



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC. CASE NO. 189 OF 2018**

*(Formerly Machakos ELC. Case No. 334 of 2012)*

CATHERINE WAMBUI WARUINGE.....PLAINTIFF

VERSUS

RETIA ENE SAMERA MUTEMPERIA.....1<sup>ST</sup> DEFENDANT

DAVID LEKENI SEMERA.....2<sup>ND</sup> DEFENDANT

SAMWEL SITOYIA SEMERA.....3<sup>RD</sup> DEFENDANT

JULIUS SAIMI SEMERA.....4<sup>TH</sup> DEFENDANT

JOHN SEMERA.....5<sup>TH</sup> DEFENDANT

SAITOTI SEMERA.....6<sup>TH</sup> DEFENDANT

**JUDGMENT**

By a **Plaint** dated 4<sup>th</sup> September, 2012 the Plaintiff sought for the following orders:

- a) *An order of Permanent Injunction restraining the Defendants whether by themselves and/or agents and/or servants from encroaching, trespassing and/or entering land parcel No. Kajiado/Kisaju/319.*
- b) *A declaration that trespassing and encroaching by the Defendants on the Plaintiff land is illegal and any beacons planted in the parcel of land be removed.*
- c) *An order for eviction do issue against the Defendants.*
- d) *Damages for trespass.*
- e) *Costs of the suit.*

The Defendants though duly served entered appearance but failed to file their respective Defences within the requisite time. The matter was set down for hearing and the Plaintiff called one witness. The Defendants although duly served with a Hearing Notice, still failed to attend court on the date the suit was set down for hearing.

**Evidence of the Plaintiff**

The Plaintiff as PW1 confirmed she is a small-scale business lady and adopted her witness statement dated 4<sup>th</sup> September, 2012 as her evidence in chief. She produced her list and bundle of documents filed on 4<sup>th</sup> September, 2012 as exhibits No. 1 -38. It was her testimony that she was an employee of the Standard Chartered Bank from 1975 upto 2008. She explained that she purchased the suit land Kajiado/Kisaju/319 through a public auction which was organized by the firm of Hamilton Harrison and Mathews Advocates. It was her testimony that she applied for a loan from Standard Chartered Bank to purchase the suit land from Kenya Commercial Bank. Further, the

owner of the suit land Mr. Semera Mutemperia Mbayo who was the father to the 6<sup>th</sup> Defendant and husband to the 1<sup>st</sup> Defendant had charged the said land to Kenya Commercial Bank. She confirmed that the bank made a down payment on her behalf to Kenya Commercial Bank, and later paid the full purchase price. She stated that the suit land was transferred to her and she was issued with a title deed to that effect. She reiterated that she is the registered owner of the suit land as at 6<sup>th</sup> March, 1987 and the said land is still registered under her name. PW1 contended that when she went to undertake a search in 2017, she found her green card missing. She testified that she had finished repaying the loan and wanted to develop her land. She claimed the Defendants were trespassing on her land and they had put up a semi permanent structure in the year 2012 while she was looking for a new green card. She explained that on inquiring from the Defendants, they were violent, and now she can no longer enter her land without fighting or being accompanied by police. She further testified that the Defendants even roughed up any photographer who went to take photos in the suit land. PW1 averred that before 2012 she had interacted with the Defendants as they were friends and she would visit but after 2012 when the children had grown older, they became violent. The Plaintiff produced the following documents as exhibits:

1. Land Certificate Title No. Kajiado/Kisaju/319
2. Letter by Hamilton Harrison & Mathews dated 06.10.86
3. Letter by Regent Auctioneers dated 22.10.86
4. Notification of Sale by Regent Auctioneers dated 22.10.86
5. Letter by Semera Mutamperia Mbaayo dated 10.11.86
6. Letter by Catherine W. Waruingi dated 11.11.86
7. Letter by Standard Chartered dated 18.11.86
8. Letter by Hamilton Harrison & Mathews dated 27.11.86
9. Letter by A.M. Gakere, District Commissioner dated 28.11.86
10. Transfer of Title No. Kajiado/Kisaju/319 dated 02.03.87
11. Green Card for Title No. Kajiado/Kisaju/319
12. Certificate of Official Search dated 06.03.87
13. Certificate of Official Search dated 09.08.88
14. Mutation Title No. Kajiado/Kisaju/23
15. Letter by Hamilton Harrison & Mathews dated 19.04.88
16. Green Card for Title No. Kajiado/Kisaju/318
17. Mutation Title No. Kajiado/Kisaju/318
18. Green Card for Title No. Kajiado/Kisaju/5061
19. Green Card for Title No. Kajiado/Kisaju/5062
20. Green Card for Title No. Kajiado/Kisaju/5063
21. Green Card for Title No. Kajiado/Kisaju/5064
22. Green Card for Title No. Kajiado/Kisaju/5065
23. Green Card for Title No. Kajiado/Kisaju/5066
24. Green Card for Title No. Kajiado/Kisaju/5067
25. Ground report on parcel Nos. 317, 318 & 319
26. Certificate of Official Search dated 27.04.12
27. Affidavit of Catherine Wambui Waruinge sworn on 12.04.12

28. Letter by the District Land Registrar dated 11.5.12
29. The Kenya Gazette dated 25.05.12
30. Letter by District Commissioner dated 04.06.12
31. Letter by District Commissioner dated 13.06.12
32. Letter by District Commissioner dated 20.06.12
33. Site revisit report dated 05.07.12
34. Letter by the District Land Registrar dated 20.07.12
35. Letter by the Chief Land Registrar dated 24.07.12
36. Letter by Catherine Wambui Waruinge dated 27.08.12
37. Certificate of Official Search dated 27.08.12
38. Letter by Nyandieka & Associates Advocates dated 04.09.12
39. Photographs

### **Plaintiff's Submissions**

The Plaintiff in her submissions reiterated her claim and stated that the 1<sup>st</sup> Defendant's husband guaranteed a loan to a third party using the suit land as security, but the said third party defaulted to repay it, culminating in the bank selling the said land through a public auction, when the amount of loan stood at Kshs.89,367/=. He explained that the 1<sup>st</sup> Defendant's husband in a move to save face offered the suit land for sale for a consideration of Kshs.128,700/= to prevent the planned auction. Further, the Plaintiff took a loan and bought the suit land which was registered under her name and later charged to Standard Chartered Bank which secured the facility of Kshs. 115,830/=. She further submitted that according to the Mutation of Parcel Title No. Kajiado/Kisaju/23, the suit land borders a road at the bottom where it measures 109.5 meters, while at the top it borders a road and parcel Title No. Kajiado/Kisaju/317 where it measures 179.5 meters and is basically a trapezium shape. The Plaintiff insisted the Defendants had encroached on the parcel claiming that it was rectangle. She reiterated that she was entitled to general damages. The Plaintiff referred to the Halsbury Laws of England, 4<sup>th</sup> edition, where it states that if trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased. She sought for the OCS in charge of Isinya Police Station to provide security to enforce the order of eviction. To buttress her averments, she relied on the following decisions: **Ochako Obinchi v Zachary Oyoti Nyamongo (2018) eKLR**; and **Nakuru Industries Limited v S S Mehta & Sons (2016) eKLR**.

### **Analysis and Determination**

Upon perusal of the materials presented in respect of the suit herein, which include Plaintiff, Witness testimony, exhibits and submissions, the following are the issues for determination:

- Whether the Defendants have trespass on the Plaintiff's land
- Whether the Defendants should be evicted from the suit land.
- Whether the Plaintiff is entitled to damages for trespass.
- Whether the Plaintiff is entitled to the orders sought in the Plaintiff.
- Who should bear the costs of the suit.

Before I proceed to make a determination of the issues herein, I note the Defendants though duly served entered appearance but failed to file their respective defences nor participate during the hearing. In the case of **North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited v City Council of Nairobi [2019] eKLR** the court held that: *"It is my view, that a party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case, the party's pleading are not to be taken as evidence, but the same remain mere statements of fact which are of no probative value since the same remain unsubstantiated pleading which have not been subjected to the required test of cross-examination. A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff's case. The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged. In such a situation the plaintiff is taken to have proved its case on balance of probability in absence of the defendant's evidence."*

In the circumstance, while associating myself with the decision cited above, I find that the Plaintiff's evidence remain uncontroverted.

As to whether the Defendants have trespass on the suit land and if they should be evicted therefrom. The Plaintiff tendered evidence to prove she purchased the suit land through a public auction and was thereafter registered as its proprietor. Further, that she still holds a Certificate of Title to that effect which she produced as an exhibit. It emerged in evidence that the suit land was initially owned by the husband to the 1<sup>st</sup> Defendant and father to the 2<sup>nd</sup> to 6<sup>th</sup> Defendants. Further, the same had been charged to Kenya Commercial Bank but later sold since the chargor had defaulted in repaying the loan. The Plaintiff explained that they had initially co existed peacefully but the Defendants later became hostile from 2012 after which the 4<sup>th</sup> Defendant moved into her land and put up a structure thereon including a cattle shed. They have denied her access to the suit land and she has to use the Police to access it. Section 26(1) of the Land Registration Act provides as follows:

**‘The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that 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; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.’**

While Section 24 (a) of the Land Registration Act further stipulates as follows: **‘subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....’**

In the case of **WILLY KIPSONGOK MOROGO v ALBERT K. MOROGO (2017) eKLR** the Court held as follows: **‘the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under Sections 24, 25 and 26 of the Land Registration Act.’**

From the legal provisions cited above, I hold that since the Plaintiff is the absolute proprietor of the suit land, she is entitled to all rights and privileges belonging or appurtenant thereto and hence entitled to protection of the law as envisaged in Sections 24, 25 and 26 of the Land Registration Act. The Plaintiff claims the Defendants have trespassed on her land and denied her entry therein. She proceeded to explain that her parcel 319 had since 1985 to 2011, shared a common boundary with Plot No. 318 until 2011 when subdivision was done creating a 9 metre road between the two parcels of land and in 2012 the 4<sup>th</sup> Defendant put up a semi-permanent corrugated iron sheet hut and fenced it with barbed wire fence inside her land. Further, according to the mutation form the Plaintiff’s plot was Trapezium shaped.

Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. **See, Clerk & Lindsell on Torts, 18<sup>th</sup> Edition, page 923, paragraph, 18-01.** Section 3 of the Trespass Act provides that, **“(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.(2)Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”**

In the case of **Eliud Njoroje Gachiri vs. Stephen Kamau Nganga ELC No. 121 of 2017**, the court observed that:

**“However in a case of continuing trespass, a trespass consists of a series acts done on consecutive days that are of the same nature and that are renewed or continued from day to day so that the acts are aggregate form one indivisible harm.”**

From the evidence before court which was uncontroverted, it is evident, the Defendants have trespassed into the Plaintiff’s land and became violent whenever the Plaintiff attempted to access it. In the case of **Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013) eKLR** P. Nyamweya J. held that:-

**“...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 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ trespass”**

**See also the cases of Ochako Obinchi V Zachary Oyoti Nyamongo (2018) eKLR and Nakuru Industries Limited Vs S S Mehta & Sons (2016) eKLR.**

In so far as the Plaintiff did not provide evidence on the loss she had incurred due the Defendant’s aforementioned acts but in relying on the above cases, and the Plaintiff’s submissions, I find the Plaintiff indeed suffered damages as a result of the Defendants’ acts of trespass. I will proceed and award the Plaintiff Kshs. 100,000 as general damages.

As to whether the Defendants should be evicted from the suit land. The Plaintiff claims the Defendants are hostile and denied her entry to the suit land. Further, the 4<sup>th</sup> Defendant has constructed a structure thereon including a cattle shed. Even though the previous owner of the suit land, was related to the Defendants, it is my considered view that once the suit land was sold to the Plaintiff through public auction, they lost their entitlement to it. Since the Defendants failed to controvert the Plaintiff’s averments, I find that they are trespassers on the suit land and should hence be evicted therefrom after being granted ample notice.

Who should bear the costs of the suit.

Since the Plaintiff has been inconvenienced with the Defendants' defiance to move from the suit land, I find that she is entitled to costs.

It is against the foregoing that I find that the Plaintiff has proved her case on a balance of probability and will proceed to make the following final orders:

- a. An order of Permanent Injunction be and is hereby issued restraining the Defendants whether by themselves and/or agents and/or servants from encroaching, trespassing and/or entering land parcel No. Kajiado/Kisaju/319.
- b. A declaration be and is hereby issued that the Defendants' acts of trespassing and encroaching on the Plaintiff's land is illegal and any beacons planted in the parcel of land be removed forthwith
- c. An order of eviction be and is hereby issued against the Defendants from the Plaintiff's Parcel of land parcel number Kajiado/Kisaju/319 after ninety (90) days from the date hereof, after being issued with a requisite notice and the OCS Isinya Police Station do oversee the same.
- d. The Plaintiff be and is hereby awarded Kshs. 100,000 as Damages for trespass

The Costs of the suit is awarded to the Plaintiff.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2021**

**CHRISTINE OCHIENG**

**JUDGE**