



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 313 OF 2017**

**PAUL MWOVA MULEE.....PLAINTIFF**

**VERSUS**

**JOHN MUTUNGA MUTHUKU.....DEFENDANT**

**JUDGMENT**

1. By his plaint dated 13<sup>th</sup> July, 2017 and filed in court on 21<sup>st</sup> July, 2017 the Plaintiff prays for judgment against the Defendant for;
  - a) **An order that the Defendant be compelled to transfer and hand over vacant possession of the parcel of land known as MAKUENI/KAKO/258 to the Plaintiff herein.**
  - b) **Damages.**
  - c) **Interest thereon.**
  - d) **Costs of this suit.**
  - e) **Any other relief the court deems fit to grant.**
2. On the 28<sup>th</sup> July, 2017 the Defendant was served with summons to enter appearance and to file his defence but he did not do so. Consequently, on the 17<sup>th</sup> October, 2017, the court directed that the matter should proceed as an undefended suit.
3. During the hearing the Plaintiff told the court that he is the Chief for Mbimbini Location in Kaleo Division of Mbooni East Sub County. He went on to say that in the year 1996, he bought a portion of land from the Defendant and pointed out that he began purchasing the same in the year 1987. He said that he and the Defendant entered into 4 sale agreements written in Kamba language. He produced the 4 sale agreements as PEX No. 1(a). He also produced their translations as PEX No 1(b). He said that the agreements were witnessed by among others, Nicholas Musyoki Mbuvi who was then the Assistant Chief but now retired.
4. The plaintiff went on to say that the Defendant later applied for letters of administration and he was issued with a grant of letters of administration on the 20<sup>th</sup> March, 2001 which was confirmed on the 24<sup>th</sup> September, 2008(see PEX no. 2(a) and (b) respectively). It was also his evidence that the size of the land that was subject of the sale agreement was 7 acres.
5. The plaintiff pointed out that on the 26<sup>th</sup> January, 1993 he asked the Defendant to allow him to develop the 7 acres which the latter did vide the written authority which the plaintiff produced as PEX no. 4. He said that on the 15<sup>th</sup> September, 2016 the Defendant while in the company of his members of his family obstructed him as he was carrying out construction on the said land. He said that the building materials are still on the site.
6. On being asked by the court to clarify whether or not the 7 acres of land were transferred to him by the Defendant, the Plaintiff said that the latter has so far been unco-operative.
7. The Plaintiff did not file his submissions despite being directed by the court to do so.
8. From the evidence on record it is clear that the Plaintiff has an interest in land parcel number Makueni/Kako/258 which is in the name of Muthuku Usongi who is the father of the Defendant. Muthoku Usongi is deceased. The Defendant did obtain letters of administration (PEX no. 2(b)) in respect of his late father's estate which include land parcel number Makueni/Kako/258 of which the Plaintiff was to get 7 acres while the Defendant was to retain 18 acres. There is no reason why the Defendant who is the administrator of the estate of his deceased father cannot transfer 7 acres out of land parcel number Makueni/Kako/258 in line with the sale agreements (PEX No.1(a) to(d))

and the certificate of confirmation of grant dated 24<sup>th</sup> September, 2008 (*PEX no 2(b)*)

9. The evidence on record shows that the parties herein had identified the portion which the Plaintiff was to take possession of. The Defendant actually proceeded to grant the Plaintiff written authority develop (*PEX no. 4*) his portion of the suit land which the Plaintiff proceeded to do until the Defendant stopped him from constructing on the said land. I am of the view that the Plaintiff is entitled to damages. **Halsburys Laws of England, 4<sup>th</sup> ed, Vol. 45 at para 26, 1503** provides as follows;

- a. If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.**
- b. If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.**
- c. Where the defendant has made use of the plaintiffs' land, the plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use.**
- d. Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights or the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.**
- e. If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.**

10) The Defendant cannot be allowed to benefit from his own mischief. He allowed the plaintiff to develop his portion of land and when the latter tried to do so, the former barred him despite clear indication in the confirmation of grant (*PEX No. 2 (b)*) on how the suit land was to be subdivided. As earlier on stated, the confirmed grant shows that the Plaintiff was to be allocated 7 acres while the Defendant was to retain 18 acres out of the suit land. In my view, a nominal sum of Kshs. 100,000/= would suffice. Under the circumstances and I will proceed to award the same to the Plaintiff in my judgement.

11. Being satisfied that the Plaintiff has on a balance of probabilities shown this court that he has a cause of action against the Defendant, I hereby proceed to enter judgment and against the Defendant as herein under:-

- a) An order that the Defendant be compelled to transfer and hand over vacant possession of the parcel of land known as MAKUENI/KAKO/258 to the Plaintiff herein.**
- b) Kshs. 100,000/= being general damages.**
- c) Interest.**
- d) For good measure, plus costs in case the Defendant fails to transfer 7 acres out of land parcel number Makueni/Kako/258, the Deputy Registrar of this court is authorized to transfer the necessary transfer forms.**

It is so ordered.

**Signed, dated and delivered at Makueni this 28<sup>th</sup> day May, of 2018.**

**MBOGO C.G,**

**JUDGE**

**IN THE PRESENCE OF;**

Mr. Hassan holding brief for Mr. Munyasya for the Plaintiff

Mr. Kwemboi Court Assistant

**MBOGO C.G JUDGE**

**28/5/2018**