



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT EMBU**

**E.L.C. CASE NO. 136 OF 2015**

**(FORMERLY KERUGOYA 679 OF 2013)**

**ALBERT KANAKE KARIUKI**

**T/A KIVANGUA INVESTMENT.....PLAINTIFF**

*VERSUS*

**THE COUNTY COUNCIL OF EMBU.....DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 6<sup>th</sup> May 2004 and filed on 10<sup>th</sup> May 2004 the Plaintiff sought the following reliefs against the Defendant;

*a. A declaration that the Plaintiff is the registered owner and is entitled to possession of the plot registered as title number Ngandori/Kirigi/2035/1.*

*b. An injunction restraining the Defendant by its agents, servants or otherwise howsoever from repossessing, trespassing on title number Ngandori/Kirigi/2035/1 or otherwise preventing or obstructing the Plaintiff from enjoying the said plot.*

*c. General damages.*

*d. Costs and interest.*

*e. Any other and better relief.*

2. It was pleaded that at all material times, the Plaintiff was the registered proprietor of a leasehold interest of *Title No. Ngandori/Kirigi/2035/1* (hereinafter known as the "suit property") located at Kivangua market in Embu District. It was further pleaded that the Defendant had unlawfully resolved to repossess the suit property and had actually entered the suit property and thus prevented the Plaintiff from utilizing and developing it.

3. The Defendant filed a statement of defence dated 5<sup>th</sup> June 2004 in which it was denied that the Plaintiff was lawfully registered as proprietor of the suit property. It was further pleaded that at all material times the suit property was public utility land reserved for public car and bus park and that its alienation and change of user was irregularly and illegally done.

4. The Defendant, therefore, lodged a counterclaim and sought the following reliefs;

*a. Dismissal of the Plaintiff's suit with costs.*

*b. A declaration that the allocation of title Number Ngandori/Kirigi/2035/1 was illegal.*

*c. Costs of the counter-claim.*

*d. Such further or other relief.*

5. According to the record, the Defendant does not appear to have taken much interest in preparing for trial and defending the suit. Whereas

the Plaintiff took steps to file his witness statement, list of documents and pre-trial questionnaire, the Defendant did not file any corresponding documents. The Plaintiff ultimately filed a statement of issues on 2<sup>nd</sup> October 2017 after which the suit was fixed for hearing on 2<sup>nd</sup> November 2017.

6. When the suit came up for hearing on 2<sup>nd</sup> November 2017, the Plaintiff and his advocate turned up for trial but there was no appearance for the Defendant despite service. The court, therefore, allowed the Plaintiff to proceed with the hearing *ex-parte* upon being satisfied that the Defendant was served.

7. The Plaintiff testified that he applied for allocation of the suit property in 1986 and a letter of allotment was issued to him by the then Commissioner of Lands. He was later on issued with a certificate of lease in 1990. The user of the suit property was specified as a petrol service station. The Plaintiff explained that the co-proprietors shown in the certificate of lease were his business partners in Kivangua Investments under which the letter of allotment was issued.

8. It was the Plaintiff's testimony that sometime in 2004 he received a letter from the Defendant dated 1<sup>st</sup> March 2004 informing him that the Defendant had resolved to re-possess the suit property since it was said to be public utility land reserved for a public parking lot. He then decided to challenge the Defendant's said action by filing the instant suit for the reliefs enumerated in paragraph 1 hereof.

9. The Plaintiff produced as exhibits all the documents listed in his list of documents dated 17<sup>th</sup> March 2015 and the supplementary list of documents dated 5<sup>th</sup> October 2017. He, therefore, asked the court to grant him the reliefs as sought in the plaint together with costs and interest.

10. The Defendant did not offer any evidence at the trial hereof and it is evident that it did not participate in the framing of issues for determination. The Plaintiff's statement of issues dated and filed on 2<sup>nd</sup> October 2017 are lopsided. It leaves out some of the issues raised in the Defendant's defence and counterclaim. For instance, it leaves out the crucial issues of whether the suit property was public utility land reserved for a public parking and whether the allocation of the suit was irregular, illegal and void.

11. The court shall, therefore, frame the issues for determination as follows;

- a. Whether the Plaintiff is the allottee and proprietor of the suit property.
- b. Whether the suit property was public utility land reserved for a public car/bus park.
- c. Whether the alienation of the suit property was irregular, illegal and void.
- d. Whether the Defendant had power to re-possess the suit property.
- e. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
- f. Whether the Defendant is entitled to the reliefs sought in the counterclaim.
- g. Who shall bear the costs of the suit and counterclaim.

12. On the 1<sup>st</sup> issue, there is adequate evidence on record to demonstrate that the Plaintiff, through his business name, was allocated the suit property. There is also evidence on record that the 3 partners (the Plaintiff included) were issued with a certificate of lease. That evidence was not challenged at the trial. The court, therefore, answers the 1<sup>st</sup> issue in favour of the Plaintiff.

13. The 2<sup>nd</sup> issue arose from the defence and counterclaim. Since the Defendant did not attend court during the hearing, there was no evidence tendered to demonstrate that the suit property was indeed public utility land reserved for a public car park or bus park. This issue was not proven hence it is answered in the negative.

14. The 3<sup>rd</sup> issue was similarly raised by the Defendant in its defence. However, no evidence was tendered at the trial to demonstrate that the alienation of the suit property was irregular, illegal or void. This issue is therefore answered in the negative.

15. The 4<sup>th</sup> issue is whether the Defendant or its committees had power to repossess the suit property. Although the Defendant did not attend court at the trial hereof, this is a legal question which may be resolved without factual evidence being adduced. It is common ground that the suit property was registered under the provisions of the **Registered Land Act** (now repealed). In those circumstances, the court agrees with the Plaintiff's submissions that only a court of law could effect cancellation of a title upon registration. There are, of course, some few exceptions such as the power which was granted to the National Land Commission under the relevant Act to review grants and dispositions of public land. The court, therefore, holds that the Defendant had no legal authority to "re-possess" the suit property. The 4<sup>th</sup> issue is answered in the negative.

16. The 5<sup>th</sup> issue relates to availability of remedies. The court is satisfied that, in view of the foregoing the Plaintiff has proved his case on a balance of probabilities as required by law. The Plaintiff is entitled to the reliefs sought to the extent as shown hereinafter.

17. The 6<sup>th</sup> issue relates to the availability of the remedies sought in the counterclaim. It is obvious that having failed to attend court to prove its counterclaim, the Defendant is not entitled the reliefs sought or any one of them. The Defendant simply failed to prove the issues it was

bound to prove in order to be entitled to the reliefs sought. The 6<sup>th</sup> issue is consequently answered in the negative.

18. The 7<sup>th</sup> issue relates to costs. The general rule is that costs follow the event hence a successful party is entitled to costs, unless, for good reason, the court orders otherwise as provided for under **section 27 of the Civil Procedure Act (Cap 21)**. There being no good reason to order otherwise, the Plaintiff shall get costs of the suit as well as costs of the counterclaim.

19. Among the reliefs the Plaintiff is seeking is an award of general damages. Although it was not specified in the plaint that what was being sought was damages for trespass to the suit property, it is obvious from the various averments in the plaint that the damages sought are in respect of trespass.

20. It has been submitted on behalf of the Plaintiff that the tort of trespass is actionable *per se* and that there is no need for evidence of specific harm or damage to be adduced. The Plaintiff's counsel cited the case of **Obadiah K. Macharia Vs Kenya Power and Lighting Co Ltd [2016] eKLR** where the court stated, *inter alia*, that;

**“38. with regard to the contention that evidence is required to prove the claim for general damages, based on the authority of Park Towers Vs John Mithamo Njika & 7 Others (supra), I reiterate that no evidence is required before damages for trespass to land can be awarded. In this regard also, see the case of Duncan Nderitu Ndegwa Vs KPLC Limited & Another [2013] eKLR where P. Nyamweya J Held;**

**“...once 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 1<sup>st</sup> and 2<sup>nd</sup> Defendant's trespass.”**

21. The Plaintiff asked for an award of Kshs 1,000,000/- as damages for trespass even though in the authority cited only Kshs 100,000/- was awarded. I see no justification for awarding the higher amount. Accordingly, the Plaintiff is awarded Kshs 100,000/- as general damages for trespass.

22. The upshot of the foregoing is that the Defendant's counterclaim is hereby dismissed with costs whereas the Plaintiff's suit is allowed in the following terms;

- a. Prayers (a) and (b) of the plaint dated 6<sup>th</sup> May 2004 are hereby granted as prayed.
- b. The Plaintiff is awarded general damages for trespass to land in the sum of Kshs 100,000/-.
- c. The Plaintiff is awarded costs of the suit and counterclaim together with interest thereon at the rate provided for in section 27 of the Civil Procedure Act (Cap 21).
- d. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **EMBU** this 22<sup>nd</sup> day of **FEBRUARY, 2018**

In the presence of Mr Njeru for the Plaintiff and in the absence of the Defendant.

Court clerk Njue/Leadys.

**Y.M. ANGIMA**

**JUDGE**

**22.02.18**