



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 281 OF 2019

JAYANTILAL KACHRA SHAH.....PLAINTIFF

VERSUS

ELIJAH MPUTHIA IRURA.....1ST DEFENDANT

PETER WAMBUGU.....2ND DEFENDANT

CHARLES MUTINDA.....3RD DEFENDANT

JUDGEMENT

1. The Plaintiff filed suit on 28/8/2019 seeking a declaration that he was the sole and absolute owner of land reference number (L.R. No.) 42/2/1/1 located in Njiru area of Nairobi measuring 12.75 acres, less 2.4 acres for the road reserve (“the Suit Property”). He also sought a permanent injunction to restrain the Defendants, their agents or servants from entering, alienating, constructing anything in or dealing with the Suit Property as well as damages for trespass, loss of user, loss of business due to threat and interference with his property and damages for racial abuse and racial discrimination.

2. The 1st and 2nd Defendants filed a defence on 30/9/2019 denying the Plaintiff’s claim while averring that the Plaintiff had not proved ownership of the Suit Property. The 1st Defendant averred that he was the Member of the County Assembly (MCA) for Njiru where the Suit Property is situated and that his dealing with the suit land was merely meant to secure and protect public interest in the suit land. The 2nd Defendant was described as an official self-help group known as Budalangi Valley Self Help Group whose members had lived in or around the Suit Property since time immemorial and were therefore entitled to be declared as bona fide members of the suit land by virtue of adverse possession.

3. The 1st and 2nd Defendants averred that the Plaintiff had encroached on public utility land by blocking a public road and was in the process of fencing off the land where the children played. They maintained that the Plaintiff was required to surrender 10% of his land for public utility. They counterclaimed for an injunction to restrain the Plaintiff from dealing with the Suit Property and a declaration that the Defendants on behalf of Budalangi Valley Self Help Group were the true owners of the Suit Property through adverse possession.

4. The Plaintiff withdrew the suit against the 3rd Defendant on 18/11/2019. When this suit came up for hearing on 26/2/2020 parties entered into a consent vide which judgement was entered for the Plaintiff in terms of prayers (a) and (b) of the plaint dated 28/8/2019, whose effect was that the Plaintiff was declared the absolute owner of the Suit Property less 2.4 acres for the road reserve and a permanent injunction was issued restraining the 1st and 2nd Defendants from interfering with the Plaintiff’s property. Further, the 1st and 2nd Defendants withdrew their counterclaim in the defence dated 26/9/2019 and parties agreed to file submissions on the issue of damages for trespass, loss of user and business, damages for racial abuse and racial discrimination and the costs of the suit.

5. Parties filed submissions which the court has considered. The Plaintiff submitted that the court only needed to address the issue whether damages should be awarded because trespass, interference, threat and loss had been established. He relied on the case of **John K. Koech v Peter Chepkwony [2019] eKLR** on the computation of damages in an action for trespass. The case sets out the factors to be considered by the court such as that the Plaintiff is entitled to receive an amount to compensate him for his loss if the trespass caused him actual damage; and where the Defendant has made use of the Plaintiff’s land, the Plaintiff is entitled to receive damages of an amount that would be reasonably paid for that use; and that general damages would be increased if the trespass was accompanied by aggravating circumstances which did not allow an award of exemplary damages.

6. The Plaintiff further submitted that he was entitled to racial abuse and racial discrimination for being threatened that he could not own property because he was of a different race, being a “*muhindi*” which was very humiliating and painful. He stated that he and his family were made to feel like lesser beings with no right to own property and their dignity was undermined. The Plaintiff averred that the 1st Defendant

physically threatened him by telling him to his face that they would take away his property whether he liked it or not. The Plaintiff submitted that the Defendants should pay some price for their illegal actions but did not indicate any proposed sum. The Plaintiff also sought the costs of the suit.

7. The Defendants contended that what was in dispute was 2.4 acres of land which constituted a road reserve. They submitted that the Plaintiff had occupied public land and should not be heard to claim damages or costs. They further contended that if the Plaintiff were to give out the 2.4 acres of the public land which he occupies the matter would be at an end. They urged the court to dismiss the claim for damages and costs.

8. The parties having recorded a consent declaring the Plaintiff the owner of the Suit Property and for an injunction to restrain the Defendants from interfering with the Plaintiff's possession of the Suit Property, the court is of the view that the Plaintiff deserves an award of damages for the trespass on his land by the 1st and 2nd Defendant or their agents. Since the court was not given any guidance by the Plaintiff on the damage he suffered as a result of the trespass or what amount would be reasonable for the Defendants use of the Plaintiff's land, the court is of the view the Plaintiff can only recover nominal damages. The court awards the Plaintiff nominal damages of Kshs. 100,000/= against the 1st and 2nd Defendants.

9. The court notes that the Defendants argued that the Plaintiff had failed to surrender the land intended for a road reserve yet at the same time the Defendants counterclaimed for an order that they were entitled to adverse possession of the Plaintiff's whole parcel of land. In the courts view the 2.4 acres indicated in the Plaintiff's title as being a road reserve should strictly be used for this purpose and it is not open for Budalangi Valley Self Help Group to encroach on that land and convert it to their own use. The Plaintiff is expected to surrender this piece of land for use as a public road in accordance with the laws governing roads.

10. Since the Plaintiff has substantially succeeded in his claim, the court awards him the costs of the suit together with interest at court rates.

Delivered virtually at Nairobi this 8th day of February 2021.

K. BOR

JUDGE

In the presence of: -

Ms. C. Hamba holding brief for Mr. J. Ogada for the Plaintiff

Mr. V. Owuor- Court Assistant

No appearance for the Defendants