



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND CASE No. 208 OF 2016

DAVID NJUGUNA MWANGI..... PLAINTIFF

VERSUS

PETER MAINA NGATIA.....DEFENDANT

JUDGMENT

1. Proceedings in this matter were commenced through plaint filed on 13th June 2016. The plaintiff averred that he was allocated Commercial Plot No. 8 at Mbaruk Trading Centre (hereinafter the suit property) by the County Council of Nakuru through letter dated 20th September 2011. That he accepted the offer and complied with all the terms stated in the letter upon which he was shown the plot and its beacons. He took possession and retained quiet possession until about March 2016 when the defendant invaded the plot, dug trenches, deposited building materials and started construction without any right. That upon conducting an enquiry, the County Government of Nakuru communicated its findings in a letter dated 5th May 2016 that the defendant has no right to interfere with the suit property.

2. Accordingly, the plaintiff seeks judgment against the defendant as follows:

- a) *Declaration that the plaintiff is the lawful allottee of Commercial Plot No. 8 Mbaruk Trading Centre.*
- b) *Permanent injunction restraining the defendant by himself or his servants, employees or agents from interfering with the plaintiff's Commercial Plot No. 8 Mbaruk Trading Centre.*
- c) *A mandatory order to compel the defendant to remove all the structures and building materials on the plaintiff's Commercial Plot No. 8 Mbaruk Trading Centre and in default the plaintiff to remove the structures and building materials from the suit plot at the defendant's costs.*
- d) *An order of eviction against the defendant, his agents, servants and or employees.*
- e) *Mesne profits at the rate of KShs 20,000 per month from March 2016 until the time the defendant vacates the suit plot.*
- f) *Costs of the suit and interest.*
- g) *Any other or further relief this honourable court may deem fit.*

3. The defendant stated in his statement of defence that the suit property was allocated to him and that he made all the requisite payments and took possession. He further admitted digging trenches and depositing construction materials on the suit property and added that he did so as the owner. He thus urged the court to dismiss the case.

4. At the hearing, only the plaintiff and the defendant testified.

5. The plaintiff testified that he saw a Notice of Repossession of plots in Daily Nation Newspaper of 1st September 2009. He got interested and visited the Clerk of Nakuru Municipal Council Mr Malinda who confirmed that repossession was to be done due to arrears of rates. He applied and was allocated two adjoining plots: the suit property herein and Plot No. 9. He produced a copy of the notice in the Daily Nation newspaper of 1st September 2009 and a letter of allocation dated 20th September 2011 as exhibits. The full details of the suit property are Commercial Plot No. 8 at Mbaruk Trading Centre. He was shown the beacons by the surveyor from the Municipal Council. He paid all the rates and the amounts specified in the letter of allocation. In particular, he paid KShs 12,900 being ground rent arrears, ground rent and other charges and was issued with receipt dated 13th January 2012 which he also produced as an exhibit. Upon being shown the plots and the beacons, he fenced both plots and got a neighbour to watch over and to use them while he was away. The plots were vacant when he was shown. He added that he usually pays the rent and rates. He produced copies of receipts for the years 2013, 2014, 2015 and 2016. Since

2016 he has not paid due to the dispute.

6. He further stated that sometime around the year 2015 his caretaker called him and informed him that the defendant had entered the suit property and dug a pit on it. The plaintiff went to Gilgil Sub-County office to find out more. He did not know the defendant at that point but got his number from a neighbour. The Gilgil Sub-County office said they would call the defendant. Both the plaintiff and defendant were summoned to a meeting of a committee of Gilgil Sub-County but the defendant did not attend the first meeting. They were summoned to another meeting and both were told to carry their documents in respect of the suit property. The defendant attended the second meeting on 27th April 2016. They were both asked to explain their interest in the suit property and how they acquired it. They were also asked for originals of their documents in respect of the suit property. The defendant said that Mr Malinda told him about the suit property and that a Mr Wafula the Municipal Council showed it to him. The defendant also produced an allotment letter dated 15th August 2012 addressed to him and referring to Commercial Plot No. 8 at Mbaruk Itherero Trading Centre, which is a different plot. The committee made its decision through letter dated 5th May 2016, a copy of which the plaintiff produced. They concluded that the plaintiff's plot was inside Mbaruk Trading Centre while the defendant's was not in the same place. They decided that the defendant should go back to Mr Malinda to show him his plot. They further ordered that the defendant's building plans be cancelled. He added that he has not been able to use the suit property since the defendant moved in and deposited construction material. Despite the committee's decision, the defendant just continued with his construction.

7. Under cross-examination, the plaintiff stated that according to the allocation letter the plots were repossessed on 15th December 2009 and allocated to him on 22nd December 2009. He received the letter of allotment on 20th September 2011, about two years later. The 2nd paragraph of the allocation letter stated that he was to make payments within 30 days. The allocation letter was not conclusive that he had the plot. That had to wait until he paid. After the allocation on 20th September 2011, he paid ground rent on 13th January 2012, about 3 months later. He was to pay within 30 days failure to which the offer would be revoked. He fenced both plots together into one compound in the year 2015 using barbed wire.

8. The plaintiff's case was then closed.

9. On his part, the defendant stated that around August 2011 he saw an announcement about plots at Mbaruk Itherero Trading Centre which were being repossessed. He got interested and enquired at the County Council office. He was told to return later to be shown the plot. When he returned he was given a County Surveyor known as Mr Wafula who took him to Mbaruk Itherero Trading Centre and showed him 4 plots. He got interested in two plots being plot number 125 residential and commercial plot No. 8. He paid for the plots and was issued with receipts. He was issued with an allotment letter dated 15th August 2012 which states his plot number as Commercial plot No. 8 at Mbaruk Itherero Trading Centre. In the year 2014 he applied for planning approval at the County Council Planning Department. He went to the ground with the Physical Planner who then prepared a plan for him. The plan was approved but he did not have enough money to construct. He dug a pit latrine in the year 2014 and also delivered construction materials. In the year 2016, the plans were renewed. When he started construction the plaintiff started claiming the plot. He did not know the plaintiff and he had never met him before. When he got the plot it was not fenced or even developed.

10. He added that they were both summoned to Gilgil Sub-county office for dispute resolution but he was not given any hearing at the meeting. He was not given a chance to explain himself and he was not formally informed about the outcome of the meeting. Informally, he was told that the plot belongs to the plaintiff. He urged the court to allow him to continue construction since according to him the plot belongs to him and he acquired it after following the correct procedure and paid for it. He produced several receipts, a copy of the allotment letter dated 15th August 2012 and the approved plans. He added that he is not ready to accept an alternative plot since he has already invested in the plot and since the plaintiff does not live on the plot.

11. Under cross-examination he stated that his allotment letter indicates that he was allocated Commercial Plot No. 8 at Mbaruk Itherero Trading Centre but his receipts do not mention the word "Itherero" or "Trading Centre".

12. Under re-examination, he stated that if he was told that the plot belonged to someone else, he would not have taken it. He added that he does not agree with the findings of the Gilgil Committee that his plot does not exist.

13. Defence case was then closed. Parties then filed and exchanged written submissions. I have considered the pleadings, the evidence and the respective submissions. Only two issues arise for determination: firstly, whether the suit property was allocated to the plaintiff or the defendant and secondly, whether the reliefs sought should issue.

14. Both the plaintiff and the defendant state that around the year 2009 to 2010, they saw advertisements that the County Council of Nakuru was allocating plots following a repossession exercise. They applied and were issued with allocation letters. The plaintiff was issued with allocation letter dated 20th September 2011. It states in part:

RE: ALLOCATION OF PLOT AT MBARUK TRADING CENTRE

Following repossession of plots by the council at MBARUK TRADING CENTRE vide Minute No. NCC/275/2009 of 15th December, 2009 of Town Planning Markets and Housing Committee and pursuant to a Full Council meeting held on 22nd December, 2009, I am pleased to inform you that you have been allocated COMMERCIAL Plot No. 8 at MBARUK TRADING CENTRE.

15. The defendant was issued with an allocation letter dated 15th August 2012 which states:

RE: ALLOCATION OF PLOT AT MBARUK IOTHERERO TRADING CENTRE

Following repossession of plots by the council at MBARUK ITHERERO TRADING CENTRE vide Minute No. NCC/275/2009 of 15th December, 2009 of Town Planning Markets and Housing Committee and pursuant to a Full Council meeting held on 22nd December, 2009, I am pleased to inform you that you have been allocated COMMERCIAL Plot No. 8 at MBARUK ITHERERO TRADING CENTRE.

16. The two letters of allocation resemble save for two key differences: the defendant's letter refers to a plot at Mbaruk **Itherero** Trading Centre while the plaintiff's refers simply to a plot at Mbaruk Trading Centre. It is important to remember that the suit property herein is Commercial Plot No. 8 at Mbaruk Trading Centre. The second difference is in the dates. The plaintiff's letter of allocation was first in time.

17. In his statement of defence the defendant stated that the suit property was allocated to him and that he made all the requisite payments and took possession. He further admitted digging trenches and depositing construction materials on the suit property and added that he did so as the owner. That is the same line of defence that he took in his testimony. In essence, the defendant admits that he is occupying the plot which the plaintiff is claiming, in other words Commercial Plot No. 8 at Mbaruk Trading Centre. That being the case, he is occupying the wrong plot. He should be on Commercial Plot No. 8 at Mbaruk Itherero Trading Centre.

18. Both parties admit that the county government constituted a committee with a view to resolving the dispute and that both appeared before the committee. Upon hearing them, the committee's finding was that the plaintiff's plot is inside Mbaruk trading Centre while the defendant's "must be in another location if at all it exists". I further note that the building plans which were submitted by the defendant to the county council and which were approved are in respect of Commercial Plot No. 8 at Mbaruk Itherero Trading Centre and not the suit property herein. Even if we were to assume that the two letters of allocation ultimately refer to one and the same plot, the plaintiff would have a better title to the plot since his allocation was first in time. The plot having been allocated to him, it would not be available for allocation to the defendant. Issue number one is therefore resolved thus: the suit property was allocated to the plaintiff and not the defendant.

19. The final issue for determination is whether the reliefs sought should issue. The plaintiff has sought judgment for a declaration that he is the lawful allottee of Commercial Plot No. 8 Mbaruk Trading Centre; permanent injunction restraining the defendant by himself or his servants, employees or agents from interfering with the plaintiff's Commercial Plot No. 8 Mbaruk Trading Centre; mandatory order to compel the defendant to remove all the structures and building materials on the plaintiff's Commercial Plot No. 8 Mbaruk Trading Centre and in default the plaintiff to remove the structures and building materials from the suit plot at the defendant's costs; an order of eviction against the defendant, his agents, servants and or employees; mesne profits at the rate of KShs 20,000 per month from March 2016 until the time the defendant vacates the suit plot and costs of the suit and interest.

20. In view of the foregoing discussion, I am satisfied that the plaintiff has proven on a balance of probabilities that he is the lawful allottee of the suit property. The prayers for declaration, permanent injunction, mandatory injunction and an order of eviction are merited and will therefore be granted.

21. The plaintiff also seeks compensation in the nature of mesne profits at the rate of KShs 20,000 per month from March 2016 until the time the defendant vacates the suit plot. By their very nature, mesne profits are what a person who is a victim of wrongful occupation of his land by another receives from the aggressor. In **Mistry Valji v Janendra Raichand & 2 others [2016] eKLR** the Court of Appeal stated:

Mesne profit is defined in section 2 of the Civil Procedure Act to mean; - "in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession". ... Measure for mesne profit was described in the Privy Council decision in Invergue Investments v Hackett (1995) 3 All ER 842 cited with approval in the Kenya Hotel Property Ltd case (supra) as follows:

"This is form of an ordinary claim for mesne profit, that is to say, a claim for damages for trespass to land....The question for decision is the appropriate measure of damages."

The privy council observed that that measure of damages must be reasonable rent. The usual practice is to assess mesne profits down to the date when possession is given.

22. It was incumbent upon the plaintiff to lead evidence to justify the claim for mesne profits and to determine the appropriate measure of damages under that head. No evidence was adduced or submissions made to justify the monthly sum of KShs 20,000 which is claimed or indeed any other sum. I therefore dismiss the claim for mesne profits.

23. In the end, I enter judgment in favour of the plaintiff as follows:

- a) It is hereby declared that the plaintiff is the lawful allottee of Commercial Plot No. 8 at Mbaruk Trading Centre.
- b) A permanent injunction is hereby issued restraining the defendant by himself or his servants, employees or agents from interfering with Commercial Plot No. 8 at Mbaruk Trading Centre.
- c) A mandatory injunction is hereby issued compelling the defendant to remove all the structures and building materials on Commercial Plot No. 8 at Mbaruk Trading Centre and in default the plaintiff to remove the structures and building materials from the suit plot at the defendant's costs.
- d) An order of eviction from Commercial Plot No. 8 at Mbaruk Trading Centre is hereby issued against the defendant, his agents, servants and or employees.

e) The plaintiff is awarded costs of the suit and interest thereon at court rates.

24. Judgment herein was to be delivered on 20th February 2019 but was delayed since I proceeded on medical leave. The delay is regretted.

Dated, signed and delivered in open court at Nakuru this 15th day of July 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Mrs Oliech holding brief for Mr Wachira for plaintiff

No appearance for defendant

Court Assistants: Beatrice & Lotkomoi