



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MAKUENI
MISC APP. NO. 29 OF 2017
FORMERLY MACHAKOS MISC APP. NO. 160 OF 2016
BENEDICT MATHEKA MULEI.....PLAINTIFF/APPLICANT
VERSUS
GEORGE KINUTHIA.....DEFENDANT/RESPONDENT
JUDGMENT

- 1) **Benedict Matheka Mulei**, the plaintiff herein, is a resident of **Mithanga Village, Masii Location** in **Machakos County**. He claims to be the owner of **plot number 959** located at **Emali Trading Centre**.
- 2) By his plaint dated **26th February, 2016** and filed before the Principal Magistrate court on **1st March, 2016** the plaintiff prays for judgement against the defendant for a permanent injunction to restrain the defendant, servants and/or his agents from trespassing encroaching, intermeddling, constructing and (sic)any other manner of interference of the plaintiff's **plot number 959** plus costs and interest of the suit.
- 3) This suit was initially filed at the Principal Magistrate's Court Kajiado. The suit was subsequently transferred from the Principal Magistrate's Court **Kajiado** to the Environment and Land Court vide the notice of motion application dated **21st June, 2016** and filed in court on the **23rd June, 2016**. The application was allowed on the **26th July, 2017**.
- 4) The defendant has never entered appearance nor filed his defence within the prescribed period as can be seen from the affidavit of service dated the **16th March, 2016** and filed in court on the **17th March, 2016**. Hearing proceeded by way of formal proof.
- 5) During the hearing of the plaintiff's suit on the **23rd October, 2017**, he adopted his written statement dated **18th August, 2017** and filed in court on even date as his evidence. He also produced the documents in his list of documents dated **26th February, 2016** and filed in court on **1st March, 2016** as **PEXNos. 1,2,3,4(a) to (k)** respectively.
- 6) His evidence was that he is the lawful owner of **plot number 959** measuring **50 feet by 100 feet** situated in **Emali Trading Centre**. He went on to say that he acquired the plot from the defendant at a consideration of **Kshs.200, 000** vide the sale agreement (**PEXNo. 2**) dated the **26th March, 2013**. He added that he paid the transfer fees and the plot in question was transferred into his name and he has been

paying rates as and when demanded by the relevant authorities as can be seen from the rates receipts marked as **PEX No.s 4(a) to (c)** respectively.

7) The plaintiff further clarified that the original owner of **plot number 959** was **Alex Kipigat Ndaiis** who was introduced to him by the defendant. That upon introduction by the defendant, **Ndaisi** applied for transfer in the plaintiff's name. He clarified that the illegal construction by the defendant consist of a wall which the he had not allowed the defendant to construct.

8) The plaintiff revealed that the defendant, his servants and/or agents have trespassed into his property where they have proceeded to erect illegal buildings and also persistently committed wanton acts of destruction. He said that the defendants illegal acts have prevented him from quiet use and possession of his lawful property and pointed out that the defendant and his servant and/or agents have declined to heed his pleas for them to vacate the suit premises.

9) The plaintiff's counsel filed his submissions on the **8th November, 2017** same being dated the **7th November, 2017**.

10) The counsel framed three issues for determination. These were

1. Whether the defendant was properly served

2. Whether the plaintiff has proved his case on a balance of probabilities

3. Whether the plaintiff is entitled to an order of costs

11) Regarding the first issue the counsel referred the court to the affidavit of service which according to the consent it is dated **17th March, 2016**.

12) The affidavit of service is actually dated **17th March, 2016** and was filed in court on the **17th March, 2016**.

13) From the said affidavit of service, there is no doubt that the defendant was indeed served with summons to enter appearance and to file his defence as well as reply to the notice of motion application dated **26th February, 2016** but for reason best known to himself, the defendant chose not to.

14) On the issue of whether the plaintiff has proved his case on a balance of probabilities, the plaintiff's counsel referred the court to the case of **John Ndunga Kaguiya Vs Daniel Gicheha [2015] eKLR** where it was held:-

“ As there is evidence that the plaintiff is the beneficial owner of the suit property and there being no evidence to show that the defendant has any bona fide claim to the suit property, I find and hold that the plaintiff has established a case for issuance of a permanent injunction to restrain the defendant by himself, his agents, servants and/or employees from trespassing into the suit property and /or effecting developments thereon.”

15) The counsel added that the plaintiff has produced agreement of sale of the suit property and a transfer which clearly show that he is the registered owner of **plot number 959**. The counsel also relied on the case of **Appollinaris Bosire Nyamari Vs Joannes Odera Okwanyo & Another [2006] eKLR** where the court stated that:-

“There is no challenge on the plaintiff's titles and in the absence of any challenge the plaintiff is entitled to have peaceful and unhindered enjoyment of his property rights. On the basis of the evidence adduced by the plaintiff, I am satisfied the defendants have encroached and/or trespassed onto the suit property. I hold the plaintiff's suit is proved on a balance of probabilities and I

accordingly enter judgment in favour of the plaintiff...”

and asserted that the plaintiff’s ownership of the suit property has not been controverted by the defendant who failed to enter appearance and filed his statement of defence. I fully associate myself with the two authorities and I hold that the plaintiff has proved his case on a balance of probabilities.

16) On the issue of costs the plaintiff’s counsel referred the court to Judicial Hints on Civil Procedure by Retired **Justice Kuloba** where he observes that “

a. ...a successful party cannot be deprived of his costs merely because the suit proceeded ex parte or uncontested. This is to say, the fact that the unsuccessful party did not contest the case is not in itself a ground for refusal of costs but it is a factor that can be taken into account if other good reasons exist. The giving or absence of notice to sue, before a suit is instituted is a relevant consideration in awarding costs. This is a circumstance in which quite apart from misconduct, costs can be refused to a successful party.”

17) The counsel also relies on the case of **Orix Oil (Kenya) Ltd Vs Paul Kabeu & 2 others [2014]eKLR** where the court stated that :-

a. “... the court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless the conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do.”

18) I see no reason why the plaintiff who is successful in his suit should not be awarded costs and in my judgment, I will award him the same.

19) Arising from the foregoing, I hereby proceed to enter judgement for the plaintiff and against the defendants in terms of **prayers (a) and (b)** of his plaint.

Signed, Dated and Delivered on this 19th Day of December 2017

MBOGO C.G

JUDGE

In the presence of:

Mr. Hassan holding brief for Mr. Musyimi for the plaintiff present

No appearance for the defendant

Mr Kwemboi Court Assistant

MBOGO C.G

JUDGE