



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ELC CASE NO. 21 OF 2021

{Formerly of Environment and Land Court at Kisii Case No. 254 of 2014}

HOSEA NYANDIKA MOSAGWE.....1ST PLAINTIFF

MILTON NDEGE ONYANCHA.....2ND PLAINTIFF

MARTIN KAPSERI ONSASE.....3RD PLAINTIFF

=VRS=

THE COUNTY GOVERNMENT OF NYAMIRA.....DEFENDANT

JUDGMENT

Upon finding that the Defendant had wrongly encroached on the Plaintiff's parcel of land after adopting the Land Registrar/County Surveyor's Report dated 26/03/2021 which disposed of prayer number (a) of the Amended Plaint, the court was left with the responsibility of determining prayer (b) of the said Amended Plaint that reads as follows: -

The Plaintiff's prayers for Judgment against the Defendant for:

(b) Damages for trespassing parcels of land known as WEST MUGIRANGO/SIAMANI 1561 and WEST MUGIRANGO/SIAMANI/1912.

(c) costs of the suit.

It is not in doubt that the Defendant, according to the Land Registrar's Report, did encroach on the Plaintiff's property and paragraphs 3 and 4 of the County Surveyor reads as follows: -

3) The ground measurement showed that 9 metres access road in dispute was created by the Respondent (Defendant) excavating sections of Plot Nos. WEST MUGIRANGO/SIAMANI/1561 and 1912.

4) The service road serving the Plots has been diverted from its true position as per the RIM to the present position that is being disputed.

According to the Amended Plaint the excision was carried out on 15th June 2014, more than 7 years now. The Defendant entered appearance on 17th July, 2014 but has never filed Defence. Since the aforesaid excision of the road, the Plaintiffs have been denied the use of the 9 metres wide parcel of land. The same cuts across the entire parcel of land, an acreage of 7,650 square feet. An ablation block and a concrete slab were demolished. In the same area that was converted to a road, the rich agricultural soil was dug out and replaced with foreign rocky soils. There is no doubt that the Plaintiffs suffered damage as is shown above.

This court has been urged to award General Damages for trespass and for the demolitions. As to the demolitions, this court cannot award the same since these are Special Damages which must be specifically pleaded and proved and since the same were not pleaded at all this prayer is disallowed. Special Damages are capable of being computed at the time of filing suit and cannot therefore be left and then submitted on at the time of Submissions.

As to General Damages for trespass, **In Park Towers Ltd...Vs... John Mithamo Njika et al (2014) eKLR**, the Court held that: -

"I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or

loss to be awarded damages. The Court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case.”

Trespass has been defined as **“any unjustifiable intrusion by one person upon the land in possession.”**

In the case of **Philip Aluchio...Vs...Crispinus Ngayo [2014] eKLR**, the Court held as follows:-

“..... The plaintiff is entitled to General Damages for trespass. The issue which arises is as to what is the measure of such Damage. It has been held that the measure of Damages for trespass is the difference in the value of the Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is lessThe Plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess General Damages for trespass...”

In the case of **WILLEDEN INVESTMENT LIMITED =VRS= KENYA HOTEL PROPERTIES LIMITED HCC NO. 367 OF 2000.**

“The court held that there is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstance in each case”.

There is no doubt that the Defendant did enter upon the suit land and its actions caused interference with the Plaintiff’s use and occupation of the suit land. However, the Plaintiffs did not provide the value with which the Court is to work nor did they provide any Valuation Report of the land where the Defendant trespassed. There is no Valuation Report to show the extent of damage.

Nevertheless, Trespass is actionable *per se*. Additionally, the Plaintiffs must have suffered considerably for being kept out of the use of their land and also they will be forced to unearth the rocky soil, transport it out of the land and get a place far away to dump it, get and pay for a dumping license from the same Defendant and then get good clay or black cotton soil at a cost and have it transported to the suit land in order to restore the land to its original condition before the intrusion. The Court also takes into account the Defendant’s mitigating factor that this is a case where the County Government of Nyamira was carrying out the exercise for the benefit of all the surrounding adjacent parcels for the owners to continue using the access road. It is true that the Defendant meant well. But good intentions or otherwise, the Law ought to be obeyed and people’s constitutional rights to their properties respected.

The Court therefore proceeds to award a figure of **Kshs. 500,000/=** considering the length of time that the trespass has occurred.

I must also point out here that the exercise such as the one carried out here by the Defendant causes a lot of pain and anguish and must be discouraged at whatever cost as long as the cost is lawful. I will therefore award the sum of Kshs. 100,000/= additional on General Damages for pain and suffering, mental torture and distress. The Plaintiffs and their families have been put in a position of fear where in future any sound of bulldozers passing anywhere near their properties will cause shivers in their nerves and they may have to live with this feeling for the rest of their lives. The Plaintiffs will also have the costs of this suit and interest at court rates from the date of filing this suit till payment in full.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 16TH DAY OF DECEMBER, 2021.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Plaintiffs: Mr. Momanyi

Defendant: Mr. Nyachiro