



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**ELC NO. 135 OF 2017**

**STEPHEN MARIRA MWANGI.....PLAINTIFF**

**VS**

**DAVID NJIRI STEPHEN.....1<sup>ST</sup> DEFENDANT**

**CELTEL KENYA LIMITED.....2<sup>ND</sup> DEFENDANT**

**JAMES KARIUKI.....3<sup>RD</sup> DEFENDANT**

**GEORGE KARUKU.....4<sup>TH</sup> DEFENDANT**

**JAMES IRUNGU KANGATA.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed suit on 20/12/2016 against the Defendants seeking the following orders;

a) That an order be issued for the eviction and demolition of all the illegal structures erected on the land parcel known as Murang'a Municipality Block 2/462 (hereinafter called the suit lands). Further the Defendants be ordered to grant vacant possession to the Plaintiff of all that land parcel known as Murang'a Municipality Block 2/462.

b) Mesne Profits

c) Costs and interests of the suit.

2. By a consent order recorded in Court on the 5/12/2017 the suit was marked settled as between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants agreed to vacate, removed the container placed thereon and handed over the suit land to the Plaintiff on or before the 30/1/2018.

3. On the 25/1/2018 the 3<sup>rd</sup> -5<sup>th</sup> Defendants sought the leave of the Court amend their defence which leave was granted on the 16/2/2018 with the consequence that the County Government of Muranga, The National Land Commission and The Hon Attorney General were enjoined as the 6<sup>th</sup> – 8<sup>th</sup> Defendants respectively. On the 20/3/2018, the 3<sup>rd</sup> – 5<sup>th</sup> Defendants withdrew the case against the 6<sup>th</sup> -8<sup>th</sup> Defendants.

4. The Plaintiff's claim against the Defendants is for eviction and demolition of illegal structures erected thereon. The Plaintiff has particularized the Defendants encroachment under para 6 of the plaint. The Defendants opposed the Plaintiff's claim on the grounds that they are the lawful allottees of the suit land on temporary basis. Further that the suit land is public land and in the circumstances an order of eviction is not available.

5. At the hearing the Plaintiff testified and stated that he is the registered proprietor of the suit land. He informed the Court that he bought the land from one James Maina Mwangi vide a sale agreement dated the 2/8/2010 at a purchase price of KShs 815,000/- which he paid in full. That upon completion of payment the said vendor sought and obtained consent to transfer from the Municipal Council of Murang'a (now county Government of Muranga) to him. That the title was finally transferred to him on the 3/1/2014 and a title issued to him. He produced documents interalia; agreement of sale dated the 2/8/2010, several acknowledgement notes in respect to the purchase price, rates payments to the County Council of Murang'a, copy of green card certified on the 19/2/2018, copy of title for the suit land issued on 3/1/2014, several photographs showing the encroachment and structures on the plot by the Defendants marked as PEX No. 10(a) - (c). He clarified that the beacons of the suit land are in situ and therefore the land is identifiable on the ground.

6. DW1 – Joseph Irungu Kangata stated in evidence that he is the treasurer of Township Wazee self help group formerly Wazee Draught Club and originally Muranga Draught Association. That the Defendants are the office bearers of the Association. That the suit land was allocated to the association (Muranga Draft Association) vide a letter dated the 13 /7/2006 on a temporary basis. That since then they have occupied the suit land which according to him is public land. On cross examination he stated that they do not own the suit land nor pay any rates to the County Government. He confirmed that there is a temporary structure on site which members use to play draught. That the plot belongs to the Council of Murang’a.

7. DW2- Francis Mwangi adopted his statement sworn on the 14/7/2017 which by and large is similar to the evidence given by DW1. He produced a letter dated the 1/3/2005 from the Ministry of Gender sports culture and social services which indicated that the wazee draught club is registered with the department of sports Muranga and that a certificate was to be issued. He produced the list of members and marked DW2-3. On cross examination he stated that he has not seen a title in the name of Murang’a County Council. That their allotment was temporary. Further he stated that they have no approval from the members of the association to represent them. That they have been sued in their personal capacities. He stated that he has no personal interest in the subject matter.

8. DW3- Peter Njuguna Mwangi affirmed and stated that he is the chairman of the draught association. He reiterated the evidence as given by DW1 and DW2. When shown the copy of the green card he concurred that the lessor is the County Council of Murang’a and that the land was allocated in the name of James Mwangi Maina in 1998. He further stated that the letter of temporary licence did not confer upon the association permanency nor a title or interest in the suit land. That they were allocated an empty space on temporary basis. He informed the Court that it would appear that the land allocated to the association may be different from the suit land.

9. On the 15/5/2018 parties agreed to file written submissions. The Defendants did not file any despite being given extension of time to do so by the Court on the 30/5/2018. I have read and considered the submissions of the Plaintiff as filed on record.

10. Having considered the pleadings, the evidence adduced at the hearing and the written submissions where filed, the key issue is whether the Plaintiff is the registered owner of the suit land; whether the Defendants have encroached on to the suit land and what orders should be given by the Court.

11. 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.

12. 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.

13. Among the rights to be enjoyed by a registered owner of any land is the right for peaceful and quiet enjoyment of the land he owns, in other words the rightful owner to the land has a right to possession, occupation and use of the suit land.

14. The Plaintiff has led evidence that he is the registered proprietor of the land. He produced in Court a copy of the green card and title deed in his name to support his case. The Defendants have also laid claim on the suit land based on a letter dated the 13/7/2006 from the then Municipal Council of Murang’a. The letter interalia read as follows;

“RE; APPLICATION FOR A TEMPORARY PLOT FOR PUBLIC USE AND DEVELOPMENT;

Reference is made to your letter dated the 25/4/2006 on the above cited subject.

The Council is pleased to inform you that your application for a temporary draft game plot has been approved subject to the following conditions;

a) That you produce copy of the certificate of registration of your association.

b) The plot is purely temporary.

c) You construct a temporary shed measuring 12 feet \* 20 feet.

d) That the said temporary plot is the open space next to the lock-up shops.

Please acknowledge in writing if the offer is acceptable to you.”

15. The Defendants did not produce before the Court any title to support their claim of ownership of the land. It is on record that James Maina Mwangi was allocated the land by the then Murang'a Municipal Council on 1/5/1996. The commissioner of Lands on behalf of the Council issued a lease to the said James Maina Mwangi on the 20/1/1998. A title was issued to the said James Maina Mwangi who sold the same to the Plaintiff in 2010 and transferred to him on 3/1/2014. The head lessor of the suit land remains Murang'a County Council (now County Government of Muranga) as seen on the certificate of lease and the green card. According to the letter dated 13/7/2006 it is clear that the Defendants were only given a temporary allocation of some unidentifiable land. The Defendants have not produced any evidence to show that what was allocated to them under temporary basis is indeed the Plaintiff's land. The letter dated the 13/7/2006 does not identify the land under consideration. Even if the land under temporary occupation is the suit land (which is not), it would follow that then Council had no power to allocate that which they already had appropriated to the predecessor in title to the Plaintiff. The Council had no interest or title to pass to the Defendants in 2006 when the interest and title passed in 1998. It is also clear that the Defendants did not pay any rates licence fees or rent to the Council on account of the suit land. The Court holds and finds that the suit land belongs to the Plaintiff.

16. Has there been encroachment? According to the evidence of the Defendants and the photographs produced in Court by the Plaintiff it is evident that the Defendants have encroached on the suit land by constructing some temporary structures in form of a shed. They explained to the Court that the shed is used for playing draught by its members and other members of the public. The Court holds and finds that indeed encroachment has been proved.

17. The Plaintiff has pleaded mesne profits however no evidence was led to guide the Court on the nature and quantum of the mesne profits. He who asserts must prove. Parties are bound by their pleadings. The Court declines this prayer.

**18. Final orders;**

a. It is hereby ordered that the Defendants do demolish and remove the illegal structures on the suit land and voluntarily vacate the suit land within the next 30 days. In default the Plaintiff do so demolish and remove the structures at the cost of the Defendants.

b. Further in default of a) above eviction to issue without further orders of the Court in strict compliance with the provisions of the Land Act.

c. The Defendants shall meet 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. Kanyi for the Plaintiff.

Defendants –

1, 2 - Discontinued

3, 4, 5 - Absent

Ms. Irene and Ms. Njeri, Court Assistants