



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO. 452 OF 2017

JUSTUS MUNYAO KYUNGU.....PLAINTIFF

VERSUS

ROBIN STUART MCDONALD.....1ST DEFENDANT

PETER NGAO.....2ND DEFENDANT

JUDGEMENT

1. By his plaint dated 05th May, 2008 and filed in court on even date, the plaintiff prays for judgement against the Defendants jointly and severally for:-

(a) An injunction to issue to permanently restrain the Defendants whether by themselves, their servants and/or agents or others whomsoever from continuing with the acts of trespass or in any other manner howsoever from interfering with the Plaintiffs quiet possession and peaceful occupation and enjoyment of the property.

(b) A mandatory injunction to issue against the Defendants for restitution by the Defendants of the status quo as at the time of the trespass aforesaid.

(c) General and exemplary damages.

(d) Costs of this suit and interest of the decretal amount at court rates.

2. The Plaintiff has averred in paragraphs 3, 4, 7 and 8 of his plaint that at all material times to this suit, he was and is the rightful owner of plot No.367 within Mutitu Wa Ndei Town Council which plot is duly registered in Mutitu Wa Ndei Town Council's records in his name, that he has since 1989 developed the said plot, putting up a shop building comprising three units, that in or about February, 2008 the 2nd Defendant, holding out as the agent or apparent agent of the 1st Defendant wrongfully entered the Plaintiff's plot, broke the Plaintiffs locks and purported to evict the Plaintiff's tenants and have since wrongfully commenced to repaint the shop without the Plaintiff's consent or authority and that the Defendant's acts complained of are high handed, unlawfull and amount to trespass upon private property and have occasioned to the Plaintiff great inconvenience, hardship, loss ad damage. He claims for general and exemplary damages.

3. The claim is denied by the Defendants vide their statement of defence dated 04th August, 2008 and filed in court on even date.

4. In paragraphs 5 and 7 of their joint statement of defence, the Defendants have averred that in Machakos HCCC No.121 of 1998 in which case the Plaintiff was on his own application, added as a party and which matter was referred to Mutito Wa Andei Town Council for arbitration and in an award dated 18th June, 2001 the Plaintiff was found to have no plot in the area near 1st Defendant's plot No.134. That the arbitrator's further found the Plaintiff herein was being used by the co-Defendant in the said case to secure the co-Defendants developed plot No.134 and which plot No.134 arbitrators found to belong to the 1st Defendant herein who had acquired the same through auction and which arbitrators award was entered as judgement of the court with effect from 08th June, 2007. That the Defendants state that the Plaintiff in collusion with the co-Defendant in HCCC No.121 of 1998 have conspired to deprive the 1st Defendant his plot claiming plot No.134 to be plot No.367 which is not the case as per the council records and as on the ground and as arbitrators found.

5. The Defendants though served with the hearing notice did not attend the court when the matter came up for hearing first on the 02nd May, 2018. An affidavit of service sworn by Francis Kathitu, a process server, at Machakos on 30th April, 2018 showed that the Defendants Counsel was served with a hearing notice on 09th February, 2018. This case therefore commenced for hearing in the absence of the Defendants.

6. During the hearing, the Plaintiff adopted his statement dated 28th September, 2017 as his evidence in chief. He went on to produce a letter from Makueni County Government dated 21st September, 2017, 3 photos, letter of allotment from the Department of Lands dated 16th June, 1999 and a receipt, miscellaneous receipts issued by Makueni County Government, valuation report and an extract of register as P.Exhibit Nos.1, 2, 3(a) &(b), 4, 5 and 6 respectively.

7. His evidence was that he is the registered owner of all that surveyed commercial plot known as plot No.367 measuring 80 by 100 feet at Mtito Andei town Council. That he has substantially developed the plot by putting a 3-unit commercial building. That he has owned the plot since 1989 when he bought and developed it. That since 05th January, 1993 he dutifully paid all the necessary plot rates. That vide the allotment letter dated 16th June, 1999 {P.Exhibit No.3(a)} the Government of Kenya offered him a grant of the said plot which he accepted. That in or about February, 2008, the 2nd Defendant while holding himself as an agent of the 1st Defendants, wrongfully and unlawfully entered into the said developed plot, broke the doors and locks of his 3-unit commercial building and he has remained in the Plaintiff's plot since then. That the 1st Defendant's acts are unlawful and amount to trespass upon private property. That the same has occasioned the Plaintiff great inconvenience, hardship, loss and damage.

8. The Plaintiff called B. Keneth Ngeny (PW1) who is the Director in charge of Lands and Urban Planning Makueni County Government as his witness. Ngeny (PW1) told the court that plot No.367 Mtito Andei measuring 80 feet by 100 feet is registered in the name of Justus Munyao Kyungu, the Plaintiff herein as per the records that the County Government inherited from the defunct Mtito Andei Town Council pursuant to devolution. The witness said that the Plaintiff has been paying rates and rent for the plot. That there has never been change of ownership, sub division or transfer. The witness produced the extract of the register as P.Exhibit No.6.

9. In their written submissions, Nzei and Company Advocates for the Plaintiff submitted that the Defendants in their written statement of defence did not deny having entered into the Plaintiff's plot. That the two instead purported to justify their tortious act of trespass by alleging "ownership of the Plaintiffs" plot which according to them was plot No.134. The Counsel added that the Defendants never attended court to prove their allegations.

10. The Counsel further submitted that the Plaintiff having proved ownership of the disputed plot, what follows is the assessment of damage for such trespass. The Counsel cited **Clerk & Lindsell on Torts, 18th Edition at page 923** which defines trespass as;

"any unjustifiable intrusion by one person upon the land in possession of another."

The Counsel further relied on the case of **Ochako Obinchi v Zachary Oyoti Nyamongo [2018] eKLR** and **Halsbury 4th Edition, Vol. 45 para 26, 1503**. The latter provides as follows: -

- (a) *If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.*
- (b) *If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.*
- (c) *Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.*
- (d)
- (e) *If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.*

The Counsel was of the view that the Defendants having invaded the Plaintiff's plot for over 10 years since February, 2008 Kshs.1,500,000/= would be appropriate award in general and exemplary damages.

11. As for permanent and mandatory orders of injunction, the Counsel added that the Plaintiff having proved that plot No.367 Mtito Andei is owned by him and that without justifiable cause, the Defendants trespassed into it and have unlawfully remained therein, the orders mentioned hereinabove ought to issue.

12. I have read the evidence on record as well as the submissions filed. I would agree with the Plaintiff's Counsel that there is no evidence to show that the Defendants own plot No.134 Mtito Andei or even that said plot and plot No.367 are one and the same. If indeed this were the case, B. Ngeny (PW1) who is the Director of Planning and Urban County Government would have said so in his evidence. I, therefore, hold that plot No.367 Mtito Andei Town belongs to the Plaintiff who was allocated the same by the Government of Kenya as can be seen from the letter of allotment {P.exhibit No.3(a)}. The Plaintiff has paid all the necessary rates and rent as can be seen from his evidence and that of B. K. Ngeny. That being the case, I am satisfied that the Defendants did trespass into the Plaintiff's plot. Their continued occupation of the said plot since February, 2008 has denied the Plaintiff use and profits accruing from the same. Given those circumstances, I am satisfied that the Plaintiff is entitled to damages for trespass and in my view, Kshs.1,500,000/= proposed by his Counsel is sufficient under the circumstances. In my judgement, I will award the Plaintiff the aforementioned sum of money. I agree that there is need for the Defendants to be compelled by an order of mandatory injunction to restitute the suit property to the Plaintiff and they also ought to be restrained by an order of injunction. Being satisfied that the Plaintiff has on a balance of probabilities a cause of action against the Defendants, I hereby proceed to enter judgment for him and against the Defendants jointly and severally as hereunder:-

- (a)
- (b)

(c) Kshs.1,500,000/= general and exemplary damages.

(d)

Signed, dated and delivered at Makueni this **31st** day of **July, 2019**.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Wasolo holding brief for Mrs. Nzei for the Plaintiff

J. A. Makau for the Defendant

Ms. C. Nzioka – Court Assistant

MBOGO C. G. (JUDGE),

31/07/2019.