



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CIVIL CASE NO. E055 OF 2021**

**DIM AGENCIES LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA AIRPORTS AUTHORITY.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiff has filed the subject suit vide Plaint dated the 12<sup>th</sup> February 2021, and in respect of which same seeks the following reliefs;

- I. Declaration be and is hereby made that the Plaintiff is the bonafide and registered owner of L.R No. 9042/617.*
- II. Declaration be and is hereby made that the Defendant has trespassed and is continuing to trespass onto the Plaintiff's property.*
- III. Declaration be and is hereby made that the Defendant has violated the Plaintiff's right to property under Article 40 of the Constitution of Kenya 2010.*
- IV. General damages for trespass to land*
- V. Compensation for breach of the Plaintiff's right to property under Article 40 of the Constitution of Kenya 2010.*
- VI. Interest on iv & v above from the date of judgment until payment in full.*
- VII. Cost of the suit.*

2. Following the filing and service of the Plaint and summons to enter appearance, it was incumbent upon the Defendant herein, to enter appearance and file a statement of defence, if any, within the statutory and/ or prescribed timeline.

3. However, despite service of the Plaint and summons upon the Defendant, same did not find it necessary and/or appropriate to enter appearance and/or file the statement of defense.

4. Owing to the foregoing, the Plaintiff proceeded to and caused the subject matter to be fixed for formal proof and thereafter the matter indeed proceeded for formal proof, whereby one, Ashok L. Doshi, namely, the Managing director of the Plaintiff company tendered evidence for and/or on behalf of the Plaintiff.

**EVIDENCE BY THE PARTIES:**

**PLAINTIFF'S CASE:**

5. The Plaintiff called one witness, namely Ashok L. Doshi, who testified as PW1. According to the witness, the Plaintiff herein entered into and executed a land sale agreement dated the 20<sup>th</sup> January 2000 between herself and one Hussein Maalim Mohamed, whereby the latter covenanted to and indeed sold in favor of the Plaintiff the property otherwise known as L.R No. 9042/617, hereinafter referred to as the suit property.

6. It was the witness' further testimony, that upon entry into and execution of the sale agreement, the Plaintiff paid all the purchase price, which was agreed upon and thereafter the suit property was transferred to and registered in the name of the Plaintiff.

7. Nevertheless, the Plaintiff's witness further averred that despite the fact that the suit property lawfully belongs to and is registered in the name of the Plaintiff, the Defendant herein has trespassed onto and thus deprived the Plaintiff of the rights of the suit property.

8. The Plaintiff's witness further contended that during the entire period, spanning the year 2000 upto and including the filing of the subject suit, the Defendant has continued to trespass onto the suit property and has thus deprived the Plaintiff of lawful rights of entry, use and development of the suit property.

9. In any event, the witness further testified, that in the month of February 2018, same visited the suit property and discovered that the Defendant had now proceeded to and erect a stoned fence/wall, around the entire property. In this regard, the witness contended that the Defendant has thus chosen to annex and/or exercise the entire of the suit property and thereby divested the Plaintiff of her rights to and/or in respect thereof.

10. It was the Plaintiff's witness further averment, that as a result of the actions by and/or on behalf of the Defendant, same has not been able to develop the suit property and thereby benefit from same.

11. Owing to the foregoing, the Plaintiff thus implored the court to adopt the witness statements filed alongside the Complaint and thereby grant the Reliefs sought at the foot of the Complaint dated the 12<sup>th</sup> February 2021.

#### **DEFENDANT'S CASE:**

12. Though the Defendant herein was served, same neither entered appearance nor filed a statement of defense. In this regard, the Defendant herein did not oppose and/or dispute the Plaintiff's claim.

13. In view of the fact that the Defendant did not file appearance and a statement of defense, no evidence was thus laid and/or adduced by and/or on behalf of the Defendant or at all.

14. In short, the Plaintiff's testimony and by extension the Plaintiff's claim, has thus not been opposed.

#### **SUBMISSIONS:**

15. Following the close of the hearing, the subject matter was set down for the filing of written submissions, by and/or on behalf of the parties herein. For clarity, the court ordered and/or directed the Plaintiff, to file Written Submissions.

16. Pursuant to and in line with the directions of the court, the Plaintiff herein proceeded to and filed her written submissions on the 26<sup>th</sup> October 2021, and to which the Plaintiff has attached four [4] decisions, to buttress the Plaintiff's claim.

17. On the other hand, even though the Defendant herein was at liberty to file and/or lodge written submissions, the Defendant yet again has failed or neglected to file the written submissions in the matter.

18. In the premises, the Plaintiff's case was not opposed and/or controverted.

#### **ISSUES FOR DETERMINATION:**

19. Having reviewed and/or considered the Complaint, the witness statements and the documents that were filed by and/or on behalf of the Plaintiff and having similarly considered the written submissions and the case law filed on behalf of the Plaintiff, **I am on the humble opinion that the following issues do arise for consideration and determination;**

I. Whether the Plaintiff is the lawful proprietor of the suit land.

II. Whether the Defendant has trespassed onto the suit land and/or whether the actions of the Defendant are lawful.

III. Whether the Plaintiff is entitled to compensation on account of trespass and infringement of her rights to property and if so the quantum thereof.

#### **ISSUE NUMBER 1**

20. In respect of the first issue herein, the Plaintiff's witness testified and informed the court that the Plaintiff company entered into a land sale agreement with one Hussein Maalim Mohammed, whereby the vendor proceeded to and indeed sold the suit property to and in favor of the Plaintiff company.

21. On the other hand, the Plaintiff's witness proceeded to and tendered before the court a copy of the title in respect of the suit property, which clearly showed that the property was transferred to and registered in the name of the Plaintiff on the 21<sup>st</sup> January 2000.

22. Besides, the Plaintiff herein have also adduced evidence of a copy of certificate of official search as well as a letter from the office of the Chief Land Registrar, the latter dated the 20<sup>th</sup> December 2018, in which the director of land administration confirmed and/or indicated that the Plaintiff is the lawful and the registered proprietor of the suit property.

23. On the basis of the totality of the evidence adduced and in particular the certificate of official search, there is no dispute that the property belongs to and is registered in the name of the Plaintiff.

24. In the premises, the Plaintiff herein is the lawful proprietor of the suit property and same is therefore entitled to partake of and/or benefit from same, to the exclusion of all and sundry, unless the Plaintiff has granted consent and/or permission in favor of such other third party.

25. In my humble view, the Plaintiff having established her right to the suit property, same is therefore entitled to the benefits accruing from and or attendant to the provision of **Section 24 and 25 of the Land Registration Act 2012.**

26. In any event, the issuance of a title to and/or in favor of the bearer, which title has not been challenged vests upon the holder thereof absolute and inviolable rights, which the honourable court is called upon to protect and/or vindicate.

27. In support of the foregoing position I am minded to refer to and rely on the decision in the case of **Ocean View Plaza Ltd v Attorney General [2002] eKLR**, where the honourable observed as hereunder;

*“Allotment of land to a citizen or others protected under the Constitution, which action is symbolized by Title Deeds, invests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under Land Acquisition Act”*

28. To further vindicate the legal positions and status of the Plaintiff's title to the suit property, I also wish to re-echo the sentiments of the court in the decision in the case of **Isaac Gathungu Wanjohi & another v Attorney General & 6 others [2012] eKLR**, where the honourable court held as hereunder;

*I take the view stated in the case of **Chemei Investments Limited v The Attorney General & Others Nairobi Petition No. 94 of 2005 (Unreported)** at para. 64 that, “The Constitution protects a higher value, that of integrity and rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of **Milan Kumarn Shah & 2 Others v City Council of Nairobi & Another (Supra)** where the Court stated as follows, “We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”*

*I also hold that the finding of “unlawful acquisition” referred to in Article 40(6) of the Constitution must be through a legally established process and not by whim or revocation of the Gazette Notice as the Commissioner of Lands purported to do and definitely not by forceful taking of possession. Thus, as was held in the case of **Kuria Green Limited v Registrar of Titles and Another (Supra)**, it must follow that the purported revocation to title LR No. 209/2052 by way of Gazette Notice No. 9230 is illegal, null and void and of no effect.*

29. In respect of the first issue, I return a verdict that the Plaintiff herein is the lawful and legitimate owner of the suit property and its rights thereto, must be protected and/ or vindicated in accordance with the law.

## **ISSUE NUMBER 2:**

30. The Plaintiff herein wrote to and in favor of the Defendant several letters intimating to the Defendant that same is the owner of the suit property, and besides the Plaintiff also signaled to the Defendant that by virtue of being the registered owner of the suit property, same was intent on erecting a perimeter wall/fence thereon.

31. It is common ground that the correspondence by the Plaintiff to the Defendant were duly received and acknowledged by the Defendant. For clarity, the Defendant herein wrote back to and in favor of the Plaintiff vide letter dated 17<sup>th</sup> December 2010.

32. The issue pertaining to and/or concerning the Plaintiff's title to the suit property, has been variously drawn to the attention to the Defendant and despite the various indications, the Defendant herein, has never taken any steps and/or actions, to challenge and/or impeach the Plaintiff's title.

33. Suffice it to say, that the Plaintiff's title remains valid and lawful and therefore the Plaintiff should be free to access, occupy and have possession and use the suit property for her benefit, subject only to the limitations stipulated under the law and not otherwise.

34. On the other hand, any third party, cannot enter upon and/or remain on the suit property without the consent and/or permission of the Plaintiff and in the event of any such actions, then the activities by and on behalf of such third parties would, no doubt amount to trespass.

35. I hasten to say, that despite the Defendant knowing that the suit property belongs to and is registered in the name of the Plaintiff, same have since proceeded to and erected a perimeter wall thereon, with a view to divesting the Plaintiff of her rights.

36. In my humble view, the actions and/or activities of the Defendant herein, whose purport is to unlawfully alienate the suit property, amount to and constitute to trespass.

37. In support of the foregoing position, I invoke and rely in the decision in the case of **John Kiragu Kimani v Rural Electrification Authority (2018) eKLR**, where the honourable defined trespass as hereunder:

According to the 10<sup>th</sup> Edition of Black's Law Dictionary trespass is defined as follows;

*“an unlawful act committed against the person or property of another; especially wrongful entry on another's real property. Clark & Lindsell on Torts, 18<sup>th</sup> Edition on page 923 defines trespass as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason”.*

38. Based on the foregoing decisions, it is my humble finding that the actions and/or activities by the Defendant herein, which have continued to date amounts to trespass and that in this regard the Defendant herein does not have any legitimate and/or lawful basis to continue with and/or perpetuate the offensive activities against the title of the Plaintiff.

39. In any event, even assuming that the Defendant holds the notion that the property in question should belong to them and/or was unlawfully acquired (none of which has been alluded to) the Defendant would still be obliged to approach the court of law to ventilate such position and thereafter procure pronouncement by the court on the unlawfulness or otherwise of the Plaintiff's title.

40. Suffice it to say, that to the extent that the Plaintiff's title has never been challenged and/or revoked, it is not open to the Defendant, irrespective of social and/ or economic status, to take the law unto own hands and enter upon private property, whatsoever.

### ISSUE NUMBER 3:

41. Having arrived at the conclusion that the Plaintiff is the lawful and legitimate owner of the suit property and having found and held that the actions and/or activities by the Defendant amounts to trespass, the question that then remains to be addressed is; whether the Plaintiff is entitled to compensation for the offensive activities perpetrated by the Defendant.

42. In this regard, I beg to point out that the law on trespass has now crystalized and same is to the effect that once trespass is proven and/or established, then the party aggrieved by the trespass, is entitled to compensation in the form of general damages. For clarity, trespass is actionable per-se.

43. In support of the foregoing position, I can do no better than to refer to the decision in the case of **Park Towers v Moses Chege & Others (2014) eKLR**, where the court held as hereunder;

***“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 be 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 case. As observed in the cases referred to there is no mathematical or scientific formula in such cases for assessment of general damages. However, in the case before me I consider that the suit properties are sizeable parcels sitting on nearly three quarters of an acre of land located in the Central Business District (CBD). This is a prime property in the City Centre and any unlawful act of aggression and/or intrusion that prevents the rightful owner of the property from enjoyment of his ownership rights of possession and use is to be frowned at and is punishable by way of an award of damages.”***

44. Having disposed of the issue that the Plaintiff is entitled to damages, the next course is thus to determine and/or ascertain the quantum of the damages due and awarded to the Plaintiff.

45. Before arriving at the quantum of damages, it is sufficient to note and/or observe that the suit property measures approximately 0.6070 H, that is approximately 1 ½ acres and hence the property is fairly big in terms of size.

46. On the other hand, it is also important to note that the property is situate in the City of Nairobi, off Mombasa Road and thus same is ideal for various commercial ventures and/or endeavors, which if taken, would enable the Plaintiff to attract substantial revenue and/or income therefrom.

47. Be that as it may, the Plaintiff herein has not been able to commence and/or to carry out development activities over and in respect of the suit property, as a result of the activities by the Defendant herein, who is keen to ensure that no construction and/or development is undertaken.

48. Suffice to say, that the Plaintiff could not have commenced any development on the suit property, unless and until the Defendant desists from the offensive activities, which in any event, have persisted to date.

49. Owing to the foregoing and doing the best I can in the circumstances of the subject matter, I am persuaded to award General damages in the sum of Kenya shillings **10, 000, 000/= only, on** account for General damages for trespass, based on the size of the suit property and the Geographical location thereof.

50. In support of the foregoing assessment, I am guided and/or persuaded by the decision in the case of **Joshua Ngeno v Kenya Power & Lighting Company Limited & County Government of Kericho [2021] eKLR** where the honourable Judge entered judgment as hereunder;

***Judgment is however entered for the Plaintiff against the 1<sup>st</sup> Defendant wherein I award him Kshs 5,000,000/= (five million shillings only) plus interest from the date of this judgment until payment in full, as compensation of the infringement of his right to use and enjoy the suit property.***

51. Before I depart from the quantum of General damages payable to and in favor of the Plaintiff, I must also say that the Plaintiff herein had also sought for compensation for breach of the Plaintiff's right to property under Article 40 of the Constitution 2010.

52. In my humble view, the actions and/or activities of the Defendant, which comprise of and constitutes trespass, are similarly the same actions that constitutes the infringement upon and/or breach of the Plaintiff's right to property.

53. Suffice it to say, that pursuant to the provision of Articles 40 of the Constitution 2010, the right to ownership to property vests in the property owner, the absolute and indefeasible right to use, occupy and/or possess the property in question, without interference from third parties.

54. Consequently, acts and/or activities which constitutes trespass, are the ones that amount to infringement and in this regard, having granted Damages to and in favor of the Plaintiff for trespass, it would be duplex, to award to and/or in favor of the Plaintiff another set of compensation, under the head of breach of the Plaintiff rights to property.

55. In the premises, I am of the humble view that the second claim for compensation, apart from compensation for trespass to land, is thus not legally tenable and/or feasible. Consequently, I decline to make any further award on account of compensation for breach to right to property.

**FINAL DISPOSITION:**

56. Having resolved all the issues of determination, it is now appropriate to break down the Reliefs that have been granted and in this regard, the orders that have been granted are as hereunder;

*I. Declaration be and is hereby issued that the Plaintiff is the bona-fide and registered owner of L.R No. 9042/617.*

*II. Declaration be and is hereby issued that the Defendant has trespassed and is continuing to trespass onto the Plaintiff's property.*

*III. General damages be and is hereby awarded in favor of the Plaintiff for the sum of Kenya Shilling 10, 000, 000/= only for trespass on land*

*IV. The Defendant herein having since erected a wall around the suit property, namely L.R No. 9042/617, same be and is hereby directed to remove and/or otherwise, pull down the said wall within the next 60 days from the date hereof and in default, the Plaintiff shall be at liberty to proceed and demolish the said perimeter wall without further notice to the Defendant.*

*V. In the event that the Plaintiff is disposed to carry out the demolition subject to the preceding paragraph, same shall be at liberty to apply to the Deputy Registrar for an order for provision of security, to be provided by the nearest police station and/or sub-county Police Commandant, for purposes of enforcement of and/ or Compliance with, the court orders*

*VI. The award of General damages in line with order [iii] hereof shall attract interests at court rates from the date of judgment*

*VII. The Plaintiff shall have costs of the suit.*

57. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021.**

**HON. JUSTICE OGUTTU MBOYA,**

**JUDGE,**

**ENVIROMENT AND LAND COURT,**

**MILIMANI.**

In the Presence of;

**JUNE NAFULA COURT ASSISTANT**

**MR. ISAAC RENE FOR THE PLAINTIFF.**

**N/A FOR THE DEFENDANT, WHO NEVER ENTERED APPEARANCE.**