



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 90 OF 2015

RELI SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LTD...PLAINTIFF

VERSUS

SIHOHYDRO CORPORATION LIMITED.....DEFENDANTT

JUDGMENT

By Plaint dated 10/4/2015 the Plaintiff, Reli Savings and Credit Co-operative Society Ltd sued Sinohydro Corporation Limited and prayed for a permanent injunction against the defendant, its agents, representatives, assigns or any other persons acting through their direction from trespassing upon continuing to trespass upon excavating murram or in any other way interfering with the Plaintiff's possession and use of the property. That the defendant having trespassed and occasioned damage and degradation to the suit land is duty bound to repair and restore the land to its conditions prior to the injury. An order that the defendant does compensate the plaintiff for its violation of the plaintiff's property right and for the degradation of the plaintiff's land and encroachment on it. Interests on (b) above plus Costs. The defendant filed a defence which was a general denial and never filed witness statements and never called witnesses.

The plaintiff called PW1, Bob Charles Auchu whose statement dated 14/4/2015 was adopted as evidence in chief. The gist of his evidence was that the suit land was acquired by the plaintiff from the Ministry of Lands through allotment on 22/2/1994.

PW2, Patrick Okeyo Adero a Land Surveyor found out that the defendant excavated an area of 240 metres by 250 meters that is 6 Ha. The depth of excavation was 1.5 meters and 1.8 meters wide.

PW3 was the Environmental Planner and a National Environmental Management Authority of Kenya lead expert. She has masters in Environmental Schemes from Maseno University. She did an Environmental Impact Assessment and prepared a report. She made her recommendations. According to pw3, there was loss of nutrients and land productivity. There was surface run off and floods. There was possibility of accidents and loss of lives.

PW4, Luke Okeyo Madoda was the valuer by profession and Estate agent. He produced the valuation report.

The defendant did not file witness statement and did not call any witness.

The Plaintiff filed submissions which I have considered alongside the evidence on record. The defendant did not file submissions.

I have considered the evidence on record and do find that the defendant excavated murram on the plaintiff's land without permission. The excavated parcel of land is Kisumu/Municipality/Block 17 and the excavation was 240 meters by 250 meters and depth of 1.8 meters. There is evidence of degradation and danger. The valuer put the value of murram excavated for the land of Kshs. 311,000,000. The same is not challenged. The plaintiff was registered owner of the suit land.

Section 24 of LRA provides:

Subject to this Act—

“(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

Section 25 of L.R.A. provides:

“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

Section 26 of L.R.A provides:

(1) “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

The import of the above is that the plaintiff has absolute rights over the suit property. It is evident that the defendant trespassed on the suit property.

Section 3 (1) of the Trespass Act Cap 294 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.”

I do find that the Defendant trespassed into the Plaintiff property and caused damage which has been assessed by the expert Kshs. 317,000,000. The expert’s opinion was never challenged.

I do find that the plaintiff has proved his case on a prime facie basis and do grant a permanent injunction against the defendant, its agents, representatives, assigns or any other persons acting through their direction from trespassing upon continuing to trespass upon excavating murrum or in any other way interfering with the Plaintiff’s possession and use of the property. That the defendant having trespassed and occasioned damage and degradation to the suit land is duty bound to repair and restore the land to its conditions prior to the injury. I do grant general damages of Kshs. 317,000.000 and Interest on the above. Costs of the suit to the Plaintiff.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 18th DAY OF MARCH, 2022

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.