



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO.129 OF 2009

LAZARO OCHIENG.....PLAINTIFF

VERSUS

MARIE STOPES KENYA.....DEFENDANT

JUDGEMENT

1. The plaintiff herein filed this suit on 7/12/01 vide a plaint dated 14/11/2009. The defendant is described as a Non-Governmental Organization. The Plaintiff claim is that after the titles for the lands comprised in **L.R. Nos. Kitale Municipality Block 3/882**, which belongs to the Plaintiff and **Kitale Municipality Block 3/883** were issued, it turned out that part of the defendant's development, which they had erected before the issuance of the titles had encroached onto the plaintiff's land hence this suit. The plaintiff seeks an order that the defendant do continues its operations within the extent of the land comprised in **Title No. Kitale Municipality Block 3/883** and that the part of the building that encroaches onto the plaintiff's land be demolished at the defendant's expense.

2. The defendant filed a defence on 10/2/2010 but it never was represented at the hearing. There were no witnesses to give evidence to support the statements in the defence. The plaintiff testified on 17/7/2017 when he adopted his statement filed in the court record on 3/4/17.

3. The plaintiff's case is that the plot known as **LR No. Kitale Municipality Block 3/882** belongs to him. He purchased the plot from one Endrex Mukolwe vide an agreement for Sale dated 5/9/96 which he produced as "PEXh1". An allotment letter to Mr. Mukolwe was issued on 29/9/95. The Allotment letter was produced as "PEXh2". However the Lease was prepared in the Plaintiff's name. A copy was produced as "PEXh3". A copy of the certificate of lease was also produced as "PEXh4". They are both in the name of the plaintiff and in respect of **Kitale Municipality Block 3/882**.

4. The plaintiff testified that as at the time of the issuance of the title the defendant had already built a wall around the plaintiff plot. The plaintiff then bought a map from Ardhi House which showed the location of the plots in Block 3. The certified copy of the map was produced and marked as "PEh5". Despite issuance of a demand notice which was produced as "PEXh6", the defendant is still occupying a portion of the plaintiff's land. The defendant however responded through its advocate vide a letter dated 27/5/2008 which was marked "PEXh7". In that letter, the defendant stated that it is the registered proprietor of "parcel of Land known as **Kitale Municipality Block 3/882** together with the building being erected thereon" has all along been carrying out its business.

5. The letter reads as follows on its letter part:-

"We are instructed to advise you as we hereby do that your client's title (if any) is questionable as the same is based on a subdivision subsequently, it lacks the necessary legal

force”

6. Thereafter the defendant declares that it would not comply with the plaintiff’s demand for the demolition of the portion of the defendant's building that encroached into the plaintiff's plot.

7. The plaintiff called a surveyor in the in Ministry of Lands and Physical Planning. The Surveyor, PW2, testified that he was asked to show the plaintiff the boundary between plot No. **Kitale Municipality Block 3/882** and **Kitale Municipality Block 3/883** and Kitale Municipality Block 3/883. He went to the site. He had obtained a map from the Director of Survey for Block 3. He also had a survey plan that gave distances for all plots. He identified the beacons of the plots. He took measurements on the map. He found plot No.882 borders Plot No. 883 but on the ground, both plots have been developed. There is a perimeter wall around plot No.882 which wall has been extended to cover both plots.

8. PW2 produced his report arising from this exercise, as evidence. It was marked “PEXh8”. It is the report dated 21/6/2017. It outlines the process and methodology used in resolving the problem.

9. As said earlier in this judgment, the defendant never called evidence to support its defence. However as was held in the case of **Kirugi & Another – Vs – Kabiya& 3 Others [1987] KLR 347**, by the Court of Appeal:

“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”

10. The plaintiff has produced evidence to prove his claim. In addition, it was the duty of the defendant to ensure that it developed only the portion of land that belonged to it. Any development falling outside its land and introducing into the plaintiff’s land, if unauthorized by the plaintiff and subject to planning regulations would be illegal. The plaintiff has not granted the defendant his consent hence this suit. The plaintiff is the holder of a lease over the land which PW2 has confirmed to have been fenced off by the defendant.

11. **Section 24(b) of the Land Registration Act** states as follows:-

“24(b): Subject to this Act as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease”.

12. The lease whose copy is produced as “PEXh3” is a standard lease for an urban plot which is to be used for shops, offices and plots excluding sale of petrol and motor oils. It is issued to the plaintiff by the national Government. In this Court’s view only the lessee to that Land may be allowed, on the fulfillment of special conditions of the lease, to develop the land.

13. There are no express or implied agreements in favour of or affecting the defendant that can be identified in the lease. Consequently the defendant does not have any right to erect or maintain any developments on LR No. **Kitale Municipality Block 3/882** as it belongs to the plaintiff.

14. All in all I find that the plaintiff has proved his case on a balance of probabilities. I enter judgment for the plaintiff against the defendant in terms of prayer **No (a)** of the plaint only. Each party shall bear its own costs.

It is ordered.

Dated, Signed and Delivered at Kitale on this **24th** Day of **August, 2017**.

MWANGI NJOROGÉ

JUDGE

24/08/2017

Coram before Mwangi Njoroge Judge

Court Assistant – Isabellah/Picoty

Ms. Wanyama holding brief for Mr. Kiarie for Defendant

Judgement read in open court.

MWANGI NJOROGE

JUDGE

24/08/2017