



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.305 OF 2010

JAFFAR RAMADHAN PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF KISII 1ST DEFENDANT

MIYORO PETERSON 2ND DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendants on 27th October 2010 seeking; a permanent injunction to restrain the 2nd defendant from constructing on, trespassing on or in any way interfering with all that parcel of land known as **Plot No. 29, Nyanchwa site and service scheme, Kisii Municipality** (hereinafter known as “**the suit property**”), an order directing the 2nd defendant to demolish the structure that he has erected on the suit property at his own cost and to vacate the suit property, general damages for trespass and costs of the suit. The plaintiff claimed that the 1st defendant caused the suit property to be sub-divided and proceeded to allocate a portion thereof known as Plot No. 28 to the 2nd defendant with the full knowledge that the suit property had already been allocated to the plaintiff and that the plaintiff had a house thereon. The plaintiff claimed that the 2nd defendant had commenced construction of a permanent structure on the suit property purporting to be doing so on Plot No. 28 and had in the process interfered with the plaintiff’s said house on the suit property. The plaintiff claimed that the aforesaid acts of the 2nd defendant amounted to trespass and caused him loss and damage.
2. The plaintiff’s suit was defended by the 2nd defendant. The 1st defendant entered appearance but did not file any defence. In his statement of defence, the 2nd defendant denied that Plot NO. 28 is a sub-division of the suit property and that the said parcel of land belongs to the plaintiff. The 2nd defendant contended that Plot No. 28 is separate and distinct from the suit property and that the same belongs to the 2nd defendant. The 2nd defendant denied that he has trespassed on the suit property and that the plaintiff has suffered any loss or damage. The 2nd defendant contended that it is the plaintiff who has trespassed on Plot No. 28. The hearing of this case commenced before Lagat Korir J. on 24th October, 2011 when the plaintiff’s and the 1st defendant’s cases were heard. After Lagat Korir J. left the station on transfer, the parties agreed by consent on 18th March 2013 that the hearing of the case do proceed before this court from where it was left by Lagat Korir J. In his evidence in chief, the plaintiff testified that; he was allocated the suit property by the 1st defendant. He took possession of the suit property in the year 1990. The suit property had a house already built on it by the National Housing Corporation (NHC). He was shown the boundaries of

- the suit property. He was thereafter issued with a certificate to the effect that he had been shown the beacons of the suit property.
3. The plaintiff testified further that on 10th August 2010, the 2nd defendant entered the suit property and destroyed a portion of the plaintiff's house standing thereon. The plaintiff and the 2nd defendant thereafter entered into an agreement under which the 2nd defendant agreed to repair part of the plaintiff's house that he had damaged. He decided to file this suit because the 2nd defendant continued interfering with the suit property. The plaintiff urged the court to stop the 2nd defendant from continuing with destruction of the structures on the suit property. The plaintiff also prayed for an award of damages for the destruction that had been carried out by the 2nd defendant on the suit property. The plaintiff clarified that he owns the suit property while the 2nd defendant owns Plot No. 28. The plaintiff produced in evidence as exhibits in proof of his ownership of the suit property; a copy of the receipt for the payment he made to Kisii Town Council for the application that he had made to be allocated the suit property, a copy of a receipt for the payment he made to Kisii Town Council on account of a deposit for the suit property, a copy of a letter from Kisii Municipal Council dated 19th January 1990 inviting him to sign an agreement for the allocation of the suit property, a copy of a boundary beacon certificate for the suit property dated 28th March 1990 and a copy of a letter dated 25th January 1991 by Kisii Municipal Council to National Housing Corporation (NHC) advising it that the suit property on which they had put up a demonstration house had been allocated to the plaintiff. The plaintiff also produced a copy of the agreement dated 9th October 2010 that he entered into with the 2nd defendant under which the 2nd defendant had agreed to repair the damage that he had caused to the plaintiff's house on the suit property.
 4. In cross-examination by the 2nd defendant's advocate, the plaintiff stated that the 2nd defendant owns Plot No. 28 while the plaintiff owns the suit property and that the 2nd defendant had encroached on the suit property while carrying out construction on Plot No. 28. The plaintiff stated that the 2nd defendant's construction which was being carried out close to the edge of the suit property had interfered with the suit property. The plaintiff stated further that the construction of the house standing on the suit property had been completed when the suit property was allocated to him by the 1st defendant and that the said house was sold to him by the NHC at the request of the 1st defendant. He stated further that he did not know the size of the suit property. He stated that the agreement to repair the house on the suit property was made at the police station and that it may have been signed by the son of the 2nd defendant. In re-examination, he stated that he had paid NHC for the house on the suit property and that no one was coerced to sign the agreement for the repair of the damage that had been caused to the plaintiff's house.
 5. The plaintiff called one witness, Mahmood Hassan Fadhamullah (PW2). PW2 was the plaintiff's nephew and was the one who occupied the suit property at all material times. He testified that on 10th August 2010, he was notified by the 2nd defendant that there were people on the suit property taking measurements, uprooting crops and digging trenches for construction purposes. In the course of the said construction, the said persons who wanted to erect pillars for the structure which they were putting up cut off part of the roof of the house on the suit property. The said persons also blocked the windows of the said house on the suit property in the course of constructing a wall for the said structure. He stated that the activities of the persons who were carrying out the said construction works were reported to the police who caused them to be arrested. Thereafter, an agreement was reached with the 2nd defendant who agreed to repair the damage that had been caused to the plaintiff's house on the suit property. He stated that the 2nd defendant failed to carry out the repairs as had been agreed between the parties with the effect that the windows of the house on the suit property remains blocked and the roof remains damaged. PW2 produced in evidence as exhibits; photographs that he had taken of the damaged house and blocked windows. In cross-examination, PW2 stated that he was not aware of the existence of Plot No. 28 neither did he know its boundary with the suit property. PW2 stated further that he came to know of the existence of Plot No. 28 after the filing of this suit. He stated that the construction on Plot No. 28 encroached on the suit property and that the agreement for the repair of the house on the suit property was drawn in his office and not at the police station and that the purpose of the said

- agreement which was made in the presence of the 2nd defendant's son was to facilitate the release of the 2nd defendant's construction workers who had been arrested by the police.
6. The 1st defendant called one witness, Prescott Mokaya (DW1). It is not clear to me on what basis this witness gave evidence since the 1st defendant did not file any defence. I have not seen the 1st defendant's statement of defence in the court file. However, since no objection was taken to the evidence of DW1, I would proceed to consider the same. DW1 is a surveyor with the 1st defendant. He testified that; the suit property and Plot No. 28 are known to him. Whereas the suit property is owned by the plaintiff, Plot No. 28 is owned by the 2nd defendant. The 2nd defendant presented building plans for approval by the 1st defendant which approval was duly granted after which the 2nd defendant commenced construction on Plot No. 28. He (DW1) went to the site of the two parcels of land prior to the approval of the said plan and noted that the suit property had on it an old residential house while Plot No. 28 was undeveloped. When a dispute arose between the plaintiff and the 2nd defendant, he found out that the development on the suit property had encroached onto Plot No. 28 with a margin of 8.5 metres by 2.33metres. He prepared two sketch drawings, one showing the two parcels of land before any development was carried out by the parties on the same and the other showing the two parcels of land after construction of the house on the suit property and commencement of construction on Plot No. 28. He produced the two drawings as exhibits. He stated that the 2nd defendant has not encroached on the suit property because the construction being carried out by the 2nd defendant is within Plot No. 28 and has not interfered with the suit property in any way. DW1 also produced as exhibits an extract of the original plan that was used when the suit property and Plot No. 28 were being allocated and a survey plan which contains the measurements of the two parcels of land. He stated that the suit property measures 23.5 metres in length and 8.33 metres in width. On the other hand, Plot No. 28 also measures 23.5metres in length and 8.33 metres in width. In cross-examination, he confirmed that the house on the suit property was put up by NHC and that the 1st defendant only allocated to the plaintiff the parcel of land but not the house that was to be purchased by the plaintiff directly from NHC. He stated that a physical planner had made a recommendation that the portion of the house on the suit property which has encroached on Plot No. 28 be removed but the 1st defendant could not do so without a court order. He stated that the 1st defendant could not be blamed for the NHC's mistake of putting up a building on the suit property beyond the boundary of the subject parcel of land.
 7. The 2nd defendant called one witness, Meshack Morara Miyoro (DW2). DW2 was the 2nd defendant's son and gave evidence under a power of attorney donated to him by the 2nd defendant. He produced the said power of attorney as an exhibit. He testified that the plaintiff is known to him as he is a neighbour of the 2nd defendant at Nyanchwa where the 2nd defendant owns Plot No. 28 while the plaintiff owns the suit property which parcels of land are separate and distinct. He stated that the suit property is already developed while Plot No. 28 has a building under construction. He denied that the development on Plot No. 28 has extended to the suit property. He stated that he is the one managing the construction works on Plot No. 28 and denied that the 2nd defendant has trespassed on the suit property. He stated that it is the house on the suit property which has encroached onto Plot No. 28 by a margin of 8.5metres by 2.33metres. He stated that the 2nd defendant cut off part of the roof of the plaintiff's house to enable the 2nd defendant to erect pillars after the 2nd defendant had agreed with the plaintiff on that course of action. The iron sheets which were cut off from the roof of the said house had encroached on Plot No. 28. After part of the said roof was cut as aforesaid, PW2 came with police officers and arrested the 2nd defendant's workers who were thereafter locked up at Kisii Police Station. He arranged for the said workers to be released on a police bond after which they reached a gentleman's agreement with the plaintiff and PW2. The purpose of the agreement was to settle the dispute out of court. He denied the claim that the 2nd defendant destroyed the plaintiff's crops and blocked his window. He stated that there is a space left between the structure being put up by the 2nd defendant on plot no. 28 and the suit property. DW2 produced as exhibits a copy of the agreement that was entered into between the plaintiff, PW2 and one, Dr. Samson Miyoro through which a complaint that had been lodged by the plaintiff and PW2 with the police was withdrawn, a

copy of a letter dated 8th November 2010 from the 1st defendant confirming that the 2nd defendant is the proprietor of Plot No. 28 and photographs showing that there is a space left between the structure being put up by the 2nd defendant on Plot No. 28 and the plaintiff's house on the suit property. In cross examination, he stated that the house on the suit property was put up deep inside Plot No. 28. He stated that the 2nd defendant had acknowledged that damage had been done to the plaintiff's house and he had agreed to carry out repairs to the said house which repairs were partly done. The repairs were not completed according to him because the workers who were carrying out the work were chased away by PW2. In re-examination, DW2 explained that the agreement that the 2nd defendant had entered into with the plaintiff was to secure the release of the 2nd defendant's workers and that the same was not an acknowledgment of any wrong doing on the part of the 2nd defendant.

8. After the close of the 2nd defendant's case, the advocates for the parties agreed to put in written submissions. The plaintiff filed his submissions on 24th October 2013, the 1st defendant filed its submissions on 23rd July 2013 and the 2nd defendant filed his submissions on 26th August 2013. I have considered the pleadings on record and the evidence tendered by the parties in this suit. The parties did not agree on issues for trial. In my view, the issues that arise for determination in this suit are the following:-

- i. **Whether the 2nd defendant trespassed into the suit property?**
- ii. **Whether the plaintiff is entitled to the reliefs sought in the plaint?**

9. Issue No. I:

It is not in dispute that the plaintiff is the owner of the suit property while the 2nd defendant owns Plot No. 28. I am satisfied from the evidence on record that the suit property was developed with a residential house before the 2nd defendant commenced development on Plot No. 28. I am also satisfied from the evidence on record that the said residential house on the suit property encroached and/or extended across the boundary of the suit property into Plot No. 28 owned by the 2nd defendant. I am further satisfied from the evidence on record that the building under construction by the 2nd defendant on Plot No. 28 falls within the boundaries of Plot No. 28 and no portion of it encroaches on or extend beyond the boundary of Plot No. 28 to the suit property. It is not in dispute however that when the 2nd defendant commenced construction on Plot No. 28, the same was hindered by the portion of the residential house on the suit property which had encroached and/or extended to Plot No. 28. It is not in dispute that the 2nd defendant through his agents and/or servants cut off portions of iron sheets on the roof of the plaintiff's house which extended to Plot No. 28 so as to give them room to put up pillars for the building that was being put up on Plot No. 28. It is clear from the photographs that were produced in evidence that the building on Plot No. 28 was put up so close to the house on the suit property such that the said pillars could not be put up without cutting off a portion of the roof of the plaintiff's house as aforesaid. The question that begs for an answer is whether the 2nd defendant could take it upon himself without the plaintiff's permission and without a court order to chop off a portion of the 2nd defendant's roof that it found offensive. My answer is no. The house on the suit property a portion of which extends to Plot No. 28 is owned by the plaintiff.

10. From the evidence on record, the plaintiff had occupied the same for over 20 years as at the time the 2nd defendant moved to cut off a portion of its roof that encroached onto Plot No. 28. The chopping off of a portion of the roof of the plaintiff's house aforesaid amounted to destruction of the same. The 2nd defendant could only cut off a portion of the plaintiff's roof with the permission of the plaintiff or through an order of the court. Anything short of that was an act of trespass. The 2nd defendant placed no evidence before the court that he did obtain the consent of the plaintiff before he commenced the process of cutting off the roof of the house on the suit property. The 2nd defendant did not also obtain an order of the court to carry out the said activity. Due to the foregoing, it is my finding that by cutting off the roof of the plaintiff's house that was

partly situated on the suit property and partly on Plot No. 28; the 2nd defendant committed an act of trespass. The roof covered the house that is situated on both the suit property and on Plot No. 28 and the destruction of the same affected both parcels of land on which the said house is situated.

11. Issue No. II:

As I have already stated above the building being put up on Plot No. 28 is strictly within the boundaries of the said parcel of land. No part of it extends to the suit property. In the circumstances, I am unable to grant an injunction to restrain the 2nd defendant from proceeding with the construction on his own parcel of land namely Plot No. 28. I would however restrain the 2nd defendant while proceeding with such construction from interfering with the plaintiff's house a portion of which is on Plot No. 28. For the same reason, I am unable to direct the 2nd defendant to demolish the structure that he has put up on Plot No. 28. There is no basis for such an order. In addition to injunction and an order for demolition, the plaintiff had also sought general damages for trespass. I have already held above that the 2nd defendant trespassed on the suit property. An act of trespass would attract both special and general damages. The law on special damages is now well settled. Special damages must be specifically pleaded and strictly proved. See the cases of, **William Kiplangat Maritim & Another vs. Benson Owenga Anjere, Nairobi Civil Appeal No. 180 of 1993(unreported)** and **Charles Sande vs. Kenya Co-operative Creameries Ltd, Civil Appeal No. 154 of 1992(unreported)**. The plaintiff herein neither pleaded special damages nor proved the same. None can therefore be awarded. General damages are compensatory for damage or harm done. It is not awarded as a matter of course. It follows therefore that a party seeking general damages must lay a basis for such damages otherwise the same cannot be awarded by the court. In the instant suit, the plaintiff did not tender evidence on the nature of damage or loss that he suffered when the 2nd defendant cut off a portion of the roof of his house on the suit. I am therefore not seized of any material on the basis of which I can assess general damages payable to the plaintiff.

12. In conclusion, I hereby enter judgment for the plaintiff against the 2nd defendant and issue a permanent injunction restraining the 2nd defendant by himself or through his servants, agents or nominees from in any way causing destruction or damage to the plaintiff's residential house situated on Plot No. 29, Nyanchwa site and service scheme, Kisii Municipality. As between the plaintiff and the 2nd defendant, each party shall bear its own costs as the plaintiff's suit has only succeeded in part. The plaintiff's suit as against the 1st defendant is however dismissed with costs to the 1st defendant.

Delivered, dated and signed at Kisii this 28th day of March 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Plaintiff

N/A for the Defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE