



**REPUBLIC OF KENYA**

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

**ELC NO. 58 OF 2015**

**COL (RTD) DR. HENRY MUTHEE KATHURIMA.....PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF MERU.....DEFENDANT**

**JUDGMENT**

**Background**

1. The plaintiff filed this suit on 23.7.2015 claiming that he is the registered owner of land parcel No. Ngushishi settlement scheme 10/measuring 44.5 ha (110.1375 acres). He further claims that on 12.3.2013, defendant purportedly hived off a portion of the land to the tune of 0.98 hectares on the basis that this was part of Ngushishi market.
2. A defence statement was filed on 19.7.2016, whereby plaintiff's claim is generally denied. Further, defendant state that the hiving of the 0.98 ha from plaintiff's land was done to recover the property of defendant.
3. In the course of the trial, plaintiff passed on and was substituted by his legal representative known as Sarah Mwaka Kathurima, vide a court order of 25.7.2016.
4. Pre-trial directions were conducted on 20.7.2017, when it emerged that only plaintiff's side had filed documents and statements of witnesses.
5. The matter proceeded for hearing on 10.10.2017 when plaintiff's case was heard and closed. On that day defence requested for more time (one month to be precise) to put their house in order. The court indulged them.
6. Defence hearing was then scheduled on 20.2.2018 but again defence had not filed any documents and they had no witnesses. Defence case was then closed without any witnesses.

**The evidence**

7. PW 1 (the current plaintiff) testified that she is a wife of the original plaintiff. She adopted the statement of the original plaintiff dated 13.7.2015 and her own statement dated 13.3.2017 as her evidence.
8. Plaintiff's case is that her husband is the one who bought the suit land sometime in 1990. The acreage of the land is 44.5 ha (110.1375 acres). It is averred that sometime on 12.3.2015, and without any colour of right at all, one MARTIN BIKURI the county executive committee member lands, ICT and planning of the county government of Meru, while accompanied by Kisima ward MCA, a physical planning officer, the area District officer, the assistant chief and a mob of unknown persons entered and trespassed into the plaintiff's L.R No. Ngusishi Settlement Scheme/10 and hived off 0.98 ha, purporting that the said area was part of L.R No. Ngusishi Settlement Scheme/716, which hosts the Ngusishi market.
9. That in continuance with the afore-pleaded illegality by the defendant, the said county executive committee member issued to the plaintiff an enforcement notice dated 29/06/2015, which notice reached the plaintiff on 13/07/2015, demanding that the plaintiff demolishes his fence and to remove all his properties on the area covered by the 0.98 ha illegally marked out in the plaintiff's land.
10. Plaintiff avers that the county government has no mandate to take away her land. She also avers that she was not notified that there would be an exercise to rectify the problem. Furthermore, the enforcement notice which was produced as plaintiff exhibit 3 was issued after the alleged invasion of 12.3.2013. The notice is dated 29.6.2015 and issued to plaintiff vide letter of 9.7.2015.
11. Plaintiff avers that the alleged action of the defendant was malicious since if they were honest, they could have brought the land

adjudication officer and the lands office personnel into the picture.

12. Plaintiff claims that in the course of the exercise that took place on 12.3.2013, her trees and fence were damaged.

13. In support of her case, plaintiff has produced as exhibits the title deed of the suit land and the search certificate as plaintiff exhibit 1 and 2 respectively in addition to the enforcement notice.

14. Plaintiff's prayer is for;

(a) A declaration that the purported hiving of 0.98 ha from the plaintiff's L.R No. NGUSISHI SETTLEMENT SCHEME/10 measuring 44.5 ha is illegal, un-procedural and amounted to trespass.

(b) An order of permanent injunction, restraining the defendant by itself, its physical planning department or any other officer, person, agent, contractor or anybody else acting at its direction, behest, authority and contract, from forever entering/ trespassing into, interfering in any manner whatsoever with L.R.No. NGUSHISH SETTLEMENT SCHEME/10, the plaintiff's property.

(c) General damages for trespass.

(d) Costs and interest of the suit.

15. Defence case was closed without calling any evidence.

### **Determination**

16. I have considered all the issues raised herein including the submissions of the parties. It is not disputed that Henry Muthee Kathurima (original plaintiff, deceased), is the registered owner of land parcel No. Ngusishi settlement scheme/10 which land measures 44.5 ha.

17. A reading of paragraph 7 of the defence statement also indicates that defendant had indeed set out on a mission to hive off a portion of plaintiff's property to the tune of 0.98 hectares.

18. The issue for determination is whether defendant was right in claiming that the aforementioned portion of the land, belongs to it (defendants).

19. Defendant has submitted that the court would not be able to determine the boundary dispute as this is a mandate bestowed upon the land registrar. Defence has relied on the case of **Willis Ocholla versus Mary Ndege (2016) eKLR** where it was held that; **"in terms of section 18 (2) of the Land Registration Act, proprietors of registered land with a boundary dispute are obliged to first seek redress or solution from the Land Registrar before moving or escalating the dispute to this court. That where such a party fails to do so and comes to court without first seeking redress from the Land Registrar, the court being a court of law, has to remind such a party that he/she has moved the court prematurely. That the provisions of section 18 (2) of the Land Registration Act shows clearly that the court is without jurisdiction on boundary disputes of registered land until after the land Registrar's determination on the same has been rendered"**.

20. It is the defendant who had apparently claimed that a portion of plaintiffs land was theirs. However, there is not the slightest evidence to indicate that they took this issue before the land registrar for determination. The title deed herein was issued on 26.4.1990. For all those years until 12.3.2013 (23 or so years), plaintiff's land and its boundaries remained intact. The question is, when did the defendant realize that its land had been encroached upon by plaintiff?.

21. Defendant has not availed even one single document to indicate the history of the dispute.

22. In paragraph 7 of the plaint, the names of the persons who were involved in hiving off the land have been tabulated. None of them was from the Lands office. In her evidence, PW 1 reiterated that the lands people were not involved in the exercise.

23. From the foregoing it is clear that there was no dispute for determination before the land registrar as stipulated under section 18 (2) of the land registration Act.

24. Further, there is no plausible explanation as to why defendant was issuing plaintiff with an enforcement notice long after they had carried out the exercise of hiving of plaintiff's land, and there was no basis of issuing the aforementioned notice.

25. Pursuant to provisions of section 25 of the land registration Act; ***"The rights of a proprietor, whether acquired on first registration or Subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject— to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register"***.

26. Article 40 (3) of the constitution stipulates that ***"The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or is for a public purpose or in the public interest and***

*is carried out in accordance with this Constitution and any Act of Parliament that - requires prompt payment in full, of just compensation to the person; and allows any person who has an interest in, or right over, that property a right of access to a court of law”*

27. I am in agreement with plaintiffs submissions that defendant acted arbitrarily and arrogated unto itself powers that it didn't have, which entailed entering the private land of the plaintiff and hiving off a portion of 0.98 hectares.

28. On the claim of general damages for trespass, I find that the actual nature and extent of the alleged trespass of 12.3.2015 has not come out clearly. It doesn't feature clearly in both the statement of the original plaintiff and the current one. In the statement of Henry Kathurima, it is alleged that a mob destroyed trees by cutting three branches. Even in her evidence in chief, plaintiff didn't adduce any evidence in support of this claim. It was only during cross examination that she narrated how the goons destroyed her trees and fence. No report was made to the police station and no assessment for the damaged property was made. I disallow the claim of general damages.

### **Conclusion**

29. Plaintiffs claim is allowed in the following terms

(i) A declaration is hereby made that the purported hiving of 0.98 ha from the plaintiff's L.R No. Ngushishi Settlement scheme/10 measuring 44.5 ha is illegal, un-procedural and amounted to trespass.

(ii) An order of permanent injunction is hereby issued restraining the defendant by itself, its physical planning department or any other officer, person, agent contractor or anybody else acting at its direction, behest, authority and contract, from forever entering into trespassing into, interfering in any manner whatsoever with L.R.No. NGUSHISH SETTLEMENT SCHEME/10, the plaintiff's property.

(iii) Defendant is condemned to pay costs of the suit.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 16<sup>th</sup> MAY, 2018**

**IN THE PRESENCE OF:-**

**Court Assistant:** Janet/Galgalo

Otieno C. holding brief for Mwirigi for plaintiff present

Mungai holding brief for Mutegi for defendant present

Plaintiff absent

Defendant absent

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**