



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 311 OF 2017

MONICA OKWIRRY.....PLAINTIFF

VERSUS

KEN MBAU.....DEFENDANT

JUDGMENT

1. This suit was filed on the 20/6/16 by way of a Plaint. The Plaintiff sought the following orders;

- a. An order for vacant possession of the suit property known as NGINDA/SAMAR/BLOCK 1/2314 and eviction of the Defendant, his servants and/or agents from the suit premises.
- b. A permanent injunction restraining the Defendant from re-entering, trespassing upon, cultivating, harvesting and/or in any other manner interfering with the Plaintiff's quiet possession and ownership of Land Reference Number NGINDA/SAMAR/BLOCK 1/2314.
- c. General Damages for trespass.
- d. Costs of the suit.
- e. Mesne profits.
- f. Interest on (iv), (v) and (vi) above at Court rates until payment in full.

2. The Plaintiff avers that at all material times to the suit she was the registered owner of the suit land measuring 0.78 ha. She acquired the land through purchase from the previous owner namely Jennifer Nyawira Kiboro. In October 2015 or thereabouts, she learnt that the Defendant illegally, wrongfully, unlawfully and without any justifiable cause or color of right invaded and trespassed the Plaintiff's land. The Defendant cultivated half of the suit land and destroyed crops thereon. She pleads particulars of loss and damage under para 11 of the Plaint.

3. The Defendant denied the Plaintiff's claim through his statement of defense filed on the 27/6/16. In it, the Defendant asserted that he is the Director of Circular Distribution Committee that owns parcel No NGINDA/SAMAR/BLOCK 1/2310. The defense curiously includes prayers similar to those of the plaintiff. I say curiously because the pleadings are not expressed to be a counterclaim at all.

4. At the hearing, the Plaintiff adopted her witness statement dated the 17/6/16 and led evidence and produced documents listed and marked as PEX Nos. 1-18 in support of her claim. She informed the Court of the loss in terms of crop damage by the Defendant that stood at Kshs 250,000/-. She stated that she did not present any crop damage assessment report to Court in support of the claim for damages. She stated that leasing the farm would earn her Kes 20,000/ per annum. She asserted that she knows the boundaries of the suit land and averred that the Defendant invaded her land in 2015. She stated that there are clear boundaries (trenches) between the suit land and that of the Defendant. She informed the Court that the Defendant entered the land in 2015 and ploughed it without her authority.

5. The Defendant led evidence and stated that he is the Director of Circular Distribution Limited, the company that owns the suit land. He adopted his witness statement dated the 1/10/17. He produced a list of documents marked as DEX No 1-4 in support of his defence. He informed the Court that parcel No NGINDA/SAMAR/BLOCK 1/2310 was purchased by his late father in 2002 but was prevented from immediately taking possession by squatters who live in the area. The land measures approx. 48.5 acres. He admitted in evidence that he entered the suit land and cultivated it because he was unable to identify the boundaries between parcel No.s NGINDA/SAMAR/BLOCK 1/2310 and 2314. That this is because the boundaries were not clear and the beacons were missing on the ground therefore was unable to identify the extent of his land vis a vis the suit land. He stated that he believed that the boundaries extended to A and D on the Registry Index Map. That no one raised any complaint and even the Plaintiff's worker on the suit land did not know the boundaries.

6. DW2- The District Surveyor testified and presented to the Court the Registry Index Map, the mutation forms and how the two parcels of land came into being. The Surveyor's conclusion was that the boundaries of the suit land and parcel 2310 were clearly set out in the mutation forms as well as the Registry Index Map and therefore there was no encroachment of the lands whatsoever on the ground.

7. The parties filed Written Submissions, which I have read and considered.

8. The key issue is whether the Plaintiff has proven trespass on the part of the Defendant; whether the Plaintiff is entitled to the orders sought.

9. The Plaintiff's claim is that the Defendant has trespassed onto her suit land, commenced cultivation and destroyed crops in the process. The Plaintiff testified solely. The Defendant readily admitted in evidence that he believed that the suit land was part of his land as the beacons and the squatters in the area had interfered with the boundaries according to him. The Plaintiff was categorical in her evidence that there was no issue with the boundaries of the two parcels of the lands that shared a common boundary. She indicated to the Court that the boundaries were clearly marked with trenches and clearly visible.

10. Trespass is defined in **Section 3 (1) of the Trespass Act, Cap 294 of the Laws of Kenya** as:

"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".

11. Trespass to land is a tort against possession and there must be an entry on the suit property by the tort-feasor. The Defendant has admitted this in evidence. In this case, if any claim of trespass may be sustained it succeeds against the Defendant for his cultivation and actions in the year 2015. The Plaintiff seems to have presented facts for a continuous trespass which is not the appropriate case here.

12. The Court has noted that the adjoining land is owned by a company, Circular Distribution Limited as shown in the copy of the official search. The Defendant was sued as the trespasser. The Defendant has admitted the trespass. The fact of the trespass has therefore been settled. The Defendant did not show evidence that he represents the Company, the owner of the adjoining land. It is therefore safe to conclude that the identity of the trespasser has also been settled by the admission. The Defendant therefore remains suited as a party to the case.

13. It will be noted that the Defendant was enjoined by Court order in the year 2016. Taking the contents of the Court orders issued on 23/11/2016 and his evidence of admission that he entered the suit land in 2015-2016, it follows that the trespass stopped after the Court orders. The nature of this trespass is therefore not continuous.

Whether damages and mesne profits may be awarded.

14. It is trite that a victim for trespass is entitled to recover from the unlawful actions through an award of general damages. Trespass is actionable per se.

15. In this case, the Defendant has admitted that he trespassed unknowingly onto the Plaintiff's land. The Court finds that the Defendant trespassed onto the land of the Plaintiff between the periods 2015 - Nov 2016 when the Court ordered the parties to maintain status quo on the suit land.

16. Given the period of trespass and the attendant inconvenience to the Plaintiff, I order an amount of Kshs 150,000/- in respect to general damages for trespass in respect to the tortious acts.

17. The Plaintiff in her evidence informed the Court that she suffered crop damages in the sum of Kshs 250,000/-. This falls under the category of special damages which must be pleaded and proved. However, the Plaintiff failed to prove the damage. This could have been in form of a crop valuation or assessment report by the Agricultural Officer of the area indicating the crops and the loss suffered. In the case of **Paul Audi Ochuodho - Vs- Joshua Ombura Orwa [2014] eKLR** the Court held that the Plaintiff's claims for the recovery of the cost of the damaged crops, trees, borehole, farm house, boundary fence and pit latrine are in the nature of special damages and ought to have been pleaded failure to which the same are not recoverable.

18. The conclusion is that the Plaintiff claimed an amount which she did not plead or specifically prove and therefore I reject this prayer on that ground.

19. Mesne profits are also within the limb of special damages and cannot be allowed without being pleaded before the Court. In the case of **Peter Mwangi Mbutia vs Samow Edin Osman & Naftali Ruth Kinyua C.A Civil Application No. 38 of 2004 (2014) e K.L.R** the Court of Appeal held thus:

"As regards the payment of mesne profits, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint as mesne profits and it appears to us prima facie, that there was no evidence to support the actual figure awarded..... That being so, it must be very hard on the applicant to be forced to pay an amount which had not even been pleaded in the first place, and on which the first Respondent offered no evidence"

20. The Plaintiff led evidence that the leasing rate per annum for the suit land is Kshs 20,000/- per annum. She however failed to present any evidence to support this figure. This would have been in form of rental lease valuation or any leases in the area. The Court cannot grant this prayer. It fails.

21. The Plaintiff has proven that she is the owner of the suit land. She has also proved that the Defendant trespassed into the suit land and I see no reason why prayer No. a and b should be declined.

22. Having proved trespass, the Plaintiff is entitled to general damages for trespass. The Plaintiff has sought a sum of Kshs 500,000/-. I award the Plaintiff the sum of Kshs 150,000- for trespass.

23. The upshot is that the Plaintiff's case partially succeeds and I make the following prayers;

a. An order for vacant possession of the suit property known as NGINDA/SAMAR/BLOCK 1/2314 and eviction of the Defendant, his servants and/or agents from the suit premises (if applicable).

b. A permanent injunction restraining the Defendant from re-entering, trespassing upon, cultivating, harvesting and/or in any other manner interfering with the Plaintiff's quiet possession and ownership of Land Reference Number NGINDA/SAMAR/BLOCK 1/2314.

c. Kshs 150,000/- for trespass.

d. The Plaintiff shall have the costs of the suit.

Orders accordingly.

DELIVERED, DATED & SIGNED AT MURANG'A THIS 11TH DAY OF JULY, 2019

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Gatumuta HB for Ndegwa for the Plaintiff

Defendant: Absent

Irene and Njeri, Court Assistants