



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC CASE NO 328 OF 2017**

**JOSEPH MWANIA NZIU.....PLAINTIFF**

**VERSUS**

**KYALO NGUMBI .....DEFENDANT**

**JUDGMENT**

1. The plaintiff herein is a farmer from Kalawa. He owns land parcel number Kalawa/Kathulumbi/387 which he accuses the defendant having trespassed into.

2. By his plaint dated 31<sup>st</sup> July, 2017 and filed In court on the 22<sup>nd</sup> August, 2017 the plaintiff prays for judgement against the defendant for:-

**1. An order of permanent injunction restraining the defendant himself or his servants from trespassing and carrying on illegal activities on parcel No. Kalawa/Kithulumbi/387 belonging to the plaintiff.**

**2. Costs of the suit.**

3. On 23rd August, 2017 the defendant was served with summons to enter appearance and to file his defence. His failure to do so resulted in this court directing on the 16<sup>th</sup> November, 2017 that matter do proceed as undefended suit.

4. During the hearing of the suit, the plaintiff produced title deed for Kalawa/Kathulumbi/387 as PEx no.1. He said that the defendant has built on his land and that he hired a surveyor who showed him the boundary. He added that the defendant later uprooted the markings that the plaintiff had erected on the boundary.

5. The plaintiff prayed for judgment against the defendants.

6. In his written submissions filed in court on 20<sup>th</sup> December, 2017, Mr. Tamata for the plaintiff urged the court to permanently restrain the defendant and his agents from trespassing into the plaintiff's land parcel number Kalawa/Kithulumbi/387.

7. Having read the evidence on record, I do note that whereas the plaintiff says that land parcel number Kalawa/Kithulumbi/387 is his property and went ahead to produce title deed for the suit property as PEx no. 1, paragraph 5 of his plaint shows that the suit property is registered in the defendant's name. Parties are bound by the pleadings. The evidence on record therefore does not support the averments in paragraph 5 of the plaint. No application was ever made to amend the said paragraph 5 of the plaint. In

the circumstances, the defendant cannot be restrained from carrying out activities in land parcel number Kalawa/Kithulumbi/387 which the plaintiff has averred that it belongs to him. As such, the plaintiff has failed to prove to the court that on a balance of probabilities, he has a cause of action against the defendant. His claim must therefore fail with no orders as to costs. In the circumstances, I dismiss the plaintiff.

**Signed, dated and delivered at Makueni on 21<sup>st</sup> day of February, 2018**

**MBOGO CG**

**JUDGE**

**In the presence of;**

Mr. Kwemboi Court Assistant

Mr. Tamata for the plaintiff

**MBOGO C.G**

**JUDGE**

**21/2/2018**