REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
Civil Case 285 of 2002

KIBIGORI PLANTATIONS LIMITED …….PLAINTIFF

VERSUS

JOHNSON KIPKOECH RUTTO AND 38 OTHERS …… .....DEFENDANTS

CORAM

J. W. MWERA J.

KOPOTFOR PLAINTIFF

BIRECH FOR DEFENDANTS

COURT CLERK RAYMOND INTERPRETER/SWAHILI/ENGLISH/LUO

J U D G E M E N T

By plaint filed here on 2nd September 2002 the plaintiff limited company sued the forty (40) defendants on account of trespass over its several parcels of land LR 4280/1, 3100, 1619, 3091, 3078, situate at a place called Kibigori in Nyanza Province. It was averred that sometime in 11999 the defendants jointly, wrongfully and without right trespassed on the said pieces of land and erected dwelling houses thereon thereby interfering with the plaintiff's quiet possession of his properties. That besides the invasion, the defendants destroyed the plaintiff's buildings on the said property and harvested its cane worth shs.1.3 million. So the plaintiff company prayed that the defendants be restrained from continuing in the trespass and also be ordered to vacate the parcels of land in issue. The plaintiff got an interim injunction order and so came to court for eviction orders and an award of general damages and costs.

In a defence filed, the defendants denied allegations of trespass claiming that in fact they had lived on the suit block of property since their births and their ancestors had similarly lived on the land. Destruction of crops on the land was denied and that the defendants had only harvested cane on the portions of land they occupy and which they grew. And that the buildings complained of were the dwelling houses of the defendants, some built as early as 1965. It was added that the defendants had not "grabbed" the plaintiff's land and so evicting them would be against public interest and the same would do injustice to some 230 people living on the suit premises. It was further pleaded that the defendants had become entitled to the portions of the plaintiff's land they occupied by prescription following long an interrupted occupation of the same and that between 1965 and 1988 the plaintiff had agreed to cede to the defendants the portions of the land they occupied. That the defendants paid a total of shs.1.5 million towards the sub-division and allocation of the portion(s) agreed. So they sought this court's assistance in ensuring that they got the portion(s) they were promised by the plaintiff company. Lastly, that once upon

a time the plaintiff sought similar orders as it does in this suit, in **HCMISC.APP.NO.127/00** which it withdrew. This defence was later amended to incorporate a counterclaim by the defendants for orders based on adverse possession. The court heard an application to strike out the counterclaim and the same was dismissed on account of procedure – namely that if the defendants sought orders to acquire title by adverse possession, the way to move was by Originating summons and not a counter-claim. When the injunction application was heard inter parties, Tanui J declined to grant the orders. So at the time of trial only the original plaint and defence remained to be regarded.

Antar Singh Bhullar (PW1), a director of the plaintiff company incorporated in 1963 (Exh.P1), appeared to testify in behalf of the company. It had sued the defendants as already narrated, because they had trespassed on its 5 plots of land (Exh P2 (a) to (e), thereby disabling the plaintiff from using/developing the land. The defendants had no permission of the plaintiff company to occupy its land at any time, yet they had put up structures on it. Prior to that the plaintiff company had leased its property to sugar cane growers from whom it received rents (Exh.P3 (a) to (e), Exh.P4). The five parcels of land comprising about 1120 acres had yielded no rental income to the plaintiff company since 1999 when the defendants unlawfully encroached on it. That invasion was reported to the local administrators (Exh.P5) in a bid to get the defendants out of the land. The plaintiff company had always held titles to their property which the defendants invaded only in 1999. They should be ordered to vacate the land and pay damages.

The court heard in cross-examination that PW1 did not have in court the plaintiff company's board resolution to sue on its behalf but the five directors indeed resolved to file the suit.

The defendants presented three of themselves to give evidence on their behalf.

Raphael Rono (DW1) denied that he, with others had trespassed over the plaintiff's property. A farmer from Nyangore Location, he was born where he lived to date, in 1969. The land in question was about 1000 acres in area and the plaintiff company had never lived there. The defendants did not destroy any crops as claimed, and nobody has ever attempted to evict them from the land. DW1 did not know about the title deeds produced by the plaintiff (above) and so he asked that this suit should be dismissed.

In cross-examination DW1 maintained that he could not change his mind even if he learned that somebody else held the titles to the land he occupied. He had no title to the portion he occupied and he had nowhere to go.

On her part **Maria Toyoi Kosgei (DW2)** a farmer, said that she came from Chepketei Location, Kibigori. She denied that they trespassed on anybody's land. She had lived on the land she still occupies from the time she was married to one Ondiek Kosgei, now deceased. That could be as from far back as 1948. DW1 denied coming onto the subject land in 1998 or that they destroyed any crops on it. She buried her husband where she lives. She did not know its number at all and she had not tile to it. DW2 conceded that a title deed signified who owned what land, but on her part her late husband died before he got one for their shamba. And if anyone came there with a title, DW2 was not prepared to move out at all.

Samson Kipserem Keino (DW3) testified next. He lived on Kibigori

Plantations, a farmer, but he denied having trespassed as sued. He was born where he lived and he did not know where the title of the land he occupied was. He did not know the owner of that land either. He was born on the land in 1963. His parents died and were buried there. He did not come onto the land in 1999. DW3 had been cultivating the portion he occupies with no threat to evict him. The plaintiff never grew sugarcane there and the witness never saw "him." He, like DW2, did not know who owned this land whose titles he had never seen.

DW3 added that title deeds to own land were important and that squatters should get them. He had lived where he is now without one. It was time he got one so that nobody sues him as it had happened in the present case. He occupied only a portion of the whole land measuring about 1000 acres. And only a

few of the occupants were sued. The trial closed and each side submitted.

On behalf of the plaintiff Mr. Kopot said that the plaintiff company had proved on evidence, that it owned the block of land in issue. It held the titles to it. It had been using the land by leasing it out until 1998 and then in 1999 the defendants encroached on it. Reference was made to the leases the plaintiff gave out between 1973 and 1999 to sugar cane farmers. That efforts included enlisting government offices to help in evicting the defendants, who were committing illegal acts on the plaintiff's land.

Turning to the defence evidence, the court heard that the defendants admitted that they were in occupation of the subject land. A titleholder to a given land had a superior claim to it and here the defendants held/owned no titles of their own. Their claim of long occupation did not extinguish the plaintiff's right to its property. The court was urged to issue the eviction order sought and award shs.1 million in damages arising from the trespass that resulted in destroying sugar cane on the land plus a further loss of income (from leaseholds) put at shs.5 million. The hole total of damages computed of the loss since the last lease of 1999, which leases were disrupted by the defendants acts of trespass, was put at shs.35 million. And to guide the court in all this **ClerK & Lindsell on Torts, 15th Edition** was cited.

On their part **M/S Birech, Ruto & Co, Advocates** said as follows via Mr. Sang who appeared in court on behalf of the defendants. The plaintiff company had failed to prove that the defendants trespassed on its land in 1999 or that before that it had been leasing out the block of land to cane farmers. There was no evidence of destruction of crops. That the defendants had lived on the land for long time since 1948 (see DW2) and so could not be trespassers at all. If not so, the plaintiff's case was time-barred under the Limitation of Actions Act – 3 years had long passed since the alleged trespass was committed.

It was further submitted that this suit should fail because for a suit to be instututed on behalf of limited liability company, a board meeting should pass a resolution and the case of **Bugerere Coffee Growers Limited Versus Sabaduke & Another {1970} CA 147** was cited on that account.

In this court's view the land in question comprising some 5 parcels belongs to the plaintiff company. One of its director Mr. Bhullar (PW1) tendered evidence to that effect. He also produced evidence, and the court believed, that upto 1998/99 the plaintiff had been leasing this land to sugar cane farmers who were tilling and planting. There was no evidence that when the defendants came onto the land they destroyed crops. The defendants denied that they did invade the plaintiffs land. But from the exchange of letters (Exh.P5) between the plaintiff and the provincial administration speaking about evicting intruders on the land of the plaintiff in 2000, it shows that the defendants got on the land in question without the plaintiff's consent at about this time and so it sought assistance to evict them. The letters to that effect appear genuine. The court did not believe that the defendants had been on the subject land from as far as 1948. DW2 (Mary Kosgei) did not avail her identity card to show her age but from her looks the court doubted whether she was married to one Ondiek, at that time to live on the plaintiff's land. None of the witnesses, although acknowledging that a title to land was important, held any title to the portions they occupied of the plaintiff's land. They could not have any because the plaintiff has always held them. And according to **Samson Kiperem Keino (DW3),** he so much as said that he was a squatter on the land he occupied. He did not know or "see" its owner. Well, he could not see a limited company. He desired to have a titled to his portion to avoid being sued in future. He thus appreciated that he was squatting on somebody else's land. And like the other two defence witnesses, he produced to evidence that he was born on the land and so he did not come on it in 1999. As noted earlier, the defendants seemed to tell the court that by long occupation of the plaintiff's, land and that was not demonstrated, they were entitled to get the title(s) to it by way of adverse possession. However, these proceedings were not theirs, brought under Order 36 rule 3D Civil Procedure Rules to claim such right under section 38 of the Limitation of Actions Act.

Particular focus was put on paragraph 18 of the defence:

"18. The defendants state that without prejudice to the foregoing the plaintiff and or its agents and or servants had at one time between the year 1965 and 1988 entered into a compromise under which the plaintiff and or its servants or agents agreed to given to the defendants the portion of the suit premises

which had been under their use and or occupation."

It was added in the avernment that survey and sub-division was undertaken by a government surveyor. The defendants paid shs.1.5 million towards the whole exercise which stopped at the point when registration would have taken place. It looks like nothing further transpired and so the defendants asked this court to assist them in seeing that the whole transaction came through. Unfortunately, there was no evidence on this aspect by any of the 3 defence witnesses. The court would have considered it, in the interest of justice, to see whether such a compromise/agreement took place, by considering credible evidence produced ,to see if, by such the plaintiff company could be estopped from reneging on or derogating from what it had promised the defendants. Anyway, that pleading further strengthens the claim that the defendants are unlawfully squatting on the plaintiffs land.

Then during examination of PW1 and in the submission this issue of whether the plaintiff limited company by its board of directors passed a resolution, preceding and authorising the institution of this suit. Such a resolution acts as authority for the directors to sue on behalf of the non-human entity, the limited liability company, which has the right to sue and be sued. Its agents (directors etc) should not, on their own, institute suits in the name of the company without its authority by a resolution otherwise those agents find themselves meeting the costs of such suits. So such authority is necessary as emphasized in the case **Bugerere** above. In these proceedings the defendants raised the issue at the time of cross-examining PW1. He responded that he as one of the five directors of the plaintiff, passed such a resolution. What can be said is that he did not have it in court. An elderly gentleman PW1 was, and rather direct in his testimony. The court believed him on this account that there was due resolution passed in order to bring this suit on behalf of the plaintiff limited company. The law does not require that such a resolution be produced in court. Only that it should be passed before the suit is instituted. Perhaps it could be prudent to display it but that is not required by law at all. All that must be done is that such a resolution be passed and PW1 told the court that one was passed. The defendants did not ask the plaintiff to produce such a resolution as part of discovery and inspection either. However, it transpired that a limited company did not pass a resolution for a given suit to be instituted in its name, then that suit should fail.

But that was not the case here. PW1 maintained and the court believed him when he said that such a resolution was indeed passed.

So all in all this claim succeeds with costs. The defendants are injucted from continuing to remain on the plaintiff's land. It has been a continuing wrong since 1999. They should no longer grow crops there or put up structures. They are ordered in the next 120 days to remove themselves and their structures and give vacant possession to the plaintiff company, in default it pulls down the structures and puts in hand motion to evict the defendants.

A trespass is **actionable per se**. The plaintiff has proved that the defendants have trespassed on its land. It asked for a large sum in general damages. It included in submission, perhaps not quite properly so, lost income. This is however minded to award the plaintiff shs.1.2 million in general damages, plus costs and interest.

Judgment accordingly.

Delivered on 13th May 2009.

J. W. MWERA

J U D G E

JWM/mk.