



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT KAPSABET**

**ELC CASE NO. 132 OF 2021**

**KIPLIMO TIGOI KAPLELEI.....PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF NANDI.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff Kiplimo Tigoi Kaplelei pleads in his plaint dated 27<sup>th</sup> July 2017, filed by Messrs. Nyekwei and Company Advocates that;

a) He is the registered owner of parcel of Land know as LR NO. 69575, L.R. NO. 78830/108 situated within Nandi Hills Town.

b) From 15<sup>th</sup> August 2015, the Defendant encroached the suit property by constructing a wall on a portion of it and by creating a road that runs through it to access sports stadium that the Defendant is constructing next to the suit land.

2. The Plaintiff as a result of the aforementioned activities by the Defendant thus prays for:-

a) Declaration that he is there lawful owner of the suit property LR 695775 L.R. No. 7830/108.

b) Declaration that the Defendants encroachment of Land parcel L/R 69575, LR NO 7830/108 was unlawful for lack of the Plaintiff's consent

c) Permanent injunction restraining the Plaintiff by itself, its agents from further encroaching or any other way, interfering with peaceful enjoyment of land parcel No. LR No. 69575 LR No. 7830/108.

d) In the alternative prays that the court compel's the Defendant to compensate the Plaintiff as per the current market price.

3. The Defendant filed an appearance but failed to file a defence. It appears that parties initially started negotiations on the compensation, but the negotiations did not materialize and hence the suit was listed for hearing.

4. On 16<sup>th</sup> June 2021, Justice S. M. Kibunja ordered the County Land value to file a valuation report within 45 days and parties were to share equally the valuers fees. However the said valuation report was not filed.

5. The matter proceeded for hearing on 8/12/2021 with the Plaintiff testifying as the only witness.

The Plaintiff testified as to the ownership of the suit property and produced a copy of the title as **P Exhibit 1**. The land is registered in his name. He equally produced a map where the property is situated as **P Exhibit 2**.

It is true from the said map, that the property is adjacent to the stadium.

6. He further produced a rent pay in slip dated 5/10/2014 in evidence as **P Exhibit 3**.

7. The Plaintiff further produced a letter dated 4/11/2014 titled Land Rent Payment Request as P Exhibit 4 this letter related to parcel No. 59635, located in Nandi Hills.

8. The Plaintiff further produced a Rates Demand Notice and Receipt for the said property.

9. It was the Plaintiff's testimony in the witness statement that he adopted that the Defendant encroached his property and has built a building thereon. That efforts to have the Defendant compensate him have failed hence the suit.

10. In cross examination, he stated that the acreage to be 0.0244 Ha, but did not have evidence of actual size taken by the Defendant, he indicated that he was shown an alternative property but the allocation process materialize hence he listed the suit for hearing.

11. He did not have a surveyor's report and pictures to show extent of encroachment.

In examination, he confirmed that the whole property had been encroached and that despite issuing a demand notice, the county did not dispute the claims as they did not file a defence.

12. The Plaintiff thus closed his case and there being no defence filed, the Defendant case was equally closed. The Plaintiff was directed to file submissions together with a valuation report, with the Defendant been granted leave to reply to the valuation report in its submission.

**PLAINTIFF'S SUBMISSION: -**

13. The Plaintiff submits that he has proven its case on a balance of probability as it produced evidence on ownership, and a demand notice to the Defendant to stop the encroachment. On the certificate of title (P Exhibit 1). The Plaintiff submits that under Section 23 (1) of the Repealed Registration of Titles Act, the regime under which he holds, the title a certificate of title is conclusive evidence that the person so registered therein as proprietor of the land and urges to Court to find and hold so.

14. On the encroachment, the Plaintiff places reliance on the valuation report annexed to his submission. On the said report shows how the property has been encroached; and gives the value of the property as kshs 6,000,000/=.

15. The Defendant did not file a defence neither did they call a witness. The Defendant has however filed submission.

16. In its submissions the Defendant disputes encroaching the Plaintiff's land, but submits that it never disputed that it wished to acquire the said land. The Defence submits that it was willing to buy the parcels of land and had started the process.

17. The Defendant further submits that even though it did not call evidence and file a defence, the Plaintiff did not

prove its case on a balance of probabilities, and in support of this Muranga **ELC Appeal No. 16/ 2017 Gichinga Kibutha vs. Caroline Nduku** where the Court held “ *it is automatic that in instances where the evidence is not controverted, the claimants claim shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.*”

18. The Defendant submits in response to the valuation report, that the same should not be used to prove encroachment, but only be used for purposes of establishing the value of the property.

**ANALYSIS AND DETERMINATION: -**

19. This matter was undefended and the Plaintiff’s evidence remains uncontroverted.

20. The Plaintiff has proved ownership if the property in dispute. The pexhibit 2 shows that the property in dispute is adjacent to the stadium. The valuation report equals shows that the Defendant encroached the Plaintiffs property.

21. In its submission, the Defendant confirms that it intended to acquire the suit property; however the acquisition did not materialize and was illegal as the procedure for compulsory acquisition was not followed.

22. The actions of the Defendant have deprived the Plaintiff of use of the property and the Plaintiff is entitled to compensation at the market value.

23. The Court finds there was an encroachment on the part of the Defendant which encroachment was illegal. The fact that the Defendant offered to negotiate for purchase and utilized the property before the purchase was finalized an illegality.

24. In reaching the above conclusion, the Court finds and places reliance on the Supreme Court decision in **Attorney General vs. Zinj Limited 2021 (KESC) 23 KLR.** Where the Supreme Court expounded on the procedure for compulsory acquisition.

25. From the facts of this case and decision above the Court finds that the decision by the Defendant to encroach the Plaintiff’s property and thereafter to initiate discussions for purchase was not only unlawful and illegal but also deprived the Defendant of his use of the property.

26. The Plaintiff has submitted for kshs 6,000,000/= as the value market value of the property, but did not lead evidence for loss of use, and did not seek General Damages for the illegal actions of the Defendants.

27. As parties are bound by their pleadings, the Court makes no award on loss of use and General damages for trespass and has the Defendant did not contest the valuation report submitted by the Plaintiff.

28. Accordingly, the Court awards the Plaintiff kshs. 6,000,000/= being the market value of the property. Having been compensated for the market value, and after the payment is made in full, the Plaintiff shall surrender and transfer the property to the Defendant.

29. The Plaintiff is also awarded costs of the suit and interests on the 6,000,000/= from the date of filing the suit.

30. Orders accordingly.

**DATED AT KAPSABET 28TH THIS DAY OF FEBRUARY, 2022.**

**HON. M. N. MWANYALE,**

**JUDGE**

**IN THE PRESENCE OF: -**

**MR. MOGIRE FOR THE DEFENDANT**

**MS. BORNE HOLDING BRIEF FOR MR. KIPKWEI FOR THE PLAINTIFF.**



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