



**REPUBLIC OF KENYA**

**IN ENVIRONMENT AND LAND COURT AT KISII**

**ELC CASE NO. 121 OF 2016**

**CHARLES RATEMO ONYONI.....1<sup>ST</sup> PLAINTIFF**

**CHRISANTUS IMBOGO MOBAGI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**THE COUNTY GOVERNMENT OF KISII.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiffs filed this suit against the Defendant vide a Plaint dated 4<sup>th</sup> May, 2016 seeking the following orders;

- a) A declaration that the encroachment and the expansion of the access road into the Plaintiffs' land parcels Nos. **NYARIBARI MASABA/BOMOBEA/1533** and **1318** is illegal *ab initio*.
- b) A permanent injunction restraining the Defendant, their agents and/or servants from in any way interfering with the Plaintiff's land parcels Nos. **NYARIBARI MASABA/BOMOBEA/1533** and **1318** respectively.
- c) Damages for illegal trespass/encroachment together with an order of demolition of their permanent premises on the parcels of land.
- d) Costs of the suit
- e) Any other further relief that the court may deem fit to grant.

2. Together with the Plaint, the Plaintiff filed an application for a temporary injunction to restrain the Defendant from interfering with the suit properties pending the hearing and determination of the main suit.

3. The Defendant entered appearance and filed Grounds of Opposition dated 20<sup>th</sup> May, 2016 in response to the application for injunction in which it raised several grounds: The first one is that the Applicants did not issue a statutory notice of intention to sue the Defendant as required under Section 13A of the Government Proceedings Act Cap 40. Secondly, the Defendant stated that the orders of injunction sought by the Applicant were contrary to the provisions of section 16 of the Government Proceedings Act Cap 40. Thirdly, that the Defendant being a County Government, its constitutional and statutory functions cannot be curtailed by mere allegations. Fourthly, the Defendant contended that the disputed road was on the Survey Map and it had been in existence for public use since time immemorial and thus it had not trespassed onto the Plaintiff's parcels of land. The fifth ground raised by the Defendant was that the road had already been opened and therefore the order for injunction was overtaken by events. The sixth ground is that the access road had been opened through public demand and participation and that the same was already in use by the public and thus granting prayers for permanent injunction would be in vain. The seventh and final ground was that the Plaintiffs had not been granted building approval to give effect to private development on an area preserved for an access road and as such there was need to demolish the illegal structures.

4. When the matter came up for directions on 23<sup>rd</sup> May 2016, the court ordered the Land Registrar, Kisii and the Kisii County Surveyor to visit the suit properties and establish whether or not there was an encroachment by the Defendant on the suit properties as a result of the construction of the access road by the Defendant and file a report within 45 days. The Land Registrar and County Surveyor complied with the aforementioned court order and filed a report dated 17<sup>th</sup> August 2016. The said report indicated that there was an encroachment of 5 meters to parcel no. **NYARIBARI MASABA/BOMOBEA/1533** and 3 meters to parcel No. **NYARIBARI MASABA/BOMOBEA/1318**. On 8<sup>th</sup> March 2017 the Court adopted the Land Registrar's report as a judgment of the court and ordered that the same be implemented.

5. Thereafter the Plaintiffs filed an application dated 22<sup>nd</sup> October, 2018 seeking a review of the court's judgment dated 8<sup>th</sup> March, 2017 to include an award of damages which they had pleaded in their Plaint, since the same was not dealt with by the survey report that was later adopted as the Judgment of the Court. In the application, the Plaintiffs attached a copy of the valuation reports dated 16<sup>th</sup> March, 2017 and 27<sup>th</sup> March, 2017 respectively detailing the value of the suit properties, the permanent developments thereon as well as the damage caused as a result of the illegal actions of the Defendant.

6. The application was opposed by the Defendant through its Grounds of Opposition dated 20<sup>th</sup> November, 2018 stating that the application was a non-starter and an abuse of the court process, given that the report filed by the Land Registrar and which the court had adopted did not award damages and that there was no error apparent on the face of the record to warrant the orders sought.

7. The application came up for hearing on the 27<sup>th</sup> November, 2018 and after considering the application, Grounds of Opposition and counsel's submissions, the court allowed the application on grounds that the prayer for damages had been pleaded by the Plaintiffs in their plaint and there was nothing that prevented the same from being considered. The Court therefore entered a partial judgment on liability and directed that the issue of the quantum of damages proceeds to trial if the same was not agreed between the parties. On several dates thereafter, the parties indicated that they were pursuing an out of court settlement but in the end they were unable to reach a settlement. The court therefore directed the Plaintiffs to serve the Defendant with their valuation reports and the Defendant to file and serve their own valuation report thereafter.

8. The matter was mentioned on several occasions and on 27<sup>th</sup> November, 2021 the court granted a last adjournment and directed the Defendant to file their valuation report within 45 days' failing which the court would adopt the Plaintiffs' valuation report as the Judgment of the Court. When the matter came up for mention on 7<sup>th</sup> February, 2022 the court gave a date for delivery of the judgment.

9. Notwithstanding the clear directions of the court, the Defendant proceeded to file a valuation report dated 21<sup>st</sup> January, 2021 on 17<sup>th</sup> February, 2022 for consideration by the court in its judgment.

#### **ISSUES FOR DETERMINATION**

10. Considering the fact that the court had already entered a partial judgment on liability, the sole issue for the determination is whether the court should grant the Plaintiff the damages stated in their valuation reports dated 16<sup>th</sup> March, 2017 and 27<sup>th</sup> March, 2017 respectively.

#### **ANALYSIS AND DETERMINATION**

11. As I have already stated earlier in this Judgment, the valuation report filed by the Defendant was filed on 17<sup>th</sup> February, 2022 after the court had closed its door on 7<sup>th</sup> February, 2022 when it failed to comply with the court's directions dated 27<sup>th</sup> November, 2021 requiring it to file its valuation report within 45 days from the date thereof. The said report is therefore improperly on record.

12. The above notwithstanding, even if I were to consider the valuation report filed by the Defendant, the variation between the two reports is insignificant. The said variance is brought about by the fact that the valuation report filed by the Defendant did not take into account the value of land that it hived off from the suit properties for purposes of the construction of the access road.

13. Having considered the valuation reports filed by the Plaintiffs, the only component that needs to be varied is the loss of 14 months' rent amounting to Kshs. 71,400 with respect to rental houses constructed on parcel number 1318. This is a prayer for a special damage that ought to have been pleaded and proved by evidence by the Plaintiffs. The same cannot form part of the general damages of trespass.

14. In the premises, I award the Plaintiffs damages of Kshs. 6,588,000 in respect of parcel number NYARIBARI MASABA/BOMOBEA/1533 and Kshs. 1, 958, 763 in respect of parcel NYARIBARI MASABA/BOMOBEA/1318. The Plaintiffs had already been awarded the costs of the suit.

**DATED, SIGNED AND DELIVERED AT KISII THIS 2ND DAY OF MARCH, 2022.**

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**J.M ONYANGO**

**JUDGE**