



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 69 OF 2017

ISAAC OUMA NYABERA.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF BUSIA.....DEFENDANT

J U D G E M E N T

1. By a plaint dated 20/3/2017 and filed in court on 28/3/2017, the Plaintiff – **ISAAC OUMA NYABERA** – pleaded, *inter alia*, that the Defendant – **COUNTY GOVERNMENT OF BUSIA** – had trespassed onto a portion of his land parcel No. L.R. MARACHI/BUJUMBA/2144 and fenced it off. The Defendant has then gone ahead and started using the land as a livestock market, particularly on Saturdays. It was pleaded further that the Defendant, through agents, servants and/or workers has drilled a borehole on the site and erected water tanks and other structures on the land. All this was done without the Plaintiff’s authority and/or permission.

2. The Plaintiff asks for the following orders:

- (a) That the Defendant close down forthwith the open-air animal/livestock market at Bumala “A” on L.R. MARACHI/BUJUMBA/2414.
- (b) An order of permanent injunction restraining the Defendant, its agents, servants, or any other person acting on its behalf from encroaching/trespassing, using, developing in whatsoever manner land parcel L.R. MARACHI/BUJUMBA/2414.
- (c) Costs.

3. The Plaintiff’s claim was denied vide a defence dated 18/4/2017 filed on the same date. In simple terms, the Defendant averred that it is a stranger to the Plaintiff’s claim and that the suit as filed is bad in law, and fatally defective. The Defendant asked that the case be dismissed with costs.

4. The defence did not comply with pre-trial requirements. For instance, there are no witness statement or documents filed. The court heard the matter on 10/10/2017. This happened after several hiccups from the Defendant – this is particularly manifest in the court record of 20/7/2017 and 10/10/2017 – who seemed intent on delaying the hearing. The Plaintiff testified as PW1. He reiterated that there was trespass onto his land and the Defendant was engaged in activities un-authorized by him. In the course of hearing the Plaintiff availed several exhibits to buttress his claim. There was the title deed (PEX No. 1) and a copy of search certificate (PEX No. 2) both of which vouch for his ownership of the land. There was a mutation form (PEX No. 3) showing that the Plaintiff’s land was derived from parcel No. MARACHI/BUJUMBA/41. It is clear that parcel No. 41 was subdivided into two portions which were given numbers 2414 and 2415 respectively. The Plaintiff got to own 2414 while his brother got to own 2415. There was also a demand letter to Defendant (PEX No. 4), the Defendants response to demand letter (PEX No. 5) and finally a written request to the Defendant to stop using the land (PEX No. 6).

5. The case proceeded without the Defendant. The Defendant’s counsel was aware of it but disappeared during hearing. After taking the Plaintiff’s testimony, the Plaintiff’s case was closed.

6. The Plaintiff filed his submissions on 23/11/2017. The submissions are actually a summation of the pleadings and evidence on record. There is also a reference to the applicable law – particularly sections 24, 25 and 26 of the Land Registration Act, 2012 – in the submissions. The Defendant did not file submissions despite intimation on 6/12/2017 that that would be done.

7. It seems to me that this is a case of blatant and unwarranted violation of a citizen’s property rights by an entity that should precisely seek to protect them. It is shown well that the Plaintiff owns the land. It was shown well that the Defendant has illegally encroached onto the land and is conducting activities there without the blessings of the Plaintiff. The law is clear. Property rights of a private citizen are well protected. Arbitrary violation of such rights is not acceptable. It would be wrong to allow the Defendant to continue being on the Plaintiff’s land without permission from the Plaintiff.

8. My finding is that the Plaintiff's case is well proved on a balance of probabilities against the Defendant and I therefore grant the Plaintiff prayers (a), (b) and (c) in the plaint. Prayer (a) requires to be enforced in an orderly manner. Let the Plaintiff give the Defendant 90 days notice to close the market. If the Defendant does not comply, then the order should be enforced in accordance with the law.

Dated, signed and delivered at Busia this 11th day of April, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff.....

Counsel of Defendants.....