



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 539 OF 2012**

**JOHN SEBASTIAN MBAYA.....1ST PLAINTIFF**

**MARGARET TEEI MBAYA.....2ND PLAINTIFF**

**VERSUS**

**SAMUEL KOSKEI TOO.....DEFENDANT**

**JUDGMENT**

This suit was filed by way of a Plaint dated 22<sup>nd</sup> August 2012 and filed on 24<sup>th</sup> August 2012 in which the Plaintiffs sought for Judgment against the Defendant as follows:

- (a) A declaration that the Defendant's entry and encroachment into the Plaintiffs' parcel of land known as L.R. No. 2259/15/57 (hereinafter referred to as the "suit property") is illegal, unlawful and amounting to trespass.
- (b) An order of demolition of the structures that have been built on the suit property by the Defendant.
- (c) Costs for the surveyor who identified the encroachment on the suit property by the Defendant and the cost of the Plaintiffs' advocates.
- (d) General damages for trespass on the suit property by the Defendant.
- (e) Costs of this suit.

**The Pleadings**

In the Plaint, the Plaintiffs stated that they are the registered proprietors of the suit property which is located in Karen and measures 0.2017 hectares. They further stated that the Defendant is the owner of the adjacent and neighboring parcel of land known as Land Reference No. 2259/15/58 (hereinafter referred to as the "adjacent property"). The Plaintiffs stated further that sometimes in the year 2009, the Defendant commenced some construction works on the adjacent property which included, inter alia, building a perimeter boundary wall around the adjacent property. The Plaintiffs stated that the building encroached into the suit property. The Plaintiffs indicated that upon noticing this encroachment, they contacted the Defendant with a view of discussing the extent of the encroachment. They stated that both parties agreed that the Plaintiffs would engage a surveyor who would measure the suit property and establish the extent of the encroachment. The Plaintiffs stated that they engaged M/s Two EMS Associates Ltd who visited the site and carried out survey measurements to identify, confirm and re-establish the beacons on the suit property as per the Deed Plan and the survey map. The Plaintiffs stated that the said surveyor established that the Defendant had encroached into the suit property by 14.15 metres on the North – Western boundary and by 16.45 metres on the South – Eastern boundary. The Plaintiffs indicated that the said surveyors prepared a Report containing these findings which they would produce at the hearing. The Plaintiffs also stated that they wrote to the Defendant on 23<sup>rd</sup> October 2009 forwarding to him the surveyor's report but that the Defendant did not immediately respond. The Plaintiffs stated that they proceeded to serve the Defendant with 14 days' notice to vacate from the suit property. They also indicated that the Defendant chose to contract his own surveyors and responded to the Plaintiffs confirming the encroachment and pleading for his main house to be saved. The Plaintiffs further stated that the Defendant offered to purchase the suit property as a way of sorting out the problem. The Plaintiffs stated that they considered this request and on humanitarian grounds agreed to sell the suit property to the Defendant at a purchase price of Kshs. 18 million. They stated that they entered into a Sale Agreement with the Defendant to this effect on 17<sup>th</sup> September 2010. The Plaintiffs averred that it was a term of the said Sale Agreement that the Defendant would pay to the Plaintiffs a deposit of Kshs. 3,500,000/- at the time of execution. They stated that the Defendant breached that terms as he only paid them Kshs. 2 million 10 days after the said Sale Agreement was executed. The Plaintiffs averred that as a result of that breach, they were compelled to terminate the said Sale Agreement and to refund the Defendant the Kshs. 2 million on 28<sup>th</sup> September 2010. The Plaintiffs further averred that sometimes in January 2012, the Defendant approached them and pleaded that he had gotten into financial problems but was not out of them and was ready to purchase the suit property at Kshs. 22 million. The Plaintiffs averred that up to date, the Defendant has neither purchased the suit property nor removed his structures build on the suit property despite several reminders and requests.

The Defendant entered appearance on 19<sup>th</sup> September 2012 but did not file a defence. The Plaintiffs filed their Request for Judgment on 18<sup>th</sup> December 2012 and their request was granted on 14<sup>th</sup> February 2013.

### **The Evidence**

The matter proceeded for formal proof on 16<sup>th</sup> May 2017 when only the 1<sup>st</sup> Plaintiff testified. The 1<sup>st</sup> Plaintiff, John Sebastian Mbaya, told the court that he together with the 2<sup>nd</sup> Plaintiff, who is his wife, are the registered owners of the suit property. He produced a copy of the title deed before court as evidence of this assertion. He then told the court that the Defendant was the owner of the adjacent property and that he had encroached into the suit property. The 1<sup>st</sup> Plaintiff told the court that in the year 2009, he visited the suit property and found that the Defendant had put up a stone perimeter wall on the suit property. He stated that he approached the Defendant and told him of this encroachment. He told the court that the Defendant told him to engage a surveyor to identify the beacons and find out if there was encroachment. He stated that he approached a land surveyor who identified the beacons and gave him a report showing that the Defendant had encroached into the suit property. The 1<sup>st</sup> Plaintiff produced the Surveyor's Report in evidence which showed that the Defendant had encroached into the suit property by 14.15 metres on the North – Western boundary and by 16.45 metres on the South – Eastern boundary. He told the court that he sent this Surveyor's Report to the Defendant who chose to engage his own surveyor. The 1<sup>st</sup> Plaintiff told the court that the Defendant's surveyor arrived at the same finding as his surveyor. He further told the court upon receiving the confirmation from his own surveyor that he had encroached into the suit property, the Defendant wrote to him an undated letter received on 28<sup>th</sup> January 2010 confirming the encroachment, apologizing for it and pleading that his house be saved. The 1<sup>st</sup> Plaintiff produced a copy of the said letter. The 1<sup>st</sup> Plaintiff told the court that the suit property could not be subdivided due to the minimum acreage of parcel in Karen of ½ acre so they decided that the Defendant purchases the entire suit property. He told the court that they entered into a Sale Agreement dated 17<sup>th</sup> September 2010, in which they agreed to sell the suit property to the Defendant for Kshs. 18 million. He added that it was a term of that Sale Agreement, a copy of which he produced, that the Defendant was to pay them a deposit of Kshs. 3,750,000/- upon execution and the balance within 90 days. He told the court that the Defendant only paid them a deposit of Kshs. 2 million. He further stated that as a result of this breach, they called off the transaction and refunded to the Defendant his Kshs. 2 million. He then told the court that sometime in 2012, he decided to develop the suit property. He testified that he wrote to the Defendant to remove his structures on the suit property to enable him to develop it. He told the court that come June 2012, the Defendant approached them again with an explanation that he had financial problems that is why he had not managed to honour his obligation but made another offer to buy the suit property for Kshs. 22 million. The 1<sup>st</sup> Plaintiff told the court that they agreed to this offer but that the Defendant again failed to honour this offer. He stated that they proceeded with their plans to develop the suit property and commenced by building a perimeter wall which they could not complete because of the encroachment. He told the court that he had a subsequent engagement with the Defendant in which they agreed to sell the suit property to him for Kshs. 37,500,000/- inclusive of compensation for the perimeter wall. He stated that the terms were that the Defendant deposit with them Kshs. 20 million upon which they would sign a sale agreement. The 1<sup>st</sup> Plaintiff stated that the Defendant only deposited Kshs. 8 million in 3 deposits. He told the court that the Defendant never paid any other amount to them. He told the court that they proceeded to develop the suit property with an office block, drawings of which were approved by the Nairobi County Government. He told the court that they were asking the court to declare the Defendant's encroachment into the suit property as illegal and trespass and to issue an order allowing them to demolish the structures built on the suit property.

### **The Issues for Determination**

The following are the issues that arise for determination in this suit:

- (a) Whether the Plaintiffs are the registered proprietors of the suit property.
- (b) Whether the Defendant has illegally and unlawfully encroached into the suit property amounting to trespass.
- (c) Whether or not to issue an order of demolition of the structures that have been built on the suit property by the Defendant.
- (d) Whether to order the Defendant to pay the costs of the surveyor who identified the encroachment on the suit property by the Defendant.
- (e) Whether to condemn the Defendant to pay the Plaintiffs general damages for trespass on the suit property.
- (f) Determine who is to bear the costs of this suit.

### **Analysis and Determination**

- (a) Whether the Plaintiffs are the registered proprietors of the suit property.

In his assertion that he and the 2<sup>nd</sup> Plaintiff are the registered proprietors of the suit property, the 1<sup>st</sup> Plaintiff produced a copy of their title deed. The law is very clear on the position of title holders of land such as the Plaintiffs. The position of the holder of a title deed over a parcel of land is well stated in **Section 26(1)** of the **Land Registration Act** which provides as follows:

*“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... 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, ... 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.”***

In this suit, the Plaintiffs’ title to the suit property has not been challenged in any way by the Defendant on any of the grounds enumerated above. That being the case, this court finds that the Plaintiffs are the duly registered proprietors of the suit property.

**(b) Whether the Defendant has illegally and unlawfully encroached into the suit property amounting to trespass.**

It is the Plaintiffs’ contention that the Defendant, who is the registered proprietor of the adjacent property, has illegally and unlawfully encroached into the suit property. As evidence to prove this assertion, the 1<sup>st</sup> Plaintiff produced to this court a Survey Report dated 19<sup>th</sup> October 2009 prepared by M/s Two EMS Associates Ltd. According to that report, the said surveyor established that the Defendant had encroached into the suit property by 14.15 metres on the North – Western boundary and by 16.45 metres on the South – Eastern boundary. When this report was forwarded to the Defendant, the Defendant wrote an undated letter received by the Plaintiffs on 28<sup>th</sup> January 2010, a copy of which was produced in court, in which by his own admission the Defendant confirmed that the said encroachment was true and he apologized for it.

My finding is that the Defendant admitted the encroachment as alleged by the Plaintiffs.

**(c) Whether or not to issue an order of demolition of the structures that have been built on the suit property by the Defendant.**

With the finding that the Plaintiffs are the registered proprietors of the suit property, it follows that the Plaintiffs have the rights over the suit property as set out in **section 24(a)** of the **Land Registration Act** which provides as follows:

***“Subject to this Act, 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.”***

One of the rights and privileges belonging to ownership of land is the right to have exclusive use and possession of the land to the exclusion of all others. In this particular case, the Plaintiffs, as the registered proprietors of the suit property, are entitled to have full possession and occupation of the entire suit property to the exclusion of the Defendants. This being the legal position, this court finds no difficulty in proceeding to issue an order of demolition of the structures that have been built on the suit property by the Defendant.

**(d) Whether to order the Defendant to pay the costs of the surveyor who identified the encroachment on the suit property by the Defendant.**

The Plaintiffs have prayed that they be refunded the sums of money that they paid to the surveyor who prepared the Survey Report that they produced in court. Such fees are in the nature of special damages which have to be specifically pleaded. A careful study of the Plaintiff filed herein reveals that no specific amount was pleaded. Even during his oral testimony, the 1<sup>st</sup> Plaintiff did not mention how much he paid to the surveyor. No receipts evidencing any payment were produced before this court. The finding of this court is that the costs of the surveyor were not specifically pleaded and cannot therefore be refunded.

**(e) Whether to condemn the Defendant to pay the Plaintiffs general damages for trespass on the suit property.**

There is no doubt in the mind of the court that the Plaintiffs have been denied the use of the suit property owing to the Defendant’s illegal and unlawful encroachment since the year 2009. It has been demonstrated that the Plaintiffs have, on numerous occasions, tried to engage the Defendant to purchase the suit property or remove his structures erected thereon to no avail. The Defendant admitted that he had indeed encroached into the suit property to the extent stated in the Surveyor’s Report. That being the position, I find that the Plaintiffs are entitled to be awarded general damages for the trespass on the suit property by the Defendant. To this extent, the court hereby states that the Defendant shall pay to the Plaintiffs general damages for his trespass on the suit property of the sum of Kshs. 5 million.

**(f) Determine who is to bear the costs of this suit.**

Arising from the foregoing, Judgment is entered in favour of the Plaintiffs as enumerated herein and the costs of this suit are awarded to the Plaintiffs.

It is so ordered.

**SIGNED AND DATED BY LADY JUSTICE MARY M. GITUMBI AT NAIROBI THIS 17TH DAY OF OCTOBER 2018.**

**MARY GITUMBI**

**JUDGE**

**DELIVERED BY JUSTICE BERNARD EBOSO AT NAIROBI**

**THIS 22ND DAY OF OCTOBER 2018.**

**B. M. EBOSO**

**JUDGE**