



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 5 OF 2009

WAMBUI WAGACHA.....1ST PLAINTIFF

MERCY NJERI NGOIMA.....2ND PLAINTIFF

VERSUS

DOMINIC KINYA NGABA.....DEFENDANT

S/SARAH WANJIKU KINYA.....INTERESTED PARTY

JUDGMENT

By a Plaint dated the 9th December, 2008 and filed in Court on 16th January, 2009, the Plaintiffs pray for Judgment against the Defendant for:

a) An eviction order against the Defendant and an order of permanent injunction prohibiting the Defendant by himself, servants and or agents or any other person claiming under him from trespassing, encroaching or in any other way interfering with the Plaintiffs parcels of land number 20604/69 and 20604/70 in Mavoko Municipality.

b) General and aggravated damages for trespass.

c) Costs of this suit.

d) Any other or further order as the Honourable Court may deem expedient to grant.

The Defendant filed a Statement of Defence dated the 9th March, 2009 where he denied the averments in the Plaint except for the descriptive. He denied the alleged trespass and insisted he is the rightful purchaser of the property wherein he had constructed his house, as the said property was identified to him by the seller. He explained that he is entitled to two plots in the same area under the original title creating the said plots and is ready and willing to transfer the same to the Plaintiffs. He reiterated that the prayers sought in the Plaint are oppressive and meant to prejudice him to incur losses that were not occasioned by his own acts, which fact is within the Plaintiffs' knowledge.

The Plaintiffs filed a reply to Defence insisting the Defendant was all through aware he had encroached onto their parcels of land and despite warnings including protests, he defiantly proceeded with construction thereon and adamantly refused to vacate.

On 4th September, 2013, the Court vide an Application dated the 16th June, 2009 entered summary judgement as against the Defendant and proceeded to issue a Decree dated the 1st September, 2016 as well as an eviction order dated 7th November, 2016, to that effect.

The matter then proceeded for hearing where the Plaintiffs called two witnesses while the Defendant had none.

Evidence of the Plaintiffs

The Plaintiffs claimed they are the registered proprietors of land reference numbers 20604/69 and 20604/70 hereinafter referred to as the 'suit lands' and that they hold Certificates of Title to that effect. They claim the Defendant who is well known to them had purchased two adjacent plots from the suit lands but trespassed on their land and commenced construction thereon. Further, despite confirmation by a surveyor, he denied encroaching on the suit lands and continued construction thereon. They were emphatic that the Defendant declined to heed their calls to desist from encroaching on the suit lands. They highlighted the proceedings herein and confirmed that on 4th September,

2013, the Court had entered summary judgement against the Defendant. Further, that they instructed Pyramid Auctioneers to undertake eviction of the Defendant from suit lands and spent Kshs. 100,000 for the said exercise. Further, after eviction, they have spent Kshs. 168,000 as monthly fee for security as at 19th November, 2018 and Kshs. 46, 710 as outstanding land rates which the Defendant had not paid. They averred that the Defendant who had constructed on both plots has failed to demolish his structure. Further, they hired a Valuer to undertake valuation of the suit lands. To buttress their averments, they produced the following documents as exhibits: Valuation Report by Amazon Valuers Limited with respect to the suit lands; Copies of various Correspondence dated 1st July, 2004, 1st August, 2004, 11th August, 2004; Copies of a receipt from Pyramid Auctioneers dated 11th December, 2013 for Kshs. 50,000; Copy of Invoice dated 29th December, 2016 for Kshs, 78,000 and Receipt for Kshs. 78,000 dated 19th November, 2018 from Inter Security Services Limited; Copies of Land Rates Payment Receipts in respect to suit lands for Kshs. 46,710 and Copy of letter dated 19th November, 2018 including ID Card of Wycliffe Dechia Inyambuka confirming payment of Kshs. 168,000 for provision of security services on suit lands.

The Defendant never tendered evidence to controvert the Plaintiffs' averments.

The parties later filed their respective submissions.

Analysis and Determination

Upon consideration of the Complaint, Defence, Ruling dated 4th September, 2013; Witnesses Testimonies and rivaling submissions, the following are the issues for determination:

- ***Whether the Plaintiffs are entitled to general including aggravated damages for trespass.***
- ***Whether the Plaintiffs are entitled to mesne profits.***
- ***Who should bear the costs of this suit.***

The Plaintiffs in their submissions contended that they are entitled to damages for trespass and mesne profits which the Defendant received or might have received as they were the registered proprietors of the suit lands. They further submitted that aggravated damages are awarded where the Defendant's conduct is sufficiently outrageous to merit condemnation and would serve to compensate the claimant. Further, that they were entitled to reimbursement of incidental costs. To buttress their averments, they relied on the following decisions: ***Park Towers Ltd V John Mithamo Njika & 7 Others (2014) eKLR; Visor Saw Mills Ltd Vs Attorney General (1997) eKLR; Duncan Nderitu Ndegwa V Kenya Pipeline Company Limited & Another (2013) eKLR; Attorney General V Halal Meat Products Limited (2016) eKLR; Rookes V Barnard (1964) AC 1129; Thompson V Commissioner of Police of the Metropolis (1998) QB 498; Cassel & Co V Broome (1972) AC 1129 and Nazmudin Shar & 3 Others V Kenya Power & Lighting Co. Ltd (2018) eKLR.***

The Defendant in his submissions insists he bought the suit land in 2000 but the dispute was brought to his attention in 2009 after he finished construction thereon. Further, that the Plaintiffs have not acted in good faith. He claims he was not granted an opportunity to present evidence and this creates an imbalance on the scales of justice. He admits suggesting an out of court settlement with commensurate assessment of the value of the suit lands for compensation but the appointed Valuer was unable to inspect the suit lands as he was denied access by the Plaintiffs. He further submits that the monetary claims sought by the Plaintiffs are not plausible as they have not demonstrated what pecuniary loss they have suffered over the years to warrant compensation. He reiterates that the Plaintiffs do acknowledge that he constructed the house on the suit lands and since eviction, he continues to suffer loss and damage.

I will deal with all the issues jointly.

In this instance, I note on 4th September, 2013, summary judgement was entered against the Defendant and the Court proceeded to issue a Decree dated 1st September, 2016 as well as eviction order dated 7th November, 2016. I note the Defendant did not present any evidence to confirm if he preferred an appeal, hence at this juncture, the only issue for determination is assessment of general including aggravated damages. It is not in dispute that the Plaintiffs are the owners of the suit lands and I hence find that they are entitled to all rights and privileges belonging or appurtenant thereto and to protection of the law as envisaged in Sections 24, 25 and 26 of the Land Registration Act. It is further not in dispute that the Defendant has trespassed on the suit lands and constructed thereon culminating in the Plaintiffs' inability to utilize them. PW1 in her testimony claimed they severally tried to stop the Defendant from constructing on the suit lands but he declined to heed their call. It further emerged in evidence that the Defendant has since been evicted from the suit lands although the house he erected thereon still stands. I note the Defendant despite filing his Statement of Defence failed to call any witnesses to testify to challenge the evidence of the Plaintiffs and their witnesses as well as confirm his assertions. In the case of ***Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007, Ali-Aroni, J.*** favourable cited with approval the decision in ***Edward Muriga through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997***, where it was held that even if a party filed a Defence but failed to adduce evidence to support the assertions made therein, the evidence of the Plaintiff hence remained uncontroverted. In the circumstance, I find that the Plaintiffs evidence herein is uncontroverted.

On the issue of trespass, the same has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. ***See, Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph, 18-01.***

Section 3 of the Trespass Act provides that:

- “(1)Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.***
- (2)Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had***

reasonable excuse or the consent of the occupier shall lie upon him.”

From the evidence before court which was uncontroverted, it emerged that the Defendant had trespassed on the suit lands and erected a permanent structure thereon. In the case of *Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013) eKLR, P. Nyamweya J.* held that:-

“As regards the award of mesne profits, these are special damages which not only need to be pleaded but also proved. The Plaintiff did not bring any proof of the basis for the mesne profits of Kshs. 50,000/= per month, but brought evidence to show that the land was in a state that was unusable, and it therefore could not provide any sort of profits.....once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants’ trespass.”

While in the case of *Attorney General v Halal Meat Products Limited [2016] eKLR*, the Court of Appeal observed that:

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another... As was succinctly observed by this Court in Juliet Karisa -v- Joseph Barawa & Another - Civil Appeal No. 108 of 1988 (Unreported);

“Expert evidence is entitled to the highest possible regard and though the court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, such evidence must not be rejected except on firm grounds.”

It is our considered view that the reasons given by the trial Judge for adopting the respondent’s valuation and rejecting the respondent’s are cogent. ‘

See also the decisions of *Rookes V Barnard (1964) AC 1129*.

Since the Defendant has not demolished the structure from the suit lands, I find that the Plaintiffs are indeed entitled to general and aggravated damages as well as mesne profits since they are unable to utilize the same. PW2 who is a registered Valuer in his testimony confirmed that he had undertaken valuation of the suit lands and prepared a Report which he produced as an exhibit. I note in the said Valuation Report he returned a Value of Kshs. 3million for each of the two plots, which figure, I will not award as the said plots still belong to the Plaintiffs. He further, returned a value for Kshs. 5,000,000 on development, which I will also not award as the said developments were undertaken by the Defendant. Further, I will disregard the issue of insurance of Kshs. 5, 000,000/=.

On the issue of demolition costs of Kshs. 1 million, I will award the same to the Plaintiffs as they will be forced to incur expenses in the event they proceed to demolish the structure on the suit lands. On the issue of rental income, I note he considered the said rental income from January, 2000 upto 30th November, 2018. From the evidence tendered in court, it emerged that the Defendant took possession of the suit lands in 2000. As per his letter dated the 11th August, 2004, he admitted that he commenced constructing his house thereon from 2000. I note from the various correspondence exchanged between the Plaintiffs and the Defendant which were produced as exhibits, the Defendant admitted being on the suit lands, acknowledged his mistake but failed to take action to move therefrom as well as remove his structure. The 1st Plaintiff in her letter dated the 1st July, 2004, to the Defendant stated that she wanted to commence building on the suit lands but was unable to do so. The Defendant claimed in his submissions he only learnt of the dispute in 2009 but I find that he is not being candid since he sent letters to the Plaintiff in 2004 confirming he had been constructing since the year 2000. Since the Defendant encroached and built on the two plots belonging to the two Plaintiffs, I find that the value of the rental income returned by the valuer which was not controverted, is plausible and will not interfere with it.

On the issue of special damages, the Plaintiffs presented various receipts to prove the expenses they had incurred in respect of the suit lands. These include: Copies of a receipt from Pyramid Auctioneers dated 11th December, 2013 for Kshs. 50,000; Copy of Invoice dated 29th December, 2016 for Kshs, 78,000 and Receipt for Kshs. 78,000 dated 19th November, 2018 from Inter Security Services Limited; Copies of Land Rates Payment Receipts in respect to suit lands for Kshs. 46,710 and Copy of letter dated 19th November, 2018 including ID Card of Wycliffe Dechia Inyambuka confirming payment of Kshs. 168,000 for provision of security services on suit lands. I will accept the said expenses except for the one of Rates Payment Receipts in respect to suit lands for Kshs. 46,710 as it was their responsibility to pay for rates for their land.

On who should bear the costs of this suit. Since the Plaintiffs are the inconvenienced parties, I will award them the costs of this suit.

It is against the foregoing that I find the Plaintiffs have proved their case on a balance of probability and noting that summary judgement was already entered in their favour in 2013, I will proceed to make the following final orders in respect to quantum of damages:

- a. Kshs. 17, 400,000 for rental value for the period of Kshs. 1st January, 2000 upto 30th November, 2018.*
- b. Kshs. 1, 225, 000 for loss of rental income from 1st December, 2018 to 31st October, 2021.*
- c. Cost of demolition amounting to Kshs. 1 million.*
- d. Special damages summarized as follows:*

i. Kshs. 50,000 to Pyramid Auctioneers;

ii. Kshs. 78,000 to Inter Security Services Limited;

iii. Kshs. 168,000 to Wycliffe Dechia Inyambuka for provision of security services on suit lands.

e. Costs of the suit is awarded to the Plaintiffs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 28TH DAY OF MARCH, 2022

CHRISTINE OCHIENG

JUDGE