



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 277 OF 2017

KARIUKI MATHU.....PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES OF

SHILO TABERNACLE CHURCH.....DEFENDANT

PETER MUTHAMA.....DEFENDANT

JUDGEMENT

1. The Plaintiff commenced suit against the Defendants by way of a plaint dated 15th December, 2016 and filed in court on the 16th December, 2016. He seeks the following orders against the Defendants:-

a) A permanent injunction restraining the Defendant from trespassing on the Plaintiff's parcel of land being LR No. 12080 at Kibwezi

b) The Honourable court do issue eviction notice against the Defendants from occupying the suit property which is LR No. 12080

c) General damages

d) Costs and interests of this suit

2. On the 17th September, 2017 both Defendants were served with summons to enter appearance and to file their defence as can be seen from the affidavit of service dated 2nd October, 2017 and filed in court on 3rd October, 2017.

3. Upon service, the Defendants entered appearance on the 6th November, 2017 vide the memorandum of appearance and notice of appointment filed by Munyasya & Co. Advocates.

4. The Defendants did not file their defence within the prescribed period. They failed to do so even after the court granted them leave on the 7th November, 2017. Consequently, on the 8th May, 2018 the court directed that the matter do proceed as undefended suit subject to the Defendants' right to cross-examine the Plaintiff and his witnesses. The matter was fixed for hearing on the 2nd July, 2018. Affidavit of service dated 29th June, 2018 and filed in court on the 2nd July, 2018 shows that the Defendants were served with the hearing notice dated the 21st June, 2018. They however did not attend court for the hearing.

5. During the hearing, the Plaintiff adopted his undated statement filed in court on 25th June, 2018 as his evidence. He said that he is the registered owner of property title no. LR 12080 situated in Kibwezi District Makueni County. He went on to say that he leased the land to Rawji Investment Limited whose tenancy has already expired. He revealed that while the lease was in force, Rawji irregularly and unlawfully subleased part of the property to Shiloh Tabernacle Church who is still in occupation of the said property. He said that when the lease expired, he instructed Warihui & Co. Advocates to inform the tenant that he would not renew the lease. The Plaintiff produced a copy of letter dated 13/5/2016 from Warihui & Co. Advocates as PEX No. 2. He also produced a copy of title deed number LR 12080 as PEX No.

1. The Plaintiff further produced a copy of letter of termination of tenancy for LR 12080 Kibwezi from Rawji Investment Ltd dated 25th June, 2016 as PEX No. 3.

6. The Plaintiff further said that in spite of the assurance from Rawji Investments Ltd, the Defendants herein have refused to vacate the suit premises and he has been denied access to his property.

7. The Plaintiff's counsel filed his written submissions on the 4th October, 2018. The counsel framed four issues for determination namely:-

- a) **Whether the Plaintiff is the lawful owner of the disputed property.**
- b) **Whether the Defendants have trespassed on the Plaintiff's land.**
- c) **Whether the Plaintiff is entitled to prayers sought in his plaint.**
- d) **Who should bear the costs of the application.**

8. At the outset, I wish to state that from the evidence on record, there is no doubt that the Plaintiff is the registered owner of land titled number LR 12080 Kibwezi. As such, I will condense the issues to two namely;

- a) **Whether the Defendants have trespassed on the Plaintiff's land.**
- b) **Whether the Plaintiff is entitled to the prayers sought.**
9. **Whether the Defendants have trespassed on the Plaintiff's land**

The Plaintiff's counsel submitted that the Plaintiff has demonstrated that the first Defendant is in actual possession of the suit property.

10. **Whether the Plaintiff is entitled to prayers sought in his plaint**

The Plaintiff's counsel in his submissions told the court that the Plaintiff had on several occasions engaged the Defendants to give vacant possession and that the Defendants did not heed. The counsel pointed out that the Plaintiff has suffered damage as a result of the Defendant's actions. The counsel was of the view that the Plaintiff is indeed entitled to the orders sought.

11. Having evaluated the evidence on record, it is clear that when the Plaintiff informed Rawji Investment Ltd about his intention not to renew the lease vide his letter dated PEX no. 2, the latter acknowledged in writing vide its letter dated 25th June, 2016 that it together with the other tenants whom it termed as "*illegal tenants*" would give vacant possession upon termination of the lease agreement. From the evidence on record, the Defendants herein were tenants of Rawji Investment Ltd which arrangement the Plaintiff termed irregular and unlawful. In my view, once the lease agreement between Rawji Investment Ltd was terminated, the Defendants herein became trespassers into the Plaintiff's suit property.

12. Apart from stating that the Plaintiff is entitled to the orders sought, the Plaintiff's counsel is silent on the amount of damages the Plaintiff is entitled to. In Halsbury Laws of England 4th ED, Vol 45, at para 26, 1503 it is provided as follows:-

- a) **If the Plaintiff proves the trespass he is entitled to recover nominal normal damages, even if he has not suffered actual loss.**
- b) **If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for the loss.**
- c) **Where the Defendants has made use of the Plaintiff's land; the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.**

13. In the case before me, the Plaintiff has shown that there was trespass into his premises by the Defendants. It should be noted that trespass is actionable per se. He has not adduced evidence to show the actual loss that he has suffered. In my view, therefore, the Plaintiff is entitled to nominal damages Kshs. 150,000 would suffice under the circumstances.

14. Arising from the foregoing, I am satisfied that the Plaintiff has on a balance of probabilities satisfied this court that he has a cause of action against the Defendants jointly and severally as herein under:-

- a) **A permanent injunction restraining the Defendants from trespassing, on the Plaintiff's parcel of land being LR No. 12080 at Kibwezi is hereby issued**
- b) **The Plaintiff to issue eviction notice**
- c) **Kshs. 150,000 being general damages**
- d) **Costs and interest of the suit**

Signed, Dated and Delivered at **Makueni** this 17th Day of **October, 2018**.

Mbogo C.G,

Judge

In the presence of:

No appearance for the Plaintiff

No appearance for the Defendant

Mr. Kwemboi Court Assistant

Mbogo C.G, Judge

17/10/2018