



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 314 OF 2017

MBURU GITIMU.....PLAINTIFF

Vs

DANIEL KAMAU MUIRURI.....DEFENDANT

JUDGMENT

1. By a plaint dated 13/3/12 initially filed at Kerugoya and later transferred to this Court the Plaintiff who claims proprietary right over all that parcel of land known as Loc.6/KANDANI/1212 and 1213 (formerly land parcel No.Loc.6/KANDANI/321 “hereafter referred to as the suit land”) sued the Defendant herein seeking the following reliefs.

- a) Restitution of the Plaintiff's land from the Defendant's land parcel No.Loc.6/KANDANI/327.
- b) General damages for trespass
- c) Costs of the suit
- d) Interest on (b) and (c) above
- e) Further relief as may be just

2. The Plaintiff's claim is that he is the registered proprietor of the suit land and the Defendant's father (deceased) is the registered owner of parcel No.Loc.6/KANDANI/327. The Plaintiff avers that the Defendant is sued in his capacity as the legal representative of his father. The Plaintiff claims that the Defendant encroached upon the suit land and curved/excised out an easement/ridge for his own use without the consent of the Plaintiff and in the process the Plaintiff's crops and trees were damaged. He claims that the Defendant's actions are illegal and hence claims for restitution of his parcel of land and general damages for trespass.

3. The Defendant filed a defence on 28/11/12 in person in which he claims that the issue of the easement arose over 20 years ago when his father was still alive and that it had been arbitrated over. He firmly denies that he is the legal representative of his deceased father and that he has other siblings who would be qualified as so.

4. The Defendant later instructed the firm of Ikahu Ngangah & Co. Advocates on 19/3/13. The Defendant through counsel then filed a preliminary objection on 12/3/15 on grounds that ;

- a) The Defendant is not the registered owner of No.Loc.6/KANDANI/327.
- b) That the Defendant is not the legal representative of the estate of the deceased father therefore wrongly sued.
- c) The entire suit should be dismissed with costs for disclosing no cause of action.

5. When the matter came before me on 19/7/17 the counsel for the Plaintiff indicated that they were exploring an out of Court settlement which the Court was later informed it never materialized. The Defendant failed to attend Court three times the matter came up for mention and he also did not comply with order 11 of the Civil Procedure Rules. The matter was then confirmed for hearing ex-parte.

6. The Plaintiff testified that he is the registered owner of the suit land while the Defendant's land is No.Loc.6/KANDANI/327 which borders the suit land. That the Defendant encroached on his land and produced his list of documents dated 13/11/12 which consists of certificates of search for parcels No.Loc.6/KANDANI/1212 and No.Loc.6/KANDANI/1213 which are both in the names of the Plaintiff and a search certificate for parcel No.Loc.6/KANDANI/327 in the name of Fredrick Muiruri Kinuthia. He prayed for his claim to be allowed.

7. The Plaintiff submitted that the encroachment on his land by the Defendant occurred in 2012 when the Defendant curved out an easement/ridge for his own use and in the process he destroyed crops and trees belonging to the Plaintiff. He submits that the Defendant's actions are tortuous and attract damages for trespass. That the Defendant's actions were illegal hence the Plaintiff is entitled to reliefs as sought. That an order for rectification of the boundary in order to reconstitute to the Plaintiff his parcel of land would be proper. Further that damages be assessed at Ksh.100, 000/= per year from filing of suit. He points out that the evidence of the Plaintiff is unchallenged.

8. The Plaintiff's claim is for restitution and damages against the Defendant for encroaching on his land by creating an easement without consent of the Plaintiff or any legal backing. It is his claim that the Defendant's actions have occasioned him loss and detriment as his crops and trees got damaged in the process. He has claimed for restitution and damages for trespass. He led evidence to support his claim and produced search documents to prove his ownership of the suit land and that of the offending parcel of land. The Court notes that the registered owner of the parcel of land Loc.No.Kandani/327 which is said to be demarcating the Plaintiff's land belongs to one Fredrick Muiruri Kinuthia who is not a party of this suit.

9. In the Plaintiff's pleadings the Plaintiff discloses that the said Fredrick Muiruri Kinuthia is deceased and that the Defendant Daniel Kamau Muiruri is sued as the legal representative of the deceased Fredrick Muiruri Kinuthia though no documentary evidence has been tabled before this Court in support of that position. That issue had been raised through the preliminary point by the Defendant and the Court noted it was an issue of fact and it would have been prudent for the Plaintiff to address the same in his evidence. On the face of it the suit is against a party who is not the registered owner of the offending parcel of land and not a legal representative of the estate of the deceased. A legal representative to an estate of a deceased must be appointed by a Court of law and that must be proved in evidence by producing the authorizing document in the form of Grant. Only then can the Court consider a legal representative to be properly sued. In the present case there is no such documentary evidence on record, the Defendant is therefore for certain wrongly sued.

10. In the case of **Hon. Daniel Toritich arap Moi vs. Mwangi Stephen Muriithi [2014]eKLR** the Court of Appeal stated as follows:-

“It is a firmly settled procedure that even where a Defendant has not denied the claim by filing of defence or an affidavit or even where the Defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the Defendant. And the trial Court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side. **(Emphasis added)**”

11. Having found so it leads to an early conclusion that the suit is incompletely before this Court. It will be unnecessary to then go further into the merits or otherwise of the claim. It is struck out with costs to the Defendant.

12. The Court has also noted that the claim refers to a boundary dispute which ought to be submitted to the District Land Registrar for hearing and determination in accordance with section 18 of the Land Registration Act No. 3 of 2012.

13. It is dismissed with costs in the cause.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 17TH DAY OF MAY 2018.

J G KEMEI

JUDGE