



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**ELC CASE NO. 92 OF 2015**

**JOSEPHAT OKEO KEGENGO.....PLAINTIFF**

**VERSUS**

**KISII COUNTY GOVERNMENT.....1<sup>ST</sup> DEFENDANT**

**DIRECTOR OF ROADS, KISII COUNTY GOVERNMENT.....2<sup>ND</sup> DEFENDANT**

**BLUE HOUSE CONTRACTORS.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. By a Plaint dated 5<sup>th</sup> March 2015, the Plaintiff filed suit against the Defendants claiming that the Defendants had trespassed on to his land parcel no, NYARIBARI CHACHE/NYANTURAGO/737 and constructed a road thereon thus dispossessing him of a substantial portion of his land. The Plaintiff claimed that as result of the said acts of trespass he had suffered loss and damage. He therefore prayed for the following reliefs:

- a) A declaration that the Plaintiff is the registered and/or lawful owner of L.R No. NYARIBARI CHACHE/NYANTURAGO/737
- b) An order of eviction and demolition of the structures (if any) , erected on the suit land by or at the instance of the Defendants
- c) A Permanent injunction restraining the Defendants by themselves, agents, servants and/or anyone claiming under the Defendants from re-entering, trespassing, diverting the road, interfering with and/or in any manner whatsoever dealing with the disputed portion of the suit land that is L.R No. NYARIBARI CHACHE/NYANTURAGO/737.
- d) General damages for trespass.
- e) Costs of the suit
- f) Such further and/or other relief that the Honourable Court may deem fit and expedient so to grant.

2. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a Statement of Defence dated 15<sup>th</sup> February 2016 denying the Plaintiff's claim and stating that there had been a road in use from Nyamagwa to Rotuba stretching for about 3.4 Kilometres since time immemorial and if there was any act of trespass which was denied, then the same was done through the consent of the Plaintiff. They further stated that it would be against public interest to issue a permanent injunction against the Defendants since members of the public were already using the road.

3. When the matter came up for hearing on 26<sup>th</sup> April 2017, the court directed that the Land Registrar and County Surveyor Kisii County to visit the suit property for purposes of delineating its boundaries and determining whether there was a road passing through the Plaintiff's parcel of land. The said officers visited the suit property and filed a report in court dated 17<sup>th</sup> October 2017.

4. In the said report the Land Registrar and County Surveyor concluded that the road of access had encroached on the Plaintiff's parcel of land by approximately 0.2 Hectares. The court then proceeded to adopt the said report as a judgment of the court and entered partial judgment in favour of the Plaintiff. What remained to be determined was the quantum of damages and/or compensation.

5. The parties subsequently agreed that they would each engage the services of a valuer to value the suit property and agree on the amount of compensation payable to the Plaintiff. The Plaintiff engaged a valuer who valued the disputed portion of the suit property and filed her report in court but the Defendant did not file any valuation report despite being granted ample time to do so. Instead the Defendants proposed that they be granted an opportunity to cross-examine the Plaintiff's valuer on her report.

6. The matter was set down for hearing on 27.7.2021 when Rael Otundo, the valuer, presented her report and was cross-examined by counsel for the Defendant. She told the court that she valued a portion measuring 0.2 Hectares or approximately half an acre of land parcel no. NYARIBARI CHACHE/NYANTURAGO/737 which had been taken up by the road. She testified that there was a fence which had been destroyed and the gate was hanging by the road side. She also testified that she found a grave that had been exposed. In cross-examination, she told the court that she valued the land, the fence and the gate and added 15% disturbance allowance based on the Land Acquisition Act (repealed) and arrived at a value of Kshs. 1,236,250/=.

7. The Defendant's counsel sought leave to cross-examine the Surveyor who prepared the survey report but counsel for the Plaintiff objected on the grounds that the court had already entered a partial judgment in favour of the Plaintiff based on the said report and the court upheld the objection. The parties were then granted time to file their written submissions and both parties filed their submissions which I have considered.

8. The singular issue for determination is how much compensation should be paid to the Plaintiff.

9. Learned counsel for the Plaintiff submitted that since the land was valued in May 2019, the value of land had appreciated. He submitted that the Plaintiff be awarded the sum of 1,436,250 as compensation for trespass to his land.

10. On his part learned counsel for the Defendants lamented that the County Surveyor had not been given a chance to testify. He contended that the Plaintiff had misrepresented the facts and he did not deserve to be compensated. He was of the view that if compensation had to be paid, the same ought to be reduced by half as he maintained that the road was public property which must be jealously guarded.

11. Regarding the question of trespass, I am in agreement with counsel for the Plaintiff that the court having entered partial judgment herein based on the joint report of the Land Registrar and County Surveyor Kisii County, the issue of trespass has been determined and cannot be revisited.

12. Having carefully considered the pleadings, the joint report of the Land Registrar and County Surveyor Kisii County and the valuation report produced by Rael Otundo of Otundo & Associates, Valuers and Estate Agents as well as the evidence of Rael Otundo, the valuer, I am of the view that the sum of Kshs. 1,236,250 would adequately compensate the Plaintiff for trespass to his land. I agree with counsel for the Defendant that it would not be appropriate to grant an order of permanent injunction against the Defendants as the road is for public use.

13. Consequently, I enter judgment for the Plaintiff and make the following final orders:

a) A declaration is hereby issued that the Plaintiff is the registered and /or lawful owner of L.R No. NYARIBARI CHACHE/NYANTURAGO/737

b) The Plaintiff is awarded the sum of one million, two hundred and thirty six thousand, two hundred and fifty shillings (Kshs. 1,236,250/=) as compensation/general damages for trespass.

c) The costs of the suit shall be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

**DATED, SIGNED AND DELIVERED AT KISII THIS 24TH DAY OF NOVEMBER, 2021.**

**J.M ONYANGO**

**JUDGE**