



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 83 OF 2018

THE GENERAL OF THE SALVATION ARMY.....PLAINTIFF

VERSUS

GEORGE GATECHA.....1ST DEFENDANT

MOSES NGARU KINUTHIA2ND DEFENDANT

ANTHONY MURAGE NJOROGE aka MUNJO3RD DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendants on the 26/10/18 seeking the following orders;

a. A permanent injunction stopping prohibiting and forbidding the respondents their agents servants representatives assignees and or anyone acting under their instructions directions jointly and severally from entering interfering evicting harassing threatening and or in any way dealing with the Plaintiffs land known as LR No 10531 situate within Murang'a County.

b. The Defendants be ordered to pay special damages amounting to Kshs 100,000/- being the costs incurred for surveying the suit land.

c. The Defendants be and are hereby ordered to compensate the Plaintiff for the unauthorised utilisation of additional 128 acres as opposed to just two acres amounting to Kshs 900,000,000/-

d. The Defendants are ordered to pay Kshs 100,000,000/- to the Plaintiff being the projected costs of the items required to rehabilitate the unfilled holes left behind by the Defendants.

e. Interest and costs of the suit.

2. It is the Plaintiff's case that at all material times relevant to the suit, it was the registered owner of Land Ref No 10531 situate in Murang'a County.

3. That it entered into a lease agreement with the Defendants over 2.039 acres of land for purposes of quarrying stone for a period of 5 years wef 1/8/2010 to 1/8/2010 at the rent of Kshs 85,000/- per month. That the rent was later increased to Kshs 135,000/- per month. That in furtherance of the said agreement the Plaintiff engaged the services of Geoserve Services to demarcate/excise the area of 2.039 acres for the said purpose.

4. That in breach of the said agreement, the Defendants defaulted in rent payment in respect to the leased

area, unlawfully extended their quarrying activities onto 128 acres of land belonging to the Plaintiff, sublet the land to third parties without the consent and knowledge of the Plaintiff and failed to adhere to environmental protection leading to degradation of the suit land.

5. The Plaintiff under para 16 of the plaint averred that the Defendants forged lease agreements over the suit land and has pleaded fraud on the part of the Defendants inter alia; claiming that the Plaintiff has leased its whole land to the Defendants; increasing the term of the lease from 5 years to 15 years; subletting to other tenants; forging the signature of the leadership of the Plaintiff.

6. The Plaintiff has pleaded particulars of loss and damage to the tune of Kshs 100m under para 26 of the plaint.

7. It is the Plaintiff's case that it obtained orders in CMCC No 28 of 2018 in Thika for the recovery of Kshs 3.2 million being rent defaults in respect to the leased 2 acres.

8. Despite service of the Defendants, the Defendants defaulted in entering appearance and filing of defence leading the Plaintiff seeking and obtaining judgement in default.

9. The case therefore proceeded on formal proof. Evidence was led by Major Kiliswa on behalf of the Plaintiff. He relied on his witness statement filed on the 28/6/19 as well as the list of documents of even date which he produced and were marked PEX No 1-16.

10. He stated that he is the property manager working in the employ of the Plaintiff.

11. That the land is owned by the Plaintiff and he produced a copy of the title in support. He stated that the Plaintiff leased about 2 acres to the Defendants on the 1/8/2010 for a period of 5 years at the rent of Kshs 85,000/- per month reviewable after 6 months. He informed the Court that the rent was reviewed to Kshs 135,000/- per month after 6 months.

12. He testified that the Plaintiff engaged the services of a surveyor to excise the 2 acres leased to the Defendants at the cost of Ksh 70,000/- for which Kshs 35,000/- was paid. He produced a sketch map on page 10 of the Plaintiff's bundle showing the leased area to the Defendants. That in contravention of the lease, it was his evidence that after exhausting the leased area, the Defendants proceeded to take over 128 acres of land and used it for quarrying of stones without the consent and knowledge of the Plaintiff.

13. On realizing that the Defendants had encroached on other parts of the land the Plaintiff issued a demand letter to the Defendants to vacate the 128 acres of land. He produced a demand letter dated the 17/10/17. It is his evidence that the Defendant refused to vacate the suit land.

14. Further that the Defendants failed to comply with the regulations of National Environment Management Authority (NEMA) forcing the closure of the quarries on 8/5/15 vide a closure order by NEMA.

15. The witness informed the Court that as a result they engaged the services of an expert to assess the damages and degradation of the land and the Report was produced on pages 26-86 of the Plaintiff's bundle. He also informed the Court that a consultant was engaged to assess the costs of rehabilitating the land which was set at Kshs 100 million. The firm of Midas Pearl Limited was engaged to commence the rehabilitation and a deposit of Kshs 196,000/- has been paid.

16. He testified that the Plaintiff is claiming Kshs 900m being rent over 128 acres of land unlawfully occupied by the Defendants. The monthly rent applicable is Kshs 67,500/- per acre for the 8 years and 8 months.

17. The witness reiterated his evidence that the lease agreements signed by the Plaintiff are as disclosed on pages 7 and 8 of the Plaintiff's bundle and that the lease on pages 13-20 are forgeries perpetrated by the Defendants purporting to have leased 957 acres which is the total acreage of the Plaintiff's land.

18. Finally he informed the Court that the Defendants vacated the suit land after the closure of the quarry on the 9/3/18.

19. In the submissions the Plaintiff submitted that it is the indefeasible and absolute owner of the suit land LR No 10531. That the Plaintiff through the Principal National Officers Training College leased a portion of 2 acres of the said land to the 1st and 2nd Defendants trading as Mungaru Enterprises Limited. That after a period of 6 months the rent was increased to Kshs 135,000/- and referred to a letter dated the 16/11/12 written by Kirubi & Co advocates on behalf of Mungaru Enterprises.

20. The Plaintiff submitted that before the end of the lease period of 5 years the 1st and 2nd Defendants exhausted the stones on the 2 acres and together with the 3rd Defendant proceeded in total breach of the lease agreement entered on the 1/8/2010 and utilised 128 acres over and above the 2 acres of land leased to them by the Plaintiff. The excavated area is clearly demarcated on the plan shown on page 12 of the Plaintiff's bundle.

21. The Plaintiff submitted that the 1st and 2nd Defendants forged a lease agreement dated the 1/8/2010 allegedly between them and the Plaintiff over the whole of the Plaintiff's land measuring 957 acres. With the forged agreement the 1st and 2nd Defendants invited third parties to carry out quarry activities including the 3rd Defendant with whom they excavated the area of 128 acres. The tenancy agreement is purported to be for 15 years without the consent of the Plaintiff.

22. Notwithstanding the lack of consent of the Plaintiff to quarry over 128 acres, the Plaintiff submitted that the Defendants failed to pay rent for the 128 acres for a period of 8 years and 8 months. Various meetings were held to remove the Defendants from the suit land but they remained adamantly on the land despite several demands for them to vacate.

23. The Plaintiff submitted that vide CMCC No 28 of 2018, it recovered rent in the sum of Kshs 3.2 million in respect to the 2 acres leased to the Defendants, which rent they have not been successful in recovering.

24. The Plaintiff submitted that the failure of the Defendants to comply with NEMA regulations in respect to quarrying practices led to degradation of the land which has been assessed to costs Kshs 100m to rehabilitate it. The Plaintiff submitted that it has engaged a consultant to commence the rehabilitation of the land.

25. The Plaintiff submitted that the computed rent for the 128 acres amounts to Kshs 900 million.

26. Finally, the Plaintiff submitted that this Court under section 4(1) of the ELC Act read together with Art 162 (2)(d) of the Constitution bestows upon this Court jurisdiction to determine the suit.

27. Having considered the pleadings, heard the evidence tendered at the trial, read and considered the submissions, the issues for determination of the suit are;

- a. Whether there is any breach of contract by the Defendants?
- b. Has the Plaintiff proved fraud or forgery on the part of the Defendants?
- c. Whether trespass has been proved on the part of the Defendants in respect to 128 acres of land?
- d. Whether the Plaintiff has proved loss and damages suffered as a result of breach of the agreement dated the 1/8/2010?
- e. Who meets the cost of the suit?

28. It is not disputed that the suit land belongs to the Plaintiff having been registered as proprietor according to the title on the 10/12/1962.

29. The borne of contention is a lease entered into by the Plaintiff and the Defendants on the 1/8/2010. I shall reproduce the lease as follows;

“ use of quarry agreement between George Muritu Gatecha and National officers Training college.

This is to certify that on the 1/8/2010, the above-named person has entered into an agreement with the National Officers Training College as thus;

- a. That they will use the quarry to harvest stones and any other by products thereof.
- b. That they will use the quarry upon payment of Kshs 85000/- which should be paid at the start of every month
- c. That this agreement and payment rates shall be reviewed after 6 months upon which if all the parties are satisfied, the period shall be extended.
- d. The agreement shall be rendered null and void if subsection a and b are contravened.

Signed;

George Muritu Gatecha

National Officers Training college”.

30. The 2nd agreement between the above parties is similar word for word except that it disclosed the period as 5 years.

31. It is the Plaintiff’s case that the Defendants have breached the above contract and instead of confining their quarrying activities to 2 acres has extended to cover 128 acres of land.

32. I have reviewed the contract and it is clear that the lease is very scanty in its contents. There are no terms of the agreement which the Plaintiff can purport to have been breached. This would be in terms of the acreage or size of the land under lease, rehabilitation of the quarried land excetra.

33. It is the finding of the Court that the Plaintiff has not discharged the burden of proof.

34. The role of the Court is to interpret contracts and never to rewrite contracts for the parties. In the case of **Rufale Vs Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592**, Scrutton L.J. held as follows:

“The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract.”

35. In the case of **Attorney General of Belize et al Vs Belize Telecom Ltd & Anoter (2009), 1WLR 1980 at page 1993**, citing Lord Person in **Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board (1973) I WLR 601 at 609**, the Court held as follows:

“The Court does not make a contract for the parties. The Court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the Court thinks some other terms could have been more suitable.”

36. I have seen another contract dated the 1/8/2010 in respect to 2 acres which the Plaintiff's witness informed the Court that it is a forgery. With this the Plaintiff has not proved any breach of contract at all.

37. It is not clear to the Court what terms were breached if the contract was as scanty as detailed above. The answer to issue No 1 is in the negative.

38. In respect to the 2nd issue the Plaintiff failed to lay any evidence to show that the agreements were forgeries. This would have been in form of handwriting expert to show that the Plaintiff did not sign the agreement and or the signatures are forgeries. None of the people disclosed to have signed the agreement were called to testify.

39. The agreement was between the Plaintiff and the 1st Defendant and it is not clear what the cause of action of the 2nd and 3rd Defendants is. It is not disclosed. It is the finding of the Court that there was no lease agreement between the Plaintiff's and the 2nd and 3rd Defendants.

40. Other than the averments of the Plaintiff that the Defendants encroached or trespassed onto the 128 acres of land no evidence was adduced in Court to support this averment.

41. The witness informed the Court that the Defendants vacated the suit land and therefore it would be futile to issue any eviction orders.

42. In the upshot the Plaintiffs case fails and is dismissed with costs.

43. I order that each party meets the costs of their suit.

44. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 14^H DAY OF NOVEMBER 2019

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Endoo for the Plaintiff

1st – 3rd Defendants: Absent

Ms Irene and Ms Njeri, Court Assistants