



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISUMU

ELC CASE NO. 866 OF 2015

ELIAS OBURA NDEGE.....APPELLANT

VERSUS

LAKE BASIN DEVELOPMENT AUTHORITY.....1ST DEFENDANT

KISUMU COUNTY LAND REGISTRAR.....THIRD PARTY

J U D G M E N T

Land parcel **NO KISUMU/TONDE/135** (hereinafter the suit land) is registered in the names of **ELIAS OBURA NDEGE** (hereinafter the plaintiff). He holds the title deed thereto issued to him under the then Registered Land Act, now repealed, and dated 17th November 2005. On 24th November 2015, the employees of the **LAKE BASIN DEVELOPMENT AUTHORITY** (hereinafter the defendant) went to the suit land and removed the beacons demarcating it's boundary thus causing the plaintiff to incur extra expenses in engaging the services of a surveyor to place new beacons. On 30th November 2005, the plaintiff hired a tractor to plough the suit land but was prevented from doing so by the defendant's employees who demanded that he proves his ownership of the same. However, the defendant did not attend a meeting that was scheduled before the area District Officer on 5th December 2005 to resolve that issue and so on 7th December 2005, the plaintiff again hired a tractor at a cost of Kshs. 10,000/= to plough the suit land. He was again stopped from doing so by one **MR JOSHUA OBADE** an employee of the defendant.

The plaintiff therefore first moved to this Court by his plaint dated 20th December 2005 and later amended on 8th July 2014 seeking Judgment against the defendant in the following terms: -

- (a) An order of temporary injunction restraining the defendant by itself, it's agent and/or servants from interfering with the plaintiff's quiet possession and enjoyment of the land parcel NO KISUMU/TONDE/135.**
- (b) An order of permanent injunction restraining the defendant by itself, it's agent and/or servants from interfering with the plaintiff's quiet possession and enjoyment of the land parcel NO KISUMU/TONDE/135.**
- (c) General damages for trespass.**
- (d) Costs and interest.**
- (e) Mesne profits from the date of filing of the suit until the suit is conclusively determined.**

Together with the amended plaint, the plaintiff filed his statement and list of documents which include a copy of the title deed to the suit land and various correspondences between him, the Ministry of Lands and Settlement as well as the District Commissioner Nyando with regard to the suit land. There was also correspondence showing that he had obtained the suit land in an exchange with one **DR T. O. AROKA** who had taken possession of the plaintiff's land parcel **NO MIGORI KAYAMBO/KWAY/345**.

In his brief statement which he adopted during the plenary hearing on 3rd September 2020, the plaintiff repeated the averments in his amended plaint. He added that following the two incidents on 24th November 2005 and 30th November 2005 when the defendant's employees interfered with the suit land, he went to complain to the area District Officer who told him that the defendant had alleged that he had encroached upon their land. The plaintiff however produced a copy of his title deed which he showed the District Officer who in-turn gave it to the defendant's employees and asked them to do a search and report to him on 5th December 2005. However, on that date, the defendant's employees did not turn up at the District Officer's office as agreed. The District Officer advised him to go ahead and plough the land but when he went back to the suit land on 7th December 2005 with the intention of ploughing it, he was again stopped by **MR JOSHUA**

OBADE. The plaintiff wrote a letter to the District Officer who replied him and thereafter he sought redress from the Court.

By its defence and Counter – Claim dated 16th March 2006 and filed herein on 17th March 2006, the defendant pleaded that the plaintiff obtained registration of the suit land in his name through fraud and/or collusion and/or misrepresentation and the register should be rectified. The defendant pleaded further that at the time the plaintiff obtained registration of the suit land in his names, he knew that the defendant had actual and constructive use and occupation of the suit land and was therefore justified in preventing the plaintiff from using it since it belonged to the defendant and the plaintiff had acquired it irregularly and illegally having excised it from a parcel of land belonging to the defendant. Particulars of the plaintiff's fraud, collusion, misrepresentation, irregularity and illegality were pleaded in paragraph 9 of the defence and Counter – Claim as follows: -

(a) The defendant misrepresented to the Settlement Fund Trustee that he was a landless Kenyan deserving of being settled by the Government of Kenya.

(b) The plaintiff misrepresented to the Settlement Fund Trustees that he had been displaced from his original home in Awasi to pave way for the construction of the District Headquarters.

(c) The plaintiff misrepresented to the Settlement Fund Trustees that he was a genuine squatter on the defendant's parcel of land and that the defendant had consented to the plaintiff being allotted a portion of the defendant's land.

(d) The plaintiff failed to inquire from the defendant about any objections the defendant may have had to the allocation of a portion of the defendant's land to the plaintiff.

In its Counter – Claim, the defendant pleaded that it is a State Corporation established under the Lake Basin Development Authority Act and that in 1986, the Kisumu District Development Committee recommended to the Government of Kenya that the defendant be allocated some 324 acres of land situated within Muhoroni Township and described as **"Refinery Holding Ground."** That land was subsequently surrendered to the defendant which proceeded to establish a livestock multiplication center thereon and has been in actual and constructive occupation thereof since then. In 1994, certain persons invaded the said parcel of land and the Provincial Administration and local leaders approached the defendant to agree to the excision of some 80 acres of the defendant's land to facilitate the settlement of squatters. The Provincial Administration meanwhile requested the defendant to allow certain persons who had been displaced by the construction of the District Headquarters at Awasi to be settled on the defendant's land. The defendant agreed but insisted that it be involved at every stage to ensure that only deserving persons benefit from the defendant's concession. Without involving the defendant, the Provincial Administration and the Ministry of Land Officials colluded with several underserving persons including the plaintiff and excised a considerable chunk of the defendant's land leaving the defendant with only 38.5 acres. The defendant therefore pleaded that the plaintiff's suit be dismissed with costs and Judgment be entered for it as follows: -

(a) A declaration that the plaintiff's registration as proprietor of L.R NO KISUMU/TONDE/135 is illegal, null and void.

(b) Rectification of the register.

Together with the defence and Counter – Claim, the defendant filed its list of documents dated 13th June 2006 which includes various correspondences, survey plans, Certificates of official Search, adjudication records, newspaper cuttings and Minutes of the 1986 District Development Committee Resolutions Kisumu District.

In a reply to defence and defence to Counter – Claim filed on 31st March 2006, the plaintiff reiterated the contents of his plaint and denied that his registration as the proprietor of the suit land was obtained illegally and put the defendant to strict proof thereof. The plaintiff denied knowledge that in 1994 certain persons invaded the defendant's land or that the Provincial Administration requested the defendant to settle some squatters on its land and that the plaintiff colluded with the Provincial Administration to excise a substantial chunk of the defendant's land leaving it with only 38.5 acres. The plaintiff sought the dismissal of the defendant's defence and Counter – Claim with costs and that Judgment be entered in his favour as prayed in the plaint.

By an application dated 23rd November 2015 and filed on 24th November 2013, the defendant sought and obtained orders to issue a Third Party Notice against the **KISUMU COUNTY LAND REGISTRAR** so that it could shed light on the circumstances and registration of the plaintiff as proprietor of the suit land. The defendant reiterated in that Notice that the plaintiff's registration as the proprietor of the suit land was fraudulent. However, during the trial, Counsel for the Third Party **MR MUTAI** informed the Court that it would not be offering any evidence. Prior to that, an application seeking to enjoin the **COMMISSIONER OF LANDS** and the **CHIEF LAND REGISTRAR** was filed on 29th April 2009 but appears not to have been prosecuted.

The defendant filed on 7th October 2019 the statement of its witness **DAVID NJOGU MUTUOTA** its Senior Accountant based in Kisumu. In the statement dated 4th October 2019, the witness stated that having worked for the defendant for 29 years, he was well versed with the facts of the case. That the defendant is the legal owner of the suit land which was described as the Veterinary Holding Ground measuring 324 acres which was allocated to it to establish a research center for Livestock Development in 1986. That the defendant has been in actual and constructive possession and use of the said parcel of land but in 1994, certain persons invaded and took possession of the land. The Provincial Administration and local leaders approached the defendant to agree on the excision of some 80 acres of its land on which to settle the squatters. After the excision had been done, a group of persons including the plaintiff encroached into part of the defendant's land, sub – divided portions and registered them by fraudulently and illegally obtaining titles without the prior knowledge or approval of the defendant. That the defendant placed a **CAVEAT EMPTOR** on the said parcels of land to inform the public that the same were illegally obtained from the defendant. That the plaintiff cannot own a title deed to land that belongs to the Government and this Court should not allow him to benefit from an illegality.

The suit was listed for hearing before me on 3rd September 2020 during the service week at the Environment and Land Court Kisumu. Though served with the hearing notice, neither the defendant's representative nor its Counsel **MR GUMBO** appeared for the hearing. Only **MR ANYUMBA** for the plaintiff and **MR MUTAI** for the Third Party were present.

The plaintiff testified during the plenary hearing and adopted as his evidence his statement filed on 20th November 2012. The contents of the said statement have already been summarized above. He also produced as his documentary evidence the list of documents also filed on 20th November 2012 and a further list of documents dated 7th February 2020 and filed on the same date. In addition to those two lists, he produced a Certificate of Search in respect to the suit land and urged the Court to grant him Judgment as prayed in the amended plaint. He then closed his case.

MR MUTAI Counsel for the Third Party informed the Court that he would not be calling any witnesses.

Thereafter, **MR ANYUMBA** Counsel for the plaintiff asked for 14 days to file and serve his submissions. **MR MUTAI** stated that he would not be filing any submissions. I therefore directed that the plaintiff's submissions be filed within 14 days and the matter be mentioned before the Deputy Registrar Kisumu on 21st October 2020 to confirm compliance and thereafter send the file to me in Bungoma for purposes of drafting the Judgment which would be delivered on 19th November 2020 by way of electronic mail. From the record, however, it was not until 27th November 2020 that the plaintiff's Counsel filed his submissions. The file was then transmitted to Bungoma on 8th February 2021 and received on 11th February 2021.

I have considered the evidence by the plaintiff including the documents filed and the submissions by his Counsel.

As the plaintiff was the only witness who testified in support of his case, his testimony is not rebutted. The defendant only filed its defence and Counter – Claim as well as the statement of its witness **DAVID NJOGU MUTUOTA** who is its Senior Accountant. However, that witness did not testify and neither did the representative of the Third Party.

Although the defendant filed a defence and Counter – Claim as well as the statement of its witness one **DAVID NJOGU MUTUOTA**, the said witness did not testify. The result is that without any evidence adduced either by the defendant or even the Third Party, the plaintiff's evidence remains un – controverted and it matters not that the defendant filed its pleadings and witness statement. As was held by **MADAN (J A)**, as he then was, in **CMC AVIATION LTD .V. CRUISAIR LTD NO 1 (1976 – 801 KLR)**

“The pleadings contain the averments of the three parties concerned. Until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of “evidence” in Section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven. Averments in no way satisfy, for example, the following definition of “evidence” in CASSEL’S ENGLISH DICTIONARY P 394:

Anything that makes clear or obvious; grounds for knowledge, indication or testimony; that which makes truth evident, or renders to the mind that it is truth.

The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”

On the basis of the above, it must be obvious that the defendant's Counter – Claim can only be for dismissal since no evidence was led by the defendant to prove the same.

And with regard to the plaintiff's claim seeking, inter alia, to restrain the defendant by itself, its agents and or servants from interfering with his quiet possession and enjoyment of the suit land, evidence has been placed before the Court showing that the plaintiff holds the title thereto issued to him on 17th November 2005. The title deed was produced as among the plaintiff's documents. That title deed, as provided by **Section 26(1)** of the **Land Registration Act** is prima facie evidence that the plaintiff is the absolute and indefeasible owner of the suit land subject to any encumbrances, easements, restrictions or conditions endorsed therein. The title can however be challenged if obtained by fraud to which the plaintiff is proved to have been a party, or if it was acquired illegally, unprocedurally or through a corrupt scheme. Under **Section 27** of the repealed **Registered Land Act** under which the title to the suit property was issued, it was also clear that the registration of a person as the proprietor of land vests in him absolute ownership thereof. That ownership could also only be impeached under **Section 143(1)** of the repealed Law if obtained by fraud or mistake. No evidence has been led by the defendant in this case to suggest that the plaintiff obtained title to the suit land through a fraudulent process, illegally, unprocedurally or through a fraudulent scheme. The onus was on the defendant to prove, to the required standard, that the registration of the plaintiff as the proprietor of the suit land was illegal null and void as pleaded in its Counter – Claim bearing in mind that those averments were denied in the reply to the defence and the defence to Counter – Claim dated 31st March 2006. Believing the plaintiff's un – controverted evidence as I hereby do and which is supported by the title deed to the suit land, I have no doubt that not only is the plaintiff the absolute and indefeasible owner of the suit land but that similarly, he is entitled to the order of a permanent injunction restraining the defendant by itself, its agents and/or servants from interfering with the plaintiff's quiet possession and enjoyment therefore as sought in paragraph 13(b) of the amended plaint.

The plaintiff has also sought for an order of General damages for trespass. His un – controverted evidence is that when he hired a tractor and went to the suit land for purposes of ploughing it, he found Police Officers and the defendant's Officers who stopped him from doing so allegedly on the instructions of the District Officer. Trespass to land is actionable per se. No proof of damage is necessary before the Court can make any award under that head. There is no mathematical formula to be applied in assessing the quantum of General Damages and

each case must be considered on its own peculiar circumstances. However, some of the factors that the Court will take into account in assessing the quantum of General Damages will include the size and location of the land, the length of the trespass and the conduct of the defendant. In the circumstances of this case, the suit land measures some 1.14 Hectares and is used for agricultural purposes. Due to the defendant's trespass, the plaintiff has not been able to plough it since 2005. Therefore, by the time this suit was filed in 2015, the defendant through its servants and/or agents had been interfering with the plaintiff's quiet enjoyment of the suit land for ten (10) years. In addition to that and as a demonstration of their malice and arrogance, the defendant continued to cause the plaintiff humiliation and distress by not even turning up to a meeting called by the District Officer on 5th December 2005 which had been arranged to enable the defendant produce any evidence to prove its claim to the suit land. By virtue of holding the title to the suit land, the plaintiff is deemed to be in possession thereof and is entitled to damages for the unjustified intrusion on the suit land which is essentially what trespass to land is all about. One would also have thought that as a Public institution, the defendant should have been in the forefront in recognizing and respecting the plaintiff's rights to his property. Taking all that into account and doing the best I can, I assess the General Damages available to the plaintiff at Kshs. 500,000/=.

The plaintiff also sought an award under the head of mesne profits from the date of filing of this suit until it is conclusively determined. The law however is that having made an award for General Damages for trespass, the plaintiff is not entitled to another award under the head of mesne profits – **KENYA HOTEL PROPERTIES LTD .V. WILLESSEN INVESTMENTS LTD C.A CIVIL APPEAL No 149 OF 2007 [2009 eKLR]**. See also **CHRISTINE NYANCHAMA OANDA .V. CATHOLIC DIOCESE OF HOMABAY REGISTERED TRUSTEES C.A CIVIL APPEAL No 208 of 2018 [2020 eKLR]**. In any event, mesne profits are a special damages claim which must be specifically pleaded and proved. Therefore, even if I had not awarded the plaintiff General Damages, I would still not have awarded him any mesne profits as the claim was neither specifically pleaded nor proved.

With regard to costs, they follow the even and there is no reason why the plaintiff should not be awarded the same.

Ultimately therefore and having considered the evidence herein, there shall be Judgment for the plaintiff in the following terms: -

- 1. The defendant's Counter – Claim is dismissed.**
- 2. An order of permanent injunction is issued restraining the defendant by itself, its agents, or servants from interfering with the plaintiff's quiet possession and enjoyment of the land parcel NO KISUMU/TONDE/135.**
- 3. The plaintiff is awarded General Damages of Kshs. 500,000/= for trespass to the land parcel NO KISUMU/TONDE/135.**
- 4. The claim for mesne profits is rejected.**
- 5. The plaintiff is awarded costs of his suit and the dismissed Counter – Claim to be met by the defendant.**

BOAZ N. OLAO.

J U D G E

27TH MAY 2021.

Judgment dated, signed and delivered by way of electronic mail this 27th May 2021 in keeping with the **COVID – 19** pandemic guidelines and with notice to the parties.

Right of Appeal explained.

BOAZ N. OLAO.

J U D G E

27TH MAY 2021.