



**REPUBLIC OF KENYA**

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

**ELC NO. 68 OF 2017**

**MATHEW MATINDI NYAMU.....1<sup>ST</sup> PLAINTIFF**

**WILSON BARU GICHURU.....2<sup>ND</sup> PLAINTIFF**

**VS**

**JEREMIAH MACHIHI.....1<sup>ST</sup> DEFENDANT**

**MOHAMED NUR.....2<sup>ND</sup> DEFENDANT**

**ALI IBRAHIM.....3<sup>RD</sup> DEFENDANT**

**EDITH MUTHONI.....4<sup>TH</sup> DEFENDANT**

**HADIJA DUBA.....5<sup>TH</sup> DEFENDANT**

**KAUNA TILIMANI.....6<sup>TH</sup> DEFENDANT**

**ABDI AYAKA.....7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs filed suit on the 20/3/14 against the Defendants seeking the following orders;

a) Eviction of all the Defendants from the Plaintiffs' parcels of land namely MAKUYU/KIMORORI/BLOCK 1/1929, 1930, 1931 AND 1932 (hereinafter referred to as the suit lands).

b) General damages, cost of the suit, interest and any other orders that this Honourable Court may deem fit to meet the ends of justice.

2. It is their case that at all material times to this suit they were the registered owners of all the suit lands having been registered as such on 3/6/2011. That the Defendants have trespassed on to the suit land thus depriving them the right to use, cultivate and occupy their lands. Under paragraph 8 of the Plaintiffs they have particularized the acts of trespass on the part of the Defendants for which they aver have incurred losses and damages.

3. In resisting the Plaintiffs' claims the Defendants filed a statement of defence and counterclaim on the 11/4/2014 and stated that according to them they know the suit land as MAKUYU/KIMORI/BLOCK1/1609 which land was previously owned by Ngimu Framers Limited where the Defendants inter alia worked for the said company. They averred that they have been in occupation of the suit lands since 1980 while in the employ of Ngimu Farmers Limited and have constructed permanent houses. They stated that the Plaintiffs have not disclosed that there are 60 workers in total occupying the suit land and not just the 7 Defendants in the suit. They state that Ngimu Farmers Limited owed them unpaid salaries and dues dating back over 10 years and in 2005 the said Ngimu Framers Limited sued them for trespass and eviction but the case CMCC No 737 of 2005 was dismissed for want of prosecution and an oral agreement was reached in 2011 to let the Defendants become legal owners and occupants of the suit land in lieu of unpaid salaries and terminal dues. That the transfers of the suit land was to be effected thereafter.

4. The Defendants averred that the Plaintiffs are claiming the suit land through fraudulent means surrounded by malpractice and non-material disclosure. That the purported illegal alienation of the suit lands by the Plaintiffs will render them landless from land they rightfully own and possess. They sought the orders as follows;

- a. A declaration of the Defendants as legal and rightful owners of the suit property and compel the Plaintiffs to surrender for cancellation any title or registration certificate over the suit property issued in their names.
- b. Costs of the counterclaim.
- c. Any other relief the Court deems fit to grant.

5. At the hearing of the suit the 1<sup>st</sup> Plaintiff testified and stated that upon seeing a newspaper advertisement in the daily Nation on 7/6/2001 which advertised for sale of prime land measuring 165 acres subdivided into plots of 1 acre upwards he made contact with the person indicated in the advert and expressed his intention to buy the land. The land was situated at Kenol (Kimorori) facing Kenol Petrol Station on Thika Road/Sagana Road, 12 kilometers from Thika Town. The price given was Kshs 250,000/- per acre and the contact person was given as Nelson Mwaniki of Sharkardass House Nairobi Telephone Number 340667 Nairobi.

6. The 1<sup>st</sup> Plaintiff contacted the contacts given and on 10/12/2002 entered into the agreement of sale with Ngimu Farm Limited for the sale of 2 acres comprised in two plots namely L3 and L4 out of MAKUYU/MAKUYU/KIMORORI/BLOCK 1 /1609 at the price of Kshs 500,000/-. The completion date was 10/2/2003. He led evidence and produced receipts in Court to support various payments that he made towards the purchase of the plot as follows;

- a). 10/12/02 - Kshs 25,000/- being fees for preparation of the agreement.
- b). 16/12/02 -Kshs. 150,000/- being part payment of the purchase price
- c). 10/1/ -Kshs 225,000/- further purchase price
- d). 3/1/ -Kshs 100,000/- further payment of purchase price
- e). 25/3/2011 -Kshs 4000/- for two plots - consent to transfer – Town Council –  
Makuyu.
- f). 16/3/2011 -Kshs 100,000/- title facilitation fees.

7. The witness further stated that on the 6/3/2003 he was given a letter by GM Muhoro Advocates addressed to the vendor (Ngimu Farm Ltd) informing them that he had finalized the purchase payments and that the land should be handed over to him pending the processing of the titles. That on the strength of this letter he took possession of the suit land.

8. That he attended the Land Control Board meeting and obtained consent to transfer the land which was produced in evidence. That at the time of buying the land in 2002 the land was vacant with dilapidated houses. The land was fallow but there were people grazing cattle in the open fields. That on making inquiries he was assured that the old houses belonged to the former workers of Vendor who had left the employ of the Company.

9. Thereafter when he returned to the suit land in 2012 he found the Defendants had unlawfully occupied the suit lands and were now residing in the old houses. He sought help from the vendor company who advised him to seek the intervention of the local administration whereupon he proceeded to engage the local area chief. The Defendants upon being summoned to the Chiefs office agreed to vacate the suit land by 30/9/2012 to enable the buyer utilize his land. He produced minutes dated 30/4/12 which were signed by 3 of the Defendants in the presence of the Plaintiffs and the Chief. It is his evidence that the Defendants however did not vacate the suit land as promised as a result of which the Plaintiffs filed the joint suit against the Defendants.

10. That he was issued with titles in respect to MAKUYU/MAKUYU/BLOCK1/1929 and 1930 on the 3/6/2011. He testified that he has been deprived of the use of his land which he intended to construct a retirement home and rear pigs with an estimated income of Kshs 500,000/- per year. That the 200 tree seedlings he planted were all uprooted by the Defendants occasioning him loss.

11. On cross examination he stated that he was unaware that the land had been given to the Defendants in lieu of unpaid dues by the vendor company. Nor was he informed that the company had sued the Defendants for eviction in a Court case at Thika.

12. PW2 – Wilson Baru Gichuru testified that he saw the advert in respect to the sale of the land in the Daily Newspaper and approached the company whereupon he entered into an agreement of sale on the 10/12/2002 with Ngimu Farm Limited for the sale of MAKUYU/MAKUYU/BLOCK1/1609 marked L1 and L2 measuring 2.4 acres at the price of Kshs 600,000/-. That he made full payments and produced various receipts in Court in relation to the purchase of the land and registration fees and consent to transfer fees to the Makuyu Town Council. G K Muhoro Advocate wrote to Ngimu Farm Limited on the 14/3/2003 confirming that he had fully paid the purchase price and asking the vendor to give vacant possession to him pending the finalization of the processing of the titles, which possession he was given. That he was shown the suit land which was vacant on taking possession. There were dilapidated and unoccupied houses thereon. On his return in 2012 he found the land occupied by the Defendants tilling and occupying the old houses as well. The local chief summoned the Defendants who agreed to vacate the suit land by 30/9/2012 and some of them signed an agreement to that effect. However, they reneged and failed to vacate the land hence the filing of the suit. He explained to the Court that they filed a joint suit with the 1<sup>st</sup> Plaintiff because the Defendants have occupied the whole land; tilling some portions and living or residing on other portions of the 4 parcels of land.

13. That he obtained land control board consents on the 28/4/11 and the titles were issued in his name on the 3/6/2011 in respect to the

14. Further, the witness told the Court that he financed the purchase of the two plots through his savings coupled with a loan of Kshs 300,000/- that he secured from Barclays Bank Limited in 2002. He repaid the loan at Kshs 8,000/- per month. That he planted 190 tree seedlings at the cost of Kshs 30,000/- which was destroyed by the Defendants.

15. On cross examination he restated that the invasion of the Defendants happened in April 2011. He stated that he found about 10 houses were occupied by the Defendants in April 2012 when he returned to the property.

16. The Defendants failed to prosecute their case despite the Court giving them several indulgence to do so. Finally their case was deemed closed on the 23/7/18 after failing to conduct their defense three times before. The case of the Defendants therefore is undefended.

17. The Plaintiffs have filed written submissions which I have read and considered.

18. There are two key issues in my view that commend themselves for determination by the Court; whether the Plaintiffs own the suit lands; whether the Defendant's trespassed onto the suit lands and if yes whether they should be evicted; who meets the cost of the suit and counterclaim.

19. It is commonly acknowledged that the suit lands were resultant subdivisions of MAKUYU/KIMORORI/BLOCK 1 /NGIMU /1609 measuring 5.354 ha. According to the green card that was produced in evidence the land belonged to Ngimu Farm Limited having become registered as owners on 15/4/88 and title issued thereat. The said parcel was subdivided on the 8/8/03 and new parcel numbers 1929-1932 were issued. The old title was therefore closed on subdivision. The Defendants have averred in their counterclaim that there was an agreement between them and Ngimu Framers Limited that they would be given land MAKUYU/KIMORORI/ BLOCK 1/1609 in lieu of their unpaid salaries and terminal dues. My perusal of the green card in respect to MAKUYU/KIMORORI/ BLOCK 1/1609 shows no evidence of any entry that this land was ever transferred to the Defendants as claimed in their pleadings.

20. The Plaintiffs' claim is based on proprietorship of the suit land and entitlement to the rights in respect to ownership of land. They have produced documentary evidence in form of Public advertisement on sale of the land, agreement for sale, payment receipts, land control board consents, title deeds over the suit land in their names as proof of ownership. Section 26 of the Land Registration Act, 2012 provides;

“26. (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”.

21. Further section 25 of the said Act provide that the rights of a proprietor of land whether acquired on first registration or subsequent registration for valuable consideration or by a Court order shall not be defeated except as provided by the Act and shall be held by such proprietor together with all the privileges and appurtenances belonging thereto but free from all encumbrances but subject to leases, overriding interests and trusts as provided under the Act.

22. The above provisions of section 25 and 26 of the Land Registration Act 2012 are similar to the provisions stated in section 27 and 28 of the Registration of Land Act cap 300 (now repealed). It should be noted that the titles which are subject of this suit were registered in June 2011 and the current Land Registration Act 2012, came into force on the 2/5/2012.

23. 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 titles produced by the Plaintiffs shows that the suit lands were registered in their names. That position was not challenged by the Defendants, in fact the Defendants failed to prosecute their case despite being accommodated by the Court severally through adjournments. The Court holds and finds that in the absence of any evidence to the contrary, and according to the Plaintiffs' pleadings and the evidence on record, the Plaintiffs are the rightful owners of the suit lands.

24. Have the Defendants trespassed onto the lands? In the case of **Entick Vs Carrington (1765)** Lord Camden CJ had this to say:-

“Our law holds the property of every man so sacred, that no man can set his foot upon his neighbor's close without his leave”.

Trespass is the act of unauthorized and unjustifiable entry upon the land in another's possession. The wrong of trespass is actionable regardless of the extent of the incursion and without any necessary showing of injury or damage to the claimant. In this particular case the nature of trespass is continuous trespass. The Plaintiffs claimed in their uncontroverted evidence that at the time entering into agreement of sale and taking possession the lands were vacant. That there were old disused houses which they were told by the seller that they were occupied by the former workers of the vendor and that the structures were part of the land they were buying. In 2012 on their return they found the Defendants in occupation which they trace the illegal entry to around April 2011. Efforts were made to settle the matter in the presence of the area chief where the Defendants agreed to be given time to vacate the suit land by 30/9/2012. They failed to so do. The Plaintiffs have averred that the occupation and invasion of the Defendants of their land was without their permission, consent and or authority as the legal owners of the suit lands.

25. The Defendants averred in the Counter Claim that the Plaintiffs acquired the suit lands through fraudulent means. The Defendants have not particularized fraud nor taken steps to prove the same. Fraud is not proved.

26. In the absence of any evidence to the contrary and relying on the pleadings and evidence as presented by the Plaintiffs this Court is satisfied that the continued occupation of the Defendants of the suit lands is unauthorized and amounts to trespass.

27. The Plaintiffs have sought general damages for trespass. It is trite law that trespass is actionable per se. The 1<sup>st</sup> Plaintiff has averred that he intended to use the farm to raise pigs and earn a profit of Kshs. 500,000/= per annum. The 2<sup>nd</sup> Plaintiff led evidence that he borrowed a loan to fund the acquisition of the land which repayment was in the sum of 8000/= per month. The Plaintiffs have not guided the Court in the quantum of damages and loss that they have lost arising from the deprivation of their right to use and own the suit lands. This should have been done in form of a valuation report to show the expected returns or rental income from the suit lands. Given the size of the land and the time that the trespass has been occurring based on a rental income of Kshs 5,000/- per acre per year and doing the best I can in the circumstances, I award general damages of Kshs 50,000/- each to the two Plaintiffs.

**28. Final orders;**

- a. The Defendants counterclaim is dismissed.
- b. The Defendants be and are hereby ordered to vacate the suit lands within 90 days and in default eviction shall ensue as per the provisions of the Land Act, 2012.
- c. General damages in the sum of Kshs 100,000/- payable by the Defendants equally to the Plaintiffs.
- d. The Plaintiffs shall have the cost of the suit and the Counterclaim.

**It is so ordered**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 29<sup>TH</sup> DAY OF NOVEMBER 2018**

**J.G. KEMEI**

**JUDGE**

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

1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs – Present in person/Advocate is absent.

Defendants: 1 – Absent

2 – Present in person

3 – Absent

4 – Present in person

5 – Absent

6 – Absent

7 – Present in person

Irene and Njeri, Court Assistants