



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO 712 OF 2017

(Formerly Nairobi HCCC No. 822 of 2000 and Machakos ELC No. 215 of 2012)

SIMON LENGETE OLE MASHUA.....PLAINTIFF

VERSUS

JOSEPH SAMPIROI.....1ST DEFENDANT

COUNTY GOVERNMENT OF KAJIADO.....2ND DEFENDANT

JUDGEMENT

By a Further Amended Plaint dated the 11th February, 2015 the Plaintiff prays for judgement against the Defendants jointly and severally for:

- a) A declaration that the Plaintiff is the lawful allottee of Plot Number 17 Oloopon Loitoktok, Kajiado District.
- b) General Damages
- c) A permanent injunction restraining the Defendants by themselves, agents and or servant from trespassing, remaining, building and or in any other way interfering with the Plaintiff's plot No. 17 Business Loitokitok Township (Oloolopon)
- d) An eviction and demolition order to issue against the 1st Defendant in as far as he occupies and or has trespassed and constructed on plot No. 17.
- e) Special damages in the sum of Kshs. 40,000/=.
- f) Costs and interests

The 1st Defendant filed a Further Amended Defence dated the 19th May, 2015, where he denied the allegations in the Further Amended Plaint except for the descriptive and jurisdiction of the Court. He denied trespassing on the Plaintiff's plot. He confirmed being an allottee of Plot No. 16 Business at Oloopon Loitoktok, Kajiado District which he purchased from Elizabeth M. P Kotene. He explained that the actual site for Plot No. 16 is different as a matter of fact from the alleged Plot No. 17. He contended that he has substantially developed and expended money on his plot. He insisted that the suit as filed did not disclose a reasonable cause of action and ought to be struck out.

The 2nd Defendant though duly served did not file a Defence.

The matter proceeded for hearing where the Plaintiff had two witnesses while the Defendants had one witness.

Evidence of the Plaintiff

The Plaintiff as PW1 confirmed being the allottee of Plot Number 17 Oloopon Loitoktok and produced ownership documents to that effect as exhibits. He contended that he was unable to develop his plot as the 1st Defendant had trespassed on a portion thereon by building on it. Further, that the 1st Defendant had entered into the plot, dumped construction materials and destroyed the septic tank therein. He explained that his efforts to have the matter resolved by the 2nd Defendant proved futile and despite orders of injunction having been in place, the 1st Defendant continued constructing thereon. In cross examination, he confirmed that the 1st Defendant's plot is next to his and denied selling half the portion of the plot to him. He further denied the signatures on the receipts amounting to Kshs. 90, 000/= and that the El nino rains

affected the size of his plot. He insisted that the 1st Defendant dumped materials on his land and contended that the Surveyor he hired confirmed the trespass. PW2 who was a private surveyor explained that as per the map of Loitoktok town and after having undertaken measurements, he confirmed that the 1st Defendant had indeed encroached on the Plaintiff's plot and the remaining portion could not be utilized. During cross examination, he admitted that he did not personally visit the dispute plot to undertake measurements but his assistant Pontenus Alloice Ajode did, after which he signed off the report. He further explained that at one site visit, they disagreed with the Surveyor from the 2nd Defendant in respect to the proper location of the disputed plots. He disputed the recommendations of Wesley S. Risancho the Assistant County Surveyor and insisted he was not qualified. The Plaintiff produced a Surveyor's Report dated the 3rd October, 2018 which contained other documents that had been produced in court.

Evidence of the Defendants

DW1 who is the 1st Defendant testified that he was the allottee of Plot No. 16 Business at Oloopon Loitoktok, which he purchased from Elizabeth M. P Kotene. It was his testimony that the actual site of his plot was different from the Plaintiff's plot. He insisted that he had built on his plot and that at one time he lent the Plaintiff monies and bought a portion of his plot. He denied trespassing on the Plaintiff's plot. In cross examination he insisted he only constructed on his plot No. 16 and denied knowledge of the existence of restraining orders stopping him from constructing on his plot. He confirmed that the Plaintiff had constructed a septic tank on plot No. 17 and he had never interfered with it. He testified that he obtained all the necessary approvals to enable him construct on his own plot. He produced Letter of Allotment dated 16th August, 1991; Transfer Application dated 12th May, 1999; Transfer of Plot No. 16 dated 8th September, 1999; A copy of the Plan and Receipts for KShs. 90,000/= as his exhibits.

The Parties thereafter closed their respective cases and filed submissions.

Analysis and Determination

Upon consideration of the Further Amended Plaintiff, Further Amended Defence, Witnesses Testimonies and parties exhibits, the following are the issues for determination.

- Whether the 1st Defendant had trespassed on the Plaintiff's plot.
- Whether the Plaintiff is entitled to the orders sought in the Plaintiff.

As to whether the 1st Defendant had trespassed on the Plaintiff's plot.

It is not in dispute that the Plaintiff is the owner of plot No. 17 Oloopon Loitoktok. It is further not in dispute that the 1st Defendant is the owner of plot No. 16 Oloopon Loitoktok. Further, that the two plots that neighbour each other were allotted to them by the defunct OI kejuado County Council and each party holds their respective documents of title. What is in dispute is the Plaintiff's contention that the 1st Defendant has trespassed on his land, dumped construction materials, destroyed his septic tank and constructed on a portion thereon. The Plaintiff in his submissions reiterated his claim and insists the 1st Defendant has utilized a half a portion of his plot. He submitted that the (Part Development Plan) PDP issued by the 2nd Defendant was inaccurate or erroneous as it marked Plot 16 inside Plot 17.

I note the Plaintiff and 1st Defendant both presented their PDP's and Allotment Letters to justify their respective positions. I note there was a dispute as to demarcation of the boundaries on the ground. The Plaintiff in his testimony did not present a beacon certificate to confirm the extent of his plot but was insistent that the 1st Defendant had encroached on a portion of his plot. He relied on the cases of **John Chumia Nganga V Attorney General & Anor ELC No 264 of 2014 and Paul Audi Ochuodho V Josiah Ombura Orwa (2014) eKLR**; to support his arguments. The 1st Defendant in his submissions was emphatic that he had never trespassed on the Plaintiff's plot as he is the legitimate owner of plot no. 16 having acquired the same through a lawful process. It insisted the Survey Report by PW2 should be disregarded as it was not a joint survey. Further, the Surveyor was hired by the Plaintiff hence the report lacked credibility and independence. To buttress his averments, he relied on the cases of **Eliud Njoroge Gachiri V Stephen Kamau Nganga (2018) eKLR**; **Judith Julia Wanjiro Njoroge V Samuel Ngeru Mwangi (2019) eKLR**; and **Elizabeth Wambui Githinji & 29 Others V Kenya Urban Roads Authority & 4 others (2019) eKLR**.

Section 3 of the Trespass Act provides that, **"(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence. (2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him."**

In the case of **Eliud Njoroge Gachiri vs. Stephen Kamau Nganga ELC no. 121 of 2017** "....., a trespass consists of a series acts done on consecutive days that are of the same nature and that are renewed or continued from day to day so that the acts are aggregate form one indivisible harm."

In current scenario the Plaintiff claimed trespass against the 1st Defendant and disputed the 2nd Defendant's recommendation in respect to the suit plot. I note the 2nd Defendant is the allotting authority and charged with preparation of PDP's and not the Plaintiff's surveyor. The 2nd Defendant's Surveyor in his report which had earlier been presented in court stated as follows: ***Contrary to Geomatics Services Land Surveyors report filed in Court, the five plots right from the Plot fenced with timber (plot 13) fits well on the plan and relatively to roads abutting it are in position. The proportionate adjustment in the report could only be done by the Council and the Physical Planning Department as the Planning authorities..... the encroachment by plot 16 is by no chance on plot no. 17 and that is why Geomatics Services found the distance on the ground to be smaller than that of the plan.*** I note PW2 who is the Surveyor from Geomatics Services disputed the aforementioned findings and insisted there was an encroachment. He however admitted he never did the measurement

but the same was undertaken by his assistant. To my mind the burden of proof was upon the Plaintiff to prove the 1st Defendant had indeed encroached on his plot and provided measurements as well as Beacon Certificate which confirm position of his plot. I note the 1st Defendant's Building Plans were even approved by the 2nd Defendant who is the allotting authority. Further, the 2nd Defendant who is the allotting authority further confirmed that the 1st Defendant did not encroach on the Plaintiff's plot. It further emerged in evidence that there are several plots in one line and as per annexure W2 which is the Geomatics Services Report dated the 3rd April, 2001, that was signed by Pontenus Alloice Ajode, Approved Assistant Surveyor, they recommended as follows: ' **It is therefore my recommendation that the sizes of all the five plots A – E should be adjusted such that they are all accommodated as per the PDP. The necessary calculations and drawing are under prepared for submission to this court soon.** '

It further emerged in evidence that the construction of a culvert on the road as well as the El nino rains had affected the size of the Plaintiff's plot. Based on the definition of Trespass cited above and in associating myself with the decision cited above, while distinguishing the authority cited by the plaintiff, I am unable to find that the 1st Defendant indeed trespassed on the Plaintiff's plot. I opine that, it is incumbent upon the Plaintiff to seek an alternative plot from the 2nd Defendant who is the allotting authority and responsible for the PDPs.

As to whether the Plaintiff is entitled to the orders sought in the Plaintiff. The Plaintiff sought for the following orders: a declaration that he is the lawful allottee of Plot Number 17 Oloopon Loitoktok, Kajiado District; General Damages; A permanent injunction restraining the Defendants by themselves, agents and or servant from trespassing, remaining, building and or in any other way interfering with plot No. 17 Business Loitokitok Township (Oloolopon); An eviction and demolition order to issue against the 1st Defendant in as far as he occupies and or has trespassed and constructed on plot No. 17; Special damages in the sum of Kshs. 40,000/= and Costs and interests. I note it was not disputed that the Plaintiff owned plot No. 17 and will uphold the same. However, based on my findings above, I am unable to restrain the 1st Defendant from interfering with the plot he occupies nor evict him therefrom since trespass has not been proved. Further, I note in the submissions the Plaintiff has actually admitted that there is an error in the PDP but not clearly clarified the said error. I opine that since he has knowledge of the error in the PDP, he cannot blame the 1st Defendant for it. On the prayer for General and Special Damages, the Plaintiff submitted that it had proved trespass and relied on the case of **Bhagwani Singh Kalsi V National Housing Corporation Eldoret ELC 15 of 2012** to buttress his averments, hence entitled to damages.

However, based on my findings above and since trespass was not proved and the Plaintiff further never furnished court with evidence on the damages he had suffered, I will decline to award him the same.

I note the Plaintiff sued the 2nd Defendant who is the allotting authority and from the evidence in court, it emerged that there was an error in the PDP. Further, from the 2nd Defendant's surveyors report to court marked as annexure 1 in the Plaintiff's exhibits, he recommended that: '**the council as an allocating authority should find an alternative site for plot No. 17 of which Simon Lengete had already been shown by the County Surveyor George Sanini in the same township.**' I note these averments were not controverted by the Plaintiff and it is my considered view that he should proceed to the alternative site he was allotted and the 2nd Defendant should furnish him with Letters of Allotment to that effect.

It is against the foregoing that I find the Plaintiff has not proved his case on balance of probability as against the 1st Defendant and will proceed to dismiss it with costs. As for the claim against the 2nd Defendant, I find that the Plaintiff has proved his claim against it to the extent of obtaining an alternative plot and will direct the 2nd Defendant to issue the plaintiff with Letters of Allotment to the said alternative site as pointed out by their Surveyor George Sanini within 90 days from the date hereof. Since it was the duty of the 2nd Defendant to speedily resolve the dispute herein but failed to do so, I will direct that its bears the costs of the suit.

Dated Signed and Delivered at Kajiado this 7th Day of December, 2020.

CHRISTINE OCHIENG

JUDGE