



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC NO. 260 OF 2017

(formerly MACHAKOS ELC NO. 224 OF 2012)

KENYA COMMERCIAL BANK LIMITED

(formerly Kenya Commercial Bank Ltd).....PLAINTIFF

VERSUS

REV. DR. STEPHEN KANYARU.....1st DEFENDANT

REV. ISAIAH DEYE.....2nd DEFENDANT

REV. SAMUEL GUANTA (Sued as the

Trustee of the Methodist Church of Kenya).....3rd DEFENDANT

JUDGEMENT

By a Plaint dated 22nd June, 2012, the Plaintiff is seeking for judgement against the Defendants as follows:

- a) An order of permanent injunction to restrain the Defendants by themselves, their servants and or agents from doing any of the following acts that is to say alienating, entering and or trespassing on to the Plaintiff's parcel of land known as LR No. IRN 27009 (Grant No. IRN 6177) and or from building any structures, heaping or dumping or storing any materials or personal effects, taking possession, continuing with any construction work and or in any manner interfering with the Plaintiff's use and quiet possession of the parcel of land known as LR No. 27009 (Grant No. IRN 6177)
- b) An order of mandatory injunction compelling the Defendants by themselves, their servants and or agents to forthwith vacate the suit property and to remove any equipments or personal effect dumped and or stored in the Plaintiff's parcel of land and to demolish any buildings erected on the parcel of land known LR No. 27009 (Grant No. IRN 6177).
- c) An order of eviction of the defendants, their servants or agents from the parcel of land known as LR No. 27009 (Grant IRN 6177)
- d) General damages for trespass
- e) Costs of this suit

f) Any other relief that the honourable court may deem fit and just to grant

The Defendants never entered appearance and interlocutory judgement was entered against them first on 18th July, 2012. on 27th June, 2013. The matter was then fixed for formal proof. The matter proceed on 10th July, 2017 and Plaintiff only had one witness.

Evidence of Plaintiff

PW1 Joshua Bosire Ongera

He stated that he works at KCB as the manager for facilities and property management. He has been working for KCB for 21 years and is aware of this case. He filed witness statement on 25th June, 2016 and which he adopted as his evidence. He said the suit property LR 27009 (Grant NO. IRN 6177) which is approximately 3/4 of an acre, was allocated to the bank by the defunct Ol Kejuado County Council in October, 1979. The bank intended to build staff quarters thereon for the Kajiado Branch. He averred that the bank was issued with a title with a leasehold for 99 years. He produced a copy of the title in court. He claimed they have not been able to benefit from the suit property. Further that they regularly conduct valuation of the bank properties and in 2011 the bank appointed Premier Valuers to undertake valuation of the suit property and after they submitted a report, the bank discovered there was an encroachment on it. He reiterated that after discovering the encroachment they appointed their lawyers to restrain the church from encroaching on the suit property. The Church has not removed their structures which are permanent from the suit land. He sought the Court's intervention for the Defendants to be restrained from encroaching on the suit land and also to remove the structures from the suit property.

He further stated that before the bank bought the property, it had not been set aside for public use, it was not an open play ground or public utility land. The Defendants are neighbours to the suit property and there is a church, and a school that has encroached thereon.

The Plaintiff thereafter closed its case and filed written submission which I have considered.

Analysis and Determination

After perusal of the pleadings including documents filed herein and upon hearing the testimony of PW1, I find that the following are the issues for determination:

- Whether the Plaintiff is the legal proprietor of the suit land
- Whether the Defendants have encroached on the suit land.
- Whether the Defendants and or their agents/servants should be permanently restrained from trespassing on the suit land.
- Whether the Defendants and or his agents/servants should be evicted from the suit land.
- Whether the Plaintiff is entitled to the general damages.
- Who shall bear Costs of the suit.

It is not in dispute that the Plaintiff was allotted the suit land by the defunct Ol Kejuado County Council in October 1979. It is not in dispute that the Plaintiff and the Defendants are neighbours. As to whether the Plaintiff is the legal proprietor of the suit land, PW1 produced the title as exhibit '1' in court.

Section 24 (a) of the Land Registration Act stipulates that '**Subject this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**

Based on the evidence adduced above, and in relying on section 24(a) of the Land Registration Act, the Court finds that the Plaintiff has indeed satisfied the legal proviso that it is the proprietor of the suit land and hence has absolute ownership including all rights and privileges appurtenant to it.

Further in relying on Section 26(1) of the Land Registration Act which provides that:

'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. '

The Court takes cognizance of the fact that is the Plaintiff who was allotted the suit land and thereafter obtained title and was granted a 99 years lease. The Defendant never filed a Defence to challenge the said title. PW1 also produced a title deed as an exhibit in Court. The Defendant has not adduced any evidence to rebut this position. I find that indeed the Plaintiff is the legal proprietor of the suit land and the title deed is prima facie evidence to prove it.

As to whether the Defendants have encroached on the suit land, the PW1 adduced evidence that after getting the title, the bank intended to build staff quarters thereon. He averred that the bank discovered in 2011 after appointing Premier Valuers to undertake valuation of the suit property, that there was an encroachment on it. Further that the Defendants have put up permanent structures on the suit land and refused to remove them. I note that the presence of permanent structures itself on the suit land is already proof of encroachment.

General Damages

Plaintiff pleaded that the Defendants had put up permanent structures on the section of the suit land they had encroached upon. PW1 stated that the bank was unable to construct staff houses due to the Defendants' acts of encroachment. I find that indeed the Defendants' actions of encroachment and or trespass interfered with the Plaintiff's rights to occupation and enjoyment of its property. The PW1 however did not adduce evidence to grantify the loss the bank had incurred as a result of the Defendants' acts of encroachment.

In the case of **Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013) eKLR** where **P. Nyamweya J.** held:-

“...once a trespass to land is established it is actionable *per se*, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants’ trespass”

In so far as the Plaintiff did not provide evidence on the loss it had incurred but in relying on the above case, I find the Plaintiff suffered damages as a result of the Defendants' acts of trespass

Whether the Defendants' should be evicted from the suit land

From the evidence of PW1 and the photographs presented as evidence in court, I note that the Defendants have already constructed permanent structures on the Plaintiff's land without any colour of right whatsoever over the suit land. The Defendants further failed to come to court to controvert the evidence presented by the Plaintiff. I find that the Defendants should indeed be evicted from the portion of the Plaintiff 's land where they had encroached upon.

In the circumstances I find that the Plaintiff has proved its case on a balance of probability and enter judgement in its favour as prayed. I further make the following order:

a) A permanent injunction be and is hereby issued to restrain the Defendants by themselves, their servants and or agents from doing any of the following acts that is to say alienating, entering and or trespassing on to the Plaintiff's parcel of land known as LR No. IRN 27009 (Grant No. IRN 6177) and or from building any structures, heaping or dumping or storing any materials or personal effects, taking possession, continuing with any construction work and or in any manner interfering with the Plaintiff's use and quiet possession of the parcel of land known as LR No. 27009 (Grant No. IRN 6177)

b) A mandatory injunction be and is hereby issued compelling the Defendants by themselves, their servants and or agents to forthwith vacate the suit property and to remove any equipments or personal effect dumped and or stored in the Plaintiff's parcel of land and to demolish any buildings erected on the parcel of land known LR No. 27009 (Grant No. IRN 6177).

c) An eviction order be and is hereby issued against the defendants, their servants or agents from the parcel of land known as LR No. 27009 (Grant IRN 6177)

d) General damages for trespass is awarded at a nominal cost of Kshs. 500,000

e) Costs of this suit

Dated signed and delivered in open court at Kajiado this 2nd day of November, 2017.

CHRISTINE OCHIENG

JUDGE