



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Case 118 of 2005

YOHANA WEKUNDA

NAMIRANDA:.....PLAINTIFF

VERSUS

KEFA LIHANDA

ALEGO:.....DEFENDANT

JUDGEMENT

In this suit file by the plaintiff against the Defendant on 14th December,2005, the plaintiff seeks the following Orders from this court:-

- a) A declaration that the plaintiff is the legal registered owner of the whole of all that parcel of land known as Title Number **KAKAMEGA/MAUTUMA/482** and that the Defendant has unlawfully encroached and trespassed onto the said parcel of land.
- b) General damages for trespass and unlawful encroachment onto the plaintiff's parcel of land known as Title Number **KAKAMEGA/MAUTUMA/482**.
- c) An order of eviction against the Defendant and his family members, servants and/or agents and/or his other persons to be evicted from the plaintiffs parcel of land known as Title Number **KAKAMEGA/MAUTUMA/482**.
- d) A permanent injunction to restrain the defendant and his family members /servants and/or agents or otherwise howsoever from occupying or continued occupation, from entering into and/or re-entering into, building any structures, fencing off and/or destroying any fence, encroaching onto, wasting, damaging, leasing out, selling, transferring, cultivating, tilling, and/or ploughing and/or dealing in any manner whatsoever, and/or in any other manner interfering with the possession and/or ownership of all that parcel of land known as Title Number **KAKAMEGA/MAUTUMA/482**.
- e) Costs of this suit plus interest and such further order or relief this Honourable court may deem fit and proper to grant.

The defendant was served with the summons and plaint on 7th January,2006 when his wife Angela Inyangasi accepted service on his behalf at his home and duly signed for them. The Defendant did not enter any appearance and interlocutory Judgment was entered on 30th January,2006.

At the trial the plaintiff testified that he was the registered owner of the suit property, Title Number **KAKAMEGA/MAUTUMA/482** measuring approximately 8.0 hectares. He testified that on 7th

march,2005. he saw the defendant digging in the suit property and when the plaintiff asked why he was doing so, the defendant assaulted him and a fight broke out. The matter was reported to the police at Mautuma Police Base who told him to go to Hospital. The plaintiff testified that shortly thereafter, he was arrested and placed in police cells. He stayed in the police cells for 2 days without any treatment.

The plaintiff was subsequently charged in Eldoret magistrate's Criminal Case No.1806 of 2005 with the offence of grievous bodily harm. The Defendant then started building a house on the suit land claiming that he had a claim on the land. He also cultivated 2 acres of the land and harvested maize. The plaintiff stated that the Defendant did not plough the land this year but he apprehends that he could still return.

The plaintiff produced his titled document to the land. He claims damages for the trespass and encroachment. The plaintiff pleaded general damages. The plaintiff said that had he not been deprived 2 acres of land he would have ploughed and cultivated the land himself and produced maize and beans whose amount and values he estimated as follows:-

MAIZE: 50 – 60 bags at Kshs. 1200 – 1300 per bag. Taking the lower estimate works out at 50 x 1200 = Ksh. 60,000/=

BEANS: 10 bags at between Kshs. 1500/= - 2000/= per bag. Taking the lower estimate works out at 10 x 1500 = Kshs. 15,000/=. The total claim works out at Kshs. 75,000/=.

I have considered the plaintiffs claim, his testimony on oath and submissions by counsel. The defendant chose not to defend his suit. After careful perusal of the title deed to the suit property, I do hereby find that the plaintiff is registered as the absolute proprietor and owner of L.R. No. Title No. Kakamege/Mautuma/482. As for constitution protects the right to private property and the plaintiff has produced evidence to show that he is the owner of the property, this cannot be taken away without due process of the law. Also, he has the absolute right to use and abuse his property and the defendant has no right to enter into the said land without the consent of the plaintiff.

Since the plaintiff is the registered proprietor of the land there is no need for this court to declare what is certain and obvious. There is no need to put doubt on the title deed as to enhance it. It speaks for itself and the law of this land will protect it to the hilt. If the defendant has any rightful claim then he must pursue it in accordance with the law.

As a consequence, I do find that the defendant unlawfully encroached and trespassed on to the plaintiffs parcel of land.

The plaintiff has sought an order of eviction against the defendant. At the trial, the plaintiff testified that the defendant did not plough the land in 2006. The house being constructed was left uncompleted. In the premises, I am unable to find that the defendant is still on the land. I see no basis for an order of eviction since while this was a proper action of ejection at the time the suit was filed, the defendant is no longer on the premises at the time of the trial.

In the book "McGregor on Damages" 16 Edition, 1997, it is stated: at P.984, paras 1502-

"Where the defendants merely uses the plaintiff's land or part of it without depriving him of its possession, no question of recovering the land or its value arises. Damages are necessarily limited to loss arising from the period of wrongful user."

With regard to damages, how does the court consider and assess this? In **SWORD HEATH PROPERTIES –V- TABET (1979) 1 W.L.R. 285 CA**, the Court of Appeal in England held:-

"It appears to me to be clear, both as a matter of principle and of authority, that in a case of this sort the plaintiff, when he has established that the defendant has remained on as a trespasser in residential property, is entitled, without bringing evidence that he could as would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the

property as it would fairly be calculated; and, in the absence of anything special in that particular case it would be in the ordinary letting value of the property that would determine the amount of damages.”

Applying this , “User principle” that combines both compensatory and restitutionary elements, I am inclined to award the plaintiff a reasonable amount in damages that would reflect the value of the proceeds he would have fetched had he grown maize and beans on the two acres of land for the 2005 season. The plaintiff did not call in any marketer or expert. As a result, this court cannot rule out that the estimates given by the plaintiff could be self serving. Even if truthful and accurate, this court cannot accept this to be so without other evidence. As a result doing my best, I think that it would be fairly safe to reduce the aforesaid estimates of shs.75,000/= by 40% per cent. I assess the damages suffered by the plaintiff in the sum of Kshs. 45,000/=.

Since the plaintiff has proven the acts of trespass and encroachment, this court would grant the permanent orders of injunction sought.

Accordingly I do hereby enter judgement in favour of the plaintiff against the defendant as follows:-

- a) General damages for trespass and unlawful encroachment in the sum of shs. 45,000/= together with interest thereon at court rates from the date of judgement until payment is full.
- b) Prayer (d) is granted.
- c) The defendant shall pay costs of the suit to the plaintiff.

Orders accordingly.

DATED AND DELIVERED AT ELDORET ON THIS 21ST DAY OF JULY 2006.

M. K. IBRAHIM

JUDGE