



**REPUBLIC OF KENYA**

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

**ELC NO. 98 OF 2017**

**ALOIS MUIA.....PLAINTIFF**

**VERSUS**

**EDWARD MUTINDA NDETEL.....1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF MAKUENI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1) This suit commenced by way of a plaint dated 22<sup>nd</sup> August, 2013 and filed in court on even date. The Plaintiff sought for judgment against the Defendant for:-

- a) **An injunction restraining the Defendant, his servants, workmen, agents and/or anyone else claiming under him from entering on, erecting or causing to be erected thereon any structures, alienating or from in any way interfering with the Plaintiffs use and enjoyment of land title number Emali Township Block 1/198.**
- b) **An order for eviction of anyone found to have trespassed onto the Plaintiff's property and demolition of any structures erected on the said land Title Number Emali Township Block 1/198.**
- c) **Damages.**
- d) **Interest thereon.**
- e) **Costs of this suit.**
- f) **Any other relief the court may deem fit to grant.**

2) The claim is denied by the Defendant vide his undated statement of defence filed in court on the 22<sup>nd</sup> January, 2014.

3) On the 3<sup>rd</sup> December, 2014 the Plaintiff filed an amended plaint where he sought the following orders against the Defendants:-

- a) **A permanent order of injunction to restrain the Defendants jointly and/or severally, their servants, workmen, agents and/or anyone else claiming under them from entering on, erecting or causing to be erected thereon any structures, alienating, trading on or from in any way interfering with the Plaintiff use and enjoyment of land title number Emali Township Block 1/198.**
- b) **A declaration that the Plaintiff is the absolute and indefeasible registered proprietor of land title number Emali Township Block 1/198 to the exclusion of anyone else.**
- c) **An order for eviction of anyone found to have trespassed onto the Plaintiff's property and demolition of any structures erected on the said land title number Emali Township Block 1/198.**
- d) **Damages.**
- e) **Interest thereon.**
- f) **Costs of this suit.**

**g) Any other relief the court may deem fit to grant.**

- 4) In the amended plaint, the Plaintiff enjoined the County Government of Makueni as the second Defendant. The latter Defendant neither entered appearance nor did it file its defence upon being served with summons.
- 5) During the hearing, the Plaintiff adopted his undated statement filed in court on 3<sup>rd</sup> December, 2014 as his evidence. Briefly stated, his case was that the 1<sup>st</sup> Defendant has interfered with his plot number 1/198 Emali Township. That he has owned the plot for the last 25 years and that in the allotment letter, the premises appears as UNS BCR plot number 286 Emali. Its size is indicated as 0.4296 hectares and has leasehold of 99 years. That he paid all the dues that were required of him. That more than 15 years ago, he caused the plot to be subdivided as shown in the RIM map for the area as FRM map. That the subdivision created two plots out of LR 1/198 namely; LR 1/198 and LR 1/197, the latter being a petrol station owned by one Peter Ngumwa. That the 1<sup>st</sup> Defendant has occupied part of LR 1/198. That the encroachment occurred when he was out of the country. The Plaintiff produced the 16 documents in his list of documents dated 2<sup>nd</sup> December, 2014 as PEX nos. 1 to 16 respectively.
- 6) On the other hand, the 1<sup>st</sup> Defendant's case was that he bought plot number 556 which according to him is at the centre of dispute from one Agnes Nduku Katilimo at a price of Kshs. 500,000/=. That its size is 20 feet by 100 feet. That upon purchase in September, 2012, he was given the plan of approval upon which he paid Kshs. 10,000 to the counsel. That he proceeded to build a storeyed building on the plot, an exercise that took him one and a half years. That no one stopped him from doing business after he obtained a licence in the year 2013. That the Plaintiff is his neighbour. That there are three other people whom the Plaintiff has not sued. That he knew the Plaintiff as a person who has built rental houses next to his plot. That while the Plaintiff was a councilor, he took people who covered the foundation the 1<sup>st</sup> Defendant had dug. That he and the Plaintiff have been rivals since 1997. He produced his documents as D.Exhibit Nos.1 to 8.
- 7) The Plaintiff's evidence in cross-examination was that the first suit that he filed was dismissed for non-attendance and that he has filed an appeal against the dismissal. He reiterated that he has owned the property for over 25 years. He maintained that he found the construction going on when he came back from abroad and that apart from the construction, the property is intact. He said that he was elected as a councillor in 2003 and that he acquired the property long before he started to work for the County Council. He also said that he started working on the plot in the year 1981 or 1982.
- 8) The 1<sup>st</sup> Defendant's evidence in cross-examination was that Agnes Nduku Katilimo showed him an allotment letter and other documents for rate payment before he purchased the plot. He said that he does not have an allotment letter from the Commissioner of Lands. He also said that he has never received a letter (PEX No. 12) from Makueni Physical Planner. He said that he was aware that the council had written letters to Agnes requiring her to stop interfering with plot number 556 (PEX No. 11). He said that he could not see Agnes' signature in the sale agreement that he had with her and added that there is a schedule of acknowledgement of money. He said that even though the Plaintiff has produced a certificate of lease, he himself had not made any efforts to acquire one.
- 9) The Defendant called Wilbert Muthiani Kaboi (DW1) and Agnes Nduku Katilimo (DW2) as his witnesses.
- 10) Kaboi (DW1) adopted the statement that he recorded on 10<sup>th</sup> July, 2017 as his evidence. He said that the suit premises belong to the 1<sup>st</sup> Defendant. That he was present when the sale transaction took place between the 1<sup>st</sup> Defendant and the husband of Agnes (DW2). That the 1<sup>st</sup> Defendant produced Kshs. 500,000/= which he paid to Agnes (DW2) who then handed over documents for plot number 556 to him.
- 11) The witness agreed in his evidence in cross-examination that the agreement of 7<sup>th</sup> September, 2012 (DEX No. 2) does not bear his signature. He further agreed that the agreement that he signed was the one where Agnes (DW2) received money. He however pointed out that he saw an allotment for the year 1983 being given to the Defendant. He further said that Agnes (DW2) was allocated the plot by a councilor in 1983 and admitted that the allotment letter does not bear plot number 556. Finally, the witness said that he does not know whether it is the 1<sup>st</sup> Defendant who has trespassed into the Plaintiff's plot.
- 12) Agnes (DW2) too adopted her statement which she recorded on 10<sup>th</sup> July, 2017 as her evidence. She told the court that she is the owner of plot number 198 and that it was allocated to her in 1983 by the then Machakos County Council (see DEX No. 4). That she owned the plot until 2012 when she sold it to the 1<sup>st</sup> Defendant. That the Plaintiff sued her over the plot in the year 2012. That the Plaintiff's suit was dismissed as can be seen from the judgement which she produced as DEX. No.1.
- 13) Her evidence in cross-examination was that the plot in question is 556 and not 198. She said that the plot was allocated to her by councilor Nicholas Muteti. She said that the allotment letter that she got did not indicate the plot number. That when she tried to acquire title deed, the Plaintiff claimed that the plot was his. According to her, the Plaintiff acquired two plots from two different people and ended up acquiring other plots which included hers. She admitted that she does not have certificate of lease similar to the one that the Plaintiff holds. She said that since 2012, she went to the County Council demanding to know why it accepted rates from her and yet her plot had been grabbed by the Plaintiff. In her evidence in re-examination, Agnes (DW2) told the court that the council never informed her that her plot belongs to the Plaintiff.
- 14) In his written submissions, the Plaintiff's counsel submitted that from the evidence of the Plaintiff, his statement as well as the exhibits that were produced, it is not disputed that:- the Plaintiff was allocated UNS.B.C.R plot number 286, Emali measuring 0.4296 hectares or thereabouts vide letter of allotment dated 8<sup>th</sup> December, 1995 by the Commissioner of Lands and that he was paying rates and rent over the said plot no. 286 to Makueni County Council as is evident from PEX Nos. 2 and 3. That the Plaintiff vide PEX No. 4 dated 3<sup>rd</sup> December, 2000 paid for registration, conveyance, survey fees, rent, standard premium, stamp duty, approval fees and rates over plot no. 286 totaling Kshs.90,593/=-.
- 15) The counsel further submitted that the 1<sup>st</sup> Defendant in a bid to justify his entitlement to the property in dispute, and as pleaded in

paragraph 4 of his statement of defence, claims to have bought it from Agnes N. Katilimo (DW2). The counsel went on to submit that the only document produced by the 1<sup>st</sup> Defendant to prove purchase is one headed sale agreement dated 7<sup>th</sup> September, 2012.

16) The sale agreement relates to plot no. 556, situated at Emali Township measuring 20 x150. The counsel pointed out that the sale agreement is not signed by the said Agnes Katilimo (DW2) as the vendor and that this offends the mandatory provisions of Section 3(3) of the Law of Contract Act.

17) The counsel submitted that the allotment letter is issued by the clerk Makueni County Council for plot number 556, Emali Market to Agnes N. Katilimo and not Emali Township Block 1/198 and thus she had no registrable interest to pass over to the 1<sup>st</sup> Defendant. The counsel further submitted that from the evidence of Agnes (DW 2) the property that she purportedly sold to the 1<sup>st</sup> Defendant is inside the Plaintiff's land title number Emali Township Block 1/198 and thus it is clear that the 1<sup>st</sup> Defendant had trespassed into the Plaintiff's land. It was also the counsel's submissions that the 1<sup>st</sup> Defendant in answering to the Plaintiff's claim did not file any counter-claim to establish his perceived right over the Plaintiff's property and thus the court cannot grant what has not been sought were we to assume that the 1<sup>st</sup> Defendant had a legitimate claim.

18) The Plaintiff's counsel further submitted that the Plaintiff's claim over Emali Township Block 1/198 is conferred under Section 24 of the Land Registration Act, 2012 and his rights over the said property are protected under Section 25 thereof. The counsel pointed out that under Section 30(3) of the Act, it is stated that it shall be prima facie evidence of the matter shown in the certificate. He concluded by urging the court to find that the Plaintiff has proved his case on a balance of probability and thus grant prayers (a) (b) (c) (d) (e) (f) and (g) of the amended plaint.

19) On the other hand, the first Defendant's counsel framed two issues for determination. The issues were:-

**i. Who is the owner of the suit property?**

**ii. Whether the reliefs sought by the Plaintiff have merit?**

20) In answer to the first issue, the counsel for the first Defendant submitted that all factors taken into account, the suit property belongs to the first Defendant who duly and bona fide acquired it from Agnes Nduku (DW2). In answer to the second issue, the counsel submitted that even though the Plaintiff heavily relies on registration documents, he has shied away from other facts such as the delay it has taken him to enforce his rights if he is indeed the owner of the suit property. The counsel pointed out that the Plaintiff's own actions confirm that the reliefs sought herein lack merit and urged the court to dismiss the Plaintiff's suit with costs.

21) I have read the evidence on record as well as the submissions that were filed by counsel on record for both parties. I will adopt the two issues for determination as framed by the Defendant's counsel.

22) On the issue of who is the owner of the suit property i.e. Emali Township Block 1/198, the evidence on record is that the Plaintiff has a lease over the said property (PEX No.1) while on the other hand, the 1<sup>st</sup> Defendant has a letter of allotment issued by County Council of Makueni. The Plaintiff has also produced registry index map (RIM) for the area in question. Kimondo, J had this to say in the case of *Stephen Mburu & 4 others Vs Comat Merchants Ltd & Another [2012]eKLR*

***“An allotment letter is transient and often conditional right of offer to take the property which has not been progressed to a formal title.”***

I fully associate myself with the Justice Kimondo. The letter of allotment held by the 1<sup>st</sup> Defendant cannot override the lease held by the Plaintiff. I agree with the Plaintiff's counsel that under Section 30(3) of the Land Registration Act, 2012, it is prima facie evidence of the matters shown in the certificate of lease. Arising from the above, I hold that the suit property belongs to the Plaintiff.

23) Regarding the issue of whether the reliefs sought by the Plaintiff have merit, it follows therefore that having found that the suit property is his, the reliefs sought have merit. It is not lost on me that the 1<sup>st</sup> Defendant did not file a counter claim against the Plaintiff and as such, this court cannot proceed to grant that which was not sought by him.

24) The upshot of the foregoing is that I am satisfied that the Plaintiff has satisfied this court that he has a cause of action against the Defendants on a balance of probabilities. As for damages, Halsbury Laws of England 4<sup>th</sup> Edition, Vol 45 at para 26, 1503 provides as follows;

**a. If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.**

**b. If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.**

**c. Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use.**

**d. Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.**

**e. If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.**

25) I am of the view that Kshs. 200,000 would suffice as general damages. In the circumstances, I hereby proceed to enter judgment for the Plaintiff and against the Defendants as herein under;

**a) A permanent order of injunction to restrain the Defendants jointly and/or severally, their servants, workmen, agents and/or anyone else claiming under them from entering on, erecting or causing to be erected thereon any structures, alienating, trading on or from in any way interfering with the Plaintiff use and enjoyment of land title number Emali Township Block 1/198.**

**b) A declaration that the Plaintiff is the absolute and indefeasible registered proprietor of land title number Emali Township Block 1/198 to the exclusion of anyone else.**

**c) An order of eviction of anyone found to have trespassed onto the Plaintiff's property and demolition of any structures erected on the said land title number Emali Township Block 1/198 as provided for under Section 152E of the Land Act.**

**d) Kshs. 200,000 being general damages.**

**e) Interest thereon.**

**f) Costs of this suit**

Signed, dated and delivered at Makueni this 28<sup>th</sup> December, 2018.

**MBOGO C. G,**

**JUDGE.**

**IN THE PRESENCE OF:**

Mr. Kyalo holding brief for Mr. Mbindyo for the Plaintiff

Mr. Kelly holding brief for Mr. Mwangambo for the Defendant

Mr. Kwemboi - Court Assistant

**MBOGO C. G, JUDGE,**

**28/12/2018.**