



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

**CIVIL CASE 337 OF 2011**

LA NYAVU GARDENS LIMITED..... PLAINTIFF

VERSUS

1. WILSON MUNGUTI MBITHI ALIAS KAVUTI

2. JACKSON MUTUA

3. SYOKIMAU BRIGHT HOMES LIMITED .....DEFENDANTS

**JUDGMENT**

The Plaintiff instituted this suit vide a plaint dated 14<sup>th</sup> November, 2011 in which it sought judgment against the defendants jointly and severally for-

- “1. ***A declaration that the plaintiff is the right, legal and registered proprietor of the parcel of land known as L.R. No. 12610/4, LR. No. 43769, Mavoko Municipality, Machakos District, measuring approximately 231.4 hectares.***
2. ***An order of permanent injunction be issued to restrain the defendants jointly and severally through themselves or their agents, employees, servants, nominees from ever trespassing, alienating, invading, damaging, wasting, destroying or purporting to be registered owner or otherwise dealing with the parcel of land known as L.R. No. 12610/4, LR. No. 43769, Mavoko Municipality, Machakos District, measuring approximately 231.4 hectares in a manner which is adverse to the interest of the registered proprietor, La Nyavu Gardens Limited, the Plaintiff herein.***
3. ***An order to evict the defendants and/or their agents from the plaintiff’s property and to demolish all illegal structures put up on the parcel or land known as L.R. No. 12610/4, LR. No. 43769, Mavoko Municipality, Machakos District, measuring approximately 231.4 hectares***
4. ***An order directing the Officer Commanding Police Division (OCPD) or his agents, Athi River, to ensure compliance with the orders in (2) and (3) above.***
5. ***General damages for trespass***
6. ***Punitive damages***
7. ***Interest on (5) and (6) above at court rates from date of filing this suit until payment in full.***
8. ***Costs of this suit***
9. ***Any other relief or order that this honorable court deems fit to grant for the interest of justice.”***

The suit is anchored on the grounds that the plaintiff is the registered proprietor of the land parcel 12610/4, Mavoko Municipality, Machakos District measuring approximately 231.4 hectares, “*the suit premises*”. The plaintiff had since created a charge of Kshs. 200,000,000/= in favour of Development Bank of Kenya Ltd. However, in March, 2011 the defendants and or their agents started encroaching and trespassing on the suit premises. With the assistance of hired goons, hirlings and or hooligans, the defendants had forcibly attempted to subdivide the suit premises into plots and even purported to sell them to unsuspecting members of the public, until the plaintiffs engaged Private Security Guards to guard the suit premises. However on 8<sup>th</sup> October, 2011, the marauding crowd armed with crude weapons invaded the suit premises and seriously injured the plaintiff’s security guard stationed thereat. The defendants and their agents had even gone a notch higher and started putting up illegal structures on the suit premises in total disregard of the plaintiff’s interest thus derailing the intended subdivision and development of the dairy farms. Hence the suit.

Service of summons to enter appearance and the plaint was duly effected upon the defendants going by the affidavit of service on record. The defendants failed to enter appearance and or file defence within the prescribe time. On 26<sup>th</sup> January, 2012 upon request for judgment by the plaintiff dated 9<sup>th</sup> December, 2011, the Deputy Registrar of this court entered interlocutory judgment against the defendant’s subject to formal proof. The suit was thereafter set down for hearing by way of formal proof on 8<sup>th</sup> May, 2012 where the plaintiff through **Bishop Boniface Adoyo** gave unchallenged and uncontested evidence.

**Bishop Boniface Adoyo** is a director of the plaintiff. He testified that the plaintiff is a business arm of La Nyavu Sacco which is a Sacco of Nairobi Pentecostal Church. The plaintiff purchased the suit premises for the sum of Kshs. 354,000,000/= from Eva three D. Constructions Ltd and the suit premises were transferred and registered in the name of the plaintiff on 24<sup>th</sup> February, 2010. Part of the purchase price came through members and a loan of Ksh. 200,000,000/= from Development Bank of Kenya. A charge in that amount is registered on the title of the suit premises in favour of the bank. However the plaintiff has not been able to repay the loan because of the interferences by the defendants. They invaded the suit premises and demarcated it. Prior to this, suit premises had been subdivided with a view to using ½ of it for farming and the remaining ½ to be utilized for residential houses. Indeed towards this end, the plaintiff had obtained the necessary approvals from the Municipal Council Mavoko. Those approvals were in the bundle of documents filed in this case by the Plaintiff.

The plaintiff sought the help of police and Provincial Administration to evict the defendants to no avail. Although it had obtained an injunction in this suit, it had been brazenly ignored by the defendants who had continued putting up structures in the suit premises. The plaintiff has been forced in the circumstances to hire more security guards to restrain the defendants from further continuing to trespass on the suit premises. Before the invasion, the plaintiff had constructed servant quarters and green houses for farming purposes. The invaders destroyed and completely tore them to the ground. The total costs of the destruction is Kshs. 4,600,000/=. He therefore urged the court to enter judgment in their favour as against the defendant jointly and severally as prayed for in the plaint. With that the plaintiff closed its case.

**Mr. Wambugu**, learned counsel for the plaintiff requested and was allowed to put in final written submissions. He subsequently did so. I have carefully read and considered the same alongside cited authorities.

No doubt the premises are currently in the name of the plaintiff. The registration was interested registered under the registration of Titles Act (*now repealed*) and which has since been replaced by Land Registration Act. However in the transitional clauses of the later Act, it allows for any rights, liabilities and remedies to be enforced in accordance with the law that was applicable to the land immediately before the new act came into force. Accordingly, this suit has to be determined in accordance with the provisions of Registration of Titles Act.

Section 23(1) of the said Act deals with indefeasibility of title. It is in these terms-

**“the certificate of titles issued by the registrar to a purchaser of land upon a transfer or**

**transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party”.**

In this case, the plaintiff has proved by incontrovertible evidence that it owns the suit premises. That title cannot be challenged or impeached unless fraud or misrepresentation is alleged and proved against it. There is no such evidence before this court. The Court of Appeal in **Charles Ogejo Ochieng vs Geoffrey Okumu[1995] eKLR** had this to say with regard to section 23(1) of the Registration of Titles Act-

**“moreover, under section 23(1) of the Registration of Titles Act, the Certificate of Title in respect of L.R No. 8530/130 and in possession of the respondent shall be taken by all courts as conclusive evidence that the respondent is the proprietor of the said land as the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title shall not be subject to challenge except on the ground of fraud, misrepresentation to which he is proved to be a party. No particulars of fraud or misrepresentation were pleaded nor was any evidence led to prove them. In our view the findings of the learned judge that the title of the respondent was indefeasible was correct.”**

In the case, it is common ground that the plaintiff has title to the suit premises. I think and as correctly observed by counsel for the plaintiff; this court should take the same as conclusive evidence that the plaintiff is the proprietor of the suit premises. There is a history as to how the plaintiff came into possession thereof. It is an innocent purchaser for value. No fraud or mis-presentation has been alleged or proved. To this extent the plaintiff’s title is valid incontrovertible and cannot be impugned. I would therefore hold and determine on the evidence before me that the plaintiff is the lawful and undisputed proprietor of the suit premises by virtue of the title issued to it. Accordingly the title is not liable to impeachment and it is indefeasible under section 23(1) of the Registration of Titles Act.

The consequence of the above holding is that if the defendants are on the suit premises, they are trespassers liable to be evicted forthwith. Any unauthorized entry into another persons’ land constitutes trespass. Trespass, to land occurs when a person directly enters upon another’s land without permission, and remains upon such land, places or projects any object upon such land. As stated in **Charles Ogejo Ochieng case (supra)**-

**“Trespass is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass.”**

Based on this, it cannot be denied that the defendants are trespassers. They have title to the suit premises nor have they demonstrated that they had in the past been in possession thereof. The title belongs to the plaintiff. Nonetheless the defendants entered the suit premises without the authority of the plaintiff and caused destruction by flatterer structures put on it by the plaintiff such as servant quarters as well as green houses. They must be evicted forthwith. Besides the eviction, they must be compelled to make good their destruction. The Plaintiff was forced to beef up security at an additional cost. This notwithstanding the defendants and or their hired goons attacked those security guards and seriously injured one of them. In the case of **Star Energy Wealed Bagiri Limited and Another vs Bocardo S.A. 2008 EWCA Civil 579** which quoted with approval the decision in **Attorney General vs Blake [2001] IAC 268 at 278** – It was stated thus:-

***“A trespasser who enters another’s land may cause the landowner no financial loss. In such a case damages are measured by the benefit received by the trespasser namely by his use of the land. The same principles are applied where the wrong consist of use of another’s land for depositing, or by using a path across the land or using passages in an underground mine. In this type of case the damages recoverable will be in short, the price a reasonable person would pay for the right of user.”***

The illegal activities by the defendants can only be described as a blatant breach the law and unmitigated assault on the premium attached to title. They were ready to injure, maim, destroy property and even blatantly disobey a lawful court order of temporary injunction emanating from this court.

Sanctity of title and ownership of property is protected by article 40 of the Constitution. Arbitrary deprivation of property is unconstitutional. The defendants have used unorthodox, extra judicial and unlawful means to deprive the plaintiff of the use and occupation the suit premises. If such actions of the defendants are not condemned and frowned upon by this court, it will be an affront to land registration regime in this country. In those circumstances nominal damages will not do.

The Plaintiff has lost colossal amounts of money due to the unlawful activities of the defendants. The plaintiff obtained a loan to finance the purchase of the suit premises which it has to repay. The suit premises is not generating any income as it was anticipated at the time of the purchase. All this economic loss is attributed to the hooliganism act of the defendants. This court must of necessity condemn such acts by an award of both general and punitive damages. I am saying all these as a precursor or justification of my view that besides the defendants' eviction, they must be called upon to account and atone for their illegal and senseless destruction of the plaintiff's property. They must be made to pay for their evil and sordid acts as well as their flagrant disobedience of a lawful court order.

From the documents on record a total sum of Kshs. 4,664,941/60 is the actual loss occasioned to the plaintiff as result of the defendant's acts of trespass. The plaintiff has asked me to treat such loss as general damages. Perhaps this was out of realization that it had not pleaded special damages in the plaint and also perhaps this is the loss it has incurred since the filing of the suit. I accept the invitation. Besides, I think that the plaintiff is entitled to punitive damages. The plaintiff has asked for Kshs. 10,000,000/=. However, I feel that amount to be on the higher side. Doing the best I can and weighting one thing against the other, I am of the considered view that a sum of Kshs. 7,000,000/= will be adequate recompense on this account.

In the result I enter final judgment in favour of the plaintiff as against the defendants jointly and severally in terms of prayers 1, 2, 3, 4 and 8 of the plaint. I also award the plaintiff general damages of Kshs. 4,664,941/60 and punitive damages of Kshs. 7,000,000/= respectively. The damages shall attract interest from the date of this judgment until full payment in full.

**JUDGMENT DATED, SIGNED and DELIVERED at MACHAKOS, this 6<sup>TH</sup> day of JULY, 2012.**

**ASIKE-MAKHANDIA**  
**JUDGE**