



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO 980 OF 2014**

**JOSEPH MURIMI GAITA .....PLAINTIFF**

**VERSUS**

**SUSAN MBEKE KASOME .....DEFENDANT**

**JUDGMENT**

**Background**

1. Vide a Complaint dated 23<sup>rd</sup> July, 2014, the Plaintiff instituted this suit against the Defendant seeking for the following reliefs:

- i. An injunction to restrain the Defendant from trespassing onto or in any way dealing with Plot No. P1778 pending the hearing and determination of this suit.*
- ii. General damages for trespass.*
- iii. Such other or further relief that the court may give.*

2. It is the Plaintiff's case that sometime in 1999, he purchased Plot No. P1778 (*suit plot*), Embakasi Ranching Share Certificate No. 11525 from Peter Njoya Chris at a consideration of Kshs 200,000; that at the time of the purchase, the suit plot was still in the name of Embakasi Ranching Company Limited who sanctioned the sale transaction and thereafter transferred the plot from its previous owner to him and that the Company surveyed the plot, pointed out the beacons to him and witnessed the handing over of possession of the plot. The Plaintiff averred that thereafter, he fenced off the plot in anticipation of developing the same.

3. According to the Plaintiff, the Defendant whose property is Plot V10022 has been trespassing on the suit property alleging to be the owner of the same; that the Defendant sued Embakasi Ranching Company Limited restraining it from trespassing on her plot V10022 and that despite having been advised that her plot V10022 and the Plaintiff's plot 1778 are distinct plots, the Defendant has persisted in her acts of trespass onto his property.

4. The Defendant filed a Defence in which she denied the averments as set out in the Complaint asserting that plot number V10022 belongs to her son and daughter in law; that pursuant to the power of attorney granted to her by her son and daughter in law respectively, she filed ELC Suit No 1537 of 2013 against Embakasi Ranching Company Limited for trespassing onto the suit plot number V10022 and that the said suit was determined in her favour.

**The Plaintiff's case**

5. The matter proceeded for hearing on 4<sup>th</sup> October, 2021. PW1 was Joseph Murimi Gaita, the Plaintiff herein. It was PW1's testimony that the property referred to in ELC case number 1537 of 2013 is plot V10022 whereas his property, the subject of this suit is plot No P1778; that the Defendant has trespassed on his property and constructed temporary structures thereon claiming that it belongs to her and that he first visited the property with Peter, the agent who sold him the property.

6. According to PW1, Peter showed him the map of the plot and he confirmed the same with Embakasi Ranching Company Limited when he paid the visiting fees; that the photographs produced by the Defendant showing a one roomed mabati structure is evidence that she has trespassed on his property and that the Defendant is in possession of the property and should vacate and pay him damages.

7. In cross-examination, PW1 stated that his property is P.1778, a quarter piece of land that he acquired in 1999 from its original owner Pauline Wanjiku Njomo; that the said original owner is not a party to the suit; that the non-membership certificate he was given by the seller doubles as the consent of the Embakasi Ranching Company Limited and that after purchasing the suit property he fenced it off.

8. It was the evidence of PW1 that he has never lived on the suit property; that when he found a structure on the suit property, he reported the matter to Embakasi Ranching Company Limited who informed him that a site visit would be undertaken; that he has been away from the country and is not sure when the Defendant put up the structure on the suit property and that the documents relied on by the Defendant are in respect of plot V10022 and not P.1778.

9. PW1 stated that the Memorandum of Understanding he had with the seller does not mention the plot number; that whereas indeed the map adduced shows plot P1778 while the agreement refers to plot number 1778, the two numbers refer to the same plot and that he is in possession of a share certificate but forgot to produce it as evidence.

10. In re-examination, PW1 stated that he made payments to Embakasi Ranching Company Limited; that they consented to his purchase of the suit property and gave him a non-member share certificate for plot number P1778; that he was informed that plot number P1778 cannot be plot number V10022 and that Embakasi Ranching Company Limited have not disputed his documents.

### **Submissions**

11. The Plaintiff's counsel submitted that the Plaintiff has proved that the plot he occupies is plot P1778 and the Defendant is a trespasser thereon; that pursuant to Section 107 of the Evidence Act, whoever alleges is obligated to prove the allegations and that the Defendant not having led any evidence, the Plaintiff's case remains uncontroverted. Reliance was placed on the case of **North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited vs City Council of Nairobi [2019] eKLR** where the learned judge found that where no evidence had been led by the Defendant, the defence remains mere allegations.

12. It was submitted that the Plaintiffs' claim for general damages is merited; that the Defendant has erected a temporary structure on the suit property which structure is still on the property and that as a result of the structure aforesaid, the Plaintiff has been unable to develop the suit property. Counsel urged the court to consider the award of Kshs 2,000,000 as general damages for trespass. Reliance was placed on the case of **Josephat Thuo Githachuri vs Joseph Kibui Mwithiga [2020] eKLR**.

13. The Defendant's advocate submitted that whereas the Defendant did not testify in the case, she filed a Defence, witness statement and list of documents and that there is another pending suit between herself and Embakasi Ranching Company Limited being ELC No. 1537 of 2013 which she filed on behalf of her son, Stephen Kioko and his wife, who donated to her the power of attorney, claiming that Embakasi Ranching Company Limited double allocated the property to a third Party who appears to be the Plaintiff herein.

14. It was submitted that in ELC No. 1537 of 2013, Stephen Kioko and his wife claim to be the rightful allottees of the property known as plot V10022 situate at Ruai within Embakasi Ranching Company Limited Settlement Scheme and have had possession of the property since March 2010 to date.

### **Analysis and determination**

15. Having carefully considered the pleadings, testimonies and submissions, the following issues arise for determination;

**i. Whether Plot No P1778 and Plot No V10022 refer to one and the same parcel of land?**

**ii. Whether the Defendant has trespassed onto the Plaintiffs property?**

**iii. Whether the Plaintiff is entitled to the orders sought?**

16. At the onset, the court notes that the Defendant, despite filing a Defence, Witness Statement and documents in support of her case failed to testify. The above notwithstanding, counsel for the Defendant has through his submissions not only referred to the said pleadings but has invited the court to consider the documents filed by the Defendant. It is settled law that until a document filed by a party is formally produced as an exhibit in court, it is of no evidentiary value and the court cannot rely on it in making its determination. As expressed by the Court of Appeal in **Kenneth Nyaga Mwige vs Austin Kiguta & 2 others (2015) eKLR**:

*“Any document filed and/or marked for identification by either party, passes through three stages before it is proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.”*

17. It therefore follows that the Defendant failed to adduce evidence. What are the consequences thereof? In the case of **Motex Knitwear Limited vs Gopitex Knitwear Mills Limited Nairobi [2009] eKLR**, Lesiit, J (as she then was) cited the case of **Autar Singh Bahra and Another vs Raju Govindji, HCCC No. 548 of 1998** where it was appreciated that:

*“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated.”*

18. The above notwithstanding, the burden on the Plaintiff to prove his case remains the same and that burden of proof is in no way lessened because the Defendant did not adduce any evidence. In this respect, the Court of Appeal in the case of Charterhouse Bank Limited case[2016] eKLR stated thus;

*“The suggestion, however, implicit...that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff’s case is proved on a balance of probabilities cannot possibly be correct.”*

*While the defendant’s failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities.*

*The Evidence Act is clear enough upon whom the burden of proof lies. [see Section 107 and 109].”*

19. The Plaintiff instituted this suit seeking *inter alia* injunctive orders against the Defendant and general damages for trespass. It is his claim that he bought the suit plot being plot number P1778 from one Pauline Wanjiku through her agent Peter Njoya and that the said plot is in the name of Embakasi Ranching Company Limited.

20. According to the Plaintiff, Embakasi Ranching Company Limited consented to the sale of the suit property; that he was duly issued with a non-member share certificate; that he took vacant possession of the plot in the year 2000 and fenced it in anticipation of developing it and that the plot was invaded by the Defendant sometime in the year 2011.

21. The Plaintiff produced in evidence a copy of the Sale Agreement together with the map of the area, the Memorandum of Understanding, a non-member certificate of ownership, receipts for site visit and other payments all in respect of Plot No P.1778, and copy of the order in ELC 1537 of 2013 dated the 23<sup>rd</sup> July, 2014.

22. From the foregoing, it is apparent that it was incumbent on the Defendant to prove that plots V10022 and P1778 were the same parcels of land as alleged. This could easily have been achieved by engaging the services of a surveyor or indeed a representative from Embakasi Ranching Company Limited who allocated the plots. However, the Defendant did not present any evidence before this court to aid her in finding that indeed plots V10022 and P1778 are one and the same.

23. In the absence of any evidence to show that the two plots refer to the same parcel of land, the logical conclusion is that the two are independent of each other as they bear different registration numbers, with the suit property herein being plot P.1788. Indeed, the Plaintiff holds documents in relation to the suit property. The said documents show that the suit property was registered in favour of the Plaintiff and not the Defendant. That being the case, this court finds that the Plaintiff has proved on a balance of probabilities that he is the registered proprietor of the suit property.

24. The Plaintiff has claimed for general damages for trespass. Trespass has been defined in **Black’s Law Dictionary, 10<sup>th</sup> Edition** as;

*“an unlawful act committed against the person or property of another; especially wrongful entry on another’s real property.”*

25. **Section 3(1) of the Trespass Act**, provides;

*“(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.”*

26. In the instance case, the testimony of PW1 that the Defendant encroached onto the suit plot and constructed a temporary structure thereon without his permission has not been rebutted. The legal position with respect to trespass to land is that the same is actionable *per se*, meaning that once it has been established that trespass has occurred, the person against whom the trespass was committed is entitled to damages. This position was affirmed by the Court of Appeal in the case of Kenya Power & Lighting Company Limited vs Fleetwood Enterprises Limited [2017] eKLR where it was held as follows:

*“It is trite law and as correctly submitted by counsel for the respondent that trespass to land is an actionable tort per se and proof of damage is not necessary or required. In other words, where trespass is proved as in this case, the affected party such as the respondent need not prove that it suffered any damages or loss as a result so as to be awarded damages. The court is under the circumstances bound to award damages, of course, depending on the facts of each case.”*

27. With respect to the computation for damages to trespass, **Halsbury’s Laws of England** is instructive. **The 4<sup>th</sup> Edition, Volume 45 para 26 1503** provides as follows;

*“a) If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.*

*b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.*

*c) Where the Defendant has made use of the Plaintiff’s land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.*

**d) Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, damages may be awarded.**

**e) If the trespass is accompanied by aggravating circumstances.**

**28.** Counsel for the Plaintiff urged that the Plaintiff is entitled to the sum of Kshs 2,000,000 as general damages for trespass due to the fact that the Defendant has put up a structure on the suit property. Reliance in this regard was placed on the case of **Josephat Thuo Githachuri vs Joseph Kibui Mwithiga [2020] eKLR** in which Kshs. 1,000,000 was as nominal damages.

**29.** In this case, no evidence was led to assist the court in assessing general damages. Whereas there is a structure on the suit property, the same is temporary in nature. Further, the Plaintiff is unsure of when exactly the structure was put up on the suit property, meaning that he may not have had immediate plans of using the suit property. In the circumstances, the court will award the Plaintiff nominal damages of Kshs 500,000.

**30.** In conclusion, the court finds that the Plaintiff has proved his case on a balance of probabilities and proceeds to enter Judgment in the following terms;

**a) A permanent injunction be and is hereby issued restraining the Defendant together with her agents/servants against trespassing on the Plaintiff's property known as Plot P1778 situate in Ruai, Embakasi.**

**b) The Defendant to pay the Plaintiff Kshs 500,000 as general damages for Trespass.**

**c) The Defendant to pay the costs of the suit.**

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24TH DAY OF MARCH, 2022.**

**O. A. ANGOTE**

**JUDGE**

**IN THE PRESENCE OF;**

**MR. MBAABU FOR 2ND DEFENDANT/RESPONDENT**

**MR. OLOUCH FOR 1ST DEFENDANT**

**COURT ASSISTANT - OKUMU**