



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 54 OF 2013**

**DERRICK KIBAARA MUNYUA.....1<sup>ST</sup> PLAINTIFF**

**DOROTHY KARIMI NTARI.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**MWEVIA M'MURUNGI M'TUIKATHI.....DEFENDANT**

**JOSEPH GITHOGORI NDEGWA.....3<sup>RD</sup> PARTY**

**JUDGMENT**

1. The uncontroverted or undisputed facts of this case are that:-

- i. Joseph Githogori Ndegwa (hereinafter referred to as the third party) sold the parcel of land known as **Laikipia/Daiga Ethi Block 2/376** (hereinafter referred to as the suit property) to the plaintiff.
- ii. the third party also sold the parcel of land known as Laikipia/Daiga Ethi Block 2/1341 to the defendant.
- iii. The suit property and the property sold to the defendant do not share a boundary.
- iv. The suit property was, in accordance with the agreement executed between the third party and the plaintiff, transferred to the plaintiffs and a title deed issued in favour of the plaintiffs on 15th May, 2012.
- v. The defendant based on the agreement he executed with the 3rd party and on the mistaken belief as to the property the third party had sold to him, took possession of the suit property and began developing it.
- vi. On or about 11th October 2012, the plaintiffs through the firm of G.M Wanjohi & Co. Advocates, wrote to the defendants complaining about his activities in the suit property and requiring him to vacate the land as his activities thereat were detrimental to them.
- vii. The defendant did not heed the demand by the plaintiffs thus rendering the filing of the suit herein necessary.

2. After the defendant was served with the plaintiffs' suit, he filed a statement of defence through which he *inter alia* averred that he bought a parcel of land from the 3rd party herein and that the third party had shown him the location of the land before he assumed possession and occupation. The defendant also denied the contention by the plaintiff that the dispute between the plaintiffs and him was referred to the area assistant chief who advised that he vacates the suit property. He also denied having received any demand letter requiring him to vacate the suit property. The defendant also gave notice of his intention to raise a cross-claim against the third party.

3. On 22nd February, 2016 the plaintiff and the defendant recorded a consent to the effect that the County Land Registrar and Surveyor, Laikipia County, visits the locus and establish where the suit properties are situated.

4. Pursuant to that order the County surveyor filed the following report:-

**“ SURVEYOR'S REPORT**

**RE: LAIKIPIA/DAIGA ETHI BLOCK 2/376 & 1341**

**In reference to the above subject I do confirm that on 4<sup>th</sup> May 2016, I visited the above parcels in a mission to execute a court order issued by the Environment and Land Court at Nyeri on 12<sup>th</sup> April 2016 to do a site visit and know the ground status and file the following**

**Present Members**

**Mr.Mwevia M' Murungi M'Tuikathi.....defendant**

**Mr. Derick Kibaara Munyua.....plaintiff**

**Daniel Leakano-Surveyor Laikipia**

**Pamela Mutegi Land Registrar Laikipia**

**Amos Nguru-Driver**

**Stephen Kitunga-brother in law to the defendant**

**Njagi Mbaya brother in law to Mwevia**

**Findings**

- **Parcel No.376 is well fenced with a chain link and has semi permanent house in it which belongs to the defendant, Mr. Mwevia;**
- **Also the same 376 has been ploughed and wheat has been grown on it by one Mr. Mwevia the Defendant;**
- **On inquiry both parties know the exact location of parcel No.376 on the ground;**
- **On the map parcel No.376 is in Registry Map Sheet No.6 of Laikipia Daiga Ethi Block 2 (East Laikipia Farmers);**
- **That on visiting parcel No.1341 we noted that it is almost 4 km away from parcel No.376 but in the same scheme.**
- **That parcel No.1341 has no developments in it and no one lives on it;**
- **On the map parcel No.1341 is in Registry Map sheet No.3 of Laikipia Daiga Ethi Block 2 (East Laikipia farmers).**
- **Both parcels have approximately equal acreage.**

**In conclusion the parcels are OK on the ground and are far apart. They don't share any common boundary."**

5. Following the report of the County Surveyor to the effect that the suit property and the parcel of land sold to the defendant were different and distinct parcels of land on the ground, the defendant moved the court for leave to issue a third party notice to the third party herein.

6. On 28th October, 2016 the court allowed the defendant to issue a third party notice on the third party. As a result, the defendant issued the third party notice dated 3rd November 2016 through which he seeks indemnity against liability for any damages, costs and interest that may be awarded to the plaintiffs. The defendant also seeks indemnity from costs he incurred defending the plaintiffs claim and the third party proceedings.

7. Through the third party notice, the defendant contends that whilst he bought the parcel of land known as Title No.Laikipia/Daiga Block 2/1341, the third party pointed out to him the suit property, took possession and occupation of it and extensively developed it.

8. It is the defendant's case that the third party acted dishonestly and fraudulently by selling the same parcel of land twice, misleading him on the location of the suit property and by enriching himself unjustly at at his expense.

9. Through his statement of defence filed on **7th December, 2016** the third party denied the allegations levelled against him and contended that the defendant had no justifiable cause to occupy the plaintiffs' land.

10. In reply to the third party's statement of defence, the defendant maintains that the third party showed him the suit property as opposed to the parcel of land he sold to him.

11. When the matter came up for hearing, the 1st plaintiff relied on his witness statement recorded on 25th March, 2013 as his evidence in chief. He also relied on his documents filed on 26th March, 2013. He informed the court that he has never utilized the suit property since 2012. As a result, he lost the benefit he could have obtained if he was using the suit property. However he had no documents capable of proving the loss he suffered or that the beacons in the suit property were destroyed.

12. The defendant relied on his witness statement as his evidence in chief and the list of documents filed on 3rd December, 2014 after the same were adopted. He maintained that the third party showed him the suit property as the property he sold to him in 2011 which he took possession the same year. He stated that when they accompanied the surveyor, he discovered that the 3rd party showed him the wrong parcel. He urged the court to order the third party to pay the cost of his building and the costs of the suit.

13. In cross examination, the defendant maintained that when he purchased land from the 3rd party, the 3rd party showed him where the land was situated. He did not bring a surveyor to show him where the land was. He maintained that the 3rd party should pay him the full costs of the suit and the developments he effected in the suit property. All along he believed he was occupying the land he bought.

14. In re-examination, the defendant stated that at the time he bought the suit property, the 3<sup>rd</sup> party was unknown to him. He informed the court that the third party was introduced to him by a Mr. Wachira.

15. The third party, Joseph Gitonga Ndegwa, relied on his statement of defence, witness statement and the documents he filed on 7th March, 2016.

16. In cross examination, he acknowledged that he sold land to the plaintiff and the defendant but stated they were different parcels. The court heard that the land where the defendant lives in belongs to him but is not the one he sold to the defendant.

17. After hearing closed, only the plaintiff filed submissions. This was so despite the fact that all the parties were accorded an opportunity to file submissions.

18. From the pleadings and submissions filed in this suit, the issues for determination are found to be:-

- i. Whether the plaintiff has made up a case for being granted the orders sought or any of them?
- ii. Whether the defendant has made up a case for being indemnified by the third party?
- iii. What orders should the court make?

19. With regard to the first issue, on behalf of the plaintiff, a brief background of the circumstances leading to the filing of the instant suit is given and submitted that the defendant did not act as a reasonable person especially after he was notified that the suit property belonged to the plaintiff and required to vacate.

20. Based on the evidence led in this suit to the effect that the plaintiff is the registered proprietor of the suit property and that the defendant is the one in use and occupation of the suit property, it is submitted that the plaintiff has made up a case for issuance of eviction orders against the defendant.

21. With regard to the claim for damages, it is submitted that the plaintiff has made up a case for the pleaded special damages of Kshs.20,000/= required to fix the boundary to the suit property which the defendant is said to have destroyed. It is further submitted that the plaintiff is entitled to award of general damages for trespass to land amounting to Kshs.5,000,000/=. In support of the said award, reference is made to the case of **John Arap Koech v. AINU SHAMSI AUTOMOBILE HARDWARE LTD & 3 OTHERS (2017)eKLR** where **Kshs.3,000,000/=** was awarded on account of loss of use owing to trespass and the case **Bhagwani Singh Kalsi v. National Housing Corporation (2017)eKLR** where **Kshs. 1,500,000/=** was awarded as general damages for trespass to land.

22. Having carefully reviewed the evidence adduced in this case which is to the effect that the plaintiff is the registered proprietor of the suit property and that the defendant has been in use and occupation of the suit property despite having been notified that the suit property belongs to the plaintiff, I agree with the submission by the plaintiffs' counsel that the defendant did not act as a reasonable person in refusing to vacate the suit property despite having being informed that the property he occupied belonged to the plaintiff.

23. Whilst from the evidence adduced in this case it is probable that the defendant's initial entry was attributable to a mistake attributable to the third party and/or his agent, one John Wacira Nyaga, in identification of the parcel of land sold to him, the same cannot hold good for the conduct of the defendant after he was notified by the plaintiff that the parcel of land he occupied belonged to him. As a prudent person, instead of insisting that he was the owner of the suit property when his ownership was in doubt, he should have at least contacted the 3<sup>rd</sup> party to confirm from him about the issue raised by the plaintiff or consulted a surveyor to confirm the position of his land as was ultimately done in this case.

25. As the use and occupation of the suit property by the defendant was without the permission or sanction of the registered proprietor thereof, it in law amounted to and amounts to trespass to land. Being the registered proprietor of the suit property, the plaintiff is entitled to use and enjoyment of the suit property to the exclusion of all other persons, the defendant included. Since the defendant's continued use and occupation of the suit property amounts to unwarranted interference of the plaintiffs' legal right to enjoy quiet possession and use of the suit property, I find and hold that the plaintiff has made a case for being granted an order compelling the defendant to vacate the suit property failing which he should be forcefully evicted.

25. With the regard to the claim for damages for trespass to land, I am satisfied that the plaintiff suffered loss and damage on account of denial of use of the suit property for the period the defendant was in wrongful use and occupation of the suit property. Although the plaintiff did not specifically plead and strictly prove the loss suffered as by law required, cognisant of the fact that trespass to land is actionable per se, I assess damages payable to the plaintiff at Kshs. 1, 000,000/= based on the vastness of the suit property. I also award the plaintiff costs of the suit and interest thereon at court's rate from the date of delivery this judgment to the date of payment in full.

26. As to whether the defendant has made up a case for being indemnified by the third party, based on my finding that the defendant was, in the circumstances of this case, not justified in insisting that he was the owner of the suit property when he could easily have taken measures to confirm the true position concerning his alleged ownership of the suit property either from the third party or by engaging the services of a surveyor, I find and hold that he has not made up a case for being indemnified by the 3<sup>rd</sup> party against whom in any event he failed to prove he was the one who showed him the suit property.

27. The upshot of the foregoing is that the plaintiff's suit has merit and is allowed in terms of prayers (a), (b) to the extent that the plaintiffs are awarded general damages of Kshs.1,000,000/=, (d) and (e).

28. Implementation of prayer (a) shall be suspended for a period of 90 days from the date of delivery of this judgment to give the defendant time to make necessary arrangements to vacate the suit property.

29. Orders accordingly.

**Dated, signed and delivered in open court at Nyeri this 26th day March of 2019.**

**L N WAITHAKA**

**JUDGE**

Coram:

Ms Miriti h/b for S. K. Njuguna for the plaintiff

Joseph Githogori -3rd party

Mwevia M' Murungi the defendant

Court assistant - Esther