



No. 169

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CASE NO. 277 OF 2012

NYANGERI OBIYE THOMAS
..... PLAINTIFF

VERSUS

YUNUKE SAKAGWA

LAMECK NYOKA SAKAGWA
..... DEFENDANTS

JUDGMENT

1. The Plaintiff brought this suit against the defendants on 16th July, 2012 seeking a permanent injunction to restrain the defendants from trespassing on, wasting, alienating, damaging and/or erecting structures on all that parcel of land known as **LR. No. Central Kitutu/Mwabundusi/1052** (hereinafter referred to as “**the suit property**”). In his plaint dated 11th July, 2012, the Plaintiff averred that he is the registered proprietor of the suit property and that on 23rd January, 2012, the defendants entered the suit property without the Plaintiff’s permission or consent ploughed the same and planted maize and beans. The Plaintiff averred further that the defendants were in the process of putting up temporary structures on the suit property. The Plaintiff averred that a demand was made upon the defendants to vacate the suit property but the defendants refused and/or declined to comply thereby leaving the Plaintiff with no alternative but to institute this suit. The defendants were served with the summons to enter appearance but failed to enter appearance. The Plaintiff requested for interlocutory judgment on 11th February, 2013 which was entered by the Deputy Registrar on 13th February, 2013. The matter was thereafter listed for formal proof on 3rd June, 2013.
2. During the formal proof, the Plaintiff gave evidence and did not call any witness. The Plaintiff testified as follows; the defendants are known to him. They are his neighbours at Mwabundusi, Jogoo area of Kisii County. The defendants entered the suit property without his consent. They have put up a structure on a portion of the suit property and have also planted Napier grass and Maize thereon. The Plaintiff has called upon the defendants to vacate the suit property but they have refused to do so. The Plaintiff produced a demand letter to the defendants dated 22nd June, 2012 as Pexh.1. The Plaintiff had purchased the suit property from one, JONES MATARA NYANKUNE on 7th November, 1997. He produced a copy of the agreement for sale between him and the said Jones Mataru Nyankune as Pexh. 2 and a copy of the title deed for the suit property in his name as Pexh. 3. The Plaintiff urged the court to grant the prayers sought in the Plaint together with costs of the suit. After the close of the Plaintiff’s case, the Plaintiff’s advocate chose to make written submissions.

3. In their written submissions dated 24th June 2013, the Plaintiff's advocates submitted that the Plaintiff has proved that he purchased the suit property from JONES MATARA NYANKUNE in the year 1997, paid the purchase price in full and had the property transferred into his name. The Plaintiff's advocates submitted that the plaintiff is the registered and absolute proprietor of the suit property and as such the defendants had no right to enter the same and to engage in the acts complained of without the Plaintiff's consent. The Plaintiff's advocates submitted that the Plaintiff has made out a case for the injunction sought in the plaint. On general damages, the Plaintiff's advocates submitted that the defendants ought to be punished for their acts trespass so as to be a lesson to the defendants and the rest of the public who have the habit of trespassing into and wasting or damaging the private properties that such properties must be respected. The Plaintiff's advocates submitted that an award of general damages against the defendants would be an ideal punishment. They submitted that an award of Kshs. 500,000/= as general damages for trespass and loss of use would be fair and reasonable in the circumstances.
4. I have considered the Plaintiff's case as pleaded and the evidence tendered in support thereof. The Plaintiffs' claim against the defendants is based on the tort of trespass. In the book, **Clerk & Lindsell on Torts, 18th Edition at paragraph 18-01**, trespass to land is defined as consisting of **"any unjustifiable intrusion by one person upon land in the possession of another."** In the same book, it is stated that trespass is actionable at the suit of the person in possession of the land (paragraph 18-10) and that proof of ownership is a prima facie proof of possession (paragraph 18-110).
5. In this case therefore, the Plaintiff was under a duty to prove that the defendants had unjustifiably entered the suit property which was in his possession. I am satisfied from the Plaintiff's testimony and the documents produced by the Plaintiff in evidence that the Plaintiff has proved on a balance of probability that the defendants have committed acts of trespass on the suit property. The Plaintiff proved that the suit property is registered in the name of the Plaintiff. The Plaintiff produced in evidence a title deed for the suit property in the name of the Plaintiff which confirmed the Plaintiff's ownership of the suit property and that the same was registered in his name on 29th March, 2011. The defendants did not enter appearance and as such failed to tender any evidence at the trial to challenge the Plaintiff's claim. The Plaintiff's testimony was therefore not controverted.
6. It is my finding therefore that the Plaintiff has proved that he is the registered proprietor of the suit property and that the defendants have trespassed thereon by putting up structures and carrying out cultivation of maize and Napier grass thereon without the Plaintiff's permission or any lawful cause or excuse to do so. On the issue of general damages, I am not satisfied that the Plaintiff did lay a proper basis for the same. Damages whether special or general are not to be awarded as a matter of course. The same are compensatory and must be proved. The Plaintiff had a duty to prove that as a result of the defendants' aforesaid acts of trespass; he did suffer non pecuniary loss with respect to which he is entitled to an award of general damages. I am not in agreement with the Plaintiff's submission that general damages can be used as a form of punishment against a defendant so as to teach him "a lesson". That I believe is the province of exemplary damages.
7. The foregoing notwithstanding, I am of the view that the Plaintiff is entitled to nominal damages in recognition of the fact that the defendants' aforesaid acts of trespass did interfere with the Plaintiff's proprietary rights over the suit property.
8. In conclusion therefore, it is my finding that the Plaintiff has proved his case against the defendants on a balance of probability. I therefore enter judgment for the Plaintiff against the defendants jointly and severally for;
 - a. **A permanent injunction restraining the defendants by themselves, their agents, servants and/or employees from wasting, alienating, damaging, erecting structures on and/or trespassing on all that parcel of land known as LR. No. Central Kitutu/Mwabundusi/1052 or any portion thereof;**
 - b. **Kenya Shillings One Thousand (Ksh.1000.00) being general damages for trespass together with interest thereon at 12% per annum from the date hereof until payment in full;**
 - c. **The cost of the suit to be paid by the defendants.**

Delivered, dated and signed at KISII this 29th day of November 2013.

S. OKONG'O

JUDGE

In the presence of:

N/A for the Plaintiff

N/A for the Defendants

Mobisa Court clerk

S. OKONG'O

JUDGE