



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC PETITION NO. 936 OF 2007**

**JAMES MACHARIA GACHUGU.....PLAINTIFF**

**-VERSUS-**

**JOSEPH KARANJA GITAU.....DEFENDANT**

**JUDGEMENT**

1. The plaintiff has filed this suit against the defendant seeking:-

- a. A permanent injunction restraining the defendant, his agents, servants and/or employees from trespassing on the plaintiff's parcel of land No. Gatamaiyu/Gachoire/924 or in any other way whatsoever interfering with the plaintiff's possession of the suit land.
- b. A mandatory injunction for the eviction of the defendant, his agents, servants and/or employees from LR No. Gatamaiyu/Gachoire/924.
- c. Mesne profits to be assessed by the court.
- d. General damages for trespass.
- e. Interest on (d) above.

2. Upon being served with copies of plaint and summons to enter appearance, the defendant entered appearance and filed a statement of defence dated 2<sup>nd</sup> October 2007.

3. The defendant who was duly served with a hearing neglected and/or refused to attend court on 10<sup>th</sup> April 2019. The court was satisfied that the defendant had been duly served and ordered that the matter proceeds ex parte.

4. PW1 James Macharia Gachugu told the court that the defendant trespassed onto his parcel of land. He told the court that he relied on his witness statement dated 3<sup>rd</sup> February 2008 and the bundle of documents filed on 7<sup>th</sup> February 2012.

5. The plaintiff's case is uncontroverted. In support of his case, the plaintiff relied on the following documents:-

- A copy of the title deed for land parcel number Gatamaiyu/Gachoire/924.
- Certified copies of proceedings at the CM's court at Nairobi in CR Case No. 32430/2003, R vs Joseph Karanja Gitau.
- Subdivision plan.
- Application and consent from the Land Control Board.
- Transfer and mutation forms.
- Letter dated 28<sup>th</sup> July 2003 from the office of the president.
- Letter dated 30<sup>th</sup> August 2012 from the District Officer, Lari.
- Green card entries.
- Official search.

6. In his defence the defendant claims that he has been on this suit land for over 35 years and has developed the same. He however failed to attend court to establish this.

7. It is not in doubt that the plaintiff is the registered owner of the suit property. It is also not in doubt that the defendant was charged with the offence of forcible detainer and was convicted. The proceedings and judgment in the criminal case were produced as exhibits in this case.

8. Section 25(1) of the Land Registration Act 2012 provides that:-

**“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—**

- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.”

Section 26(1) of the Land Registration Act, 2012

**“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.”

9. It is not in doubt that the defendant has trespassed on to the plaintiff’s land. This is an actionable tort for which damages is payable. I find that the plaintiff has proved his case on a balance of probabilities as against the defendant.

10. I award Kshs.200,000/- being damage for trespass. The court was not guided on the mesne profit. I do not award any.

11. Accordingly judgment is entered for the plaintiff as against the defendant in the following terms:-

- a. on the plaintiff’s parcel of land number Gatamaiyu/Gachoire/924 or in any other way whatsoever interfering with the plaintiff’s possession of the suit land.
- b. A mandatory injunction is hereby issued for the eviction of the defendant, his agents, servants, and or employees from LR No. Gatamaiyu/Gachore/924.
- c. General damages for trespass Kshs.200,000/- with interest at court rates from the date of judgment until payment in full.
- d. Costs of the suit and interest.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 11<sup>th</sup> day of December 2019.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Nyawara for the Plaintiff

No appearance for the Defendant

Kajuju - Court Assistant