



**REPUBLIC OF KENYA**

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

**ELC NO. 151 OF 2017**

**JOSEPH MWANGA MUUNDA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**STEPHEN NDOO MUINDI.....1ST DEFENDANT/APPLICANT**

**ANNA MUINDI MUTHAMO..... 2<sup>ND</sup> DEFENDANT/APPLICANT**

**JUDGEMENT**

1) This suit commenced by way of plaint dated 1st March, 2012 and filed in court on even date. The Plaintiff has averred in paragraphs 4 and 5 of his plaint that he is the registered proprietor of all that the parcel of land known as Kithuka/Kanthuni/Kimundi/158 measuring 2.3 hectares. That sometime in the year 2006 the two Defendants herein entered into his land and proceeded to interfere with the boundaries. He has further averred that the Defendants also cultivated, grazed and carried out other acts within the land without his consent.

2) The matter proceeded by way of formal proof on 15th October, 2012 after the two Defendants who were served on the 23rd March, 2012 with summons to enter appearance and to file their defence failed to do so. The Defendants notice of motion application to set aside the interlocutory judgement herein was dismissed on the 19th February, 2018. The aforementioned application is dated 28th June, 2013 and was filed in court on even date.

3) The Plaintiff's evidence was that he is the owner of land parcel number 158 Kimonde in Kanzokeya location. He produced a copy of the title deed as PEX no. 1.

4) That on the 8<sup>th</sup> November, 2012 he found the two defendants trying to clear bush in his land. He went to say that he reported the two to the chief but the Defendants declined to appear before the chief forcing him to instruct his advocate who wrote a demand letter(DEX no. 3) to them. That surveyors later visited and measured the land in question. He said that the Defendants ignored the District Officer's letter requiring the two to vacate the suit land.

5) The Plaintiff prayed for judgement as per his plaint.

6) The Plaintiff called Urbanus Maithya Mainga(PW2) as his sole witness.

7) Mainga's (PW2) evidence in chief was that he is the employee of the Plaintiff. He said that in April 2008, the Plaintiff instructed him to fence it. He went on to say that he used branches to fence the land. That on the 12th and 13<sup>th</sup> May, Ndoos who is the first Defendant herein remove the fence. He revealed that he saw the first Defendant removing the fence.

8) After closing the Plaintiff's case, his counsel requested for a mention date to enable him file his submissions. The counsel however did not file any submissions. Nevertheless I am of the view that the issues for determination are :-

**a) Whether or not the Plaintiff is the registered proprietor of Kithuki/Kanthuni/Kimundi/158.**

**b) Whether or not the Defendants have trespassed onto the suit property.**

**c) Whether or not the Defendant should vacate the suit property.**

**d) Whether or not an order of permanent injunction should issue against the Defendants.**

9) On the first issue the Plaintiff produced a title deed for land parcel number Kithuki/Kanthuni/Kimundi/158. The title deed is in his name and as such, I hold that plaintiff is the registered proprietor of the suit property.

10) On the second issue, the evidence from the Plaintiff and that of Mainga (PW2), there is no doubt that the two Defendants are the ones who removed the fencing material that the Plaintiff had instructed Mainga (PW2) to put on the boundary.

11) And on the third issue, my finding is that given the reasons I have enumerated in issues number (a) and (b), there is no reason why the two Defendants should not give vacant possession of the suit property to the Plaintiff.

12) As per issue number (d) the evidence on record is that the Defendants defied directions from the area chief as well as the District Officer to vacate the suit property despite the evidence that the said property does not belong to them. Unless the two are sanctioned, they do not appear like they can give vacant possession of the suit property voluntarily.

13) As for mesne profits, Halsbury laws of England 4<sup>th</sup> 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.**

14) From the evidence on record, the two Defendants cleared the bush inside the Plaintiff's land. They also damaged the fence. In my view, nominal damages of Kshs . 150.000 would suffice under the circumstances.

15) The upshot of the foregoing is that I am satisfied that the Plaintiff has, on a balance of probabilities, a cause of action against the Defendants. I therefore, proceed to enter judgment in his favour and against the Defendants jointly and severally as hereinunder:-

**a) A declaration that the Defendants have encroached into the Plaintiff's land and ought to vacate the same.**

**b) An order of permanent injunction restraining the defendants jointly and severally from entering, encroaching, destroying, grazing and or in any other manner interfering with the land title no. Kithuki/Kanthuni/Kimundi/158.**

**c) Kshs. 150 being mesne profits**

**d) Cost of this suit.**

**e) Interests on c and b above herein at court rates.**

It is so ordered.

**SIGNED, DATED and DELIVERED at MAKUENI this 26<sup>TH</sup> day of NOVEMBER 2018**

**MBOGO C.G,**

**JUDGE**

**IN THE PRESENCE OF:**

Ms Kyalo for the Plaintiff

Mr. Kwemboi Court Assistant

No appearance for the Defendant

**MBOGO C.G, JUDGE**

**26/11/2018**