



Kariuki v Embakasi Ranching Company Limited & another (Environment & Land Case 517 of 2015) [2023] KEELC 22444 (KLR) (20 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22444 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 517 OF 2015
LC KOMINGOI, J
DECEMBER 20, 2023**

BETWEEN

PETER NJENGA KARIUKI PLAINTIFF

AND

EMBAKASI RANCHING COMPANY LIMITED 1ST DEFENDANT

SIMON MBUGUA NDUATI 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated 9th June 2015 the Plaintiff claims that he is the owner of plot number G35 and G35B. Having purchased plot number G35, the 1st Defendant awarded him plot number G35B as a bonus plot on 28th July 1993. The 1st Defendant later revised the said plot G35B to Plot No. N370 then to Parcel No. 8545 and fraudulently sold it to the 2nd Defendant in total disregard that the plot had already been allocated to him. After the allocation the 2nd Defendant trespassed onto it and began undertaking developments. On or about 23rd July 2013 the Plaintiff reported the said trespass vide OB Number 16/23/7/2013 and had been following up with the 1st Defendant to resolve the dispute in vain.
2. The Plaintiff particularised fraud against the 1st Defendant as: failing to seek consent from the Plaintiff before changing Plot No. G35 to Plot No. N370; failing to seek Plaintiff's approval before transferring the plot to the 2nd Defendant; failing to reverse the purported sale and transfer to the Plaintiff.
3. In paragraph 11 of the plaint the particulars of trespass against the 2nd Defendant were given as; continued occupation of the suit plot even after being notified that the sale was illegal; failing to vacate the suit plot; illegally purchasing a plot that was not available for sale.
4. The Plaintiff thus claimed that he has suffered damage by being denied his right to quiet possession and usage of the suit property and prayed for:
 - a. General damages;



- b. Special damages;
 - c. Cost of the suit;
 - d. Interest on a) b) and c) above at the court's rates from the date of this suit until payment in full.
 - e. Any other relief that this Hon. Court may deem fit and just to grant.
5. The 1st Defendant in its Statement of Defence dated 16th July 2019 confirmed that the Plaintiff was the lawful allottee of plots G35 and G35B but stated that the plot the Plaintiff was claiming to be G35B was plot V15216 which had been regularly allotted to the 2nd Defendant. The 1st Defendant deponed that they had tried to engage the Plaintiff to show him the actual location of his plot G35B but he had been adamant.
 6. The 2nd Defendant in his statement of defence dated 16th July 2019 contested the claim indicating that he was the lawful allottee of property known as Plot No. V15216 (LR Nairobi/Block 136/8545) and not plot number G35B as alleged by the Plaintiff. He stated that he was shown the actual location of his plot by the 1st Defendant and was therefore not a trespasser.

Evidence of the Plaintiff

7. PW1, Peter Njenga Kariuki adopted his witness statement dated 9th June 2015 as part of his evidence in chief and produced five (5) documents which were marked as P. Exhibits 1-5. He stated that he was a retired accountant and owner of plots G35 and G35B. He stated that he purchased plot G35 in 1975 and was issued documents as proof of it and in 1993 he was allocated plot G35B as a bonus plot. He had been in possession and developed the properties until 2013 when he found his perimeter wall had been brought down by the 2nd Defendant. He reported the matter at Ruai Police station vide OB No. 16/23/7/2013 as well as to the 1st Defendant. The 1st defendant indicated that they would give him another plot of land but he refused and demanded to get his original plot back which the 1st Defendant was declined to do.

Evidence of the Defendants

8. DW1, Simon Mbugua Nduati, the 2nd Defendant, a businessman adopted his witness statement dated 16th July 2017 as his part of his evidence in chief and produced four (4) documents as exhibits. They were marked as D. Exhibits 1 to 4. He stated that he bought plot number V15216 from the 1st Defendant on 30th July 2013 and was issued with a share certificate marked as D. Exhibit 1. He took possession and began developing it. The plot was later converted to Block 136/8545. On 5th July 2016 he sold the plot to one Reuben Gitogo vide the sale agreement produced as D. Exhibit 2. The 1st Defendant's surveyor then took him and Reuben to the site location of the property and pointed out the beacons. He indicated that he paid Kshs. 20,000 for the site visit as shown by the receipt of payment marked D. Exhibit 3. The said Reuben Gitogo then paid Kshs. 150,000 to the 1st Defendant as fees for transfer of the plot as shown on the receipt marked D. Exhibit 4 and he was thereafter issued with a non-membership certificate of plot ownership.
9. On cross examination he stated that he purchased the property in 2013 for a consideration of Kshs. 1,080,000 although they did not have a written sale agreement nor proof of payment of the purchase price. He was then taken to the site location by the 1st Defendant's surveyor and he began developing it once he got a go ahead from the 1st Defendant. DW1 was shown Plaintiff's documents and the 1st Defendant's acknowledgement that the Plaintiff was the lawful allottee of plot number G35B to which he responded that he was neither aware whether his property and the said G35B was one nor had



he been informed of any dispute regarding the plot. However, in 2015 they were summoned by the 1st Defendant where the Plaintiff was to be shown the actual location of his plot. He stated that the 1st Defendant consented to his sale of the suit property to one Reuben Gitogo as per the documents produced including the sale agreement which was generated by the 1st Defendant. He stated that in 2016 he sold the plot for Kshs. 3,500,000 indicating that the value of the said plot would probably be much higher now.

10. On re-examination he reiterated that when the plot was allocated to him in 2013, it was vacant and he put up a perimeter fence and started developing it. It was until later that he learnt that someone else was claiming it. He maintained that he together with Plaintiff appeared before the 1st Defendant and he was declared the legitimate owner of the suit property and the Plaintiff was to be shown his plot.
11. DW2 Jack Kamau the 1st Defendant's surveyor adopted his witness statement dated 16th July 2019. He stated that he was a registered surveyor who had been working with the 1st Defendant from the year 2003. He stated that plot V15216 belonged to the 2nd Defendant. He also confirmed that the Plaintiff had on several occasions visited their offices and but declined to be shown his actual plot and insisted that the 2nd Defendant's plot was his. He confirmed that Plot No. G35B existed but it was not at the same place as G35. He also confirmed that the issue of bonus plots began in 1993.
12. On cross examination he stated that bonus plots were issued from the year 1993 and were not at the same place with the original plots because they were not being allocated sequentially and did not know the criteria that was used in the allocation. He confirmed that he showed the 2nd Defendant the location of his plot and he was accompanied by another surveyor and a Director. He maintained that the Plaintiff was to be shown his actual plot but he declined to appear. On being shown the documents held by the Plaintiff, he pointed out that the Plaintiff's documents were different because he was a shareholder and the 2nd Defendant was not. He also confirmed that the bonus plot G35B was signed by the then Chairman, Geoffrey Muchiri. He stated that he was not sure whether there was a sale agreement between the 1st and the 2nd Defendants. He was also not aware if the 2nd Defendant had sold his plot.
13. On re-examination he confirmed that the Plaintiff was the owner of plot number G35B but he was not willing to be shown his actual plot and the suit should be dismissed because the issue was resolved.
14. This marked the close of the Defendants case.
15. At the close of the oral testimonies, parties were directed to file final written submissions.

The Plaintiff's Submissions

16. In the submissions counsel for the Plaintiff submitted on the following five issues summarised here below.
17. Whether the Plaintiff was the lawful proprietor of the suit property, counsel submitted that the Plaintiff was the rightful proprietor of the suit property as guaranteed by Sections 24, 25 and 26 of the [Land Registration Act](#) having adduced evidence of how he acquired bonus plot G35B issued to him by the 1st Defendant on 28th July 1993. Counsel added that the issue of the bonus plot was not contested by the 1st Defendant.
18. On whether the 1st Defendant illegally and fraudulently transferred the Plaintiff's property to the 2nd Defendant, counsel submitted that the element of fraud was proved because the 1st Defendant had for 20 years been aware of the Plaintiff's possession of the suit property. They however, went ahead and allocated it to someone else in 2013. This notwithstanding, the 2nd Defendant did not produce



proof of the alleged sale or payment of the purchase price which could only be inferred to mean the 2nd Defendant colluded with the 1st Defendant to acquire title to property that belonged to someone else which was against the established principles of sanctity of title as was held by the Court of Appeal in *Joseph N.K. Arap Ng'ok v Moiyo Ole Keiwua & 4 others* [1997] eKLR.

19. On the issue of continuous trespass, counsel submitted that as per Section 3(1) of the *Trespass Act* and elaborated by Kemei J. in *Eliud Njoroge Gachiri v Stephen Kamau Nganga* [2018] eKLR the 2nd Defendant had persistently continued to occupy the Plaintiff's land which action could not be compensated by general damages alone but also by the 2nd Defendant being ordered to give vacant possession for depriving the Plaintiff of his rightful ownership and possession.
20. Counsel thus submitted that the Plaintiff was entitled to damages and the other orders sought for the above unlawful and illegal acts against him.
21. The Defendant's counsel sought and was granted twenty one (21) days to put in submissions, on the 21st September 2022 on the 9th November 2022 the defence counsel still had not filed submissions. By the time of writing this judgement the Defendant's submissions are not on record.

Analysis and Determination

22. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited. The issues for determination are:
 - i. Whether the Plaintiff is entitled to the relief of special and general damages as prayed.
 - ii. Who should bear costs of the suit?
23. The Plaintiff asserts his rightful ownership of property G35B, which was allotted to him as a bonus plot adjacent to his existing plot G35 back in 1993. However, the 1st Defendant, while acknowledging the Plaintiff's ownership of plot G35B, contests its location, insisting it is situated in a different area. According to the 1st Defendant, the plot in question belongs to the 2nd Defendant, who purchased it in 2013.
24. Evidence presented by the Plaintiff includes an allocation letter for plot G35 dated 28th November 1982 and a payment receipt from 28th March 1990, bearing the inscription of plot G35B. The 2nd Defendant failed to produce evidence of the acquisition of the contested plot, save for an ownership certificate dated 24th June 2013, indicating payment for survey, engineering, and registration fees. Notably absent were documents of the purchase price paid or a sale agreement. Additionally, documents produced reflected the purported transfer of the disputed plot to Reuben Mwangi Gitogo in 2016, during the pendency of this legal action. And similarly, without evidence of payment of purchase price.
25. The 1st Defendant's claim that the Plaintiff's plot G35B is situated in a different place and not the location of the dispute raises questions about how the Plaintiff maintained possession of an alleged wrong property from 1993 to 2013 without notice or correction by the 1st Defendant. Only for them to appear from their deep slumber, dispose of the property and purport to show the Plaintiff another plot that allegedly should be his. This casts doubt in the court's mind about the assertion of the alleged wrong location of the Plaintiff's plot and I find that the Plaintiff is entitled to the property he had held for over two decades.
26. Secondly, as already indicated, the 2nd Defendant did not adduce evidence of how he acquired the suit property in 2013. The only evidence adduced was transfer of the property from him to the said Reuben Gitogo without proof of payment of consideration.



27. Thirdly, this suit was filed in 2015, but the Defendants disposed of the suit plot in 2016 during pendency of the suit. It is on record that the 1st Defendant was duly served with notice of the suit and several hearing notices. This action raises suspicions regarding the potential rush by the Defendants to divest themselves of the subject matter of the lawsuit. Could this have been a ploy to cover the illegally acquired land on the guise of ‘*bona fide* purchaser for value?’
28. The plaintiff has sought redress for special and general damages against the Defendants for violation of his right to own the suit plot and ruining it. It is trite that special damages should not only be pleaded but also proved as was held by the Court of Appeal in *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others* [2021] KECA 328 (KLR) (17 December 2021) (Judgment) and *Hahn v Singh* [1985] eKLR “... special damages which must be not only claimed specially but proved strictly... The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves....”
29. Further, the Court of Appeal in *Jogoo Kimakia Bus Services LTD v Electrocom International LTD* [1992] eKLR elaborated as follows:
- “The distinction between general damages and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings.”
30. I find that the Special damages have not been proved. As such, the prayer for special damages fails.
31. On whether the Plaintiff is entitled to general damages, the courts have the discretion to award this based on circumstances and merits of each case as was held by the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR: “...it is not in doubt under common law principles, that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, such as tort, where compensation of personal loss is at issue...” The same court in *Ugenya Bus Services v Gachoki* [1982] eKLR went on to outline how such a decision should be arrived at stating: “...General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is very heavy task. When I ponderingly struggle to seek a reasonable award I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can....”
32. From the above authorities, the court having determined that the Plaintiff was entitled to the plot he was dispossessed of by the Defendants finds that he is equally entitled to an award of general damages for the loss and damage he suffered together with costs for the suit.
33. According to *Black’s Law Dictionary 8th Edition*; Trespass is defined as;
- “An entry in another’s ground without a lawful authority and doing some damage, however inconsiderable to his real property”.
- A continuing trespass is defined as:-
- “A trespass in the nature of a permanent invasion on another’s rights, such as a sign that overhangs another’s property.”



34. It is trite law that trespass to land is actionable per se (without proof of any damage)
In the case of *Park Towers Ltd Vs. John Mithamo Njika & 7 Others* (2014)eKLR Mutungi J stated;
“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.....”
35. It is not in dispute that the plaintiff has suffered loss and damage. He has been denied quiet enjoyment of his property through unwarranted interference of his property by the defendants.
I award Kshs. 1 million being general damages which I think is adequate compensation.
36. In conclusion I find that the plaintiff has proved his case as against the defendants on a balance of probabilities.
37. According Judgement is entered for the plaintiff as against the Defendants jointly and severally as follows;
- a. That the Plaintiff is entitled to the suit property being Plot No. G35B at the location it has been since 1993.
 - b. General damages Kshs.1 million with interest at court rates from the date of filing suit till payment in full.
 - c. Costs of the suit and interest.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 20TH DAY OF DECEMBER 2023.

L. KOMINGOI

JUDGE.

In the presence of;

N/A for the Plaintiff.

N/A for the 1st Defendant.

N/A for the 2nd Defendant.

Court Assistant – Mutisya.

