



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 45 OF 2015

RAMATHAN MAKAL LALANGOLE.....PLAINTIFF

VERSUS

LOPUSIKOU KORI LOKAMAR.....DEFENDANT

JUDGMENT

1. The Plaintiff moved this Court by way of a Plaint dated **01/04/2015** and filed on **02/04/2015**. He sought the following reliefs:

- (a) **A declaration that the Plaintiff is the owner of Plot No. 274 in Kanyarkwat Settlement Scheme and further that the Defendant is a trespasser in the said plot and he and anybody claiming under him should be ordered to vacate the said plot and failing which he will be evicted;**
- (b) **A mandatory and permanent injunction;**
- (c) **General and exemplary damages for trespass;**
- (d) **Costs;**
- (e) **Interest.**

2. The Defendant never entered appearance. He did not file a defence in spite of proper and satisfactory service of summons. Consequently, the matter was fixed for formal proof hearing.

The Plaintiff's Case

3. The Plaintiff was the sole witness. He testified that his brother, the late **Loitalima Lalangole** was the allottee of all that parcel of land known as **Plot No. 274 Kanyarkwat Settlement Scheme**. He produced and marked as **P. Exhibit 1** a letter dated **01/08/2014**, from the **Ministry of Land, Housing and Urban Development** in support of this evidence.

4. He added that since the brother died on **09/11/2009** without a family, he was made the administrator of his estate in **Kitale HC Succ. No. 65 of 2012** which was, **In The Matter of the Estate of Loitalima Lalangole (Deceased)**. For this assertion he produced a Grant of Letters of Administration and a Certificate of Confirmation of Grant. He marked them as **P. Exhibit 2** and **3** respectively. He confirmed that following transmission, he took occupation and possession of the said parcel and lived on it with his son, **Kiprop Lalangole**. His evidence was that he erected two houses one of which his son lived in. There was also a store and a washroom built in the plot.

5. The Plaintiff further testified that he knew the Defendant as his neighbour but the latter did not own a plot. Sometime in **2014**, the Defendant sued him in **Kitale ELC No. 67 of 2014; Lopusikou Lokamar -vs- Ramadhan Makal Lolongole**, claiming that he was the legitimate owner of the said plot. In the matter, he accused the Plaintiff of being a trespasser. He sought a declaration that he was the lawful owner of the subject plot. Ultimately, on **10/02/2015**, the suit was dismissed for want of prosecution. He produced the decree dated **10/02/2015** as **P. Exhibit 4**.

6. Following the dismissal of the suit, the Defendant entered into the subject premises and threatened to murder the Plaintiff's son. For fear of such imminent threat, the Plaintiff's son ran away from the plot, thereby making the Defendant to forcefully evicting the Plaintiff and his son. The Defendant then moved into the house and took possession of it.

7. Owing to the Defendant's actions, the Plaintiff wrote a letter dated **22/02/2015** to him. The Plaintiff marked it as **P. Exhibit 5**. In it, the Plaintiff asked the Defendant to vacate the premises since he was a trespasser. The Plaintiff further wrote to the Officer Commanding Station (OCS) Kapkoi Police Station on **23/02/2015** vide a letter which he produced as **P. Exhibit 6**. In it he informed him that the Defendant had

unlawfully evicted the Plaintiff from his own land. He asked the OCS to intervene so he could get his land back. He also wrote a letter to the Officer Commanding Police Division (OCPD) Kwanza to evict the Defendant. He marked the said letter dated 23/02/2015 as **P. Exhibit 8**.

8. Since the OCS could not act without a court order, the Plaintiff filed the present suit. He also filed an Application seeking eviction of the Defendant on the subject premises. The Court issued an order dated 18/05/2015 which the Plaintiff marked in evidence as **P. Exhibit 7**. The Defendant was eventually evicted from the premises in **December 2021**, six (6) years later. The Plaintiff testified that for the six (6) years, he had incurred losses which, if the land comprising the five (5) acres was leased, would have attracted a sum of **Kshs. 10,000/-** per acre. He prayed that the suit be allowed as prayed.

Submissions

9. On 25/03/2022 the Plaintiff filed submissions dated 24/03/2022. He submitted that he was entitled to a sum of **Kshs. 350,000/-** as he was deprived of the use of the land following the Defendant's illegal continued occupation of the premises for seven (7) years. He cited several authorities for the submission that he was entitled to general damages for trespass, loss of user and exemplary damages.

Analysis and Disposition

10. I have carefully analyzed the pleadings and the documents relied on. I have also considered the Plaintiff's submissions. It is clear that the Defendant, in spite of proper service of summons, failed to enter appearance or file Defence. It is also admitted through the Plaintiff's testimony that the Defendant has since vacated the suit land. The Plaintiff gave uncontroverted evidence that he was indeed the proprietor of the subject premises namely **Plot. No. 274 Kanyarkwat Settlement Scheme**. His documentary evidence, **P. Exhibit 1** confirmed that the deceased was allotted the said parcel albeit the payment of the purchase price had not been fully settled. **P. Exhibit 2** and **P. Exhibit 3** affirmed that the Plaintiff remained the administrator of the deceased's estate. On them, the subject parcel of land was listed as one of the assets of the deceased's estate. The Plaintiff confirmed that the parcel of land was transferred to him by way of transmission. The Plaintiff further wrote several letters to advance his claim. On that evidence, I have no doubt in my mind that the Plaintiff is the legal proprietor of **Plot. No. 274 Kanyarkwat Settlement Scheme**. Save for the antecedent suit instituted by the Defendant, he did not raise any evidence to challenge on the Plaintiff's allegations. For the reason that the Defendant was on the suit land without the Plaintiff's express or implied permission from the time of institution of this suit to the time he vacated it, I find that he trespassed on the Plaintiff's property per the definition of **Section 3 (1) of Trespass Act Cap 294**. On a balance of probabilities therefore, I find that the Plaintiff proved his case on a preponderance of the evidence adduced. I however need to interrogate further the issue of general and exemplary damages.

11. According to **Halsbury Law of England, 4th Ed, Vol. 45 at para 26, 1503**, the following must be taken into consideration in an action for damages for trespass provides thus:

- (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 sum as would reasonably be paid for that use* (emphasis mine).**
- (d) **Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights or the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.**
- (e) **If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.**

12. Having found that the Defendant indeed trespassed on the Plaintiff's parcel of land, I find that the Plaintiff is entitled to general damages for trespass. What then is the threshold measure of general damages? The Court, in **Philip Ayaya Aluchio v Crispinus Ngayo [2014]eKLR**, held as follows:

“The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately after the trespass or the costs of restoration, whichever is less See Hostler -vs- Green Park Development Co. 986 S. W 2d 500 (No. App. 1999).

13. I find that the Defendant forcefully did ingress upon the Plaintiff's parcel of land in 2015. He was evicted in 2021. The Plaintiff computed that the property would have been leased at **Kshs. 50,000/-** annually. Although there was no basis for the specific claim of leasing the land at an annual rate of **Kshs. 10,000/=**, this Courts take judicial notice that whenever parcels of agricultural land are leased, a sum of money is paid thereon. Without a valuer's report to show the current valuation, it is difficult for the Court to agree with the Plaintiff that an acre of land would be leased at **Kshs. 10,000/=** annually in such location. Thus, this Court would award general damages for trespass at a global sum. Therefore, for the six (6) years the Defendant was in occupation of the suit premises, I find that the Plaintiff is entitled to a sum of **Kshs. 250,000/-** in general damages for trespass.

14. On exemplary damages, I find that the same is awarded based on the facts and circumstances of the case. They are of a discretionary nature. In **Obongo & Another -vs- Municipal Council of Kisumu (1971) EA 91** The **Court of Appeal of East Africa** held as follows:

“Exemplary and punitive damages are appropriate in two classes of cases; oppressive, arbitrary, or unconstitutional action by the servants of the government and conduct by a defendant calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff....”

15. In my view, the Plaintiff did not demonstrate to the satisfaction of the Court that he was entitled to exemplary damages. Consequently, the prayer is declined.

Orders and Disposition

16. Having found that the Plaintiff has proved her case to the required standard of proof, I make the following orders:

(a) A declaration be and is hereby made that the Plaintiff is the lawful and/or legal owner, by way of Grant of Letters of Administration of the estate of his deceased brother, of Plot No. 274 Kanyarkwat Settlement Scheme;

(b) A permanent injunction be and is hereby issued against the Defendants, his agents, servants and whosoever claims under him or any other person exercising authority from him from interfering with the Plaintiff's use, occupation and quiet possession of Plot No. 274 Kanyarkwat Settlement Scheme;

(c) The Plaintiff is awarded general damages in the sum of Kshs. 250,000/=;

(d) The Plaintiff is awarded costs of the suit with interest thereon in (c) above;

Orders accordingly.

Dated, signed and delivered at Kitale via Electronic Mail on this 28th day of April, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.