



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 1071 OF 2014

JULIUS GITONGA NJOROGE..... PLAINTIFF

VERSUS

EMBAKASI RANCHING CO. LTD.....1ST DEFENDANT

SAMUEL NJOGU KAMITA.....2ND DEFENDANT

JUDGMENT

1. Through the plaint dated 7th August, 2015 the Plaintiff seeks a permanent injunction to restrain the 1st Defendant from reallocating his plot issued through share certificate no. 14227 to any other person The Plaintiff also seeks an order that the 1st Defendant allocates the Plaintiff a bonus plot and releases to the Plaintiff the documents over the two plots. He also seeks an order that the 1st Defendant regularises the allocation of the two plots to him.
2. As against the 2nd Defendant, the Plaintiff seeks a permanent injunction to restrain the 2nd Defendant from trespassing on the Plaintiff's plot and constructing a perimeter wall or in any other way interfering with the Plaintiff's rights over the disputed land. The Plaintiff also seeks damages for trespass and the costs of this suit plus interest at court rates.
3. The 1st Defendant is a land buying company incorporated in Kenya. It placed an advertisement in the *Daily Nation* of 26th August, 1992 inviting members of the public to purchase shares from it which would secure plots for the shareholders.
4. Following this advertisement, the Plaintiff visited the offices of the 1st Defendant and paid Kshs. 24,000 vide receipt no. 2877 on account of the shares he had purchased. He was issued share certificate no. 6362. The Plaintiff made further payments to D.K Thuo and Company Advocates and the 1st Defendant to cater for transfer and survey fees. He was duly issued with receipts which he produced in court. The Plaintiff was issued with share certificate number 14227 on 9th September, 1992 in respect of one share.
5. The Plaintiff avers that he entered into a further agreement with the 1st Defendant pursuant to which he would be entitled to a bonus share once he made payment for first share. He would be required to pay Kshs. 6,000/= for the second share, and that this would result in the member being given a second plot.
6. The 1st Defendant did not honour this agreement when the Plaintiff went to collect the documents in respect of the first plot and to pay for the bonus plot. The 1st Defendant informed the Plaintiff that his share certificate was not genuine and withheld his documents.
7. This prompted the Plaintiff to file **Milimani CMCC No. 4013 of 2000** claiming the bonus plot with respect to share certificate no. 14227. The parties recorded consent in that case in which firstly, the Plaintiff was to be shown plot no. 1393 on account of share certificate no. 14227 and secondly, he was to be given a bonus quarter acre plot upon payment of Kshs. 6,000 to the 1st Defendant.
8. The Plaintiff avers that the 1st Defendant partially complied with the consent order and allocated him plot no. 1393 but failed to give him the bonus plot despite receiving his payment of Kshs. 6000/=.
9. Thereafter, the Plaintiff erected a semi-permanent structure on plot no. 1393 and resided in it until July 2014 when the 2nd Defendant deposited building materials on the Plaintiff's plot alleging that the 1st Defendant had allocated this plot to him. The 2nd Defendant started constructing a stone wall around the Plaintiff's plot and blocked his access to his house.
10. Both Defendants were served. The 2nd Defendant appointed advocates and filed a replying affidavit in opposition to the application for

injunction. He did not file a defence. The 2nd Defendant averred in the affidavit that his plots were numbers 3654 and 3655 issued against share certificate no. 52070 which he maintained were different from the Plaintiff's plots. The 1st Defendant participated in these proceedings. His counsel last attended court on 13/10/2015 when he informed the court that he wished to file a surveyors report. No report was filed.

11. The application for injunction was argued. In a ruling delivered on 5th June, 2015, the court found that the dispute between the parties related to the physical location of their plots and directed that a survey be undertaken to establish the physical location of the plots in issue and a report was to be filed in court within 60 days.

12. Further, the court made an order that the status quo was to be maintained and no party was to enter, construct, dispose of or otherwise alienate the disputed plots until the court made further orders.

13. The parties engaged a surveyor who prepared the report dated 21st Sept, 2015 which was produced in court. The surveyor observed that a wall had been built around plot nos. 1393 and 1394 and that the wall blocked the access to plot no. 1393. The Plaintiff testified that he paid the surveyors costs alone even though the court had ordered that this was to be shared between him and the 2nd Defendant. The surveyors report confirmed that the Plaintiff's structure was built on plot no. 1393.

14. The issues for determination are;

- i. Who is the lawful owner of the suit property?
- ii. Did the 2nd Defendant's action of building a wall around the Plaintiff's plot amount to trespass?
- iii. Is the Plaintiff entitled to damages for trespass? If yes, what quantum?
- iv. Is the Plaintiff entitled to the reliefs he seeks? and
- v. Who should bear the costs of this suit?

15. The Plaintiff produced the receipt which the 1st Defendant issued to him when he purchased a share in Embakasi Ranching Company Limited. He also produced other receipts issued in 1992 by the 1st Defendant which show that the payments were in respect of share certificate no. 14227. The 1st Defendant issued share certificate no. 14227 in respect of plot no. 1393 to the Plaintiff. The consent recorded in **Milimani CMCC No. 4013 of 2000** confirmed that the Plaintiff was the owner of plot no. 1393 and the 1st Defendant was to point out this plot to the Plaintiff. Based on the evidence adduced in court, the court finds that the Plaintiff is the lawful owner of plot no. 1393.

16. The surveyors report confirmed the physical location of plots numbers 1393 and 1394 and that these plots are different from plots nos. 3654 and 3655 which belong to the 2nd Defendant. The surveyor's report confirmed that the wall, which was put up by the 2nd Defendant, was erected round plot numbers 1393 and 1394. The court finds that the 2nd Defendant trespassed on the Plaintiff's land by erecting a stone wall around the Plaintiff's land.

17. Having found that the 2nd Defendant's action of putting up a stone wall round plot no. 1393 and 1394 amounts to trespass, the Plaintiff is entitled to damages for trespass having been forced to move out of the structure he had erected on plot no. 1393 in which he was residing and look for alternative accommodation.

18. The Plaintiff relied on the case of **Park Towers Limited V John Mithamo Njika and 7 others** [2014] eKLR in which J.M. Mutungi J. stated that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages.

19. The Plaintiff also relied on the case of **Duncan Nderitu Ndegwa V KPLC & Another** [2013] eKLR in which Nyamweya J. held that once trespass to land is established, no proof of damage is necessary. In that case, the court awarded Kshs. 100,000 as compensation to the Plaintiffs for the denial of their rights to use and enjoy the suit property occasioned by the 1st and 2nd Defendants trespass.

Based on these authorities, the Plaintiff submitted that an award of Kshs. 1.5 million will suffice as general damages to compensate the Plaintiff for the loss he suffered as a result of the Defendant's actions. The court is of the view that this figure is high and awards the Plaintiff Kshs 300,000.

20. The court finds that the Plaintiff has proved his case on a balance of probability and grants the reliefs sought in the plaint together with the costs of this suit.

Dated and delivered at Nairobi this 10th day of May 2017.

K. BOR

JUDGE

In the presence of: -

Mr. Muchoki for the Plaintiff

No appearance for the Defendant

Mr. V. Owuor- Court Assistant