



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 771 OF 2017

(Machakos ELC Case No. 114 of 2009)

MICHAEL NGANGA KIBUNJA.....PLAINTIFF

VERSUS

MICHAEL GITHONGORI.....DEFENDANT

JUDGEMENT

By a Plaint dated the 20th April, 2007, the Plaintiff seeks judgement against the Defendant for:

- a. Permanent injunction restraining the Defendant from further dealing and development of PLOT NO. 45 BUSINESS ISENYA.
- b. An Eviction Order compelling the Defendant to unconditionally vacate PLOT NO. 45 BUSINESS ISENYA.
- c. General Damages for trespass.
- d. Costs of this suit and interest.

The Defendant entered appearance on 8th May, 2009 and only filed a replying affidavit but not his Defence. The Defendant's Counsels messrs Kivuva Omuga & Company Advocate were served with a hearing notice on 30th July, 2017 as evident from the affidavit of service sworn on the 12th December, 2017 but failed to attend court for the hearing. The Plaintiff hence proceeded with the hearing ex parte.

Evidence of the Plaintiff

PW1 Michael Nganga Kibunja who was the Plaintiff herein adopted his witness statement dated the 24th July, 2017 and produced the bundle of documents dated the 24th July, 2017 as his exhibits '1 – 9'. He explained that the Letter of Allotment over the suit land was originally issued to Paul Saoli Ole Nchake by the Ol Kejuado County Council whose clerk signed it. He confirmed that the original owner Paul Ole Nchake transferred the suit land to him and he was issued with a Transfer letter dated the 4th November, 1991 signed by the Clerk to the Council, to that effect, after he had cleared all the rates as evidenced by the Rate Clearance Certificate. He testified that Paul surrendered ownership of the suit land to him on 4th April, 1996. Further, that Justice Lenaola gave orders directing the County Government to submit a status report over the suit land but they never did so. He stated that he reported the dispute to the Isinya Police and produced an OB Number and the map of Isinya Town showing that the suit land is situated at zone number 5 which is meant for commercial purposes. He reiterated that he has paid the rates for the suit land from 1991 to date, the Council as proven from the receipts that he produced as exhibits. Further, that the Certificate of Official Search issued in 2013 as well as 2017 respectively, confirmed the suit land belonged to him. He reiterated that since he is the bona fide owner of the suit land, he wanted the Court to grant him the orders sought in the Plaint. He explained that the property the Defendant is claiming is plot no. 442/Residential Isenya, which is not on zone 5. He insisted one cannot move a plot physically from a residential area to commercial one and that the two plots do not have any relationship.

The Plaintiff thereafter closed his case and later filed submissions on 6th April, 2018 where he reiterated his claim and stated that since the matter proceeded ex parte, his averments remain uncontroverted. He submitted that he is proved his case on a balance of probability and prayed for judgement in his favour.

Analysis and Determination

Upon perusal of documents filed herein and evidence presented by the Plaintiff, the main issues for determination are:

- i. Whether the Plaintiff is the owner of the suit land.

ii. Whether the Defendant has trespassed on the suit land and should be evicted therefrom.

iii. Whether the Plaintiff is entitled to General Damages.

iv. Who should bear the costs of the suit.

On the first issue as to whether the Plaintiff is the owner of the suit land. I wish to interrogate the evidence before me. PW1 produced a Letter of Allotment in the name of Paul Saoli Ole Nchake; Letter of Transfer from Paul Saoli Nchake to him; Certificate of Official Search as well as the Rate Payment Receipts to prove ownership of the Suit land. It was PW1's evidence that he had purchased the suit land from one Paul Saoli Ole Nchake who transferred the said land to him. I note exhibit '2' is a Letter of Transfer dated the 4th April, 1991 of plot no. 45/Business – Isenya Trading Centre from one Paul Saoli Ole Nchake to Michael Nganga K. Kibunja, which was signed by the Clerk to Council one Kekayaya. I further note that as per a letter dated the 4th April, 1991, Paul Saoli Ole Nchake surrendered all his rights over the suit land to Michael Nganga K. Kibunja. As per the bundle of receipts for payment of rates, it is evident the Plaintiff has paid the rates for the suit land. From the Property Search Certificate dated the 26th September, 2011 and 5th June, 2017 respectively, it confirms that as per the records within the County Government of Kajiado which succeeded the defunct Ol Kejuado County Council, the Plaintiff MICHAEL NGANGA KIBUNJA is listed as the owner of plot number 45/BUS ISENYA TRADING CENTRE and not the Defendant herein. From all these document which were not controverted by the Defendant, I find that the Plaintiff has indeed established that he is the legal owner of plot number 45/BUS ISENYA TRADING CENTRE which is the suit land.

As to whether the Defendant has trespassed on the suit land and should be evicted therefrom, I note the Defendant never controverted the averments of the Plaintiff as pleaded within the Plaint and did not attend court during the hearing. The Plaintiff as PW1 claimed the Defendant had encroached on his land and commenced construction thereof. Further, that despite the suit, the Defendant continued to construction the suit which actions have made him unable to develop it. The Defendant in his replying affidavit claimed he was constructing on his plot number 442/ Residential Isinya and not Plot No. 45/ Business that is the suit land. As per the Isinya Development Plan from the Ministry of Local Government and Physical Planning and approved by the Commissioner of Lands on 9th May, 1989, plot 45/business is situated in zone 5/5 set aside for commercial plots while plot 442 claimed by the Defendant is stated as residential. This is indeed indicative that the Defendant's plot is different from the suit land, and since he did not controvert the Plaintiff's averments that he is constructing on the suit land, I hold that he has indeed encroached on the Plaintiff's land and should be hence be evicted therefrom. Since I have already made a finding that the Plaintiff is the legal owner of the suit land, I find that the Defendant has no legal nor colour of right to construct thereon. Further, that any actions by the Defendant amount to acts of trespass. I further find that since the Defendant did not prove his claim over the suit land, he should be permanently restrained from interfering with the Plaintiff's peaceful and quiet possession of it.

As to whether the Plaintiff is entitled to General Damages, the Plaintiff pleaded that the Defendant had trespassed on his land and testified that he is constructing thereon, which has interfered with him, which averments were not controverted by the Defendants. PW1 however did not adduce evidence on the loss he had had incurred as a result of the Defendant's acts of trespass. However, in the case of **Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013) eKLR P. Nyamweya J. held:-**

“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants' trespass”

Even though the Plaintiff failed to adduce any evidence on the losses he had incurred as a result of the Defendant's acts of encroachment, in being persuaded by the above judicial authority and the Plaintiff's submissions, I find the Plaintiff indeed suffered damages as a result of the Defendant's acts of trespass and will proceed to award the Plaintiff Kshs. 100,000 as general damages.

As to who should bear the costs of the suit, I find that costs generally follow the event. In this instant case, since the Plaintiff has been inconvenienced, I find that he is entitled to costs of the suit and will award him the same.

In the circumstances, I find that the Plaintiff has proved his case on a balance of probability and proceed to enter judgment in his favour and make the following final orders :-

- a. That a declaration be and is hereby issued, as against the defendant, that the Plaintiff is the legal owner of plot number 45/ Business Isenya Trading Centre;
- b. That judgement be and is hereby entered for the Plaintiff against the Defendant in the sum of Kshs. 100,000/= as general damages for trespass;
- c. A permanent injunction be and is hereby issued restraining the Defendant either by himself, his agents and or servants from harassing, threatening, intimidating, trespassing upon, constructing and or in any manner whatsoever interfering with the Plaintiff's plot known as number 45/ Business Isenya Trading Centre;
- d. An order of eviction be and is hereby issued against the Defendant either by himself, his agents and or servants from the Plaintiff's plot known as number 45/ Business Isenya Trading Centre.
- e. The costs of the suit are awarded to the Plaintiff.

Dated signed and delivered in open court at Kajiado this 10th day of July, 2018.

CHRISTINE OCHIENG JUDGE