



## REPUBLIC OF KENYA

### IN THE ENVIRONMENT AND LAND COURT

#### AT MURANG'A

ELC NO. 121 OF 2017

**ELIUD NJOROGE GACHIRI.....PLAINTIFF**

**VS**

**STEPHEN KAMAU NG'ANG'A.....DEFENDANT**

#### JUDGMENT

1. The Plaintiff filed suit against the Defendant seeking the following orders;

- a) A permanent injunction against the Defendant his servants, and or agents from interfering with the suit land
- b) Eviction from the suit land under supervision of nearest police station.
- c) Damages, detinue, costs and mesne profits
- d) Costs of the suit and interest.
- e) Any other relief that the Honourable Court may deem fit to grant.

2. The Plaintiff is the legal representative of Geoffrey Godfrey Gachiri (the deceased) having been issued with letters of grant ad litem on 22/03/2016. The Plaintiff claims beneficial interest in suit land and that he is entitled to possession and occupation of the suit premises.

3. That Plot No. LOC 1/GAKIRA/T19 was awarded to the Plaintiff's deceased father in the 1960's and registered in his name, later on 19th January 1974 the deceased applied to the Murang'a County Council for an extension of his plot to include an adjacent V- shaped piece of land that was vacant. That the extension of the plot was allowed by an extra 10 feet by the Council which was amalgamated to the Plot No. LOC 1/GAKIRA/T19. That the suit land became part of the Plot No. LOC 1/GAKIRA/T19.

4. In the year 2015 after the demise of the Plaintiff's father, the Defendant herein who owns an adjacent plot to the suit land encroached and started occupying the suit land. The Plaintiff now wants the Defendant evicted from the suit land which he contends was legally acquired by his deceased father.

5. In his evidence in chief the Plaintiff stated that he was informed by his late father that he applied to be awarded the suit land as an extension to his plot No. 19 in 1974 and his request was granted. That the plot was extended by 10 feet. That the deceased however misplaced the documents that had been issued to him by the Council to that effect. That he searched in their house after the demise of his father and found the said documents. That the Defendant started trespassing on the suit land in the year 2010 by constructing a sewer and later constructed mabati stores. He produced the documents in support of his claim;

6. In cross examination the Plaintiff testified that after he found the documents he had to wait to be granted the letters of administration in order to institute this suit. He also stated that was aware the deceased had confronted the Defendant over the trespass on his land and both of them went to the Council to determine the ownership of the suit land but he was not able to institute legal action against the Defendant as he had misplaced the documents from the Council that awarded the suit land to him. He confirmed that the Defendant had done some developments on the suit land before the year 2015. He maintained that the documents produced were authentic.

7. PW2, an elderly lady and the wife of the deceased and the Plaintiff's mother testified that she was aware that her late husband applied for extension of his plot No. 19 and the suit land was awarded to him. That later the Defendant trespassed on the suit land even when her late husband was alive and when he was confronted about it he said that it was given to him by the Council. She could not clearly recall the year when the Defendant started making developments on the suit land. That her husband did not file suit against the Defendant as he had

misplaced the documents from the Council and the Council had refused to give him certified copies of the same. That the documents were later found by her children after the demise of her husband.

8. In his submission the Plaintiff opposes the Defendant's claim that the suit is statute barred and contends that his claim is based on the tort of trespass that happened and is still continuing to happen on the suit land. That the delay in instituting the suit was because the ownership documents had been misplaced. He contends that the testimony of both of the Plaintiff's witnesses was consistent and trustworthy. He challenges the Defendant's case in that the minutes produced are computer typed whilst computers were not in use at the Council offices at the time the minutes are alleged to have been written and signed. He challenges the authenticity of the minutes produced by the Defendant as they relate to two different meetings allegedly held on 20.09.2007 and 11.10.2007 respectively yet they both are dated and signed on the same date 18.10.2007. He also claims that the Council plots were being allocated for free therefore the Defendant's claim that he paid Kshs. 50,000/- for the suit land is false. He faults the sketches and maps produced by DW2 for having not been authorized by the Council hence are inadmissible.

9. The Defendant's case is that he was allocated the suit land on 30.07.2007 by the Town Council of Kangema at a cost of Kshs. 50,000/- in order to construct a sewer plant. That at the time of allocation the Council did not have any records of previous allotment of the suit land.

10. The Defendant testified that the Plaintiff's family are known to him and the deceased was his friend. That he was allocated the suit land on 30.11.07 and paid Kshs. 50,000/-. He produced two copies of minutes dated and signed on 18.10.2007 from the Town Council of Kangema and a letter dated 30.11.2007 from the Town Council of Kangema advising him that his application for allocation of a septic tank space had been approved and the suit land had been allocated to him. He claims that at the time of allocation the suit land was vacant and undeveloped. That the allocation was done during the life time of the Plaintiff's father and he constructed the sewer way back in 2007 before his demise and he never raised any objection.

11. In cross examination, the Defendant denied that they ever went to the council to determine the ownership of the suit land with the deceased. He confirmed that the minutes produced were dated the same date (18.10.2007) though relating to two different meeting / events. He also stated that he did not apply for the plot whilst the letter he produced dated 30.11.2007 indicates that it was in response to his application to the Council.

12. DW2 who is a mason testified that he was contracted to construct a sewer, a wall and mabati stalls on the suit land by the Defendant herein. That he drew maps and sketches for the construction and produced them in court though they did not have authorization from the Council. That he constructed the sewer in 2007 and later constructed the wall and the stalls in 2015. That no one ever interrupted him or objected while he did the work.

13. In his submission the Defendant faults the Plaintiff for failing to call a scheduled witness from the Council to ascertain the authenticity of the documents produced and avers that that goes to show the documents were not authentic. Further that PW2 testified that the Council had informed them that the documents do not exist therefore the Plaintiff failed to prove that the documents were from the Council. He claims that the suit land had in 1974 been allocated to a totally different person one named Patriarch which was well known to the Plaintiff's family. He also faults the Plaintiff for failing to attach a map that shows the extension of Plot No. 19 as alleged. He also challenges the duration taken by the Plaintiff to bring the current suit and dismisses the allegation that the deceased had misplaced the Council documents. He claims that since both parties have produced documents of ownership the real owner should be determined in regard to ownership and occupation. He contends that the Plaintiff has failed to lay a firm legal basis to support the grant of the injunctive orders and damages sought.

### **The determination**

14. The borne of contention between the Plaintiff and the Defendant is the occupation of the Defendant of a V-shaped piece of land which the Plaintiff claims to have been allocated to him by Muranga County Council and incorporated into Loc 12/subloc1/Gakira/T.19. The Plaintiff's claim is set out in the plaint filed on 16/6/16. The Plaintiff claims that upon allocation of the V-shaped piece of land and its incorporation into T19, the V-shaped plot ceased to exist and became part of T.19 The Plaintiff claims that the Defendant unlawfully invaded & trespassed without any right of colour and started occupying the said V-shaped piece of land.

15. The Defendant filed his statement of defense on 24/8/16. In the said defense the Defendant denies trespassing onto the Plaintiff's land and asserts ownership by allocation by Municipal Council of Murang'a and avers that the Plaintiff is not entitled to any order for eviction because the cause of action was brought forward later than 3 years under the Limitation of Actions Act.

16. Both the Plaintiff and the Defendant gave oral evidence by themselves and through witnesses. The Plaintiff produced the following documents all which have reference to Plot No. T. 19 stated in the plaint;

a. Letter dated 9/1/74 addressed to the Municipal Council of Murang'a seeking allocation of the triangular or V – shaped plot and its annexation to the main Plot T19.

b. An extract of the minutes of the Trade and Markets Committee of municipal Council of Muranga of 15/2/74 where the resolution was made that the plot No T19 is extended by 10 feet. This is the measure comprising the triangular/V-shaped portion allegedly invaded by the Defendant.

c. Letter dated the 21/12/89 by the Municipal Council of Muranga advising that the triangular/V-shaped plot therein described be incorporated to plot T19.

17. The Defendant produced in evidence the following documents which all do not bear any reference to either the triangular/V-shaped plot;

a. Extract of Council minutes of the Town Council of Kangema dated the 11/10/07.

b. Extract of the minutes of the Town Council of Kangema dated the 20/9/07.

c. Letter by Town Council of Kangema dated the 30/11/07

18. The Court has considered the written submissions filed by the leaned counsels of the parties. The Court has also analysed the evidence, documents and materials presented by parties inclusive of the pleadings.

19. On the evidence the court finds the evidence given by and on behalf of the Plaintiff is verifiable truthful and believable. The court finds so because all the documents produced by the Plaintiff are consistent in reference to which the triangular/V-shaped plot was annexed on application and approval in an authentic manner. On the contrary the evidence and documents of the Defendant refer to matters undertaken at Kangema Town Council which was then part of the then the larger Municipal Council of Muranga. These documents do not refer to any verifiable piece of land or parcel of land allocated to the Defendant. Indeed, the Defendant states that the undisclosed land allocated to him was subject to payment of Ksh 50,000/- but it did not bear or give any evidence of such monies paid to Kangema Town Council.

20. In the absence of any documents of allocation to the Defendant referring to any verifiable plot and evidence of any payment agreed the Court is unable to verify or believe the evidence of the Defendant by himself and that given on his behalf by his witnesses.

21. The Defendant pleaded limitation of time on the Plaintiffs claim for trespass. This is a correct plea going by the provisions of the Limitations of Actions Act section 4(2) which provide that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. This presupposes a case of a one time trespass. The term accrue in the context of a cause of action means to arrive, to commence, to come into existence or to become a present enforceable demand or right the time of accrual of a cause of action is a question of fact (see **Blacks Law dictionary at Page 23**). However, in a case of a continuing trespass, a trespass consists of a series acts done on consecutive days that are of the same nature and that are renewed or continued from day to day so that the acts in the aggregate form one indivisible harm.

22. Trespass is described under the Trespass Act Cap 403 to mean any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence. (**Emphasis mine**)

23. A continuing trespass is defined in JOWITT'S DICTIONARY OF ENGLISH LAW 2ND EDITION as follows:-

“A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbor's land”.

In BLACK'S LAW DICTIONARY 8TH EDITION, a continuing trespass is defined as:-

“A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property”.

Finally, in CLERK & LINDSEL ON TORTS 16th EDITION, paragraph 23 - 01, it is stated that:-

“Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues”.

This clearly means any unauthorized entry whether present or continuous is trespass. In the case of the Plaintiff it is indeed common ground that the Defendant entered into and has remained in occupation of the triangular/V-shaped land which the court has found was properly allocated and amalgamated into the plot T19 in respect of which the suit lies. The Defendants continued occupation from the 1<sup>st</sup> date of entry in so far as it is unauthorized is and remains trespass to date in the land referred to as triangular/V-shaped incorporated into T19. Indeed the said land does not exist independent of plot T19. The Defendant therefore is reasonably in occupation of a section of plot T/19. The Plaintiffs claim for trespass being a continued tort is not time barred.

24. As to whether the Plaintiff was allocated the triangular/V-shaped plot occupied by the Defendant, the answer is in the affirmative. There was therefore nothing to allocate to the Defendant at the time which the Defendant alleges to have been so allocated. The V-shaped plot was not available for allocation;

25. Is the Plaintiff entitle to damages, detinue and mesne profits; the settled law on trespass is that trespass is an actionable tort for which damages are payable. In this case the court has found that there is trespass which as continued todate. The Plaintiff did not offer or give any guidance as to the amount he seeks or has suffered as a result of the trespass. Nevertheless, the Defendant as the court has found trespassed onto the Plaintiff land and damaged the same by constructing unauthorized buildings/structures. The court states unauthorized because no evidence was tendered to show that the said structures were approved by the county Government of Muranga or as required by law.

26. As for damages in trespass being an actionable wrong, the court considers a sum of Kshs 100,000/- annually from 2015 and similar amount annually or a part thereof until vacant possession is delivered to the Plaintiff would be sufficient for the continuity of the illegal occupation of the suit land and erected structures thereon by the Defendant.

27. The claim for mesne profits is declined as he did not offer any evidence as to the quantum of such claim.

28. In respect to costs, the Plaintiffs suit is well founded and the Defendant has unreasonably refused to vacate the land despite demand in which case the costs shall follow the event.

29. In view of the totality of the evidence adduced and evaluated above the court makes the following orders;

- a. The Defendant is hereby ordered to vacate the premises and remove all the buildings structures and restore the suit land to its original condition within 60 days from the date of this judgement.
- b. In the event of default of the Defendant to b) above, the Plaintiff be at liberty to so evict or cause to be evicted from the suit land in strict adherence to the law and to remove all the Defendants buildings and structures thereon and restore the suit land to its original condition at the cost of the Defendant.
- c. A permanent injunction against the Defendant his servants, and or agents from interfering with the suit land is granted.
- d. Damages for trespass is provided in the sum of Kshs 100,000/- annually from 2015 and similar amount annually or a part thereof until vacant possession is delivered to the Plaintiff.
- e. The Defendant to pay the Plaintiff the cost of the suit.

**DATED, DELIVERED AND SIGNED AT MURANG'A THIS 8<sup>TH</sup> DAY OF MARCH 2018**

**J G KEMEI**

**JUDGE**