



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAJIADO
ELC CASE NO. 40 OF 2018
(Formerly NAIROBI ELC Case No. 261 of 2016)

MUCHIRI EPHRAIM MWAI (CHAIRMAN)

MUGAMBI S. GITARI (SECRETARY)

JOHNSON WAITHAKA NJUGUNA (TREASURER)

ON THEIR OWN BEHALF AND ON BEHALF OF MEMBERS OF

MAZINGIRA WELFARE AND SPORTS ASSOCIATION.....PLAINTIFF

VERSUS

JULIUS LUKA NANTEYA.....1ST DEFENDANT

JOHN NANTEYA.....2ND DEFENDANT

WILLIAM NANTEYA.....3RD DEFENDANT

JUDGMENT

By a Plaint dated the 19th February, 2016, the Plaintiffs pray for judgment against the Defendants for:

- a) A declaration that the Defendant is not entitled to enter or use the Plaintiffs properties or construct manyattas, graze pastures or any way alienate the Plaintiffs' properties being: KJD/ LOODARIAK/ 6637 – 6955;
- b) An injunction restraining the Defendant by himself, his servants or agents or otherwise howsoever from entering, using, occupying, building any structures or manyattas, grazing pastures upon the Plaintiffs properties;
- c) An injunction directing the Defendant to remove with immediate effect all the manyattas, animals grazing pastures upon the Plaintiffs' properties aforesaid;
- d) An order of eviction from the Plaintiffs' properties;
- e) Damages for trespass;
- f) Costs

The Defendants though duly served as evident in the affidavits of service filed in court on 4th April, 2016; 11th August, 2016; 19th October, 2017; 8th March, 2018 and 29th May, 2019 respectively failed to enter appearance nor file their respective defences.

The matter hence proceeded for hearing ex parte with the Plaintiffs' calling one witness.

Evidence of the Plaintiffs

The Plaintiffs' evidence was given by PW1 JANNIFER NDIBARU who is its Manager where she testified that the Plaintiffs are members of Mazingira Welfare and Sports Association under the Ministry of Environment. She explained that in March, 2013, the Plaintiffs' purchased land parcel number KJD/ LOODARIAK/ 768 measuring 100 acres from Pr. William Sankona Ketere at a cost of Kshs. 24 million. After successful completion of the transaction including obtaining consent of the Land Control Board, the land was transferred to the Trustees of Mazingira Welfare and Sports Association namely Benson N. Mugambi, Wilfred F. O. Amolo and Cleophas O. Oyaró. PW1 confirmed that the said land was subsequently subdivided into 319 plots which were distributed to individual members on 16th November, 2013. The said individual title deeds KJD/ LOODARIAK/ 6637 – 6955 were processed in the respective names and issued to them in January, 2014. In August, 2013, someone put up a Manyatta on the land but on 16th November, 2013 when the plots had been allocated to the members, the said squatter organized boda boda operators at Oletepesi Centre to stop any member from accessing their plots, alleging the land belonged to their ancestors hence no one should claim it. In early 2014, despite the intervention of the Provincial Administration that convened two meetings with the Plaintiffs together with the squatters, they did not resolve the dispute. The Plaintiffs' commissioned a Surveyor Messrs. Kapanga Land Surveyors who found that the squatters were occupying plot nos. 29; 30; 31; 32; 58; 59; 61; 60; 62; 81; 82; 85; 90; 91; 92; 93; and 95. The said squatters have put up temporary structures thereon, are grazing all over the land and insist they will not move out of the land unless they are given ten (10) acres out of it. The squatters have been very violent before and even during the time of serving court papers. The Plaintiffs' seek police intervention in executing the Court Orders. PW1 produced 319 Certificates of Title for the respective members; Surveyors Report; Survey Plan for the entire subdivision and Certificate of Registration to support their case.

The Plaintiffs thereafter closed their case and filed submissions that I have considered.

Analysis and Determination

Upon consideration of the pleadings filed herein, testimony of the witness including exhibits produced the following are the issues for determination:

- Whether the Plaintiffs are entitled to the orders sought in the Plaintiff.
- Whether the Police assistance is necessary in the circumstance.

As to whether the Plaintiffs are entitled to the orders sought in the Plaintiff. The Plaintiffs are members of an association and proprietors of land parcel numbers KJD/ LOODARIAK/ 6637 – 6955 hereinafter referred to as the 'suit lands'. The Defendants have trespassed on it by putting up temporary structures including grazing thereon. The Defendants are hostile and efforts to remove them have proved futile since they are violent and demand for ten (10) acres out of the land. PW1 produced various documents including Certificates of Title for KJD/ LOODARIAK/ 6637 – 6955 and survey Plans for the subdivisions to prove their case. All the evidence of PW1 remained uncontroverted as the Defendants failed to enter appearance nor file their Defences.

I wish to make reference to section 26(1) of the Land Registration Act which provides as follows"

"The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. '

Further, section 24 (a) of the Land Registration Act further stipulates as follows: '**subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....'**

In the case of **Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR** where Justice J.M. Mutungi stated that '**the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the Land Registration Act entitled to the protection of the law'**.

Further in the case of **WILLY KIPSONGOK MOROGO v ALBERT K. MOROGO (2017) eKLR** where the Court held as follows: '**the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.'**

In associating myself with the two decisions and based on the evidence adduced herein and the legal provisions cited above, I find that the Plaintiffs having been issued with their respective Certificates of Title are indeed proprietors of their respective parcels of land which vests in them absolute ownership as well as rights and privileges appurtenant thereto. I opine that since the defendants have not proved any legal right to the Plaintiffs' parcels of land, they should be permanently restrained from interfering with the plaintiff's land and be evicted therefrom.

As to whether Plaintiffs are is entitled to damages as a result of the Defendants acts of trespass.

PW1 testified that the Defendants had trespassed on parcels numbers 29; 30; 31; 32; 58; 59; 61; 60; 62; 81; 82; 85; 90; 91; 92; 93; and 95 as per the report from their Surveyor. Further, that the Defendants had put up temporary structures on the suit lands and were grazing on it. It was her testimony that they had declined to move out, demanded ten (10) acres out of the land and were violent and did not want any of the members to the plaintiff to access their land. Based on the evidence before me, I find that indeed the Defendants' acts on the suit lands

amount to trespass as they had interfered with the Plaintiffs' rights to occupation and enjoyment of their properties. PW1 however did not adduce evidence on the loss the Plaintiffs had incurred as a result of the Defendants' acts of trespass.

In the case of **Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013) eKLR** where **P. Nyamweya J.** held:-

“...once a trespass to land is established it is actionable *per se*, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants' trespass”

Insofar as the Plaintiffs' failed to adduce evidence on the loss they had incurred due to the Defendants' acts on suit lands but in, associating myself with the decision cited above, I find that the Plaintiffs' indeed suffered damages as a result of the Defendants' acts of trespass. I will proceed and award them Kshs. 200,000 as general damages.

On the issue as to the whether the Police assistance is necessary in the circumstance. Since PW1 adduced evidence that the Defendants have been hostile and violent culminating in their members inability to occupy their land. Further, that at one moment the Defendants mobilized boda boda operators to block any members' from accessing their land, I find that they are indeed entitled to assistance of the Police in enforcement of the Court Orders.

Costs

Costs generally follow the event, and in this instant case, since the Plaintiffs have been inconvenienced with the Defendants' acts culminating in filing this suit, I find that they are indeed entitled to costs of the suit and will award it to them.

In the circumstances, I find that the Plaintiffs have proved their case on a balance of probability and proceed to enter judgment in their favour and make the following final orders :-

- (a) A declaration be and is hereby issued that the Defendants are not entitled to enter or use the Plaintiffs properties or construct manyattas, graze pastures or any way alienate the Plaintiffs' properties being: KJD/ LOODARIAK/ 6637 – 6955;
- (b) An injunction be and is hereby issued restraining the Defendants by themselves, their servants or agents or otherwise howsoever from entering, using, occupying, building any structures or manyattas, grazing pastures upon the Plaintiffs properties; KJD/ LOODARIAK/ 6637 – 6955
- (c) The Plaintiffs be and are hereby awarded Kshs. 200,000 as General Damages for trespass;
- (d) The Defendants be and are hereby directed to give vacant possession of LR. No. KJD/ LOODARIAK/ 6637 – 6955 to the Plaintiffs' within 90 days from the date hereon, failure of which an eviction order will issue.
- (e) The Officer Commanding Station (OCS), Kiserian Police Station and or the nearest Administration Police Post be and is hereby directed to supervise the execution of the eviction order against the Defendants after 90 days from the date hereof
- (f) The costs of the suit are awarded to the Plaintiffs.

Dated signed and delivered in open court at Kajiado this 22nd day of October, 2019

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

M/S. Maina for Muturi for plaintiffs

No appearance for defendants.

Court assistant- Mpoye