



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1294 of 2005**

**FRANCIS KIMANI NJOROGE .....PLAINTIFF**

**VERSUS**

**MUNICIPAL COUNCIL OF LIMURU.....DEFENDANT**

**J U D G M E N T**

1. The Plaintiff herein, **Francis Kimani Njoroge** commenced his action by filing a plaint dated 30/09/2005 and filed in court on 27/10/2005. The Plaintiff's claim against the Defendant arises out of an alleged trespass by the Defendant onto the Plaintiff's parcel of land known as LR No. LIMURU/BIBIRIONI/1394 and the subsequent loss of user of 0.25 acres out of the said land which the Defendant is said to have unlawfully excised from the Plaintiff's land LR No. LIMURU/BIBIRIONI/1394. The Plaintiff says he is the registered owner of LR No. LIMURU/BIBIRIONI/1394 (hereafter referred to as the suit land). The Plaintiff says that the Defendant committed the acts of trespass on the suit land on 14<sup>th</sup> June 2005 and 11<sup>th</sup> July 2005 and destroyed crops and property thereon valued at Kshs. 253,600/= particulars of which are given in paragraph 5 of the plaint. The Plaintiff prays for judgment against the Defendant for:-

- (1) *General damages for trespass and damage to crops and property on LR No. LIMURU/BIBIRIONI/1394.*
- (2) *Exemplary damages and mesne profits*
- (3) *Restoration of 0.25 acres to the Plaintiff or compensation to the Plaintiff for the loss thereof at the current market price thereof.*
- (4) *Costs of this suit.*

3. The Summons to Enter Appearance together with a copy of plaint and verifying affidavit were duly served upon the Defendant on 10/11/2005 at 12.00 noon but the Defendant neither entered appearance nor filed defence. As a consequence, interlocutory judgment was entered against the Defendant on 8/12/2005. The matter was then fixed for formal proof.

4. The Plaintiff gave evidence as PW1. He told the court that he was the registered proprietor of the suit land which measures about 1.50 acres or thereabouts. The Plaintiff produced a certified copy of the Abstract of Title as PExhibit 1. In his further testimony, PW1 stated that on the 14/6/2005 and 11/07/2005, the Defendant trespassed onto the suit land and destroyed the following items:-

- |   |                          |   |                       |
|---|--------------------------|---|-----------------------|
| · | <i>½ acre of maize</i>   | - | <i>Kshs.20,000.00</i> |
| · | <i>¼ acre of cabbage</i> | - | <i>Kshs.50,000.00</i> |

· ¼ acre of potatoes	-	Kshs. 9,600.00
· Kales (sukuma wiki)	-	Kshs.10,000.00
· Kei apple hedge 3800 @20/=	-	Kshs.76,000.00
· 11 mature cedar trees @ Kshs.2500 per tree	Kshs.24,000.00	
· 150 cedar posts @150/= per post	-	Kshs.22,500.00
· 4 rolls of barbed wire @ 3000/= per roll	-	Kshs.12,000.00
· 1 iron gate	-	<u>Kshs. 2,000.00</u>
	<i>Total</i>	- <u>Kshs.253,000.00</u>

5. PW1 also stated that the Defendant excised 0.25 acres out of the suit land for purposes of widening the existing road from 9 feet to 20 feet and that in doing so, the Defendant deprived PW1 of the user of the said 0.25 acres.
6. PW2, one Kimani Macharia, also gave evidence in support of the Plaintiff's claim. PW2 stated that he was formerly employed by the Ministry of Agriculture between 1960 and 1990 as a Junior Technical Assistant whose duty it was to advise farmers on the best agricultural practices for various crops. That he used to inspect farmers' crops with a view to determining whether the crops were grown according to the best agricultural practices. PW2 stated further that he went to the Plaintiff's farm on 14/06/2005 and confirmed the damage that had been caused to the Plaintiff's crops fence and gate. He said he worked out the estimates of the damage using his knowledge gained during his tenure as a Government Officer between 1960 and 1990. PW2 produced a report which he prepared after assessing the damage. This report was produced as PExhibit 4. It is that report that formed the basis of the Plaintiff's claim at paragraph 5 of the plaint.
7. The question that now arises for determination is whether the Defendant trespassed onto the suit land. The Plaintiff through his advocate, Mr. Mwaura Shairi, submitted that the suit land being private land and the access road between the suit land and LIMURU/BIBIRIONI/1395 also being a private access road, the Defendant had no business committing the acts of trespass complained of, and in particular excising the Plaintiff's 0.25 acre for the private road expansion. Further, the Plaintiff submitted that if the Defendant had any justification for the commission of the said acts, it would have entered appearance and filed defence. The Plaintiff urged the court to find that the actions of the Defendant, in the absence of justifiable legal authority amounted to trespass in law and that as a result thereof, the Plaintiff is entitled to damages under three separate heads:-

- (i) *Direct Damages*
- (ii) *Indirect damages*
- (iii) *General damages*

8. Regarding the claim for direct damages the Plaintiff submitted that this is made up of Kshs.253,600/= arising from destruction of crops and other items as set out in paragraphs 5 of the plaint. The Plaintiff submitted that the indirect damages arise from the Plaintiff's loss of user of 0.25 acres of the suit land since the Defendant's trespass on 11/07/2005, namely that that if the Plaintiff had used the said 0.25 acres for growing quick growing crops such as cabbages , he would have made about Kshs.20,000/= every three months and approximately Kshs.80,000/= a year. The Plaintiff submitted that he had been deprived of the user of that 0.25 acres for 4½ years from 11/07/2005 all totaling Kshs.360,000/=.
9. The Plaintiff also submitted that he is entitled to exemplary damages because he was deprived of the user of 0.25 acres of the suit land contrary to law; that if the Defendant wanted to acquire the said 0.25 acres from the Plaintiff, the proper procedure under **The Land Acquisition Act, Cap 295 Laws of Kenya** should have been followed. That in the absence of any proof that there was need to acquire the Plaintiff's 0.25 acres out of the suit land, the Plaintiffs proprietary rights were grossly violated and he is thus entitled to exemplary damages for the violent acts of trespass.
10. The Plaintiff's counsel cited **Kinyi –vs- NairobiCity Council [2003] KLR 218** in support of the Plaintiff's claim for exemplary damages. In the case, the Plaintiff sued the Defendant claiming special and general damages for the demolition of the Plaintiff's business **kiosk** which he said had been licenced by the Defendant. The Defendants' side of the story was that the kiosk had been demolished because it stood on a plot that did not belong to the Plaintiff. Though the Defendant alleged that it had given notice to the Plaintiff of the impending demolition, it did not produce a copy of such a notice and the Plaintiff denied that such notice had been given. The court held, inter alia, that

*“4. With regard to general damages, the court viewed seriously the off-hand manner in which the Defendant destroyed the Plaintiff's property. Considering the circumstances of the case, a fair and reasonable compensation to the Plaintiff in general damages would be an award of Kshs.400,000/=.”*

11. In determining the issue at hand, I have sought help from STROUDS JUDICIAL DICTIONARY OF WORDS AND PHRASES, 6<sup>th</sup>

Edn Volume 3 (Q-Z) which defines trespass as follows at page 2716:-

*“TRESPASS. “Trespass” signifies any transgression of the law under treason, felony or misprision of either” (Cowel; see further Jacob).*

*“A trespass is an injury committed with violence; and this violence may be either actual or implied; and the law will imply violence, though none is actually used, where the injury is of a direct and immediate kind, and committed on the person, or tangible and corporal property, of the Plaintiff. Of actual violence, an assault and battery is an instance; of implied, a peaceable but wrongful entry upon the Plaintiff’s land.”*

12. In JOWITT’S DICTIONARY OF ENGLISH LAW, Second Edition by John Burke, Volume 2, L-Z, the author says at page 1804 that –

*“The action of trespass lies where a trespass [transgression of the law less than treason or misprision of treason] has been committed either to the Plaintiff’s person or property. A trespass is an injury committed with violence, and this violence may be either actual or implied, and the law will imply violence though none is actually used, where the injury is of a direct and immediate kind, and committed on the person or tangible and corporeal property of the Plaintiff --- of implied, a peaceable but wrongful entry upon the Plaintiff’s lands.”*

13. In BLACK’S LAW DICTIONARY, Eighth Edition the term trespass is defined as follows at page 1541:-

*“Trespass: 1. An unlawful act committed against the person or property of another, especially wrongful entry on another’s real property.”*

14. Considering the circumstances of this case, and the law as outlined above, the court is satisfied that the Defendant committed acts of trespass on the suit land both on 14/06/2005 and on 11/07/2005. There is evidence to show that the Defendant destroyed crops and other tangible properties belonging to the Plaintiff. The Defendant has not filed any papers to explain the reasons for entry onto the Plaintiff’s land, nor did the Defendant appear to the Summons served upon it on 10/11/2005. On the other hand, the Plaintiff has adduced evidence to confirm that he was and still is the registered owner of the suit land; that the Defendant caused direct damage to the Plaintiffs’ property to the tune of Kshs.253,600/= as confirmed by PW2. The Plaintiff has also adduced evidence to confirm that the Defendant excised 0.25 acres out of the suit land for the expansion of a private access road between the suit land and LR No. LIMURU/BIBIRIONI/1393 without following the law. The court frowns on such conduct as exhibited by the Defendant. If the Defendant genuinely wanted to expand the road in question, it would have given notice to the Plaintiff in accordance with the provisions of The Land Acquisition Act; but from the Plaintiff’s testimony, the Defendant’s employees who were many in number arrived unannounced on the suit land first on 14/06/2005, all armed with pangas and also had a tractor. The gang of the Defendant’s employees descended on the Plaintiff’s fence and destroyed it and then on 11/07/2005, the gang returned went ahead to widen the road which the Defendant alleged was not wide enough. Without as much as talking to the Plaintiff or even explaining why no notice had been given to the Plaintiff.

15. Considering all the above circumstances, the court is satisfied that the Plaintiff is entitled to direct, indirect and general damages. Accordingly, I would enter judgment for the Plaintiff as against the Defendant as follows:-

(i)	Direct damages in the sum of	Kshs.253,600/=
(ii)	Indirect damages in the sum of	Kshs.360,000/=
(iii)	Exemplary damages in the sum of	<u>Kshs.500,000/=</u>
	Total	<u>Kshs.1,113,600/=</u>

16. The Plaintiff shall also have the costs of the suit and interest on the sums awarded from the date of this judgment until payment in full.

Orders accordingly.

**Dated and Delivered at Nairobi this 12<sup>th</sup> day of March, 2010.**

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-

Mr. Mwaura Shairi (present) For the Plaintiff

No appearance for the Defendant

Weche - court clerk