Ngeno v County Government of Kericho (Environment & Land Case E10 of 2020) [2023] KEELC 18534 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18534 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT & LAND CASE E10 OF 2020

MC OUNDO, J

JULY 6, 2023

BETWEEN

DAVID KIPKORIR NGENO ..... PLAINTIFF

AND

THE COUNTY GOVERNMENT OF KERICHO ..... DEFENDANT

JUDGMENT

1. Vide a Plaint dated 1st November 2020, the Plaintiff herein sought for the following orders;

   i. A declaration that the Plaintiff is the bonafide registered owner of all that property known by reference as L.R No. Kericho/Kipchorian/Lelu Block 10/10 (Borowet)

   ii. That the Defendant is an illegal occupant and/or trespasser on about half an acre of the Plaintiff's property known by reference as L.R No. Kericho/Kipchorian/Lelu Block 10/10 (Borowet).

   iii. That the marks delineating the boundaries in respect of that property known as L.R No. Kericho/Kipchorian/Lelu Block 10/10 (Borowet) be re-ascertained and restored.

   iv. A permanent injunction does issue restraining the Defendant, its agents and/or servants from any further trespass and/or interference with the Plaintiff's quiet possession, use and enjoyment of the parcel of land comprised in L.R No. Kericho/Kipchorian/Lelu Block 10/10 (Borowet).

   v. General damages for trespass and/or illegal encroachment on the Plaintiff's property known as L.R No. Kericho/Kipchorian/Lelu Block 10/10 (Borowet).

   vi. Costs of this suit.

   vii. Interest on (v) and (vi) above.

viii. Any other relief that the court may deem fit and just to grant.

2. Pursuant to the service of the pleadings upon the Defendant herein, the Defendant filed its Defence dated 1st April, 2021 wherein he denied the allegations contained in the Plaintiff's Plaint putting the Plaintiff to strict proof of the allegations as founded therein.

3. After the matter was certified ready for hearing on 2nd March 2012 upon compliance with the provisions of order 11 of the Civil Procedure Rules, evidence was adduced in court on May 16th 2012 wherein the Plaintiff, David Kipkorir Ngeno, testified as PW 1 to the effect that he was a farmer who resided in Kipkelion, Borowet Location, Kericho County. He testified that the matter in court was in relation to his land L.R NO. Kericho/Kipchorian/Lelu Block 10/10 (Borowet) measuring 18[1]/2 acres wherein he had filed a suit against the County Government of Kericho for exceeding the 9 meters mark into the said land while constructing the Kasheen-Borowet road. He produced a copy of the title deed issued on 4th November, 1991 as Pf Exh. 1 and a search certificate dated 15th November, 2021 as Pf Exh. 2 wherein he continued to testify that the county government got into his land in May, 2020 and dug a trench that was 4 feet deep, 4 meters wide and 110 meters long and that he reported the matter to the Chief who visited the suit land and sympathized with him but did not take any action. That was when he had sought legal advice from Counsel and also sought the help of a private Surveyor.

4. That thereafter the said surveyors known as Earthscope Survey Services came to the suit land, took measurements and compiled a report dated 21st October 2020. He marked the said surveyor's report as PMFI 3 and further testified that the surveyor used his tape measure and also had a map and that the trench was 4 feet deep as measured by the surveyor. He marked the RIM dated 9th March, 2001 as PMFI 4.

5. When he was referred to PMFI 3, he clarified that the length of the trench was 210 meters and not 110 meters as he had earlier stated and that according to the surveyor's finding, half an acre of his land was affected. That he normally used to use part of the land to graze his cattle and part of it for planting but he had suffered loss because that part of the land could no longer be cultivated and his cattle could no longer graze there.

6. His evidence was that when it rained, there was water that filled the trench and caused soil erosion, that the government had never given him notice that the said part of land had been reserved by it and that had been why he had fenced the said suit land which fence the Defendant had destroyed and caused destruction inside his land.

7. That when the Defendant's officials visited the land, they just stepped on his barbed wire and got into the land, that although he had removed the barbed wire that was adjacent to the road, the Defendant had destroyed the wire that was inside his land hence, he sought that the court grants him the orders as prayed in his plaint dated 1st November, 2020.

8. On being cross-examined by Counsel for the Defendant, the Plaintiff testified that the Defendant entered his land when they were constructing the road in May, 2020 and that the said road was completed that same year though he could not recall the exact date of completion. He also confirmed that he lived on the said land. He further confirmed that the instant matter was filed in court on 1st November 2020 and admitted that he did not do anything from the month of May to November 2020.

9. He however reiterated that he first reported the matter to the Chief and even went to the police where he had been informed that, that was not their work. Consequently he approached the court in the month November 2020.

10. He confirmed that the road was not new, that at the time, they were refurbishing it and that his issue was that the Defendant had exceeded the 9 meters road mark and trespassed into his land and dug a drainage therein.

11. He reiterated that the chief sympathized with him but took no action. When referred to destruction of the barbed wire, he confirmed that there was a barbed wire along the road onto his land and when the Defendant started digging, they threw soil which covered the wire wherein he had to remove it so that it could not get destroyed. That had been when the Defendant had got inside his land and started digging.

12. In re-examination, the witness confirmed that the Defendant exceeded the 12 meters mark as per the RIM. That the barbed wire had marked his boundaries, that he had removed the said barbed wire to save it as the Defendants were covering the same with soil and it would have been destroyed. He also confirmed that there was a second barbed wire inside the land which was also destroyed by the Defendant.

13. PW2, one Harrison Rotich Tanui testified on 14th November 2022 to the effect that he lived in Litein town Bureti sub-county within Kericho County and was an assistant surveyor working with Earthscop Survey Services as a licensed land Surveyor and the company was owned by Peter Okeyo Olal a licenced surveyor. That he held a diploma from Kenya Institute of surveying and mapping having graduated in the year 2008. He produced a copy of Diploma Certificate serial No. DD/TEP/0010255 as Pf Exh 5. That he was also a member of the Institute of Surveyors of Kenya (ISK) since February 2019 his membership number being LS/3671/19 wherein he had produced a copy of Certificate of ISK issued on 28th February, 2019 as Pf Exh 6.

14. He continued to testify that he had worked as a Surveyor for the last 13 years but with Earthscope surveyors, for the last 8 years and that as an Assistant surveyor his main duty is to carry out land survey work, like cadastral survey, topographical surveys and mutation surveys among others.

15. His evidence in relation to this matter was that the Plaintiff herein went to their office complaining that a road under construction had passed through parcel No. Kericho/Kipchorian/Lelu block 10/Borowet/10 wherein he had requested him to ascertain whether there had been any encroachment during the road excavation.

16. That he visited the suit land on 10th October, 2020 having with him a Registry Index Map showing the parcel of land. That as per the Registry Index Map, there was a 9m road passing through that land. That when he carried out his own survey, he saw that there was a road excavation and it had encroached onto the land Kericho/Kipchorian/Lelu block 10 by a larger section of a total length of 350 meters, but the total length affected by the road excavator was 210 meters.

17. He testified that since the Registry Index Map stated that the road was 9.4 meters the encroached width was about 4 meters even though the encroachment was not uniform. That the total area encroached was 0.19 hectares which was approximately 0.469 of an acre and that by the time he visited the ground, the excavation was fresh with no standing fence although a pole was lying down showing that it had been uprooted.

18. His further evidence was that he had prepared his report dated 21st October, 2020 with an extracted Registry Index map attached to the said report. He produced the Report marked PMFI 3 as Pf Exh 3 and stated that the said report contained a sketch drawing showing an encroached part of the land and that he relied on the RIM (original). He produced the extract of RIM in respect of Kericho/Kipchorian/Lelu Block 10/Borowet/10 marked PMFI 4 as Pf Exh 4.

19. He further testifies that aside from the RIM, he had checked to see if there had been beacons wherein he had found out that the same were present partially and on the surrounding lands and that there were no beacons along the boundary of the land/road since they had been excavated. he had confirmed that he had used a 50-tape measure and GPS locator and the RIM to conduct the survey.

20. On cross-examination, he confirmed that the RIM indicated that the width of the road was 9.14 meters and that the said road passed through the Plaintiff's land. That the Plaintiff owned the land adjacent to the road on both the right and left-hand side and that the part that entered into the Plaintiff's land was 4 meters. He stated that according to his observation, the drainage was caused by the excavation.

21. He testified that since the road was under construction, the trench that interfered was caused by the excavation that the drainage needed to be within the 9.14 meters roads and not to encroach on somebody's property. He also testifies that the size of the drainage system differed with the size of the road and for such a road, the drainage could not measure 4 meters.

22. When he was referred to Pf Exh3, he confirmed that the dotted line marked the existence of the road and that the same was at the center before the excavation. That after excavation, the center of the road must have shifted, that the road should have remained 9.14 meters.

23. He confirmed that he visited the suit land when the construction was going on, that the Plaintiff told him that the road was under construction and his land was affected and that although the excavation on the Plaintiff's land was done, the work was still ongoing on the other side.

24. He reiterated that his sketch reflected exactly what was on the ground, that the RIM showed that the road meandered whereas it should have been straight and that the area was moderately hilly and moderately flat.

25. He also confirmed that the drainage was on the right side of the road as one went towards the school and that the said drainage did not affect the left-hand side of the Plaintiff's land. It was further his evidence that by the time he was on the ground, he had asked the Plaintiff whether there had been a fence and he had replied in the affirmative. That he saw a few posts lying down though he could not tell who had removed them.

26. In re-examination, he confirmed that at the time of his visit, he did not notice any signs of a land slide on the suit land.

The Plaintiff thus closed his case.

27. The Defence case opened with the testimony of one Sylvester Kinetic who testified as DW1 to the effect that he was a Land Surveyor and holds a diploma in Land surveyor having graduated in the year 2018. That he had worked with the County Government of Kericho for 3 years. That was familiar with the case and had the recorded a witness statement dated 1st April, 2021.

28. He continued to testify that on 12th March, 2021, a road inspector in-charge of Kipkelion West Sub-county had informed him about a case touching on land parcel No. Kericho/Kipchorian/Lelu block 10, to the effect that there had been an encroachment case filed in the Environment and Land's Court.

29. Subsequently, on the said day, they visited the site that is Kasheen -Borowett road wherein they conducted their survey. That he was with his colleague, the road Inspector one Mr. Bii and the area chief. That using the RIM for Kericho/Kipchorian/block 10 he had confirmed that there were existing a fence and posts.

30. His evidence was that they took measurements from point J to point A and from point C to point B and found that the road had shifted. It was not in the exact position as the RIM. That in the RIM, there is normally something called 'press' meaning the road had cut across the land and that whereas the width of the road on RIM was 10 meters, on the ground, it was 9.1 meters.

31. He testified further that there was no encroachment, the only issue was that the road was shifted because of the landslides the soil being black cotton, that the road had been in existence, and had only been upgraded and that the extended width was within the road reserve which was 10 meters. That the road was smaller than the required standard road and that murram was usually put on 6 – 7 meters and the other space is left for drainage, electric poles and other utilities like water pipes.

32. His further evidence was that the width of the road did not exceed 10 meters, that the Plaintiff owns land on both sides of the road. That he prepared an undated report which he produced as Df Exh 1. He also produced the RIM to Kericho/Kipchorian/Lelu block 10 as Df Exh 2.

33. On cross-examination, he stated that he did not carry his Diploma certificate but he was employed by the Defendant and that although he was not a member of ISK he had applied for membership and was still waiting for the same.

34. He confirmed that he was supposed to conduct a survey before a road was expanded or done, however in this case the same was not done and that he was not aware that the said road was constructed in 2020 as he reached the site after the road had been constructed, that from May 2020 to April 2021, 10 months had lapsed.

35. When he was referred to Df Exh 2 he confirmed that the 10 meters was shown therein and that the search did not indicate whether a road passed through the land parcel, but only showed the owner of the land. He confirmed that the road had shifted though in his report, he did not indicate by how much.

36. When he was further referred to Paragraph 3 of his report, he testified that he did not say the drainage had encroached but had indicated that there was 2 meters of storm waters on the Plaintiff's land, that the drainage ought to have been provided for within the road reserve and that he could not tell the length of the storm water drainage because he was dealing with the parcel Kipchorian block 10.

37. He confirmed that he did not present the layout before the court although he had drawn it and that the shifting of the road was due to landslides and that the area of the road was utilized by the Plaintiff.

38. He also confirmed that the extent by which the road had shifted was 15 meters from where it was supposed to be though the width remained the same.

39. In re-examination, he responded that before 12th March, 2021 he had never heard of a complaint from the Plaintiff, that the said Plaintiff waited for 10 months before lodging a complaint and that the road had shifted before the excavation, the Defendant only increased the width.

40. The Defence closed its case and parties were directed to file their written submissions to which I shall herein summarize as follows;

Plaintiff's submissions

41. The Plaintiff's submission was to the effect that sometimes in the month of May, 2020, the Defendant while undertaking various road construction works along the Borowet-Kasheen Road which runs along his parcel of land known as L.R No Kericho/Kipchorian/Lelu block 10/10(Borowet), had caused excavation to be made into his land which further caused excavation of several storm water drainage lines into the property thus causing inundation in about half an acre or thereof. That he had

been using the said land for cultivation and grazing of his livestock but he could no longer use it the cause during the rainy seasons had been massive soil erosion coupled with the fact that his fences and barbed wire had been destroyed during the excavation.

42. The Plaintiff framed his issues for determination as follows:

    i. Whether the Defendant trespassed and/or illegally encroached into the Plaintiff's parcel of land known as L.R L.R No Kericho/Kipchorian/Lelu block 10/10(Borowet).

    ii. What remedies are available to the parties herein.

43. On the first issue for determination, the Plaintiff submitted that it was not in dispute that he was the registered proprietor of all that property known by reference as L.R L.R No Kericho/Kipchorian/ Lelu block 10/10(Borowet), and that it was also not contested that a public road cut through the said parcel of land.

44. The Plaintiff referred to the Defence witness's testimony during cross-examination to wit that he was not aware that the road had been constructed in the year 2020, that he visited the suit land ten months after the road was constructed whereupon he did the report he had submitted as Df Exh-1, that as much as he indicated that the road had shifted, he did not indicate the extent it had shifted in his report and that he could not tell the length of the storm water drainage because he was dealing with the parcel No. Kipchorian block 10 begging the question whether he indeed did a complete survey on the suit land.

45. In further reference to the Defence witness's testimony on cross examination, the Plaintiff submitted that the said witness admitted that there was a 2-meter storm water drainage on the Plaintiff's land, that the storm water ought to have been provided for on the road reserve and that that the road had shifted by 15 meters and the area of the road was now being utilized by the Plaintiff. He also admitted that no survey work was undertaken before the road was expanded.

46. Consequently the Plaintiff submitted that the allegations that the road had shifted due to landslides was only contrived in a vain attempt to absolve the Defendant of any liability as no evidence was tendered in proof of the assertion and in any event PW2 clearly indicated that he did not perceive any indication at the time of conducting his survey that the area had been affected by landslides and that the center of the road shifted after the encroachment/excavation.

47. The Plaintiff further submitted that PW 2's cogent evidence that the Defendant had encroached on 0.469 acres of his land was not discredited the court ought to find so in his favour and that in so far as there was no challenge to the legality of his title under Section 26 of the *Land Registration Act*, he was entitled to protection of his proprietary rights thereof as guaranteed under Section 24(a) of the *Land Registration Act* and Article 40 of *the Constitution*.

48. In support of the above assertion, the Plaintiff relied on the decided case in *EWM (suing in his capacity as the Guardian Ad litem & Next Friend to EWM) vs. County Government of Laikipia* [2019] eKLR.

49. On the second issue for determination as what remedies were available to the parties herein, the Plaintiff prayed for an award of general damages as compensation for the Defendant's illegal encroachment onto his land and further submitted that in as much as trespass was actionable without proof of damage, the Plaintiff urged the court to take cognizance of the fact that the Defendant's act of excavating a storm water drainage on his land had caused inundation on 0.469 acres thereof and exposed it to soil erosion permanently altering it and thus denying the Plaintiff its optimal use and enjoyment hence the prayer for reasonable award for general damages. Reliance was placed on the decided case in *Joshua Ngeno v Kenya Power & Lighting Company Limited & County Government of Kericho* [2021] eKLR.

Defendant's Submissions.

50. The Defendant submitted that no encroachment was caused in the process of the construction of the road in question and that the part claimed to have been encroached was a wetland and was utilized for drainage, power line, and a box culvert which act as a bridge. The Defendant further submitted that the part claimed to have been encroached was normally affected by landslides, that the road had been positioned where it is currently for several years due to landslides and that the Defendant only restored the land to its lawful size (ten meters wide).

51. The Defendant framed its issues for determination as follows;

    i. Whether the Defendant encroached on the Plaintiff's property.

    ii. What orders should the Court grant.

52. In its submission, the Defendant stated that the Plaintiff's case was totally unjustified as no sufficient evidence had been adduced to support the claims made, that the case was an afterthought, having been filed in November, 2020, when the alleged encroachment is said to have taken place between February 2020 and June 2020 and that the Plaintiff confirmed on cross examination that he approached court when the road construction touching on his property had already been concluded and that he voluntarily removed his barbed wire when the constructions were being conducted on the part of the road adjacent to his suit property.

53. The Defendant further submitted that the Plaintiff testified in Chief that the Defendant had constructed a water drainage that had encroached his land by about 4 meters and for a length of about 210m and about 4 ft deep, however, on cross examination, the Plaintiff had confirmed that only the water drainage affected his land not the actual road surface that had been worked on. PW2 on the other hand had testified in Chief that the width of the road that passed through the Plaintiff's property was 9.14meters and following the excavation, a length of about 210 meters and a width of about 4 meters was encroached amounting to an area of 0.469 acres, but on cross examination, the said witness had confirmed that following the road construction, the road was measuring 10 meters wide and that the Plaintiff owned the land on both sides of the road in the area in question. That the layout plan showed that the existing map boundary line for the road was 10meters width.

54. The Defendant also submitted that it was not logically possible for a road measuring 10 meters in width to have a trench measuring 4 meters in width on one side of the road only and that the Plaintiff having stated on cross examination that he removed his barbed wire because the soil was piling on it during road construction, the said Plaintiff did not lead evidence to prove that any boundary markings or fence were destroyed by the Defendant's agents hence contradicting the claim in that Plaintiff's previous fence had been destroyed.

55. The Defendant submitted that the Plaintiff had not demonstrated that there had been any trespass on his land at all hence there was no basis for granting any of the prayers sought including general damages for trespass. That the Defendant had been authorized by law to work on the road in question so as to restore it to its original position. The Defendant relied on the decided case in *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] eKLR in support of their submissions.

56. On the issue that the marks delineating the boundaries in respect of that property known as L.R No Kericho/Kipchorian/Lelu block 10/10(Borowet), be re-ascertained and restored, the Defendant placed reliance on the decided case in *Onesmus Kamau Mungai vs. Phares Mwangi Kamau & 2 others* [2019] eKLR to submit that the court lacked the jurisdiction to determine a boundary dispute and

that the Plaintiff had jumped the gun and failed to adhere to the procedure provided by the statute on how to address any grievances related to boundary dispute.

57. On the issue in regard to the Plaintiff's claim that the excavation had caused inundation on 0.469 acres and exposed it to soil erosion, the Defendant submitted that no expert evidence was led to prove such claim. That the Defendant was mandated by law to construct and maintain such roads, and water culverts and drainage systems was part and parcel of the road construction process meant to ensure that the roads can benefit the public. Reliance was placed on the decision in the case of *Vancouver (City) vs. Ward*,2010 SCC 27, [2010] 2 S.C.R. 28 cited with approval by the Court of Appeal in *Municipal Council of Eldoret vs. Titus Gatitu Njau* (Supra) to submit that that the assessment of damages was discretionary, that damages should be fair to both the claimant and the state and that a court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interest.

58. The Defendant further submitted that the Plaintiff failed to mitigate any damages if any as he approached the court in November 2020 yet the alleged destruction occurred in May 2020 and if the Plaintiff was justifiably aggrieved, he should have moved the court immediately and stopped the construction before more harm/trespass could be done on the lengthy stretch of the land that he alleges was encroached. The Defendant maintained that there had been no encroachment at all and that was the reason why the Plaintiff had approached the court as an afterthought after the road construction had been completed. That there had been no eminent danger at the time of construction hence the Defendant was never barred from the said construction. The Defendant asked the court to dismiss the suit with costs.

Determination.

59. I have considered the matter before me, the evidence as well as the submission, the authorities and the applicable law herein. I have also considered that the Plaintiff's suit against the Defendant is founded on the act of trespass. I have considered the uncontroverted fact herein to which that the suit land No. Kericho/Kipchorian/Lelu block 10/Borowet/10 was registered to the Plaintiff herein. I have also considered the uncontroverted fact that in the year 2020, the Defendants herein had embarked on the excavation and restoring of the Kasheen -Borowett road.

60. From the evidence on record is can be discerned that in the process of excavation of the said road, the Defendant herein had trespassed into the Plaintiff's suit land, destroyed his fence and dug trenches which act had rendered the said portion of land which the Plaintiff had previously used to cultivate and graze his cows unproductive.

61. Although the Defendant has denied trespassing onto the Plaintiff's suit land, his evidence was ousted by the evidence of PW2, one Harrison Rotich Tanui a licensed surveyor working with Earthscop Survey Services who produced documentary evidence that was not challenged confirming that his survey on the Plaintiff's land on 10th October, 2020 using a Registry Index Map, 50 meter-tape measure and GPS locator, had established a 9 meter road excavation passing through that section of the road and which road had encroached onto the Plaintiff's land by a larger section of a total length of 210 meters and by a width of about 4 meters. That the total area encroached was 0.19 hectares which was approximately 0.469 acres. That the excavation was fresh with no standing fence although a pole was lying down showing that it had been uprooted. He produced his report showing the encroached part of the land as Pf Exh 3 and the extract of RIM in respect of Kericho/Kipchorian/Lelu Block 10/Borowet/10 as Pf Exh 4.

62. He had also testified that the beacons had also been excavated. There also had been a drainage passing through the Plaintiff's parcel of land which had been caused by the excavation. His evidence was that there existed a road after excavation and that the center of the road had shifted because the same had meandered whereas it ought to have been straight. This situation was not as a result of landslides as there had been no signs of the same since the area was moderately hilly and moderately flat.

63. The Defendant's case on the other hand was that there had been no encroachment, the only issue was that the road had shifted because of the landslides the soil being black cotton. That the road had been in existence, and had only been upgraded wherein the extended width of 10 meters was within the road reserve. The Defendant's witness, Sylvester Kinetic, a Land Surveyor had also confirmed that the road had shifted by 15 meters from where it was supposed to be although the width had remained the same. He had also confirmed that and that there was a 2 meter storm water drainage on the Plaintiff's land, which drainage ought to have been provided for within the road reserve but that he could not tell the length of the storm water drainage because he was dealing with the parcel Kipchorian block 10.

64. I have reviewed and considered the evidence of the Plaintiff as against the Defendant's evidence herein. I find the issues that arise for determination therein as follows;

    i. Whether the Defendant herein are trespassers on land reference No. Kericho/Kipchorian/Lelu Block 10/Borowet/10.

    ii. Whether or not the Defendant should be injuncted from further trespass from land reference No. Kericho/Kipchorian/Lelu Block 10/Borowet/10

    iii. Whether there should be issued orders for damages for trespass.

65. The provision of Section 24(a) of the *Land Registration Act* outlines the interests and rights of a registered proprietor of land as follows;

    'the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....'

66. Section 25(1) of the *Land Registration Act* also stipulates that ;

    'The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...'

67. The law is very clear on the position of a holder of a title deed in respect of land. Indeed Section 26(1) of the *Land Registration Act* provides as follows:

    > " the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all counts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –
    >
    > a. On the ground of fraud or misrepresentation to which the person is proved to be a party

b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme

68. It will be seen from the above provisions of the law, that title to land is protected, but the protection can be removed and title impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme.

69. The Defendant did not adduce any evidence to the effect that the Plaintiff had acquired the suit land through fraud or misrepresentation or that his certificate of title had been acquired illegally, un-procedurally or through a corrupt scheme.

70. Indeed based on the evidence adduced herein above, and while relying on Section 26(1) of the *Land Registration Act*, we cannot ran away from the fact that the Plaintiff has indeed satisfied the legal proviso that he is the proprietor of the suit land and hence has absolute ownership including all rights and privileges appurtenant to it and therefore the Defendant had encroached on the Plaintiffs land.

71. Section 7 of the *Land Act* is explicit on the methods of acquisition of title to land and recognizes that title to land may be acquired through any manner prescribed by statute.

72. The process of compulsory acquisition was laid down in the decided case of *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR where the court had held as follows;

''Under Section 107 of the *Land Act*, the National Land Commission (the 1st Respondent herein) is ordinarily prompted by the national or county government through the Cabinet Secretary or County Executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by Article 40(3) of *the Constitution*. In our view, the threshold must be met: the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.

Under Sections 107 and 110 of the *Land Act*, the National Land Commission must then publish in the gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land.

As part of the National Land Commission's due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified. In the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose: see Section 108 of the *Land Act*.

The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition.

The burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of Sections 107 through 110 of the *Land Act*, the landowner's role is limited to that of a distant bystander with substantial interest.

Section 112 of the *Land Act* then involves the landowner directly for purposes of determining proprietary interest and compensation. The section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage.

On completion of the inquiry the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award. It could also be land in lieu of the monetary award, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted then the payment is to be made into a special compensation account held by the National Land Commission: see Sections 113- 119 of the *Land Act*.

The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made. The property is then deemed to have vested in the National or County Government as the case may be with both the proprietor and the land registrar being duly notified: see Sections 120-122 of the *Land Act*.

If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined: See Section 111 of the *Land Act*. This is in line with the Constitutional requirement under Article 40(3) of *the Constitution* that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.

The Constitution dictates that acquisition be in accordance with the provisions of *the Constitution* itself and any Act of Parliament. *The Constitution* itself only provides for just compensation being made promptly.

The current procedure for acquisition of land by the State is as outlined above. As can be seen parliament took very seriously its constitutional duty to legislate on the State's powers of deprivation or expropriation. Perhaps conscious of the emotive nature of land issues, the Legislature appeared scrupulous and contemplative."

73. In the present case, I find that the Defendant did not annex any copy of a Gazette Notice on the impending acquisition nor was there evidence provided by the Defendant to show that the Plaintiff's parcel of land was due for compulsory acquisition by the government or any other body for that matter.

74. I find that there being no evidence that the Defendant's action of entering into the Plaintiff's land and carrying out the impugned activities was lawful or otherwise legally sanctioned, the Defendant's action of forcefully excavating part of the Plaintiff's parcel of land and creating a drainage therein so as to expand and/or refurbish an already existing road without the Plaintiff's authorization and/or consent, therefore constituted forceful and/or trespass to land.

75. Trespass has been defined by the 10th Edition of *Black's Law Dictionary* as;

> " an unlawful act committed against the person or property of another; especially wrongful entry on another's real property."

76. Section 3 (1) of the *Trespass Act*, also defines trespass as follows;

> " 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."(Emphasis mine)

77. The Court in *John Kiragu Kimani vs Rural Electrification Authority* [2018] eKLR also in defining trespass relied on Clark & Lindsell on Torts, 18th Edition on page 923 which defines trespass as;

'any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to proof that the Defendant invaded his land without any justifiable reason'.

78. It is trite law that trespass to land is actionable per se (without proof of any damage). See the case of *Park Towers Ltd vs. John Mithamo Njika & 7 others* (2014) eKLR where J.M Mutungi J., stated:-

'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. ..'

79. In the case of *Duncan Nderitu Ndegwa v. K P & LC Limited & Another* (2013) eKLR P. Nyamweya J. held:-

> " ...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants' trespass"

80. From the holding herein above and the definition of trespass, the court finds that indeed the Defendants' action of excavating part of the Plaintiff's suit parcel of land in the name of refurbishing an already existing road constituted trespass. It is trite law that an act of trespass is actionable per se by an award of general damages once it is established.

81. In *Philip Ayaya 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 See Hostler – VS – Green Park Development Co. 986 S. W 2d 500 (No. App. 1999)".

82. In the case of Willesden Investments Limited vs. Kenya Hotel Properties Limited NBI H.C.C. NO. 367 of 2000, it had been held thus:

> " There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case."

83. In this case the Plaintiff has not adduced any evidence as to the state or the value of his property before and after the trespass. This makes it difficult to assess the general damages.

84. The summation of my finding is that having found that the Plaintiff had proved his case against the Defendant on a balance of probabilities, judgment is herein entered against the Defendant for the following orders;

    i. A declaration is herein issued that the Plaintiff is the bonafide registered owner of all that property known by reference as L.R No. Kericho/Kipchorian/Lelu Block 10/10 (Borowet)

    ii. That the Defendant is an illegal occupant and/or trespasser on about half an acre of the Plaintiff's property known by reference as L.R No. Kericho/Kipchorian/Lelu Block 10/10 (Borowet).

    iii. A permanent injunction is herein issue restraining the Defendant, its agents and/or servants from any further trespass and/or interference with the Plaintiff's quiet possession, use and

enjoyment of the parcel of land comprised in L.R No. Kericho/Kipchorian/Lelu Block 10/10 (Borowet).

iv. The Land Registrar Kericho shall within 30 days re-ascertain and restore the marks delineating the boundaries in respect of that property known as L.R No. Kericho/Kipchorian/Lelu Block 10/10 (Borowet) at the Defendants' cost.

v. General damages of Kshs.2,000,000/= (Two million shillings only) shall be paid by the Defendant to the Plaintiff to compensate him for the wrongful entry onto his Land.

vi. Costs of the suit and interests shall be at court rates.

85 It is ordered.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 6TH DAY OF JULY 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE