



No. 310

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 102 OF 2012

PAUL AUDI OCHUODHO.....PLAINTIFF

VERSUS

JOSHIA OMBURA ORWA.....DEFENDANT

JUDGMENT

1. The plaintiff is the duly appointed attorney of one, George Sam Onyango who is the registered proprietor of all that parcel of land known as **LR No. Suna East/Wasweta I/11465** (hereinafter referred to as “**the suit property**”). The plaintiff brought this suit against the defendant on behalf of the said **George Sam Onyango** (hereinafter referred to as “**Onyango**”) on 21st March 2012 through a plaint dated 20th March 2012. In the said plaint, the plaintiff averred that in the month of February, 2011 the defendant without any lawful cause damaged the boundary fence of the suit property, entered therein and annexed a portion thereof measuring 1ha. In the process of taking possession of the said portion of the suit property, the defendant damaged the crops that had been planted thereon, uprooted trees and pulled down the structures that had been put up on the property.

2. The plaintiff averred further that the defendant’s occupation of the said portion of the suit property has deprived the plaintiff of possession, use and enjoyment of the same as a result of which the plaintiff has suffered loss and damage for which he holds the defendant liable. The plaintiff has sought judgment against the defendant for; a declaration that Onyango is the registered and lawful owner of the suit property, a permanent injunction to restrain the defendant from re-entering, trespassing onto, cultivating, interfering with and/or in any other manner whatsoever dealing with the suit property, general damages for trespass and mesne profits and cost of the suit. The defendant was served with the summons to enter appearance but neither entered appearance nor filed a statement of defence.

3. On 29th May 2012, interlocutory judgment was entered against the defendant in default of appearance. The suit was thereafter listed for formal proof on 26th March 2014 when the plaintiff gave evidence and closed his case. In his testimony, the plaintiff told the court that; Onyango is the registered owner of the suit property. He purchased the suit property from the defendant in the year 1997 at a consideration of Kshs. 150,000.00. When Onyango purchased the suit property; it was a portion of a larger parcel of land then known as LR No. Suna East/Wasweta I/10172 (hereinafter referred to as “**Plot NO. 10172**”). Plot No. 10172 measured 3.97ha. (approximately 9.5acres) of which the defendant sold to Onyango 4 acres. The defendant caused Plot No. 10172 to be sub-divided and thereafter transferred to Onyango a portion thereof measuring 1.60ha (approximately 4 acres) which is now comprised in the suit property. Onyango

took possession of the suit property soon after the same was sold to him by the defendant and commenced development thereon.

4. In the month of February, 2011 the defendant entered the suit property and caused considerable damage to the developments Onyango had carried out thereon. The defendant damaged the crops and cut down the trees that were growing on the suit property. The defendant also damaged a boundary fence, a pit-latrine, a borehole and a farm house that had been put up on the suit property. The defendant thereafter annexed and occupied a portion of the suit property measuring 1ha. The plaintiff is now unable to make use of the portion of the suit property which is occupied by the defendant where he used to grow maize. The defendant's invasion of the suit property was reported to the area chief. The area chief however took no action in the matter because the defendant's son one, Caleb Orwa Ombura is an assistant chief of the area where the suit property is situated. The plaintiff thereafter reported the matter at Migori Police Station from where he was given a letter to take to the Divisional Agricultural Office, Migori so that they may assess the damage to the crops on the suit property. The defendant also reported the incident to the Kenya Forest Service so that they may also assess the damage done to the trees on the suit property.

5. The Divisional Agricultural Officer assessed the damage that was caused to the plaintiff's crops on the suit property at Kshs. 12,000/= while the Zonal Forest Manager assessed the damage to the trees at Kshs. 32,680/=. The plaintiff paid a sum of Kshs. 1,600/= to Kenya Forest Service for the assessment aforesaid. The plaintiff told the court further that the portion of the suit property annexed by the defendant was being used for growing maize and that in one season the yield would be upto 36 bags. Since the area had two maize planting seasons, the annual maize yield came to 72 bags that earned him Kshs. 230,400/= in a year. He urged the court to award him as mesne profits a sum of Kshs. 230,400/= for each year the defendant has remained in possession of the said portion of the suit property. The plaintiff testified further that the pit latrine that was damaged by the defendant was constructed at a cost of Kshs. 50,000/= while the farm house was put up at a cost of Kshs. 500,000/=. The boundary fence on the other hand was put up at a cost of Kshs. 150,000/=. The plaintiff put the total loss arising from the defendant's invasion of the suit property at Kshs. 2,323,300/=.

6. The plaintiff contended that the defendant is using the influence of his son who is the area assistant chief to extract more money from Onyango for the suit property. The plaintiff produced in evidence copies of; the title deed for the suit property (exhibit 1), registry index map for Suna Location Wasweta I registration section (sheet map No. 4) (exhibit 4), certificate of official search dated 1st July 2011 on the title of the suit property (exhibit 3), special power of attorney donated to the plaintiff by Onyango (exhibit 2), mutation form for the sub-division of Plot No. 10172 (exhibit 6), agreement for sale dated 25th March 1997 between Onyango and the defendant (exhibit 5), crop damage assessment report by Migori Divisional Agricultural Extension Officer dated 8th July 2011 (exhibit 7), a report dated 15th November 2011 by Migori Zonal Forest Manager on malicious damage and theft of trees (exhibit 8), a receipt dated 6th December 2011 for Kshs. 1,600/= paid to Kenya Forest Service (exhibit 8 (a)), photographs showing destruction that was carried out on the suit property (exhibit 9), the plaintiff's own report on the loss that ensued following the defendant's invasion of the suit property (exhibit 10) and a letter that was written by the Officer Commanding Migori Police Station to the Agricultural Extension Officer, Migori to assess the damage to crops on the suit property (exhibit 11).

7. After the close of the plaintiff's case, the plaintiff's advocate Mr. Agure Odero informed the court that he wished to rely on the evidence on record and urged the court to enter judgment for the plaintiff against the defendant as prayed in the plaint. I have considered the plaintiff's case as pleaded and the evidence tendered in support thereof. The plaintiff's claim against the defendant is based on the tort of trespass. Trespass has been defined as any unjustifiable intrusion by one person upon the land in the possession of another. See, **Clerk & Lindsell on Torts, 18th Edition at page 923**. The onus was on the plaintiff to prove that Onyango is the owner of the suit property and that the defendant had invaded and occupied the same without any justifiable cause.

8. I am satisfied on the material before me that the plaintiff has proved that Onyango is the registered

owner of the suit property. The plaintiff placed before the court a copy of the title deed for the suit property in the name of Onyango and a certificate of official search on the register of the suit property which confirmed that the property is registered in the name of Onyango as the proprietor thereof. Under section 24 (a) of the Land Registration act, 2012, the registration of a person as the proprietor of land vests in that person the absolute ownership of that land together with all rights and privileges associated with that status. Section 26 (1) of the said Act provides that the certificate of title issued by the land registrar upon registration or to a purchaser of land upon transfer 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 thereof and that the said title shall not be challenged save on the ground of fraud or misrepresentation to which the holder is a party or where the title is acquired illegally, unprocedurally or through a corrupt scheme.

9. The defendant did not defend this suit. The title of Onyango over the suit property is therefore not challenged on any of the grounds mentioned above or at all. In the absence of such challenge, I am enjoined by law to take Onyango on the basis of the title deed that he placed before the court to be the absolute and indefeasible owner of the suit property. As the absolute proprietor of the suit property, Onyango is entitled to enjoy rights and privileges associated with such ownership which includes exclusive use, possession and enjoyment thereof without interference by any third party save with his consent. The plaintiff has accused the defendant of entering the suit property without the consent of Onyango and causing massive damage to the developments thereon. The defendant has also been accused of encroaching onto and annexing a portion of the suit property measuring 1 ha.

10. The plaintiff's evidence on these incidences has not been challenged. I am satisfied therefore that the plaintiff has proved that the defendant entered the suit property without Onyango's permission, caused the damage complained of and occupied a portion thereof measuring 1ha. The defendant having been proved to have entered the suit property without the permission of the proprietor or any lawful cause, the defendant is a trespasser on the suit property and the plaintiff is entitled to judgment against the defendant for an injunction to restrain the defendant from committing further acts of trespass. The plaintiff is also entitled to general and special damages arising from such trespass. The plaintiff has not claimed special damages in the plaint. The law as I know it is that special damages must be pleaded and strictly proved. See the cases of **Charles Sande vs. Kenya Cooperative Creameries Ltd., Court of Appeal, Civil Appeal No.154 of 1992(unreported)** and **William Kiplangat Maritim & Another vs. Benson Owenga Anjere, Court of Appeal, Civil Appeal No.180 of 1993(unreported)**. The plaintiff's claims for the recovery of the cost of the damaged crops, trees, borehole, farm house, boundary fence and pit latrine are in the nature of special damages and ought to have been pleaded failure to which the same are not recoverable.

11. On general damages, the plaintiff led evidence of the massive destruction that was carried out by the defendant when he entered the suit property. The plaintiff placed before the court photographs of the trees that were cut down and banana plants that suffered the same fate. The plaintiff also produced reports from the Ministry of Agriculture and Kenya Forest Service on the damage. The defendant damaged 40 mature banana plants and 32 eucalyptus trees. From my review of the photographs I have no doubt that the damage was carried out maliciously. After carrying out the said destruction, the defendant proceeded to annex and occupy a portion of the suit property measuring 1ha. and has denied the plaintiff the use thereof since February 2011. The plaintiff led evidence that the maize yield from the portion of the suit property in a year would be 72 bags which would retail at Kshs.230,400/= which the plaintiff sought from the defendant as mesne profits per year until the portion of the suit property under the defendant's possession is delivered up. I am satisfied in the circumstances of this case that the plaintiff has laid a basis for an award of general damages and mesne profits. Taking into account all the circumstances of this case, I am of the opinion that an award of general damages in the sum of Kshs. 500,000/= would be adequate compensation to the plaintiff for the loss suffered as a result of the defendant's acts of trespass. For mesne profits, the plaintiff did not place convincing evidence in support of his claim for Ksh. 230,400/= per year as mesne profits until the defendant vacates the portion of the suit property in his occupation. I would award the plaintiff a sum of Ksh. 5000/= per month as mesne profits from the date of filing this suit until possession of the suit property in occupation by the defendant is delivered up.

12. In conclusion, I hereby enter judgment for the plaintiff against the defendant as follows:-

i. It is hereby declared that GEORGE SAM ONYANGO OLUOCH is the registered and lawful owner of LR No. Suna East/Wasweta I/11465.

ii. A permanent injunction is issued restraining the defendant either by himself or through his agents, servants or anyone claiming under him from re-entering, trespassing onto, cultivating, interfering with and/or in any other manner whatsoever dealing with LR No. Suna East/Wasweta I/11465.

iii. Kshs. 500,000/=as general damages for trespass.

iv. Ksh.5000/=per month as mesne profits from the date of filing this suit until the date of delivery of possession of the portion of the suit property occupied by the defendant.

v. The cost of the suit to be paid by the defendant.

Delivered, signed and dated at KISII this 15th day of August, 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the plaintiff

N/A for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE