



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 41 OF 2017**

**AGRICULTURAL DEVELOPMENT CORPORATION**

**LANDS LIMITED.....PLAINTIFFS**

**-VERSUS-**

**RAPHAEL MLEWA MKARE & 515 OTHERS.....DEFENDANTS**

**JUDGMENT**

By a Plaint dated 27<sup>th</sup> February, 2017, the Plaintiffs herein sued the Defendants jointly and severally seeking the following orders: -

- a) An order of permanent injunction restraining the Defendants, their servants and/or agents from interfering, trespassing, selling, wasting or interfering with the Plaintiffs quiet enjoyment and use of their parcels of lands known as LR NO. 513, 510, 490, 495, 489, 483, 482, 488, 455, 456, 550, 475, 480, 427, 461, 469, 472, 460, 454, 479, 458, 114, 440, 540 M 53, M54, M58, M38, M29 and 392 at Malindi township Kilifi County.***
- b) Vacant possession/ eviction orders be granted against the Defendants.***
- c) The Defendants to pay special damages.***
- d) The Defendants to pay the Plaintiffs mesne profits of Kshs. 3,000/- per year from January, 2010 until possession is delivered.***
- e) The OCS Malindi Police Station to provide security and in effecting the courts orders.***
- f) Costs of the suit.***

**PLAINTIFFS CASE**

PW1 a Legal Officer of the Plaintiffs adopted her statement and testified that the Defendants started encroaching on the suit parcel known as LR No 513 Malindi in Kilifi County in the year 2000. PW1 further stated that the Defendants would encroach during rainy seasons, cultivate the land and plant crops like maize and cassava.

It was PW1's testimony that in the year 2009, the Defendants increased in numbers and started building temporary structures which necessitated the Plaintiffs to issue notices stopping them from further encroaching on the land.

PW1 gave evidence that the Defendants filed a suit vide **Malindi ELC Case No. 16 of 2010** against the Plaintiffs and that while injunctive orders were in place, the Defendants continued encroaching until the case was determined on 15<sup>th</sup> April, 2016 whereby the court decreed that the land belongs to the Plaintiffs.

PW1 further stated that the Plaintiffs gave the Defendants three months' notice to stop encroaching and to remove the temporary structures on the parcel of land, but the Defendants completely ignored the said notice and continued trespassing on the said parcel of land.

It was PW1's evidence that the 2<sup>nd</sup> Plaintiff is the registered owner of all that land known as Malindi land No. 513, 510, 490, 495, 489, 487, 483, 482, 488, 455, 456, 550, 475, 480, 427, 461, 469, 472, 460, 454, 479, 458, 114, 440, 540, M53, M54, M58, M38, M29 and 392 situate within Kilifi County. That the 2<sup>nd</sup> Plaintiff is the subsidiary company of 1<sup>st</sup> Plaintiff and it purchased all the suit lands in 1977.



suit is therefore undefended.

The issues for determination are as to whether the Defendants have trespassed on the suit parcels of land, whether an order of permanent injunction should issue against the Defendants, whether eviction orders should issue and whether the Plaintiffs are entitled to loss and special damages.

The evidence on record is that has been adduced by the Plaintiffs and the documents produced in support of the case are that it is not disputed that the Plaintiffs are the registered owners of the suit lands. It is also not disputed that the 1<sup>st</sup> Plaintiff has the mandate to manage all the government agricultural lands which has been gazetted as government specialized farms including the above mentioned farms situated at Malindi township Kilifi County under legal Notice No. L.N 37/2001 and L.N 157/2003.

The court also takes into account the fact that the Defendants filed a suit in **Malindi ELC No. 16 of 2010** in which they sought to be granted the suit parcels of land on the basis of adverse possession which matter was dismissed on the 15<sup>th</sup> day of April, 2016. The fact that the Defendants filed a suit claiming adverse possession is a confirmation that they acknowledge that the Plaintiffs are the registered owners of the suit parcels of land. One of the ingredients of adverse possession is that you have to prove that your claim is against the owner of the suit land by attaching a copy of the title, an extract of the register or a certificate of search.

The Plaintiffs also produced copies of titles/indentures, transfers, survey maps and official search indication that the parcels of land belong to them. Section 24(a) of the Land Registration Act, 2012, provides that the registration of a person as the proprietor of land vests in that person the absolute ownership of that land together with all rights and privileges associated with that status.

Section 26(1) of the said Act provides that the certificate of title issued by the Land Registrar upon registration to a purchaser of land upon transfer shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner thereof and that the said title shall not be challenged save on the ground of fraud or misrepresentation to which the holder is shown to be party or where the title is acquired illegally, un procedurally or through a corrupt scheme.

I therefore find that the Plaintiffs are the absolute owners of the suit parcels of land and are therefore entitled to enjoy rights and privileges associated with such ownership which includes exclusive use, possession and enjoyment thereof without interference by any third party.

On the issue of trespass, it is on record that the Defendants are on the parcel of land where they have put temporary structures. This is as per the correspondences National Land Commission, the provincial administration and the various letters by the Plaintiffs to government offices to urge the Defendants to vacate the parcels of land. The Defendants had also been given 3 months' notice to vacate after the judgement was delivered in **Malindi ELC No 16 of 2010** but they ignored.

Further the fact that the Defendants sued for adverse possession is proof that they were on the land but the court decreed that they were on the land illegally as they cannot claim adverse possession on government land.

In the case of **TELKOM KENYA LIMITED V COUNTY GOVERNMENT OF MURANGA [2019] eKLR** set out the definitions of trespass as below;

**“25. According to the 10th Edition of Black’s Law Dictionary trespass is defined as follows;**

**“an unlawful act committed against the person or property of another; especially wrongful entry on another’s real property. Clark & Lindsell on Torts, 18th Edition on page 923 defines trespass as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason”.**

The Defendants having unlawfully entered the suit property without the permission of the Plaintiffs are trespassers on the suit property and the Plaintiffs are entitled to judgment against them for eviction and for a permanent injunction to restrain any further acts of trespass. The Defendants have no legal mandate to use the suit land in any manner. The Defendants are trespassers on the suit parcels of land hence should vacate or be evicted.

On the issue of loss and special damages which was itemized and evidence led to prove the same, the Plaintiffs prayed for Kshs. 33,442, 282/- which includes loss of 203 cows and cost of fodder. PW1 in her testimony told the court that Plaintiffs livestock died in great numbers as a result of starvation due to shortage of grazing area/grass. To prove this, PW1 produced the animals’ death certificates and that in order to sustain the remaining livestock, they had to incur heavy costs of buying and transportation of hay/grass from Kitale and Nakuru as shown in the exhibits 16 and 17.

I find that the Plaintiffs have proved the claim for special damages which as to be specifically pleaded and proved as was held in the Court of Appeal case of **Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716**, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

**“Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”**

I have considered the pleadings, the evidence, the documents produced, submissions by counsel and the relevant authorities and find that the Plaintiffs have proved their case against the Defendants and are therefore entitled to the orders sought save for mesne profits being a special

damage which has not been proved.

I therefore grant the following specific orders:

- a) *An order of permanent injunction is hereby issued restraining the Defendants, their servants and/or agents from interfering, trespassing, selling, wasting or interfering with the Plaintiffs quiet enjoyment and use of their parcels of lands known as LR Nos. 513, 510, 490, 495, 489, 483, 482, 488, 455, 456, 550, 475, 480, 427, 461, 469, 472, 460, 454, 479, 458, 114, 440, 540 M 53, M54, M58, M38, M29 and 392 at Malindi township Kilifi County.*
- b) *The Defendants to pay special damages of Kshs. 33, 442, 282/-*
- c) *The Defendants to give vacant possession of the suit parcels on land within 60 days failure to which the Plaintiffs are at liberty to evict the Defendants or cause to be evicted from the suit land in strict adherence to the law.*
- d) *The OCS Malindi Police Station to provide security in effecting the court's orders.*
- e) *The Defendants to pay costs of the suit.*

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 2<sup>ND</sup> DAY OF MARCH, 2022.**

**M.A. ODENY**

**JUDGE**

***NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.***