



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 812 OF 2012

MIMOSA INVESTMENTS LIMITED.....PLAINTIFF

=VERSUS=

TOM ONYANGO.....DEFENDANT

JUDGEMENT

1. By a Plaint dated 31st October 2012 the Plaintiff seeks judgment against the Defendant for:-

a) Issuance of vacant possession of the suit property by the Defendant.

b) Mesne profits earned by the Defendant while in illegal occupation of the suit property from the date of such illegal entry to the date of vacant possession.

c) Rent payable to the Plaintiff on the premises occupied by the Defendant from the date of such illegal entry until date of vacant possession.

d) General damages for trespassing the suit property.

e) General damages for causing nuisance on the suit property.

f) Costs of the suit and interest thereon.

g) Such further or others orders as to the court may deem just.

2. The Plaintiff's case is that it is the proprietor of the land known as **L.R No.1870/V/63**. It was the Plaintiff's case that in 1990, it granted a revocable license to one Ashok Sood (now deceased) to occupy the suit land and the dwelling house erected thereon but without the Plaintiff's right, he allowed the Defendant to live with him on the suit property where the Defendant occupied the servants' quarter of the main house. Upon Mr. Ashok's death, the Defendant refused to vacate the suit property.

The Defendant's case.

3. Vide his statement of defence dated 14th January 2014. The Defendant denied that the Plaintiff was the registered proprietor of the suit land and contended that the registered proprietor was Mr. Ashok Kumar Sood (deceased) who was his employer. It was his case that Mr. Ashok was considering to transfer the suit title to him but he died before effecting the transfer and that he left the title to the suit land in the Defendant's custody.

4. The Plaintiff filed an application dated 19th November 2012 brought under section 1A, 1B and 3A of the Civil Procedure Act, order 51 rule1 of the Civil Procedure Rules and all enabling provisions of the law.

5. It sought the following orders:-

3. That pending the hearing and determination of this suit, this honourable court be pleased to issue injunctive orders restraining the respondent whether by himself, his servants, agents or howsoever from destroying the suit property, putting up temporary structures on the suit property, cutting down trees on the suit property, or abusing and/or wasting the suit property in anyway whatsoever.

5. *That pending the hearing and determination of this suit, this honourable court be pleased to issue mandatory orders compelling the Respondent whether by himself his agents, servants or howsoever otherwise to remove all structures they have illegally erected on the suit property and do all necessary repairs to return the suit property to the position it was before the embarked on its abuse and/or waste.*

7. *That pending the determination of this suit, the honourable court be pleased to issue mandatory order compelling the respondent, his agents, servants or whatsoever otherwise in illegal occupation of the suit property to immediately vacate the suit property and with the help of the court bailiff to put the plaintiff in possession.*

8. *That the honourable court be pleased to issue an order directing the OCS Kabete Police Station and/or under his direction to give assistance to the Court Bailiff in enforcing the order in prayer no 6 and/or 7 above.*

6. Upon considering the said application, honourable J Mutungi in his ruling dated 20th September 2013 granted the following orders among others:-

(i) *“That a mandatory injunction is hereby issued compelling the respondent whether by himself, his agents, servants or howsoever otherwise to remove all structures they have illegally erected on the suit property and do all necessary repairs to return the suit property to the position it was before they embarked on its abuse and/or waste”.*

(ii) *“That a mandatory order is hereby issued compelling the respondent, his agents, servants or whosoever otherwise in illegal occupation of the suit property to immediately vacate the suit property and with the help of the court bailiff to put the plaintiff in possession.”*

(iii) *“That an order is hereby issued directing the OCS Kabete Police Station and/or under his direction to give assistance to the court bailiff in enforcing the order in prayer (6) and (7) above”.*

7. It is on record that the Defendant appealed against the said ruling which appeal was dismissed.

8. Before PW1 testified, counsel for the Plaintiff told the court that they were not pursuing prayers (2) and (3) of the Plaintiff. They only wished to pursue the prayer for damages for trespass plus costs of the suit.

The Plaintiff's evidence

9. PW1, a director of the Plaintiff testified that the Plaintiff is the duly registered proprietor of the suit land and has been paying land rent and land rates for the property as required.

10. He further testified that the Plaintiff's directors allowed one Ashok Sood to occupy the residential house erected on the suit property out of good will as the Plaintiff did not require rent from him.

11. He stated that Mr. Ashok passed away on 14th September 2011 and it was then that the Plaintiff became aware that the Defendant was residing in the servants' quarters' extension that was erected on the suit property and it became clear that Mr. Ashok had allowed the Defendant to occupy part of the suit property without the Plaintiff's authority.

12. He further stated that the Plaintiff attempted on various occasions to have the Defendant peacefully hand over vacant possession of the suit property but the Defendant adamantly refused to vacate and issued threats of violence to the Plaintiff's agents who requested him to vacate the suit property. He added that the Defendant became a constant cause of nuisance to the tenants of the Plaintiff who were brought in to occupy the main house of the suit property and he ignored the Demand Notice to vacate dated 16th October 2012. He only vacated when evicted by this court's orders issued on 20th September 2013 and affirmed by the Court of Appeal.

13. He stated that the Defendant's action of intentionally denying the Plaintiff access to and use of its property were malicious and aimed at intimidating the Plaintiff and its tenants and infringing on their rights to own, use and enjoy the suit property and therefore he is wholly liable for losses the Plaintiff has incurred as it had trouble in renting out the suit property as tenants were not willing to live on the suit property with all the disturbance and threats from the Defendant.

14. It was his testimony that as a result of the Defendant's actions, the Plaintiff has suffered great loss and damage both financially and in reputation as a landlord. He stated that the Plaintiff's claim is for *mesne* profits for the period the Defendant occupied the suit property unlawfully as well as the rents payable on the suit property which the Plaintiff was denied as a result of the Defendant's acts of causing nuisance.

15. At the close of the testimony PW1 Atulesh Jayantlal Shah, the Plaintiff tendered final written submissions.

The Plaintiff's submissions

16. They are dated 13th October 2021. The Plaintiff submitted that in a ruling delivered on 20th September 2013; Hon. Mr. Justice Mutungi ordered delivery of vacant possession summarily. It added that the Defendant lodged an appeal of the said ruling being **Civil Appeal No.30 of 2014 Nairobi; Tom Onyango v Mimosa Investments Limited** and the court of appeal upheld the ruling by Justice Mutungi.

17. It submitted that having obtained vacant possession of the suit property, it now seeks damages for trespass and nuisance which it has

proved by virtue of the ruling of the J. Mutungi and the judgement of the Court of Appeal.

18. It relied on the case of **Nakuru Industries Limited v SS Mehta & Sons [2016] e KLR** and the case of **Rhoda S Kiilu v Jiangxi Water and Hydropwer construction Kenya Limited [2019] eKLR** to submit that general damages of Kshs.1,500,000/= would suffice to compensate the Plaintiff's injury.

19. It urged the court to consider the court's finding in **Philip Aluchio v Chrispinus Ngayo [2014] e KLR** in measuring the general damages to be awarded.

20. I have considered the pleadings and the evidence on record. I have also considered the written submissions filed on behalf of the plaintiff. The issues for determination are:-

(a) Whether the Plaintiff is entitled to damages for trespass.

(b) If so, how much?

(c) Who should bear costs of this suit?

21. PW1 Atulesh Jayntlal Patel told the court that after the Plaintiff had bought the suit property from Nationwide Finance Company Limited, it allowed Mr. Ashok Kamar Sood to remain on the suit property with its permission. The Defendant who was Mr. Ashok's houseboy was allowed to reside at the servants quarter but without permission of the Plaintiff.

22. PW1 further stated that Mr. Ashok moved to the apartment after he was attacked by thugs. He promised to get the defendant alternative accommodation. When Mr. Ashok passed on the Defendant was asked to vacate the suit property but he kept asking for more time.

23. This court in its ruling of 20th September 2013 summarily found the Defendant was a trespasser on the suit property. I find that the Plaintiff is entitled to damages for trespass.

24. Despite being served the Defendant did not adduce any evidence or file submissions on the issues of damages. In the case of **Park Towers Ltd vs John Muthamo Njika & 7 Others [2014] e KLR** Mutungi J stated as follows:-

“I agree with the learned judges that where trespass is proved a party need not prove that he suffers any specific damage or loss to be awarded general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case”.

25. In **Clerk & Lindsell on Torts 17th Edition paragraph 1701**. Trespass is defined thus:

“An unjustifiable entry by one person upon the land in possession of another.....”

26. The Tort of trespass is actionable without any proof of damage. In the case of **Philip Aluchio vs Chrispinus Ngayo [2014] eKLR** E Obaga J 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 Plaintiffs property immediately after the trespass or the cost of restoration whichever is less.....” See Hostler vs Green Park Development Co 986 S. W. 2d 500 (No App. 1999).

27. Similarly in **Nakuru Industries Ltd vs S. S. Mehta & Sons [2016] eKLR** the court held as follows:-

“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found that the defendants did trespass on to the plaintiff's land and conducted some excavation. For this reason I award the plaintiff damages in the amount of Kshs.500,000/- (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full”.

28. In the instant case the Plaintiff has suggested Kshs.1,500,000/- as sufficient to compensate the plaintiff's injury. I have considered the circumstances of this case and I award Kshs.1,000,000/- which I think is reasonable.

29. Accordingly judgment is entered for the Plaintiff as against the Defendant as follows:-

(a) General damages for trespass Kshs.1,000,000/- plus interest from the date of this judgment until payment in full.

(b) The Plaintiff is awarded costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED THROUGH VIRTUAL COURT AT NAIROBI THIS 10TH DAY OF FEBRUARY 2022.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Mwangi for the Plaintiff

No appearance for the Defendant

Steve - Court Assistant