



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC CASE NO. 396 of 2011**

**EDWARD K. KIGONDU.....PLAINTIFF**

**=VERSUS=**

**GODFREY NG'ANG'A THANJI.....DEFENDANT**

**JUDGMENT**

1. The plaintiff filed this suit against the defendant claiming the following reliefs:-

*a. A mandatory injunction directing and compelling the defendant to give possession of all that parcel of land known as title number Dagoretti/Waithaka/202 to the Plaintiff;*

*b. A mandatory injunction directing and compelling the defendant to vacate all that parcel of land known as title number Dagoretti/Waithaka/202;*

*c. General damages against the defendant*

*d. cost of this suit;*

*e. Any other remedy that this Honourable Court may deem fit to grant.*

2. The defendant had filed Nairobi HCCC No.78 of 1999 (**Godfrey Ng'ang'a Thanji Vs James Edward Kigonde and Edward K Kigonde**) against the plaintiff and his brother. The plaintiff in this case was the second defendant in that case. The first defendant is a brother to the plaintiff. The suit property is registered in the name of the plaintiff. The defendant in this case had intended to purchase half an acre of the suit property. The half-acre was being sold by the plaintiff's brother who was not the registered owner. The agreed purchase price was Kshs.230,000/=.The defendant made a down payment of Kshs.120, 000/=. The plaintiff's brother was not keen on proceeding with the sale transaction. This is what prompted the defendant to file the case against the plaintiff and his brother. This case was dismissed and the defendant was ordered to pay costs to the plaintiff who was the second defendant. After the dismissal of the suit, the defendant remained in the suit property. This is what prompted the plaintiff to file this suit against the defendant.

3. The plaintiff filed an application seeking a mandatory injunction compelling the defendant to move out of the suit property. This application was allowed. The parties to this suit however recorded a consent in which the defendant was allowed to move out of the suit property by 20<sup>th</sup> May 2012. When the defendant did not move out by the date given, the plaintiff applied for an eviction order. The eviction order was executed by an auctioneer who evicted the defendant on 20<sup>th</sup> July 2012. The eviction having been carried out what now remains for determination is general damages.

4. The plaintiff prayed for general damages for the period the defendant remained in the suit property. He also prayed that the defendant be ordered to pay auctioneer charges which are outstanding.

5. The defendant testified that during the eviction process, the auctioneers took his properties. He was left with nothing. The house which he had erected on the suit property was demolished. He stated that he has nothing more to be attached and that the plaintiff is pursuing him for self-enrichment.

6. I have considered the plaintiff's evidence as well as the defendant's evidence. I have also considered the submissions by the parties herein. The defendant has already been evicted from the suit property. The eviction has rendered some prayers in the plaint mute. The only issue for determination is whether the plaintiff is entitled to general damages.

7. In considering whether the plaintiff is entitled to general damages, it is important to know how the defendant entered into the suit property. There is no doubt that the registered owner of the suit property is the plaintiff. The defendant was allowed to go into the suit property by the plaintiff's brother who wanted to sell half an acre to him. The plaintiff's brother had convinced the defendant that though the suit property was registered in the name of the plaintiff, it was family land and that he was entitled to sell a portion to the defendant. The defendant was put in possession after paying KShs.120,000/= to the plaintiff's brother.

8. The defendant took possession in 1990. When the plaintiff's brother refused to carry on with the sale, the defendant filed a suit against the plaintiff and his brother. The defendant lost the case and the judge observed that since there was no consent of the Land Control Board given, the defendant was entitled to a refund of the money which he had paid the plaintiff's brother. As there was no privity of contract between the defendant and the plaintiff herein, the suit against the plaintiff in that case was dismissed with costs.

9. Prior to the dismissal of the defendant's case, the plaintiff herein had not complained that the defendant was a trespasser when the court decreed that he was entitled to refund of the downment he had made. The court rightly observed that there was no evidence adduced to show that the plaintiff in that case held the suit property in trust for his brother who wanted to sell half acre to the defendant.

10. The judgement in which the defendant lost his case was delivered on 9<sup>th</sup> November 2010. The defendant was evicted from the suit property on 20<sup>th</sup> July 2012. It therefore follows that he was a trespasser on the plaintiff's land for close to two years. I have considered the fact that the defendant entered into the land as a purchaser. The purchase did not go through because of lack of consent of the Land Control Board. If indeed the plaintiff felt that his brother was unlawfully selling his land to the defendant, he should have brought a suit against the defendant for trespass. The plaintiff started asserting his rights after the defendant lost his suit against him.

11. The defendant had been allowed to put up a house on the suit property. This house was demolished and his goods were attached as per the auctioneer's inventory. It will be unfair again to condemn the defendant to pay general damages in the circumstances. I therefore reject the prayer for general damages. Each party shall bear their own costs.

**Dated, Signed and delivered at Nairobi on this 7<sup>th</sup> day of March, 2019.**

**E.O.OBAGA**

**JUDGE**

In the presence of:-

Defendant in person

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**