



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC CASE NO. 71 OF 2015

ISAAC CHEPKONGA ROTICH.....PLAINTIFF

VERSUS

JOSIAH KIPROP PETER.....1ST DEFENDANT

ROBERT KIPTUM TUWEI.....2ND DEFENDANT

JUDGMENT

By an originating summons dated 10th March 2015 the plaintiff/applicant herein sought for the following orders:

- a) That a declaration be and is hereby issued declaring part of Land Parcel No. MOI'S BRIDGE /ZIWA BLOCK 2 (KIPSIGAK) 130 measuring 0.567acres situate in Uasin Gishu County belongs to the applicant having lawfully and legally purchased the same for value from the 1st respondent and a permanent injunction be issued against the respondents jointly and severally over the suit property.
- b) That an order be issued directing the 1st and 2nd respondents to execute all the relevant documents to facilitate transfer of the title to the applicant herein.
- c) That a declaration be and is hereby issued declaring that the respondents are not entitled to the suit property given the that the 1st defendant breached the terms of the sale agreement dated 31st August 2007
- d)That subject to prayer (a) , (b) and (c) above, a declaration be and is hereby issued declaring that the applicant is entitled to mesne profits, general and special damages for trespass by the respondents.
- e) That upon grant of the aforesaid prayers, a permanent injunction be and is hereby issued restraining the respondents by themselves, agents and /or employees from interfering with the applicant's lawful quiet possession of part of land parcel No MOI'S BRIDGE/ZIWA BLOCK2 (KIPSIGAK) 130 measuring 0.567 acres or thereabout situate in Uasin Gishu County.
- f) That the costs be awarded to the applicant

The respondents were served with the summons but they neither filed a response nor attended court to defend the suit though served with a hearing notice.

PLAINTIFF'S CASE

It was the plaintiff's case that he purchased the suit land from the 1st defendant for a consideration of kshs. 75,000/- which amount was paid in full. He produced a copy of the sale agreement as P-Ex1.PW 1 also stated that he took possession of the suit land after payment until the year 2014 when the 1st defendant fenced the property including the suit land.

PW1 further stated that he filed an application for temporary injunction which was heard by the court and orders issued on 16th March 2015 restraining the defendants from interfering with the suit land.

PW 1 stated that the dispute was resolved on 11th February 2013 in the presence of all the defendants who were satisfied with the verdict of

the committee but they later declined to adhere to the resolution to transfer the suit land to the plaintiff. It was PW1's evidence that the 1st defendant transferred the land to the 2nd defendant and produced a search certificate to confirm ownership.

PW2 who is the wife of PW1 gave evidence and confirmed that they were in occupation of the suit land until the 2nd defendant encroached on the land by fencing the portion of that they utilized. She stated that she attended the committee meetings that resolved this dispute.

PLAINTIFF'S SUBMISSIONS

Counsel listed three issues for determination by the court namely:

- a) Whether the applicant entered into a sale agreement over the suit parcel of land measuring 0.567 acres.
- b) Whether the 1st respondent is in breach of the agreement of sale dated 31st August 2007.
- c) Whether the applicant is entitled to the reliefs sought.

Counsel submitted that it is not disputed that the plaintiff entered into a sale agreement with the 1st defendant. That the sale agreement is binding having been signed by both parties. Counsel relied on the case of **Curtis versus Chemical Cleaning & Dying Co. Ltd. (1951), ALL ER 631.**

On the second issue as to whether the respondent has breached the terms of the agreement, counsel submitted that the plaintiff having paid the purchase price in full it was prudent that the 1st defendant signs the transfer documents and refusal of the same was in breach of their agreement and prejudicial to the plaintiff.

Mr Kandie cited the case of of **Samaki Industries (K) Ltd =versus= Bullin Bank & Another Mombasa HCCC No. 495 of 1999**

Counsel therefore urged the court to grant the orders as prayed as the defendants were given an opportunity but did not file any response to the case.

ANALYSIS AND DETERMINATION

The issues for determination is whether there was a valid sale agreement over the subject suit land, whether the plaintiff is entitled to the orders sought.

The plaintiff produced a sale agreement signed by both parties for a portion of land measuring 0.567 and produced the same as P-Ex 1. The same has not been challenged by the defendants. Further, the minutes of the meeting of the committee led by the chief show that it was agreed that the plaintiff had indeed purchased the suit land and was entitled to quiet possession of the same.

Section 3(3) of the Law of Contract provides that:

‘No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.’

The sale agreement met the threshold of the above provision.

On the second issue as to whether the 1st respondent breached the terms of the sale agreement, Black's Law Dictionary, 9th Edition, Page 213, defines a breach of Contract as;

“a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”

The respondent was under an obligation to meet his part of the bargain having been paid the full purchase price and allowed the plaintiff to take possession of the land.

It follows that the plaintiff is entitled to the declaratory orders to compel the 1st and 2nd respondents to execute the transfer documents for the

portion of the suit land to confer ownership to the plaintiff and permanent injunction to restrain the respondents from interfering with the plaintiff's quiet enjoyment of the suit land.

On the issue whether the plaintiff is entitled to an order of damages for trespass and mesne profits, it is trite law that trespass is actionable per se. In the case of **Park Towers Ltd...Vs... John Mithamo Njika et al (2014) eKLR**, where the Court held that:-

“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages, The Court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case.”

The plaintiff stated that the respondents demolished his fence and ploughed the land without his permission.

Halsbury's Laws of England 4th Edition Volume 45 para 26 1503 provides as follows on computation of damages in an action for trespass:

- a) *If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.*
- b) *If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.*
- c) *Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.*
- d) *Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, damages may be awarded.*

Further in the case of **Philip Aluchio...Vs...Crispinus Ngayo [2014] eKLR**, the Court held as follows: -

“..... The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less”

The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass....”

Trespass being actionable per se, I find that the plaintiff is entitled to general damages for trespass but I will award a minimal sum of Kshs 100, 000/.

On the claim of mesne profits I find that the same has not been proved as it is a special damage which must be specifically pleaded and proved.

Section 2 of the Civil Procedure Act Cap 21 of the Laws of Kenya defines mesne profits as follows: -

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

Order 21 Rule 13 of the Civil Procedure Rules provides as follows: -

13. (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree —

- (a) for the possession of the property;
 - (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
 - (c) directing an inquiry as to rent or mesne profits from the institution of such suit until—
 - (i) the delivery of possession to the decree-holder;
 - (ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or
 - (iii) the expiration of three years from the date of the decree, whichever event first occurs.
- (2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed

in accordance with the result of such inquiry.

In the case of **Karanja Mbugua & another v Marybin Holding Co. Ltd [2014] eKLR** stated as follows with regard to mesne profits: -

“This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of Civil Procedure Act

I have considered the evidence on record, the submission by counsel and the relevant authorities and come to the conclusion that the plaintiff has proved his case save for the mesne profits which fails. The plaintiff is also entitled to costs of the suit.

DATED and DELIVERED at ELDORET this 28th DAY OF JANUARY, 2021

M. A. ODENY

JUDGE