



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 45 OF 2019

PENNINA KAVINDU NZIOKI..... 1ST PLAINTIFF

SIMON KIVUVA NZIOKI

(Suing as the Administrators Ad-litem

of the Estate of the late NZIOKI MUIA)..... 2ND PLAINTIFF

VERSUS

JOSEPH KIEMA KITUNGI DEFENDANT

JUDGEMENT

1. The Plaintiffs, suing as the administrators of the estate of the late Nzioka Muia, brought this suit vide the Plaint dated 26th June, 2019 and filed in court on 27th June, 2019.

2. The Plaintiffs have averred in their plaint that at all material times land title number Kalawa/Kathulumbi/409 (hereinafter referred to as the suit land) measuring 29.16 hectares or thereabout was and is still registered in the name of Nzioka Muia (deceased) having been so registered on 9th September, 1969, that the Defendant has been encroaching into the suit land in a sporadic manner and that the situation was aggravated in 2018 when the Defendant created a fence curving out part of the suit land purporting it to be part of the Defendant's land title number Kalawa/Kathulumbi/407, that the Defendant has since then continued to trespass into the suit land thereby committing acts of wanton destruction by cutting down indigenous trees and plantations thereon, that the Defendant's acts amount to trespass and have caused the estate of the late Nzioka Muia great loss and damage as the Plaintiffs who are lawful beneficiaries have been deprived of the use and enjoyment of the portion encroached and that in the month of March, 2019, the District Surveyor, Makueni County conducted a survey and confirmed that the Defendant had encroached into part of the suit.

3. The Plaintiffs pray for judgement against the Defendant for:

a) A declaration that the entire land title number KALAWA/KATHULUMBI/409 measuring 29.16 Ha or thereabouts is the property of Nzioka Muia also known as Peter Nzioka Muia and that the Defendant who has trespassed over the same as confirmed by the Makueni County Surveyor's report dated 11/03/2019 has no right of claim whatsoever over the said property.

b) An order of permanent injunction to restrain the Defendant whether by himself, his family, his servants and or agents or others whomsoever from continuing with their acts of trespass complained of or in any other manner howsoever from interfering with the Plaintiffs' peaceful occupation and use of their land title number KALAWA/KATHULUMBI/409.

c) An order compelling the Defendant to demolish and remove his illegal fence and/or any other vegetation brought by him on land title number KALAWA/KATHULUMBI/409 at his own cost and in default the Plaintiffs be at liberty to demolish and remove the same at the Defendant's cost.

d) An order of possession and eviction of the Defendant from the Plaintiffs' land title number KALAWA/KATHULUMBI/409.

e) General damages for trespass in to the Plaintiffs' parcel title number KALAWA/KATHULUMBI/409.

f) Costs of this suit and/with interests thereon of (e) at court rates from the date of judgement until payment in full.

4. The Plaintiffs claim is denied by the Defendant vide his statement of defence dated 1st October, 2019 and filed in court on 2nd October, 2019.
5. In his defence, the Defendant has denied the Plaintiffs averments in paragraphs 5, 6 and 7 of their plaint. The Defendant has further averred that the survey that was carried out resulted in the boundaries being properly marked with sisal plants and he denies having ever encroached into the suit land. His prayer was that the Plaintiffs suit be dismissed with costs.
6. In rejoinder, the Plaintiffs filed a reply to the defence on 18th October, 2019 the same being dated 14th October, 2019. In their reply to defence, Plaintiffs reiterated the averments in their plaint.
7. Hearing of the Plaintiffs' case commenced on the 19th November, 2020. The Defendant did not attend the hearing despite having been served with a hearing notice on 7th September, 2020 as is shown in the affidavit of service sworn at Machakos on 15th September, 2020.
8. In his evidence in chief, the 2nd Plaintiff adopted his statement dated 26th June, 2019. He went on to produce several documents in his list of documents dated 26th January, 2020 as PEX Nos. 1 to 5 and 10 to 13 respectively. These documents were a letter from the Ministry of Interior and Coordination of National Government dated 7th December, 2018 (PEX No. 1), a letter from Kyalo Muia & Co. Advocates dated 12th December, 2018 (PEX No. 2), boundary dispute summons dated 21st January, 2019 (PEX No. 3), letter from the Ministry of Lands and Physical Planning dated 11th March, 2019 (PEX No. 5) a sketch map (DEX No. 4), a letter from Kyalo, Muia & Co. Advocates dated 30th November, 2018 (PEX No. 11), a letter from Mutune & Co. Advocates dated 13th February, 2018 (PEX No. 12) and a letter from Kyalo, Muia & Co. Advocates dated 24th May, 2019 (PEX NO. 13).
9. Briefly, the 2nd Plaintiff's evidence was that his father, Peter Nzioki Muia alias Nzoki Muia, died interstate on 17th October, 1987. That upon his father's death, he and his co-plaintiff obtained letters of administration ad litem on 21st May, 2019 to enable them file this suit.
10. It was also the 2nd Plaintiff's evidence that his late father left among others land parcel number Kalawa/Kathulumbi/409 measuring 29.16 hectares or thereabout which was solely registered in the deceased's name on 9th September, 1969. He went on to say that the Defendant herein is the registered proprietor of land parcel number Kalawa/Kathulumbi/407 and that the land borders land parcel number Kalawa/Kathulumbi/409.
11. It was also the 2nd Plaintiff's evidence that on various occasions, the Defendant has been encroaching into land parcel number Kalawa/Kathulumbi/409. He said that in the year 2018, the Defendant erected a fence thereby curving out part of land parcel number Kalawa/Kathulumbi/409. He added that the Defendant has committed wanton acts of destruction by cutting down indigenous trees and plantation thereon and that those acts amount to trespass. It was also his evidence that the acts have caused them (Plaintiffs) as well as the estate of the late Nzioki Muia great loss and damage. He said that in March, 2019, the District Surveyor, Makeni County visited the site and confirmed that the Defendant had encroached into parts of land parcel number Kalawa/Kathulumbi/409 measuring 0.33 hectares. The 2nd Plaintiff added that despite the surveyor's report confirming the aforesaid trespass and despite the Defendant being requested to remove his fence, he has refused to do so.
12. Gabriel Maingi (PW1), a surveyor at Makeni Survey Office of the National Government, told the court that he was directed by the Land Registrar to visit the site where land parcels numbers Kalawa/Kathulumbi/409 and Kalawa/Kathulumbi/407 are situated. He added that Land Registrar issued summons dated 24th January, 2019 upon receiving complaint from the chief of Kathulumbi as well as from Kyalo, Muia & Co. Advocates. That during the site visit on 1st March, 2019, he used the area map that covers the two aforementioned parcels of land and proceeded to take measurements from point B, D and H which are known. He said that he concluded that the boundary between land parcel number Kalawa/Kathulumbi/407 and Kalawa/Kathulumbi/409 is a river passing between points E, K, M, N and J. He went on to say that the proprietor of land parcel number Kalawa/Kathulumbi/407 had erected new posts across the river along line EJ. That a calculation of the area between the river and line EJ revealed an encroachment of 0.33 hectares equivalent to 0.82 acres. The surveyor produced the two aforementioned letters, summons, map and a report as PEX Nos. 1, 2, 3 and 4 respectively.
13. Before closing the case for the Plaintiffs, Mr. Kyalo applied for the proceedings to be stayed so that the dispute could be referred to the Land Registrar for the determination of the boundary dispute as is provided for under Section 18 and 19 of the Land Registration Act No. 3 of 2012.
14. The application was allowed and the matter was fixed for mention on 4th February, 2021 when the Land Registrar, R. M. Soo, produced her report dated 20th January, 2020. The Plaintiff's counsel thereafter closed the Plaintiff's case.
15. Mr. Mutune, the learned counsel for the Defendant, who was in court on the material applied for adjournment so that the Defendant could file and serve his documents within 21 days from the date of the said mention. The matter was fixed for defence hearing on 29th April, 2021 by consent of both parties. However, come the 24th April, 2021, neither the Defendant nor his counsel appeared in court. Consequently, the Defendant's case was deemed closed.
16. In his submissions, the Plaintiffs' counsel referred the court to the Land Registrar's report dated 20th January, 2020 and filed in court on 4th February, 2020. The report is a replica of the report (PEX No. 1) prepared by Maingi (PW1). In the said report, it is indicated that;

“After measurements it was noted that parcel number Kalawa/Kathulumbi/407 had encroached on parcel number Kalawa/Kathulumbi/409 as shown on the shaded part. The encroached acreage was 0.33 Ha which is equivalent to 0.082 Ha.”

17. The counsel cited Article 40 of the constitution that protects one's right to acquire and own property of any description in any part of Kenya. The counsel went on to cite Section 24(a) of the Land Registration Act No. 3 of 2012 which provides that the registration of a person as a proprietor of land vests upon that person the absolute ownership of that land together with all rights and privileges belonging and appurtenant thereto. The counsel went on to submit that the evidence on record shows that the Defendant has encroached into the Plaintiff's land and proceeded to erect a fence thereon.

18. The counsel urged the court to award the Plaintiff Kshs. 500,000/= as general damages for trespass. In support of his submissions, the counsel cited the case of **Sabastian Otieno Omari & 4 Others –Vs- Derek Otieno Oluoch [2018] eKLR** and **Joseph Kiema Kitungi –Vs- Francis Mutavi Musyoka [2019] eKLR**.

19. I have considered the pleadings, the evidence on record, and the submissions by the counsel for the Plaintiff and I am of the view that the issues for determination are firstly whether land parcel number Kalawa/Kathulumbi is owned by Nzioki Muia whose interests are represented by the Plaintiffs as the administrators of his estate and secondly whether land parcel number Kalawa/Kathulumbi/407 has encroached into land parcel number Kalawa/Kathulumbi/409.

20. From the evidence on record, there is no doubt that land parcel number Kalawa/Kathulumbi/409 is registered in the name of Nzioki Muia who is now deceased. There is also no doubt that the two Plaintiffs are the administrators of his estate. The two reports by Maingi (PW1) who is a Surveyor and R. M. Soo, the Land Registrar show that there was encroachment into the said land parcel number Kalawa/Kathulumbi/409 by land parcel number Kalawa/Kathulumbi/407. The size of the encroachment is 0.33 hectares. The evidence on record as well the document (PEX No. 9) produced by the 2nd Plaintiff shows that the latter land is owned by the Defendant.

21. The reports by the Surveyor and the Land Registrar have clearly shown where the boundary between the two land parcels ought to be which is a river passing between points E, K, M, N and J. I have no doubt in mind that from the sum total of the evidence on record, the Defendant is a trespasser.

22. In the case of **Duncan Nderitu Ndegwa –Vs- KPLC Ltd & Anor [2013] eKLR P. Nyamweya, J** (as she then was) held thus;

“.....once a trespass to land is established it is achievable 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. 1000,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants' trespass.”

23. Similarly, in the case of **Park Towers Ltd –Vs- John Mithamo Njika & 7 Others [2014] eKLR** J. M. Mutugi, J had this to say regarding general damages for trespass;

“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to the awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each”

24. Flowing from the foregoing, I am of the view that Kshs. 200,000/= would suffice as general damages for trespass and this is the amount I will award the Plaintiffs.

25. Being satisfied that the Plaintiffs have on a balance of probabilities proved that they have a cause of action against the Defendant, I will proceed to enter judgement in their favour and against the Defendants as hereunder.

a) A declaration that the entire land title number KALAWA/KATHULUMBI/409 measuring 29.16 Ha or thereabouts is the property of Nzioki Muia also known as Peter Nzioki Muia and that the Defendant who has trespassed over the same as confirmed by the Makueni County Surveyor's report dated 11/03/2019 has no right of claim whatsoever over the said property.

b) An order of permanent injunction to restrain the Defendant whether by himself, his family, his servants and or agents or others whomsoever from continuing with their acts of trespass complained of or in any other manner howsoever from interfering with the Plaintiffs' peaceful occupation and use of their land title number KALAWA/KATHULUMBI/409.

c) An order compelling the Defendant to demolish and remove his illegal fence and/or any other vegetation brought by him on land title number KALAWA/KATHULUMBI/409 at his own cost and I default the Plaintiffs be at liberty to demolish and remove the same at the Defendant's cost.

d) An order of possession and eviction of the Defendant from the Plaintiffs' land title number KALAWA/KATHULUMBI/409.

e) Kshs. 200,000/= being general damages for trespass.

f) Costs of this suit and/with interests thereon of (e) at court rates from the date of judgement until payment in full.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 30TH DAY OF JUNE, 2021.

.....

MBOGO C.G.

JUDGE