



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 114 OF 2017

(Formerly Kisii Elc case No. 548 of 2015) (OS)

THOMAS MWITA WANGUBO.....PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF MIGORI.....DEFENDANT

JUDGMENT

A. Introduction :

1. The property under controversy in the instant suit is plot number 55A at Nyamaharage market in Isebania Town within Migori County (Hereinafter referred to as the suit property). The same was allegedly alienated by the defunct County Council of South Nyanza on 19th July, 1989 in favour of the plaintiff, Thomas Mwita Wangubo (PW1 herein).
2. PW1 is represented by learned counsel, M/s Oguttu, Ochwangi, Ochwal and Company Advocates formerly M/s Oguttu Mboya and Company Advocates.
3. The defendant, County Government of Migori is represented by M/s. Odhiambo Oronga and Company Advocates.

B. The gist of the plaintiff's case

4. By a plaint dated 7th December 2015, and filed in court on 16th December 2015, PW 1 has sued the defendant for :-

a) Declaration that the plaintiff is the lawful proprietor and/or Allottee of plot number 55 "A" Nyamaharaga Market, Isebania, same having been duly allocated and/or alienated by County Council of South Nyanza.

b) Declaration that the actions and/or omissions of the defendant, relating to the demolition of portions of the premises constructed on the suit plot, that is plot number 55 "A" Nyamaharaga market Isebania were unlawful, illegal and hence a violation of plaintiff's legitimate rights, over and in respect of the suit plot.

c) Payment of Ksh.300,000/= only, on account of the portion of the suit plot, which was unlawfully and illegally demolished by the defendant and/or lawful agents.

d) Permanent injunction restraining the defendant either by herself, agents, servants and/or anyone claiming under defendant from further reverting to plot 55"A" Nyamaharaga Market , Isebania for purposes of further destruction and/or demolition, without regard to the due process of the law and/or in any other manner interfering with the plaintiff's rights and/or activities thereon.

e) General damages for trespass/mense profits.

f) Costs of this suit be borne by the defendant.

g) Such further and/or other relief as the Honourable court may deem fit and expedient so to grant.

5. It was the allegation of PW1 that on or about 10th February 1998 the then County Council of South Nyanza allocated the suit property to PW1 as shown in plot card dated 9th July, 1989. That pursuant to the said allocation, PW1 paid the requisite plot rent as revealed in the receipts (PExhibit 3). That PW1 then established a residence cum commercial premises thereon and demised a portion of the premises in

favour of various tenants who paid him rent thereof.

6. It was further alleged by PW1 that on 24th November 2015, the defendant either by himself, agents and or servant descended upon the suit property and demolished an extensive portion of the same as revealed by the photographs (PEXhibit 4). That the actions of the defendant caused loss to the plaintiff as pleaded at paragraphs 7 and 8 of the plaint and as disclosed in a valuation report dated 30th November 2015 (PEXhibit 5) prepared by Mr. Francis George Mwangi , Kuria West Sub-County Works Officer (PW3). Thus, it proved the instant suit.

7. In his reply to statement of defence dated 27th January,2016 and filed in court on 1st February 2016, the plaintiff did reiterate the contents of his plaint. He denied the defendant's assertion that the destroyed structures on the suit property were located on a road reserve. The defendant stated that they were destroyed by the relevant authority. He stated that the defendant's statement of defence is deficient and contravenes **Order 7 Rule 6 of the Civil Procedure Rules, 2010.**

8. During hearing of the suit, PW1 testified and called **MARIGO MWITA NYAKIHA** (PW2) and PW3 herein. He fortified his evidence by PEXhibits 1 to 5 in this matter.

9. On 19th August,2019, learned counsel for the plaintiff filed a 6-paged submissions dated 15th August 2019 providing the background of the case, framed three (3) issues for determination and analysed them in favour of the plaintiff. The issues are whether the defendant undertook offensive and unlawful demolition on the suit property causing loss to the plaintiff who is entitled to compensation of Kshs. 300,000/=special damages,Kshs. 100,000/=general damages for trespass and a permanent injunction and costs of the suit against the defendant.

10. To buttress the said submissions, counsel relied on **Selle –vs- Associated Motor Boat Limited and another (1968) EA 123 at 128 Veroniah Waithira and 4 others –vs- Kenya National Highway Authority (2014) eKLR, Ocean View Plaza Limited –vs- Attorney General KLR (E&L) 475 at 478.** Counsel further invoked **Articles 22 and 40 of the Constitution of Kenya,2010, sections 107 and 108 of the Evidence Act (Cap 80) and section 27 of the Civil Procedure Act (Cap 21)** thereof.

C.The gist of the defendant's case

11. The defendant's statement of defence dated 20th January,2016 and filed in court on 27th January 2016 is a denial of the plaintiff's claim. The defendant stated that if any demolition occurred which is denied, the same was carried out by the relevant authorities for being on a road reserve.

12. The defendant further stated that the declaration sought in the plaint is incapable of being granted as the plaintiff has not tendered evidence in support of the same. Therefore the defendant is seeking dismissal of the suit with costs.

13. By his 3–paged submissions dated 4th December 2019 and filed on 5th December 2019 and filed on 5th December 2019, learned counsel for the plaintiff made reference to the orders sought in the plaint and that PW1 is justified in repossessing the suit property as well as entitled to the orders sought in the plaint. Counsel submitted in favour of PW1 and buttressed the submission by the following authorities:-

a) **Samwel Kipkorir Ngeno and another –vs- Local Authorities Pension Trust** (Registered trustees) on the court's discretion to grant an injunctive relief in a matter.

b) **Tecno Holdings Limited –vs- National Social Security Board of Trustees (2018) eKLR** that he who comes to equity must come with clean hands.

14. On 27th July, 2017, the defendant and counsel failed to attend court for the hearing of the defendant's case yet they were aware of the date. There was no evidence offered on the part of the defendant. Thus, in the spirit **of Article 159 (2) (b) of the Constitution of Kenya,2010**, the defendant's case was deemed closed.

D. Issues for determination:

15. There is a statement of agreed issues (plaintiff's version) dated 29th January 2016 filed in court on 1st February 2016 pursuant to **Order 15 Rules 1 and 2.** I note issues 1 to 13 set out therein.

16. It is trite law that issues for determination in a suit generally flow from either the pleadings or such issues as the parties have framed for the court's determination; see **Galaxy Paints Limited –vs- Falcon Grounds Limited (2000) 2 EA 385.**

17. I have taken into account the rival pleadings and submissions including all the issues framed therein. I also consider the testimonies of PW1 , PW2 and PW3 alongside the fact that the defendant failed to offer any evidence in this suit. So, the issues for determination are compressed to whether:-

a) **The plaintiff has absolute proprietary rights over the suit property.**

b) **The defendant trespassed into the suit property.**

c) **The plaintiff is entitled to the reliefs sought in the instant suit.**

E. Analysis and Determination

18. It was the testimony of PW1 that he is the proprietor of the suit property since 1987 as shown in PExhibit 2. That he paid plot rent in respect of the suit property as revealed in PExhibit 3.

19. During cross examination PW1 maintained that the suit property was allocated to him by the defunct South Nyanza County Council. That he paid plot rent between the year 1996 and 2016.

20. The **Black's Law Dictionary, 10th Edition** defines the term "**Proprietary**" as follows:-

"Of relating to or involving a proprietor"

21. I am conscious of the meaning of the terms "**Proprietor**" and "**Register**" under **section 2 of the Land Registration Act, 2016 (2012)**. Clearly, PExhibit 1 shows that PW1 is the holder of suit property and that the same has never been withdrawn from him under the law.

22. Additionally, by PExhibit 2 it is evident that PW1 is the allottee of the suit property. Therefore, the plaintiff has proprietary rights in respect of the suit property and the acquisition of the same was legal, formal and free from any encumbrances as held by the Court of Appeal in **Munyu Maina –vs- Hiram Githiha Maina (2013) eKLR**.

23. Concerning the issue of trespass, PW1 testified that he created a business cum residential structures on the suit property. In examination in chief, he stated in part:-

"The house was demolished by the defendant's tractor. These are photos of the demolished house (PExhibit 4)"

24. During cross –examination PW1, stuck to his guns to the effect that the tractor of the defendant demolished his house. That the demolition occurred during the day and that his witness (PW2) was present.

25. PW2, who was a tenant and neighbour to PW1 witnessed the demolition as revealed in PExhibit 4. This witness stated inter alia,

"The damage to the property of PW1 was caused by a tractor of the defendant herein"

26. According to PW3, he visited the demolished structure and carried out assessment as shown in the report (PExhibit 5). PExhibit 4 reveals the demolition of the structure.

27. The **Concise Oxford English Dictionary 12th Edition** defines the term "**Trespass**" thus:-

"Enter someone's land or property without permission"

28. Similarly, **Clerk and Lindsell on Torts (18th Edition) paragraph 18-01** defines "**Trespass**" as hereunder;-

"An unjustifiable entry by one person upon land in possession of another"

29. I also approve the stand point taken by Samson Okongo, J in the case of **Zacharia Onsongo Momanyi –vs- Evans Omurwa Onchagwa (2014) eKLR** that trespass is any unjustified intrusion of one person upon the land in the possession of another. Admittedly, the tort of trespass is actionable per se.

30. The defendant's statement of defence at paragraph 7 in so the effect that the demolished structure stood on a road reserve and that the demolition was carried out by the relevant authorities. Whereas the defendant's counsel filed a list of documents simultaneous with the defence statement, there was no evidence tendered to support the defence statement. The evidence of PW1, PW2 and PW3 that the defendant trespassed into the suit property and demolished structure as revealed in PExhibit 4, stand firm.

31. On the issue of reliefs available to the plaintiff, I note that PW1 pleaded particulars of illegalities and particulars of loss at paragraphs 7 and 8 of the plaint respectively. Furthermore, PW1 proved the same at Kshs. 300,000/= as disclosed in PExhibit 5 in line with decision in **Koinange and 3 others –vs- Koinange (1986) KLR 23**.

32. As regards the claim for mesne profits, I am guided by the definition of the term "**Mesne Profit**" under **section 2 of the Civil Procedure Act (Cap 21 Laws of Kenya; see also the Rioki Estate Company (1970) Ltd –vs- Kinuthia Njoroge (1977) KLR 146**. The same are a form of special damages which must be specifically pleaded and proved. In the instant case, the plaintiff did not plead a specific amount as mesne profits. Thus and I decline to award the same as held by M.A. Odero J in **Nakuru Industries Ltd –vs- S.S. Mehta and Sons (2016) eKLR** which I endorse accordingly.

33. Notably, general damages for trespass as sought in the plaint are actionable per se. In view of the obtaining circumstances and the entire case, I find that the plaintiff is entitled to an amount of Kshs. 75,000/= in general damages for trespass; see the **Court of Appeal decision in Eric Adome and another –vs- Pauline Kasumba Osebe and another (2014) eKLR**.

34. On the injunction sought, I subscribe to the Court of Appeal view in **Nguruman Ltd –vs- Jan Bonde Nielsen and 20 others (2014) eKLR** on the very foundation of this court’s jurisdiction, to issue any order of injunction,interlocutory or permanent. The plaintiff has demonstrated that the defendant trespassed into the suit property hence he is entitled to a permanent injunction as provided for under **section 13 (7) (a) of the Environment and Land Court Act**.

35. I am aware that the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system ; see **Article 50 (1) of the Constitution of Kenya,2010** and the Court of Appeal decision in **James Kanyiita Nderitu and another – vs- Mariosphilotas Ghikas and another (2016) eKLR**.

36. In the instant suit, the defendant failed to tender any evidence or submissions to reinforce the statement of defence despite the fact that he was latitude by this court on 7th February 2019 and 27th July, 2019 as disclosed in the proceedings herein. Therefore, the defendant’s statement of defence is unsubstantiated and fails to displace the veracity of the evidence of PW1, PW2 and PW3 herein. To that end, the plaintiff has proved this claim against the defendant on a balance of probabilities.

37. A fortiori, Judgment be and is hereby entered for the plaintiff against the defendant in terms of orders (i),(ii),(iii),(iv) sought in the plaint dated 7th December 2015 and filed in court on 16th December 2015 together with general damages for trespass assessed at kshs. 75,000/=

38. By dint of the proviso **to section 27 (1) of the Civil Procedure Act Cap 21 Laws of Kenya**, costs of this suit shall be borne by the defendant.

DATED, SIGNED and DELIVERED at MIGORI this 28th day of JANUARY 2020.

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. Kisia holding brief for Ogutu Mboya learned counsel for the plaintiff

Court Assistant – Tom Maurice