



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. NO. 315 OF 2010

ISAAC KITONY MPLAINTIFF

- VERSUS-

1. MBOGA DONE KARISA

2. HARISON RUQA MWANGOLO

3. MWAVULE KENGA

4. UCHI NDANDA

5. NAE NDANDA

6. MTENDE MWALUYA

7. MWAUYA NDURYA

8. DAMARIS KAMBI MUTUNDO

9. CHAKA MWERU DEFENDANTS

JUDGMENT

[1] The plaintiff in this matter avers that he is the owner of Plot Number Kwale/Mbegani/180 measuring approximately 25.34 acres. He avers that on or about July/August 2006 the defendants wrongfully entered the said land and took possession of the same and continued to trespass on the same. He states that by reason of the same he has been denied the use and enjoyment of the same and he has therefore suffered loss and damage. This matter has an interesting history.

[2] On 27th January, 2011, this case was fixed by consent for 9th March 2011. When the case came up for hearing on 9th December, 2011 the defendant was not present, the case was fixed for hearing on 22nd February, 2012.

[3] On 22nd February, 2012 Mr. Tindi for the defendant said he was not ready to proceed arguing that he had a part heard case before Nzioka J. He said he was ready to pay costs to the plaintiffs. Costs were assessed by the court at Kshs. 2000 and parties were asked to fix a date in the registry.

[4] On 12th March, 2012 Mr. Gichana fixed the case for 28th March, 2012. On that date Mr. Adoch held brief for Mr. Tindi and said Mr. Tindi was bereaved. Mr. Gichana did not object to an adjournment. The court noted that the defendant had not filed any documents in compliance with Order 11 of Civil Procedure Rules. The court ordered that the same be done within 21 days. The case was slated for hearing on 27th June, 2012.

[5] On 27th June, 2012 Gunga advocate appeared for Mr. Tindi and asked for time to comply with Order 11 of the Civil Procedure Rules. The court ordered the defendants to file all their documents and to comply with Order 11 aforesaid within 14 days and thereafter the parties to take a hearing date.

[6] On 21st January, 2014 Gichana & Co Advocates fixed the case for hearing on 26th May, 2014. Martin Tindi & Co. for the defendants had been served and a return of service was filed in the court file. When the matter was called for hearing Mr. Magia advocate held brief for Mr. Tindi advocate. He applied for adjournment relying on the fact that Tindi & Company Advocates had not complied with Order 11 of the Civil Procedure Rules. They also had not filed witness statements. This is in spite of the Court order of 28th March, 2012 giving the defendants 21 days to do so and a further order of 27th June, 2012 giving the defendants 14 days to do so. I therefore ordered Mr. Tindi advocate to come at 2.30 p.m. to explain why court orders have not been obeyed. Mr. Tindi never came and I allowed Mr. Gichana advocate to proceed with his clients case.

[7] The plaintiff gave evidence of how the defendants entered his land. He explained how he has made various efforts to have the defendants peacefully leave his land. He even produced agreements with some of the defendants to use his land on a lease agreement. He asked the court to grant his prayers. I have traced the history of this case comprehensively. It is quite clear that all adjournments have been occasioned by the defendants. On two separate occasions two judges of this court have given the defendant 21 and 14 days to comply with order 11. They have not done so. To make matters worse, on 26th May, 2014, they relied on their own inability to comply with the rules and their own non compliance of the Court Orders to seek for another adjournment. That is a blatant abuse of the due process and massive disrespect for court orders. The defendants themselves did not come to court at all. The court has a duty to stop this kind of abuse. I have no doubt that the defendants have no intention at all to proceed with this suit. They are in the plaintiff's land anyway and the longer the matter takes the better for them. I am satisfied that the plaintiff is the registered owner of the suit property. I am also convinced that the defendants have occupied the same without any colour of right and they are trespassers. They should be evicted and ejected out of the premises forthwith.

[8] I order that the defendants do move and vacate out of the land within 14 days. If they do not do so they shall be forcibly evicted by the plaintiff with the help of the local police, Administration Police and the court broker. I make no order for damages as none was proved before me. The plaintiff shall have the costs of this suit and costs of eviction.

Dated and delivered in open court at Mombasa this 4th day of September, 2014.

S. MUKUNYA

JUDGE

4.9.2014

In the presence of:

Gichana Advocate for the plaintiff

Kithi Advocae for the defendant