



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC CASE NUMBER 200 OF 2017

JAMES MURIMI GITHINJI.....1ST PLAINTIFF

NANCY MUTHONI KARIUKI.....2ND PLAINTIFF

ARNOLD MAGUA GATITU.....3RD PLAINTIFF

VERSUS

EMBAKASI RANCHING CO.LTD.....1ST DEFENDANT

STEPHEN KARUU MAINA.....2ND DEFENDANT

JOHN KIONGERA NGUGI.....3RD DEFENDANT

JUDGEMENT

Background

1. This suit was originally filed against Embakasi Ranching Company Limited as the 1st Defendant and one of its Directors Samuel Mwangi Thuita as the 2nd Defendant. Later, an application was made to enjoin two more Defendants. This application was allowed and two more Defendants were enjoined in this suit. The court directed that the Plaint be amended to include the two additional Defendants as the 3rd and 4th Defendants.

2. When the Plaint was amended, the name of the 2nd Defendant who had since passed on was dropped. There are therefore three Defendants in this suit. By an amended Plaint filed in court on 23rd August 2018, the Plaintiffs seek the following reliefs: -

a) A permanent injunction restraining the defendants, their servants, relatives, workmen and or agents from entering on and/ or from dealing, or from or in any way interfering with the Plaintiffs use and quiet enjoyment of the suit properties being plot No. P 9184 (now parcel 8661) and plot V 2676 (now parcel 8636).

b) A declaration order that the Plot No. P 9184 (now parcel, 8661) belongs to the 1st and 2nd Plaintiffs AND Plot No. V.2679 (now parcel No.8636) belongs to the 3rd Plaintiff on the site currently occupied by the Plaintiffs.

c) An order directing the cancellation of any other non-member certificate lease or title the Defendants or Ministry of lands may have issued in respect of plot No. P 9184 (now parcel 8661) and plot V 2676 (now parcel 8636) and a declaration that both properties belong to the Plaintiffs.

d) Special damages of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/=).

e) The OCS Ruai Police Station assist in enforcement of the said orders.

f) General Damages and mesne profits.

g) Interest thereon

h) Costs of this suit

3. The 1st Defendant did not file any defence. Though the 2nd and 3rd Defendants filed a defence, neither the two nor the 1st Defendant were in court during the hearing. The hearing therefore proceeded ex-parte.

1st and 2nd Plaintiffs' case.

4. The 1st Plaintiff who is an advocate of the High Court testified that the 2nd Plaintiff is his spouse. He stated that on 16th May 2013, he entered into a sale agreement with the 3rd Plaintiff for purchase of a plot known as V 2679 Type S/1664/02 for a sum of Kshs.1,800,000/= . Upon purchase, the 1st Plaintiff and 3rd Plaintiff proceeded to the offices of the 1st Defendant where they confirmed that the plot he was purchasing belonged to the 3rd Plaintiff.

5. The 1st Plaintiff and the 3rd Plaintiff were then given an appointment when the records were to be changed. The two later went to the offices of the 1st Defendant where the records were changed into the name of the 1st Plaintiff and 2nd Plaintiff. The 1st Plaintiff paid to the 1st Defendant Kshs.20,000/= for site visit and Kshs.50,000/= for transfer. The 1st Plaintiff was subsequently taken to the ground by a surveyor from the 1st Defendant company where he was shown the plot and beacons.

6. In February 2017, some strangers went to the 1st and 2nd Plaintiff's plot and claimed that the plot belonged to them. The 1st and 2nd Plaintiff's neighbor alerted the two that some strangers had been to their plot. He advised them to fence the plot to keep off speculators. The 1st and 2nd Plaintiffs spent over Kshs.200,000/= to fence the plot. On 15th March 2017, the 1st and 2nd Plaintiff's neighbor called them and told them that some hired goons had been to their plot and that they had removed the fence and carted away the iron sheets from the house of their caretaker.

7. The 1st plaintiff proceeded to Ruai Police Station where he reported the incident. He then later followed up the issue with the directors of the 1st Defendant. He found the 2nd and 3rd Defendants in the company of the deceased director who informed him that the plot did not belong to him and admitted to having sent people who went to remove the fence which he had erected to secure their plot.

3rd Plaintiff's case

8. The 3rd Plaintiff testified through his brother Nelson Chege Gatitu to whom he had given a special power of attorney. He stated that his brother is now based in the United States of America (USA). This witness narrated how his uncle one John Charles Ndungi Albert Muthamba introduced his parents to the 1st Defendant in 1998. His parents then purchased for him one plot known as P9230 and two for the 3rd Plaintiff. The 3rd Plaintiff's plots were plot No. 2679 and P 9184.

9. The two brothers then took possession of their respective plots. Upon being shown their location by the surveyor of the 1st Defendant they left the three plots under the care of their mother who cultivated them. In 2005, Nelson Gatitu sold his plot. In 2013, the 3rd Plaintiff sold one of his plots namely plot V 2679 to the 1st and 2nd Plaintiffs. The 3rd Plaintiff's mother continued to cultivate on plot No.9184 until May 2017 when some goons invaded the plot which had been sold to the 1st and 2nd Plaintiff as well as the one for the 3rd Plaintiff.

10. The 3rd Plaintiff through his brother fenced off the 3rd Plaintiff's plot with a permanent wall and is in possession to date. He however later learnt that the 1st Defendant had earmarked the two disputed plots for registration in favour of the 2nd and 3rd Defendants as parcel no 8636 and 8661 respectively.

Analysis.

11. I have considered the evidence adduced by the Plaintiffs which is not controverted. I have also considered the submissions by the Plaintiffs. The person who introduced the family of the 3rd Plaintiff to the 1st Defendant, testified in this case as PW3. He confirmed the evidence adduced by PW2 Nelson Chege Gatitu. He went on to add how he also bought for himself plots in the area. The mother of the 3rd Plaintiff also testified as PW4 and confirmed how her two sons ended up owning plots at Embakasi and how the 3rd Plaintiff sold one of his plots to the 1st and 2nd Plaintiffs.

12. It is clear that before the Plaintiffs obtained injunctive orders, the plots which belonged to the 3rd Plaintiff one of which had been sold to the 1st and 2nd Plaintiffs had already been registered in favour of the 2nd and 3rd Defendants. The 2nd Defendant had been registered as owner of Plot No. V 2679 which is now Nairobi/Block 136/8636. This is the plot which belongs to the 1st and 2nd Plaintiffs. The 3rd Defendant had been registered as owner of plot No. P 9184 which is now Nairobi/Block 136/8661. This is the plot which belongs to the 3rd Plaintiff.

13. The Plaintiffs produced documents to show how they came to own their respective plots. The 2nd and 3rd Defendants who had filed defence did not come to court to adduce evidence in support of their case. Pleadings without any evidence in support of the same amounts to nothing. Even submission on issues of fact cannot suffice. This was the holding in the case of **John Wainaina Kagwe Vs Hussein Dairy Limited – Mombasa Civil Appeal No.215 of 2010** which was quoted in the case of **Gideon Mose Onchwati Vs Kenya Oil Company Ltd & Another (2017) e KLR.**

14. The 1st and 2nd Plaintiffs asked for Kshs.200,000/= being special damages for the destroyed fence and mabati structure on their property.

The law regarding special damages is that they have to be pleaded and strictly proved in evidence. This was not done and I will not award any. The Plaintiffs prayed for general damages for trespass. The law is clear that general damages should be given where it is proved that there has been trespass. In the case of 1st and 2nd Plaintiffs, there is evidence of a destroyed mabati structure. The deceased director admitted to having sent hired goons who destroyed the mabati structure and fence. When he was admitting this, he was in the company of the 2nd and 3rd defendants who are claiming to be owners of the two plots in dispute. Given the circumstances of this case, I will assess general damages in favour of the 1st and 2nd Plaintiffs at Kshs.100,000/=.

15. The evidence on behalf of the 3rd Plaintiff is that the hired goons destroyed the mabati structure where his caretaker was staying. There was no evidence to show that the 3rd Plaintiff's plot had been fenced with any fence other than a natural fence. The evidence in favour of the 3rd Plaintiff is that a permanent wall has since been erected around his plot. I will assess general damages in the sum of Kshs.50,000/= in favour of the 3rd Plaintiff.

16. Other than the trespass, the evidence on record is that the Plaintiffs are in possession of their respective plots. There is therefore no basis for grant of mesne profits.

Disposition.

17. Following the above analysis, I make the following final orders:-

a) A permanent injunction is hereby issued restraining the defendants, their servants, relatives, workmen and or agents from entering on and/ or from alienating or in any way interfering with the Plaintiffs use and quiet enjoyment of plot No. P 9184 (now parcel 8661) and plot V2676 now parcel 8636.

b) A declaration that plot No. P 9184 now parcel, 8661 and plot No.V2679 now parcel 8636 belongs to the 1st and 2nd Plaintiffs and the 3rd Plaintiff respectively.

c) An order directing the Chief Land Registrar to cancel LR No.Nairobi /Block 136 /8636 in the name of Stephen Karuu Maina and LR No.Nairobi /Block 136/8661 in the name of John Kiongera Ngugi and have the same registered in the names of the 3rd Plaintiff and those of the 1st and 2nd Defendants respectively.

d) General damages of Kshs.100,000/=in favour of the 1st and 2nd Plaintiffs.

e) General damages of Kshs.50,000/=in favour of the 3rd Plaintiff

f) Interests on (d) and (e) above at court rates with effect from the date of this judgement.

g) Costs of the suit.

Dated, Signed and Delivered at **Nairobi** on this 22nd day of **October 2020**.

E.O.OBAGA

JUDGE

In the Virtual Presence of : -

Mr Thimba for Plaintiffs

Court Assistant: Hilda

E.O.OBAGA

JUDGE