REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 199 OF 2014

JAMILLA BISHER BIN SALEH.....PLAINTIFF

VERSUS

ELPHAS IMBAHALA MUHAMBE.....DEFENDANT

JUDGEMENT

The plaintiff avers that she is the legal representative of the estate of Hawa Chemayo Sisiwa alias Hawa Chamayo Sisewa alias Hawa Chemayo Sisewe having been granted full letters of administration intestate on 31st January, 2013 in Kakamega High Court Succession Cause No. 1318 of 2012. The said Hawa Chemayo Sisiwa (deceased) is and was at all material times the allottee and entitled to the possession of property known as UNS. BCR. Plot No. X-Kakamega Municipality plan No. W16/96/6 measuring 0.02 hectares (approximately) situate in Kambi Somali area for a term of 99 years from 1st November, 1997 by a letter of allotment made to her by the Government on behalf of the then County Council of Kakamega dated 8th December, 1997. Since about November, 2020, the defendant herein, by himself, his servants and agents wrongfully and without any colour of right whatsoever, entered the said property and began to erect a permanent building thereon inspite of the plaintiff's protests and continues with his said construction. The plaintiff avers that in the circumstances the said acts of the defendant complained of do constitute trespass to private property. The defendant intends, unless restrained by an order of this honourable court from doing so, to complete the erection of the said building. The plaintiff prays for judgment against the defendant for:-

1. An order that the defendant do forthwith and at his own cost pull down and remove his building erected on UNS.BCR. PLOT No. X-Kakamega Municipality plan No. W16/96/6.

2. An order of permanent injunction to restrain the defendant by himself, his servants, workmen or agents, or otherwise howsoever, from erecting or continuing to erect upon the said UNS. BCR PLOT No. X-Kakamega Municipality plan No. W16/96/6.

3. General damages for trespass.

4. Costs of this suit.

PW2 the Physical Planner of Kakamega County testified that he visited the suit plots and that the Part Development Plan had not been followed on the ground. That all the properties from X to Q had shifted on the ground. That a new Part Development Plan had been prepared to amend the previous one. That the boundaries have now been realigned and the community adopted the plan. He does not know if the plaintiff was a party to the same. That they were permanent structures on the grounds and could not all be demolished.

The defendant avers that the plaintiff's suit is an afterthought, waste of time, an abuse of the court process, ill-motivated, scandalous, frivolous and vexatious as the said prescriptive rights to institute this suit (which is denied) arose in November, 2010. The defendant avers that the claim for damages as sought are unwarranted, unfounded and do not lie in law with regards to the alleged cause of action. The defendant avers and on a without prejudice to the averments herein that this suit is fatally defective and wholly contravenes the provisions of Order 3 rule 4 (2) of the Civil Procedure Rules. That the defendant do forthwith and at his own cost pull down and remove his building erected on UNS. BCR. Plot No. X-Kakamega Municipality plan No. W16/96/6 and general damages for trespass be struck out with costs. The defendant testified that he bought the plot in 2010 and has constructed the ground floor of the building. His plot is W and the plaintiff's is X and that he has not trespassed.

This court has considered the evidence and the submissions therein. It is not disputed that the plaintiff is the owner of UNS. BCR. Plot No. X-Kakamega Municipality Plan No. W16/96/6 and the defendant the owner of UNS. BCR. Plot No. W-Kakamega Municipality. The plaintiff testified that the defendant has trespassed on her plot X. PW2 the County Physical Planner testified that that the Part Development Plan had not been followed on the ground. That all the properties from X to Q had shifted on the ground. That a new Part Development Plan had been prepared to amend the previous one. That the boundaries have now been realigned and the community adopted the plan. He does not know if the plaintiff was a party to the same. That they were permanent structures on the grounds and could not all be demolished. The new Part Development Plan was never produced as evidence. There was no Surveyor who was called to clarify to the court the position on

the ground. Trespass has not been established bearing in mind that PW2 testified that all plots has shifted to the left and the community had adopted the new plan. S*ection 3 (1) of the Trespass Act (Cap 294)* of the Laws of Kenya state as follows:

> *"3. (1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."*

Trespass has been defined by *Clerk and Lindsel on Torts, 18th edition at Pg.23* as;

> *"any unjustifiable intrusion by one person upon the land in possession.''*

In the case of **Charles Ogejo Ochieng vs Geoffrey Okumu (1995) eKLR** the Court defined trespass as an injury to a possessory right. In the case of M'Mukanya **vs M'Mbijiwe, (1984) KLR 761**, the Court held that;

> *"…Trespass to land is a tort against possession and there must be an entry on the suit property by the tortfeasor. The evidence on record does not show that the Respondent had entered the suit property. The record does not show that the Respondent is cultivating or tilling the land. We find that the action of entry, cultivation or tilling was not proved by the Appellant on a balance of probability*

I find that the plaintiff has failed to establish her case on a balance of probabilities and I dismiss it with no orders as to costs as the parties are neighbours.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 23RD MARCH 2021.

N.A. MATHEKA

JUDGE