



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC CASE NO. 19 OF 2011**

**THE ESTATE OF JOSHUA WAMBUGU MINJIRE (Represented by**

**CALEB MINJIRE WAMBUGU.....PLAINTIFF**

**VERSUS**

**ISAIAH KAVULAFU)**

**JOSEPH SHIENJI).....DEFENDANTS**

**JUDGMENT**

**The Plaintiff's Case**

1. In the amended plaint dated 3/2/2016 and filed on the same date the plaintiff sought the following orders:

**(a) An order that the defendant and any other member of Mungoma Self Help Group do move out of the plaintiff's land parcel No. Kaplamai/Kachibora Block 3/Muhuti/109 and failing which they be forcefully evicted therefrom and their structures demolished.**

**(b) A permanent injunction restraining the defendants and any other member of Mungoma Self Help Group from occupying or interfering with the plaintiff's user of the land comprised in Title No. Kaplamai/Kachibora Block 3/Muhuti/109.**

**(c) Costs.**

**(d) Interest**

**(e) Any other relief that this court may deem fit to grant.**

2. In the amended plaint the plaintiff states that on 23/10/2001 his late father purchased and became registered proprietor of title No. **Kaplamai/Kachibora Block 3/Muhuti/109** measuring **0.0570 hectares** (hereinafter also referred to as **Plot No. 109**) while **Mungoma Self Help Group** of which the defendants are members, was registered as proprietor of Title No. **Kaplamai/Kachibora Block 3/Muhuti/110** (hereinafter also referred to as **Plot No. 110**) on 25/2/2002. However instead of taking possession of **Kaplamai/Kachibora Block 3/Muhuti/110** the defendants and other members of the group illegally and unjustifiably trespassed on plot No. **Kaplamai/Kachibora Block 3/Muhuti/109** and erected structures thereon and having remained thereon to date. Subsequently the Land Registrar and the District Surveyor visited the site in 2009 and confirmed that the defendants are in occupation of Plot No. **109** instead of **110**. The plaintiff avers that no appeal was lodged against the findings of the Land Registrar and the District Surveyor and despite demand the defendants have failed to vacate plot No. **109** hence occasioning the plaintiff loss of user of his plot.

**The Defendants' Defence**

3. The defendant opposed the suit. They filed a defence on 23/5/2011. In that defence they deny being trespassers on the plaintiff's plot and state that they have been in occupation of **Land Parcel No Kaplamai/Kachibora Block 3/Muhuti/110** since **2001** when they took possession without any objection from anyone. They aver that the plaintiff's plot is separate and distinct from the defendant's plot. They also deny that the Land Registrar or the Land Surveyor visited the site or resolved the dispute and that if any decision was arrived at by those officers it was in violation of natural justice.

**Hearing**

4. The plaintiff's case was heard on the **23/2/2017** and **8/11/2017**. The defendant's case was heard on **4/10/2018** and on **7/3/2019**. The Surveyor from the County Survey Office also testified on the said date.

5. Thereafter the court orders parties to file final submissions and the plaintiff filed his on the **2/4/2019** while the defendants filed theirs on **25/4/2019**.

### **The Evidence of the Parties**

6. **PW1 Caleb Minjire Wambugu**, the **plaintiff**, giving sworn evidence stated that he is the administrator to the estate of Joshua Wambugu Minjire his father who died on 17/9/2013 having obtained a grant in that regard vide **Kitale HC Succession Cause N. 40 of 2015**; that he is in possession of the title deed for the suit land; that he is aware of the location of the suit land on the ground; that the defendants own another plot **Land Parcel No Kaplamai/Kachibora Block 3/Muhuti/110**; that in March **2009** the plaintiff found a semi-permanent structure on the suit land which had been built by the defendants; that upon reference to the village elder and the chief the dispute was not resolved and the plaintiff lodged a complaint with the Land Registrar who visited the site in the company of the Land Surveyor and in the presence of the 2<sup>nd</sup> defendant, the chief and village elders and ruled that the suit land belonged to the plaintiff's father while the defendants owned plot number **Land Parcel No. Kaplamai/Kachibora Block 3/Muhuti/110**; that the plaintiff can not use the land as the defendants' structures are still on site.

7. **PW2 Aggrey Kavehi** former **Land Registrar, Kitale** now in charge of West Pokot testified that while working in Kitale the dispute regarding the suit land came before him in **2009** at the instance of the plaintiff's father as a boundary dispute and he attended to it jointly with the County Surveyor in the presence of representatives of both parties on the ground. After the County Surveyor took measurements it was discovered that it was a case of trespass and not a boundary dispute, and that the owner of plot No. **109** was the plaintiff's father while the owner of the plot No. **110** was Mungoma Self-Help Group. He testified that Mungoma Self Help Group had put up structures on plot No. **109** and upon the decision that the matter was not within their jurisdiction the officers referred the parties to court.

8. **DW1 Isaiah Kavulavu**, the 1<sup>st</sup> defendant adopted his written statement dated and filed on in the record. He testified that he is the Chairman of the Mungoma Self Help Group which was formed in **1997** as a group of **12** people; that land was bought on behalf of the group vide an agreement (**DExh 1**) from one Teresia Munene on **20/11/2001**; that that land was plot No. **110**; that while the boundary dispute registered with the Land Registrar over the land was being determined the defendants were absent; that plot No. **109** is occupied by a man called Kihiko who has built a permanent house while the group occupies plot No. **110**. When cross examined by Mr. Kiarie he stated that survey had been conducted by the time the group purchased the land and maintained that the group is in occupation of plot 110.

9. **DW2, Joseph Richard Shivachi**, the 2<sup>nd</sup> defendant in this suit, gave evidence upon affirmation, and stated that the group has over 150 members; that the suit land was pointed out to them by the seller, Teresiah Munene; that he was present at the second survey ordered by this court but was not asked for his views; that while the group is in occupation of plot No. **110**, one Zipporah resides on plot No. **111**. Upon cross examination however he conceded that the agreement does not state that the group was shown the plot boundaries, and that no surveyor ever came to the ground to point out the boundaries to the group before they took possession and that the group developed the suit land believing that it was plot No. **110**.

10. **DW3 Zipporah Nabifwo Shikuku** testified that the Mungoma Self Help Group bought a plot next to hers which is number 111 and have been in occupation of their purchased plot since the year **2001**. According to her the group is in occupation of plot No. **110**.

11. **Christine Kapsiliot a Surveyor** with the County Survey Office testified on **7/3/2019**. She got a court order dated **29/5/2018**; she revisited the land as per the order; she invited the parties to the site visit on **4/7/2018**; the plaintiff and the defendant were present; so was the chief; she used the Registry Index Map to identify the location of the suit land; she identified plots numbers 109 and 110; she also located a road passing between plots 107 and 106; a second road existed between plots 112 and 113; she picked the distances from parcels 107 and 108 along their widths; the plots were in existence on the ground and were marked by structures; the measurements of plots 109 and 110 on the ground correspond with the RIM; She found that Mungoma Group was in occupation of plot 109 while Zipporah Shikuku resides on plot 110; she compiled a report which she filed in court. She also produced a certified copy of the RIM as **PExh 7**. According to the Surveyor the roads on the ground correspond with the RIM.

12. **Desterio Lwango a Private Surveyor**, testified in this matter at the instance of the defendants. He stated that he was requested by the group to establish plots starting from plot 103 to plot 116. He went to the site on **24/1/2019** armed with the RIM for Kaplamai Kachibora/Munguti certified by the County Surveyor (**DExh 9**) amongst other surveying paraphernalia; that all the plots from 103- 116 exist without any exception; however he found that the road between 106 and 107 on the RIM is actually between plots 107 and 108 on the ground; that the road between 112 and 113 on the RIM is actually between plots 113 and 114; that if the roads on the ground were considered one plot would be lost.

### **Determination**

#### **Issues for Determination**

*(a) Whether the defendants have trespassed on Land Parcel No Kaplamai /Kachibora Block 3/Muhuti/109 belonging to the plaintiff?*

*(b) What orders should issue?*

*(a) Whether the defendants have trespassed on Land Parcel No. Kaplamai/Kachibora Block 3/Muhuti/109 belonging to the plaintiff?*

13. The evidence of the Land Registrar and the two Surveyors in this matter is crucial. The first report by the Land Surveyor and the Land Registrar show that the defendants are in occupation of plot number **Land Parcel No Kaplamai /Kachibora Block 3/Muhuti/109**.

14. The report from the private surveyor commissioned by the defendants shows that all the plots in the block are in existence just as per the number on the RIM. The point at which he differs with the County Surveyor is in respect of the positioning of the plots.

15. However on this issue I must emphasize that if I were to throw out the validity of the official document that is the general authority on the plot layout in the block, that is the RIM in favour of the *de facto* situation on the ground adumbrated by the private surveyor, I would be in error.

16. The layout of the plots on the RIM must be respected and adhered to unless a rational explanation has been issued by the government office, the County Surveyor's office in charge of the relevant map.

17. In my view the only evidence that can establish the true position of plot **Land Parcel No Kaplamai/Kachibora Block 3/Muhuti/109** is the Registry Index Map (RIM). The only fact that I must observe is that that map is not a final authority on the boundaries.

18. There is no doubt that the proprietor of plot No. 109 is the plaintiff. There is no doubt that the Surveyor and the Registrar have confirmed that the plot is occupied by the defendants. The plaintiff's complaint is that the defendants have trespassed on that plot.

19. Upon analysis of the evidence of the private surveyor called by the defendants I do not find any denial that the defendants are in occupation of **Land Parcel No. Kaplamai /Kachibora Block 3/Muhuti/109**. That is the denial that would have cast some doubt on the evidence of the County Surveyor.

20. As things stand now there is not even any need to embark on an examination of the evidence in this matter any further. If the plots are all in existence on the ground as they are on the RIM it is clear that at least one person has trespassed on another's plot.

21. Expert evidence has been adduced to the satisfaction of this court that the plaintiff owns **Land Parcel No Kaplamai /Kachibora Block 3/Muhuti/109** and that the defendant has trespassed upon it.

**(a) What Orders should issue?**

22. The upshot of the above analysis is that I find that the plaintiff has established his claim against the defendant on a balance of probabilities.

23. I therefore enter judgement in favour of the plaintiff against the defendants jointly and severally and issue the following orders:

**(a) The defendants and all other member of Mungoma Self Help Group shall vacate the plaintiff's land parcel comprised in Title No. Kaplamai /Kachibora Block 3/Muhuti/109 and in default be evicted.**

**(b) A permanent injunction is hereby issued restraining the defendants and all other members of the Mungoma Self Help Group from occupying or interfering with the plaintiff's user of the land comprised in that title Land Parcel No Kaplamai /Kachibora Block 3/Muhuti/109.**

**(c) The defendants shall bear the costs of this suit.**

It is so ordered.

**Dated, signed and delivered at Kitale on this 18<sup>th</sup> day of July, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**18/7/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Wanyonyi for Defendants

Ms. Mufutu holding brief for Kiarie for Plaintiff

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

**18/7/2019**