

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CASE NO. 16 OF 2004

TIMOTHY MWANGI.....PLAINTIFF

VERSUS

KENNETH IRUNGU MWANGI.....DEFENDANT

JUDGEMENT

1. The Plaintiff was allotted unsurveyed residential plot number 2 in Pumwani Estate, Nairobi vide a letter of allotment issued by the Government of Kenya on 22/12/1997. He accepted the offer and paid the monies required for the allocation. The Plaintiff claims that on or about 6th July 2001 the Defendant trespassed on part of his land, removed the Plaintiff's fence and built some iron sheet structures on the Plaintiff's land without any lawful excuse. The Plaintiff filed suit on 13/1/2004 seeking a permanent injunction to restrain the Defendant or his agents from building or trespassing onto his land and an order for the Defendant to remove the structures he erected on the Plaintiff's land. The Plaintiff also seeks general damages, costs of the suit and interest.

2. The Defendant filed a defence on 15/4/2004 and denied the Plaintiff's claim. He averred that he was the lawful owner of the disputed land and that it was actually the Plaintiff who had trespassed on his property and caused damage as a result of which the Plaintiff was charged in **Makadara Criminal Case Number 2679 of 2003**.

3. The Plaintiff gave evidence on 20/9/2017. He produced copies of the letter of allotment dated 22/12/1997 in respect of the suit land; his letter accepting the offer dated 24/12/1998; a copy of the receipt issued on payment of Kshs. 20,690/= demanded in the letter of allotment; a copy of a letter from the City Council of Nairobi seeking payment of plot allocation fees of Kshs. 12,000/= for Plot number 2 Pumwani together with the receipt confirming payment was made on 22/12/97; copies of the demand letter issued by his lawyers to the Defendant and the response from the Defendant's lawyers dated 30/1/2004. He stated that the Defendant encroached on his land on 6/7/2001 and started building some structures after removing his fence. The Plaintiff testified that the Defendant is selling charcoal from the structures he built on the Plaintiff's land and that the structures are in front of his house.

4. The Plaintiff produced a copy of the survey report dated 20/5/2005 prepared by Simon K. Ngisirei of the Nairobi City Council showing the Defendant's encroachment on the Plaintiff's land.

5. The Plaintiff also produced copies of the proceedings and the ruling in **Makadara Chief Magistrates Criminal Case Number 26979 of 2003- Republic v Timothy Mwangi Kaheria** in which the three accused persons, who included the Plaintiff, were charged with maliciously damaging property contrary to Section 399 of the Penal Code. The particulars of the offence were that the accused persons wilfully and unlawfully damaged a wooden fence and gate valued at Kshs. 20,000/= at Mashimoni Majengo Pumwani Location in Nairobi on 30/11/2003. The Learned Magistrate, the Honourable Mrs. Mbugua found that the prosecution had failed to proceed with the matter and there was not enough evidence to put the accused persons on their defence. The court acquitted the accused persons under Section 210 of the Criminal Procedure Code.

6. The Defendant neither filed any documents nor witness statements. He did not attend court when the matter came up for hearing.

7. The question for determination is whether the Plaintiff has proved his case on a balance of probabilities. The Plaintiff filed submissions in which he sought general damages of Kshs. 1,000,000/= arguing that the trespass continued for over 17 years and also based this on the size of the plot whose measurements he gave as 17.6 m by 20m. According to the survey report, the Plaintiff has a house on the plot and the encroachment is approximately 2m into the Plaintiff's plot. An award of Kshs. 50,000/= as general damages for trespass in the court's view would be reasonable and fair.

8. The Plaintiff has proved that he was allocated the suit land and that the Defendant trespassed onto it. The court grants prayers (a) and (b) of the Plaintiff. The court awards the Plaintiff general damages of Kshs. 50,000/= together with the costs of the suit.

Dated at Nairobi this 30th day of January 2019.

K. BOR

JUDGE

In the presence of: -

Steve – Court Assistant

No appearance for the Plaintiff and the Defendant