



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NYERI

CIVIL CASE 38 OF 2008

PAUL WAGIITA THEURI .....PLAINTIFF

versus

LYDIA WANGUI BUURI .....DEFENDANT

JUDGMENT

**Paul Wagiita Theuri**, hereinafter referred to as “*the Plaintiff*” is an advocate of this court since his admission to the roll of Advocates on 23<sup>rd</sup> July, 1998. He has practised law in this court and elsewhere in the Republic. Sometimes in the year 2004 it would appear he came by some windfall and/or good fortune which enabled him to purchase land parcel **Laikipia Tigithii/Matanya Block 3/630** hereinafter referred as the “*suit premises*”. His immediate neighbour was a lady by the name **Lydia Wangui Buuri**, hereinafter referred to as “*the Defendant*”. She was the registered owner of the parcel of land adjacent to the suit premises. The suit premises measures 3.2 acres. On 19<sup>th</sup> April, 2004, the Plaintiff obtained title to the suit premises. The previous owner from whom the Plaintiff bought the suit premises was known as **Samuel Wambugu Kuna**. He immediately took possession of the same with a view to turning it into a horticultural produce farm as it was adjacent to a river. In the same year he hired a tractor to plough the suit premises.

However, out of the blue, the Defendant and her children stopped the Plaintiff in his tracks alleging that she was not the owner of the suit premises. As far as the Defendant and her son, one, Mathenge were concerned the suit premises belonged to nobody. In other words it was no man’s land as the previous owner had never taken physical possession of the same. By then the Defendant was cultivating a portion of the suit premises. The Plaintiff sought the assistance of the local administration in asserting his proprietorship of the suit premises to no avail. The local chief and the District Officer, Lamuria Division where the suit premises are situate became elusive on the issue. The plaintiff suspected collusion between the Defendant and the local chief and District Officer in frustrating his efforts in asserting his right to the suit premises. Indeed on one occasion, the District Officer called the Plaintiff and bluntly told him that in the absence of a court order he will not be of any assistance to him on the matter .

It is then that the Plaintiff instituted this suit seeking the eviction of the Defendant, his family and properties from the suit premises on the ground that the Defendant had without any colour off right unlawfully and wrongfully trespassed into the suit premises and had refused to vacate the same despite several demands and requests. The Defendant’s action complained of constituted wanton trespass and gross violation of the Plaintiff’s property rights. Hence an order for eviction as well as damages for trespass. From horticulture which is a booming business in the area, the plaintiff expected to make Kshs.100,000/= per acre per year. Accordingly he would have made 1,500.000 between 2004 to date. He therefore also asked general damages in those terms.

The Defendant was duly served with the summons to enter appearance as well as the plaint. She never bothered to enter appearance to the summons as required by law within the prescribed period of time. By an application dated 5<sup>th</sup> May, 2008 and filed in court on the same date, the plaintiff prayed for interlocutory judgment to be entered against the Defendant as she had failed to enter appearance after being served with the summons and plaint on 17<sup>th</sup> April, 2008. The court having been satisfied as to the service upon the Defendant duly acted on the Plaintiff’s application and entered a default judgment on

the same date. On 30<sup>th</sup> October, 2008, the Plaintiff set down the suit for hearing by way of formal proof.

On 4<sup>th</sup> February, the hearing of the formal proof commenced before me. Only the Plaintiff testified. His testimony was along the lines set out at the beginning of this judgment.

In my view the Plaintiff has proved his case on balance of probabilities as required by law. He gave evidence which was unchallenged and or uncontraverted. He tendered in evidence copy of the title deed as well as a certificate of official search to prove ownership of the suit premises. The Defendant is in occupation of a portion the suit premises and has prevented the Plaintiff from utilizing the suit premises. The Plaintiff intended to practice horticulture but has not been able to-do so due to the Defendant's unbridled and wanton trespass on the suit premises. In his estimation he would have earned Kshs. 100,000 per acre per year. The suit premises measures about 3.2 acres. Accordingly at Kshs. 100,000 per acre he would have made kshs. 300,000/- per year. Therefore between April, 2004 and January 2009, he would roughly have made an income of Kshs. 1,200,000. However taking into account other considerations, the Plaintiff was content to ask Kshs. 300,000/- as general damages for trespass. No doubt the Plaintiff is the absolute registered proprietor of the suit premises. In terms section 27 and 28 of the Registered Land Act, his proprietorship of the premises cannot be impugned by the act of trespass committed by the Defendant and or members of her family. In the case of **M.Mukanya v M'mbijiwe (1984) KLR 761**, the Court of Appeal held that trespass as a tort **"...is a violation of the right of possession and M'mbijiwe must prove he, and not M'Mukanya and Nyamu, had the right to immediate and exclusive possession of it which is different from ownership..... he does not have to prove damage.... Mukanya and Nyamu are liable for trespass if M'Mbijiwe has the right to possess and they intentionally entered his plot even though they honestly believed the land was their own and they had a right of entry on it or they did so under an inevitable mistake of law or fact..."** The same principles apply to the circumstances of this case. The Defendant may assume that the suit premises belonged to nobody since the original owner had never taken physical possession thereof. It may even be in a no-man's land. However the Plaintiff has a title to it which is unchallenged. He is thus entitled to immediate and exclusive possession of the suit premises. It is the finding of this court therefore that the Defendant is a trespasser to the Plaintiff's suit premises. The remedy available to the Plaintiff against the Defendant is an order for her eviction. It will forthwith issue therefor.

The plaintiff has submitted that an award of Kshs. 300,000/= would adequately compensate him for the loss and damage that he has incurred following the Defendant's trespass in the suit premises. He had intended to be a horticultural farmer and would have made some income there from but for the actions of the Defendant. As already stated, in a claim of damages hinged on trespass a party making such claim need not prove any damage. See **Ashby v White (1703) 2 Raynd 938**. It is sufficient to prove the mere act of trespass and damages would automatically follow. In the case of **Macharia v Mwangi Kigundu & anor. NBI HCCC NO. 4067 of 1986 (UR) Bosire J** as he then was provided some guidelines though. He stated. **"...their action was wanton. The Plaintiff has long been deprived of the use of the land in dispute. He is entitled to damages. The measure of damages is such sum as the court will consider reasonable, considering the size of the land involved and the length of time the Plaintiff has been deprived of the same. There are (other) factors but the Plaintiff never called evidence in regard to them. Those would include, the purpose the Plaintiff intended to use the land for. Doing the best I can in the circumstances, and considering that the land involved is very small, I assess damages at Kshs. 50,000/-...."** In our case however, the Plaintiff has demonstrate what he intended to do with the suit premises but for the Defendants actions. The suit premises being 3.2 acres cannot be said to be small by any standards. The Plaintiff is a lawyer of not small repute. He was in a position to actualize his desire of being a horticultural farmer besides being a lawyer. In other words, he had the necessary capital to turn his dreams into reality. However I do not think that a sum of Kshs. 300,000/- is a good estimate of what he should have earned. There could have been other imponderables as well. Doing the best I can in the circumstances I would assess damages at Kshs. 200,000/-.

In a nutshell it is the judgment of this court that:

(a) An order of eviction shall forthwith issue against the Defendant, members of her family and their properties if at all.

(b) General damages of Kshs. 200,000/- on account of trespass shall be payable to the Plaintiff by the Defendant.

(c) The plaintiff shall have costs of his suit plus interest at court rates.

(d) Interest at court rates on general damages shall accrue from the date of this judgment.

Dated at Nyeri this 26<sup>th</sup> day of February 2009.

M.S.A. MAKHANDIA

JUDGE