



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 464 OF 2017

SYLVESTER KYALO MUTUA

BERNARD SYENGO KILONZO MULI *t/a*

NZAMU INVESTMENT.....PLAINTIFF

VERSUS

FELIX MULWA MUNYALO.....1ST DEFENDANT

KENNY MUTHOKA2ND DEFENDANT

JUDGMENT

1. In his Complaint dated 24th November, 2017, the Plaintiff averred that it is the legal registered owner of parcel of land known as Kitui Municipality Block 111/445; that the Defendants have been harassing the Plaintiff's Directors and have been committing acts of waste on the suit land and that the Defendants have trespassed on the suit land. The Plaintiff is seeking for an order of injunction and for damages for trespass.
2. The 1st Defendant averred in his Statement of Defence that he is improperly enjoined in the proceedings and that he is not aware of Machakos ELC. No. 441 of 2017.
3. In his Statement of Defence, the 2nd Defendant averred that he has always been in possession and occupation of plot numbers 29/95/15/F and 29/95/15/G which were allocated to him by the County Council of Kitui; that he has never been made aware of Machakos ELC. No. 441 of 2017 and that he has not trespassed on the suit land as alleged.
4. When the matter came up for hearing, the Plaintiff withdrew the suit as against the 1st Defendant.
5. The Plaintiff's Director, PW1, informed the court that the Plaintiff is the registered proprietor of the suit land; that despite being arrested for trespassing on the suit land, the Defendants have continued with their acts of trespass and that he has constitutionally guaranteed right to property.
6. It was the evidence of PW1 that the suit land had been set aside for the establishment of a High Class Hotel; that the Plaintiff was issued with a Letter of Allotment on 3rd February, 1997 and that it was later on issued with a Certificate of Lease dated 1st December, 2016 for a term of 99 years.
7. According to PW1, after the suit land was allocated to the Plaintiff, he was given a Surveyor who showed him the location of the land and that he has been ploughing the said land; that the Plaintiff's Letter of Allotment was first in time and that the Plaintiff was allocated the suit land by the National Government which owned the land. Although it is the Commissioner of Lands that allocated the Plaintiff the suit land, PW1 stated that the County Government was consulted.
8. On his part, the 2nd Defendant stated that he was allocated the suit land by the County Government of Kitui; that the land he was allocated is within Kitui town and that he was allocated plot numbers G and F. It was the evidence of DW1 that he paid to the County Government rates in respect of the two plots and that he has been in occupation of the two plots since 1998.
9. In cross-examination, DW1 stated that his land is 200m away from the Kitui Pastoral Centre; that his plot borders Nzeeu River; that although he was given a Part Development Plan, he did not have it in court and that his land had not been surveyed.
10. The Plaintiffs' advocate submitted that the 2nd Defendant admitted for not having a Beacon Certificate, a Survey Plan, a Deed Plan, a

Registry Index Map and a Surveyor's Report to show the exact location of his plots; that the Surveyor's Report by the Plaintiff was never challenged and that the 2nd Defendant is developing the suit land. Counsel submitted that being the registered proprietor of the suit land, it is the Plaintiff which has proved ownership of the land.

11. The 2nd Defendant's counsel submitted that the issue of ownership of the suit land is not in dispute; that what is in dispute is the location of the suit property; that the location of the 2nd Defendant's land is on the Physical Development Plan and that the Plaintiffs have not made up a case of injunction as against the 2nd Defendant.

12. The evidence before me shows that the Plaintiff applied to the Commissioner of Lands to be allocated a plot vide a letter dated 1st October, 1994 as per "the attached plan marked in red" for the construction of a High Class Hotel. The Plaintiffs' Application was approved by the then Town Clerk of the Municipal Council of Kitui vide his letter dated 29th November, 1994.

13. It is after the then Municipal Council of Kitui and the District Commissioner approved the Plaintiffs' Application that the Plaintiff was issued with a Letter of Allotment dated 3rd February, 1997 for "UNS. PLOT FOR HIGH CLASS HOTEL-KITUI." The Plot was identified in a Part Development Number KTI/29/96/10.

14. The Plaintiff produced in evidence the Lease that was issued to it for parcel of land known as Kitui Block 3/445. The said Lease was registered on 1st December, 2016 and a Certificate of Lease issued on the same day.

15. The Survey Plan that gave rise to the amendment of the Registered Index Map dated 9th September, 2015 identifying the location of parcel number 445 was annexed on the Surveyor's Report dated 11th January, 2018. In the said Report, the Surveyor noted as follows:

"The Surveyors visited the site on 11th January, 2018 to confirm the structures being constructed; we found that the two structures currently being constructed are within the borders of Block 111/445 as per the survey records in our possession."

16. The Surveyor also took the photographs which shows the developments that were being put on parcel number 445.

17. The 2nd Defendant did not deny that he is the one putting up the foundation that the Surveyor identified in his Report. According to the 2nd Defendant, he is putting up structures on his parcel of land and not on parcel number 445 belonging to the Plaintiff.

18. The 2nd Defendant's documents shows that he was allocated two plots for residential purpose known as "G" and F". The two plots were identified by way of Plan Number KTI/29/95/15 which is different from the plan that was used to grant to the Plaintiff its Letter of Allotment. Indeed, the 2nd Defendant's building plan that was submitted to the County Government of Kitui shows that the said building was to be built on Plan Number KTI/29/95/15, which is different from the plan that was issued to the Plaintiff.

19. The 2nd Defendant did not produce any document to show that before commencing construction, he obtained a Beacon Certificate from a qualified Surveyor. Indeed, the 2nd Defendant did not call any evidence to controvert the evidence of the Surveyor which shows that he has commenced construction on parcel number 445.

20. Considering that the Plaintiff is in possession of a Survey Plan showing the fixed boundaries of parcel number Kitui Block 3/445, and in view of the fact that the 2nd Defendant has not impugned the Certificate of Lease which shows that the Plaintiff is the registered proprietor of parcel number Kitui Municipality Block 111/445, I find that the 2nd Defendant has indeed trespassed on the land belonging to the Plaintiff.

21. The 2nd Defendant's acts of trespass involved the construction of a permanent building which was captured by the Surveyor in his report. To the extent that the 2nd Defendant's acts have interfered with the Plaintiffs' ownership and proprietorship rights, the Plaintiff is entitled to damages for trespass to the tune of Kshs. 1,000,000 and not Kshs. 10,000,000 as submitted by the Plaintiffs' advocate.

22. For the reasons I have given above, I allow the Plaintiff's Plaint dated 24th November, 2017 as follows:

a. An order of permanent injunction be and is hereby issued restraining the 2nd Defendant either by himself, agents, servants, employees, workers or otherwise whomsoever from harassing, intimidating, or threatening the Plaintiff and/or its workers, directors, agents and from entering, trespassing, wasting, alienating, occupying and or damaging the crops and vegetation growing on parcel of land known as Kitui Municipality Block III/445 or interfering with the Plaintiff's peaceful possession of the said land.

b. The 2nd Defendant to pay to the Plaintiff damages for trespass on the suit land to the tune of Kshs. 1,000,000.

c. The 2nd Defendant to pay to the Plaintiff interest on (b) above at court rates from the date of this Judgment until payment in full.

d. The 2nd Defendant to pay the costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8TH DAY OF FEBRUARY, 2019.

O.A. ANGOTE

JUDGE