*the suit property*) and that the said land forms part of the Estate of the deceased.
2. The Plaintiffs averred in the Complaint that on 1st September, 1983, the Urban Council of Tala/Kangundo requested to use, on a temporary basis, the suit property for parking purposes at Tala Market; that the Defendant directed all public vehicles to park and load passengers on the suit property and that the Defendant encroached on the suit property and commenced construction of permanent structures on the suit property.
3. The Plaintiff has sought for a permanent injunction restraining the Defendant from trespassing on the suit property; general damages for loss since September, 1983 and the costs of the suit.
4. In the Defence, the Defendant stated that Urban Council of Tala/Kangundo vide a letter dated 1st September, 1983 requested one E.M. Ntheketha to use on a temporary basis a piece of land between the trunk road from Nairobi to Kangundo and the Makola Road.
5. In the Defence, the Defendant averred that Mr. E.M Ntheketha is not the same as Elijah Mbondo Ntheketha; that E.M. Ntheketha did not give authority to the Defendant to occupy its land; that the Defendant sought for alternative land for a bus terminus and that it purchased land known as plot number 309 from one Mutiso Soo for that purpose.
6. Although the Defendant was served with a hearing notice, when the matter came up for hearing, it was neither represented by its officials nor an advocate.
7. The Plaintiff, PW1, informed the court that he is one of the Administrators of the Estate of Elijah Mbondo Ntheketha; that by a letter dated 1st September, 1983, the Urban Council of Tala/Kangundo requested to use the deceased's land for parking of public motor vehicles (*matatus*) at Tala Market, being part of L.R. No. 11800/93 on a temporary basis and that the Urban Council of Tala/Kangundo directed all the public service vehicles to load and off load passengers on the land at a fee.
8. PW1 stated that despite charging the parking fees, the Urban Council of Tala/Kangundo did not and has not paid a penny to the Estate of the deceased at all and that to date, the Urban Council of Tala/Kangundo, now under the County Government of Machakos, is still collecting the said fees for the use of a portion of the suit property for public purposes.
9. According to PW1, he holds title to land known as L.R. No. 11800/93 measuring 3.472 Ha; that the Defendant is now putting up permanent structures on the suit land without his consent and that the Defendant should pay rent owing to the Estate of the late Elijah Mbondo Ntheketha from 1st September, 1983 to date plus interest to be assessed by a registered valuer.

10. According to PW1, the Estate of the late Mbondo is entitled to rent amounting to Kshs. 80,700,000 as per the valuation report and that the Defendant should be restrained from interfering with parcel of land known as L.R No.11800/93.

Submissions:

11. In his submissions, the Plaintiffs' advocate submitted that the land referenced in the letter of 1st September, 1983 is the same as the land the subject of this suit, that is, L.R. No. 11800/93; that the Defendant acknowledged in the Defence that they indeed wrote a letter to the Plaintiffs asking to be allowed to use the land and that indeed the Defendant is in occupation of the suit property.

12. Counsel submitted that the addressee of the letter of 1st September, 1983 one E.M. Ntheketha, is one and the same person as Elijah Mbondo Ntheketha, the owner of the suit land; that the Defendant never sought for alternative land and that the Tala bus terminus is situated on the deceased plot.

13. The Plaintiffs' counsel submitted that the Plaintiffs hold an indefeasible title to the suit land. Counsel relied on the case of *Virenda Ramji Gudka & 3 Others vs. Attorney General (2014) eKLR*, where the court found that “*the allotment of land to a citizen...vests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under the Land Acquisition Act*”.

14. On the issue of general damages, counsel submitted that the Plaintiffs have been unable to use the suit land and that the Plaintiffs are entitled to general damages for loss amounting to Kshs. 500 Million and aggravated and exemplary damages of Kshs. 10,000,000.

15. Counsel submitted that the payable rent for the land is Kshs. 1,175,000 per annum; that the value of the suit land is Kshs. 15,525,000 and that the annual rent is capitalized at 11% yearly while rent is escalated at the rate of 30% after every five (5) years.

16. It was submitted that in 2016, the rent that was to be earned from the suit property the whole year was Kshs. 4,362,693; that as at April 2016, the accumulated rent was Kshs. 80,742,353 and that as at December, 2016, the accumulated sum was Kshs. 83,650,815.

17. The Plaintiff's counsel submitted that as at December 2019, the accumulated payable sum was Kshs. 83,650,815+ (Kshs. 4,362,693 x 3 years) = Kshs. 83,650,815 + Kshs. 13,088,079=96,738,894; that the amount claimed by the Plaintiffs as at December, 2019 was Kshs. 96,738,894 and that by the time Judgment will be delivered, the amount will have gone up.

Analysis and findings:

18. The Plaintiffs' case is that parcel of land known as L.R No. 11800/93 (*the suit property*) is owned by the late Elijah Mbondo Ntheketha (*the deceased*). According to the Plaintiffs, the Defendant's predecessor in law, the Urban Council of Tala/Kangundo, requested to use a portion of the suit property as a bus park on a temporary basis and that the said land has been in use as a bus park by the Defendant since 1983 to date.

19. In his oral Application to amend the Plaintiff, which Application was allowed by the court, the Plaintiffs prayed for a permanent injunction and for rent of Kshs. 1,175,000 per year.

20. The Plaintiffs produced in evidence the letter dated 1st September, 1983 authored by the Clerk to the Urban Council of Tala/Kangundo. The letter was addressed to Mr. E.M. Ntheketha. In the letter, the Defendant's predecessor stated as follows:

“The Council in attempting control of such accidents and in providing a parking bay have found it necessary to request you to allow her the use of your land at Tala to that end. The land we request is that piece between the trunk road from Nairobi to Kangundo and the Makala road. The Council trusts that before long, she will have secured land where proper parking arrangements can be made so as to solve this problem once and for all.”

21. The Plaintiffs also produced in evidence a copy of the freehold title for L.R. No. 11800/93 measuring 3.472 Ha. The said title shows that the land was registered in the name of Elijah Mbondo Ntheketha on 13th June, 1984.

22. The valuation report produced by the Plaintiffs states that the suit property is situated along Kangundo Road within Tala of Machakos County. According to the report, a portion of the suit property “*constitutes the main stage and was utilized as a bus stage by the county government...*”

23. The valuation report further indicated that the space occupied by the bus park was approximately 0.66 acres, and that the accumulated rental value should be from 1st September, 1983 to 30th April, 2016 taking into account escalation rates and inflation experienced over the period analyzed.

24. The valuation report shows how the rent in respect to the portion of the suit land occupied by the Defendant has escalated since 1983 until 2016. As at 2016, the payable annual rent was Kshs. 1,454,231, with the total accumulated rent since 1983 being Kshs. 80,742,353.

25. The Defendant did not adduce any evidence to controvert the Plaintiffs' evidence that its bus park is occupying a portion of the suit land. Indeed, no evidence was called by the Defendant to dispute the valuation report that was produced by the Plaintiffs showing the payable rent for the occupied land since 1983 until the year 2016.

26. Considering that the Plaintiffs are entitled to the suit land, and in view of the fact that the Defendant did not adduce any evidence, it is my

finding that the Plaintiffs are not only entitled to an order of permanent injunction, but also to the accumulated rent since the year 1983 to date.

27. Consequently, the payable *mesne profits* or rent in respect of the suit property since 1983 until the year 2016 is Kshs. 80,742,353 (*as per the valuation report*). The Defendant will continue paying *mesne profits* of Kshs. 1,454,231 per year from the year 2017 until they vacate the suit property, or purchase the same from the Plaintiffs.

28. For those reasons, I allow the Plaintiffs' *Plaint* as follows:

a. A permanent injunction be and is hereby issued restraining the Defendant either by itself, agents and or servants from trespassing, interfering, erecting any structures or in any way dealing with land known as L.R. No. 11800/93.

b. The Defendant to pay to the Plaintiffs mesne profits of Kshs. 80,742,353 as at 31st December, 2016.

c. In addition to the above amount, the Defendant to pay to the Plaintiffs mesne profits of Kshs. 1,454,231 per year from the year 2017 until they vacate the suit property.

d. The Defendant to pay the costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18TH DAY OF SEPTEMBER, 2020

O.A. ANGOTE

JUDGE