



## REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 372 OF 2017

**BENSON MWANGI KAMAU.....PLAINTIFF**

**VS**

**ISAAC CHEGE KAMAU.....DEFENDANT**

### JUDGMENT

1. The background of this case is that the Plaintiff and the Defendant are brothers. They are sons of Samuel Kamau Mucheru and Nancy Njeri Kamau who died in 2007 and 2016 respectively. Samuel Kamau Mucheru owned LR NO. LOC 2/KANDERENDU/501 measuring 0.04 ha which he caused it to be registered in the names of his three sons in equal shares as follows;

- a. Stephen Mucheru Kamau – 32.5%
- b. Isaac Chege Kamau - 32.5%
- c. Benson Mwangi Kamau - 32.5%

The Court refers to the copies of titles issued on 9/6/2001 and the copy of the certificate of search dated 26/7/2004 both are on record.

2. In 2013 the aforementioned plot was subdivided into 3 portions each measuring 0.0135 ha and registered in the names of the three sons as follows;

- a. Stephen Mucheru Kamau– LR NO. LOC 2/KANDERENDU/1742
- b. Isaac Chege Kamau -LR NO. LOC 2/KANDERENDU/1740
- c. Benson Mwangi Kamau -LR NO. LOC 2/KANDERENDU/1741

The plot is developed with commercial shops with each brother having a shop on their respective plots.

3. The Plaintiff's claim against the Defendant is that the Defendant has encroached and trespassed onto his plot LR NO. LOC 2/KANDERENDU/1741 causing damage to the premises and despite demand to desist, he has persisted. The Plaintiff seeks the following orders;

- a. An order of permanent injunction restraining the Defendant by himself, his kin, agents, servants or employees from trespassing and/or encroaching onto the Plaintiff's land parcel LR NO. LOC 2/KANDERENDU/1741 and a further order prohibiting and restraining the Defendant from committing any acts of damage and destruction.
- b. The Defendant to compensate the Plaintiff for the damage caused to the premises.
- c. Costs of the suit.

4. The Defendant despite being represented by the law firm of RM Njiraini & Co who filed a memorandum of appearance on 29/6/2017 did not file any defence to the Plaintiff's claim. On the 9/4/2018 the said law firm was with the leave of the Court allowed to cease acting for the Defendant. The Plaintiff filed and obtained judgment in default of filing defense on the 16/2/2018 and proceeded to list the matter for formal proof.

5. At the formal proof the Plaintiff led evidence and relied on his witness statement filed on the 16/5/2017. He stated that the Defendant has

on various occasions sought to illegally register the whole plot in his name but with the intervention of the local District Commissioner at Kigumo the land was partitioned and registered in the names of the 3 siblings. It did not end there. That despite owning his own plot next door, the Defendant has persisted with the encroachment and trespass onto his plot and causing damage onto the shop. He singled out an incident on 24/4/2017 when the Defendant damaged and removed a metallic door. He had earlier on destroyed padlocks and a timber off-cut door with a power saw. He produced a complaint report that he made to the local police station in that regard. He also produced a valuation report which itemized the damage on the shop.

6. PW2 – Stephen Mucheru Kamau testified that he is the brother to the parties to the suit and the eldest in the family. He owns LR NO. LOC 2/KANDERENDU/1742. He states that he bought 1/3 of the shares in the plot from his father while the Plaintiff and the Defendants were gifted the total of 67.5 % shares by his father in LR NO. LOC 2/KANDERENDU/501. He recalled that the Defendant was initially uncooperative and resisted the partitioning of the plot into 3 portions. On arbitration by the local administration the dispute was resolved and partitioning was done giving rise to the 3 plots registered in each of the 3 sons as stated earlier. He confirmed that the Defendant has on several occasions encroached onto the Plaintiff's land causing damage to the property.

7. The Plaintiff through his counsel on record filed written submissions which I have read and considered.

8. It is not in dispute that both the Plaintiff and the Defendant's each own their separate plots which are registered in their names. It is not in dispute that the Plaintiff is the registered owner of Plot No. LR NO. LOC 2/KANDERENDU/1741. The Plaintiff led evidence and produced a title and a certified copy of official search to support the ownership.

9. Section 24 of the Land Registration Act No 3 of 2012 states that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Section 25 of the said Act provides that 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 encumbrances charges or leases shown on the register and the overriding interests as stated in section 28 of the Act.

10. Section 26 of the Land Registration Act, 2012 provides;

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

11. The Courts are therefore mandated by statute to consider a title document as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated as above. In the present case the title produced by the Plaintiff shows that the suit land is registered in his name. That position was not challenged by the Defendant in fact the Defendant failed to file any pleadings in opposition to the claim either in person or through his counsel on record then.

12. The Plaintiff led evidence that the Defendant has encroached and trespassed on his land. By consent of the parties the District Land Registrar was ordered to visit the site and file a report in Court which was done on the 6/11/2017. The visit was done in the presence of all the parties and the purpose was to establish the boundaries of the plots; No. LR NO. LOC 2/KANDERENDU/1740, 1741 & 1742. The District Surveyor confirmed that the beacons on the ground were as per the mutation form/survey map and that there was no boundary overlapping on the ground. It must be noted that during the partitioning of the mother plot the three brothers were present and each, the Defendant included, signed the mutation form on record. From the above the Court finds and holds that the Plaintiff is the rightful owner of No. LR NO. LOC 2/KANDERENDU/1741.

13. Black's Law Dictionary 10<sup>th</sup> Edition at page 1733 defines trespass as an unlawful act committed against the person or property of another; especially wrongful entry on another's real property. Clark & Lindsell on Torts, 18<sup>th</sup> Edition on page 923 defines trespass as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant encroached his land without any justifiable reason. The Plaintiff stated that the trespass has been continuous and cited an incident on the 24/4/2017 when the Defendant trespassed and caused damages to his property. This evidence has been supported and corroborated by PW2 in his testimony. The Plaintiff also produced a valuation report as well as various Occurrence Book (OB) reports at the local police station where the damage to property was reported. The Defendant has not controverted this weighty evidence and the Court finds and holds that indeed trespass as well as damage to property took place.

14. Having held that there was trespass and damage to property, the next issue is the quantum of damages payable to the Plaintiff. The Plaintiff produced a valuation report which has itemized the damage and assessed the compensation at the sum of Kshs 40,000/-. The Court finds the assessment reasonable and in the absence of evidence to the contrary awards the sum to the Plaintiff.

15. In the upshot the Court makes the following orders;

a. An order of permanent injunction be and is hereby issued restraining the Defendant by himself, his kin, agents, servants or employees from trespassing and/or encroaching onto the Plaintiff's land parcel LR NO. LOC 2/KANDERENDU/1741.

b. An order be and is hereby issued prohibiting and restraining the Defendant from committing any acts of damage and destruction on the Plaintiff's land parcel LR NO. LOC 2/KANDERENDU/1741.

c. The Defendant is ordered to compensate the Plaintiff for the damages caused to the premises in the sum of Kshs 40,000/-. The same to attract interest at Court rates until payment in full.

d. The Plaintiff shall have the costs of the suit.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2018**

**J.G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Mr Peter Muthoni HB for Mr Kirubi for the Plaintiff

Defendant – Absent

Ms.Irene and Ms Njeri, Court Assistant