



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 450 OF 2008

BROADLANDS KENYA LIMITED.....PLAINTIFF

=VERSUS=

CITY COUNCIL OF NAIROBI.....1ST DEFENDANT

MOSES MULEHI.....2ND DEFENDANT

OSCAR BETTAH.....3RD DEFENDANT

MR. N. NJERU.....4TH DEFENDANT

MR. OMONDI T/A NGEI II SECURITY.....5TH DEFENDANT

MR. AKALLA.....6TH DEFENDANT

MRS MUHORO C/O LANGATA JUNIOR SCHOOL.....7TH DEFENDANT

JUDGMENT

1. By a plaint dated 22nd September 2008, the plaintiff prays for judgment against the defendants for:-

(a) A permanent order of injunction restraining the defendants by themselves, their servants and or agents and any other person claiming under them from further encroaching, occupying, destroying and trespassing upon the property known as Nairobi/Block 72/2918 Ngei Estate or in any other way interfering with the plaintiff's occupation thereof pending the hearing of this suit or further orders of this honourable court.

(b) General damages for trespass.

(c) Costs of the suit.

(d) Any other or further order that the court may deem fit and expedient to grant.

2. It is the plaintiff's case that it is the registered lessee of Land Parcel No. Nairobi/Block 72/2918 Ngei estate (hereinafter referred to as "the suit property") for a term of 99 years with effect from 1st December 1992. That on 26th August 2008, the defendants, their agents and or servants trespassed upon the suit property and demolished the perimeter fence and other structure son the suit proeprty. They also removed the plaintiff's movable properties.

3. It was averred that the defendants intended to clear the ground for erection of an Econet Wireless Kenya Limited Mast in the pretext that it was a public land. It is further the plaintiff's case that the defendants' acts of trespass and destruction of property are illegal, unconstitutional and calculated to cause a breach of the peace. It also amounts to interfering with the plaintiff's quiet possession of the suit property. The plaintiff further contends that the 1st defendant permitted and or allowed the acts of trespass by the 2nd to the 7th defendants. The plaintiff desired to develop the suit proeprty but the said acts of trespass have made it impossible.

4. The 1st defendant field a statement of defence dated 19th November 2008 where it denied each and every allegation in the plaint. The 2nd

to the 7th defendants also filed a written statement of defence dated 5th February 2013. They denied each and every allegation in the plaint. They stated that the suit property had encroached on playing fields which was public land. That the said playing field had been alienated for temporary use as school premises and playing fields for pupils and the rest of the community. They denied that they had trespassed on the suit property. They pray that the plaintiffs suit be dismissed with costs.

5. PW1 Peter Ndegwa, a director of the plaintiff produced the documents in the list of documents as exhibits P1 to P12 in this case. He told the court that he was ready to start construction on the suit property when some people invaded the same. They roughed up the workers on the site and took away construction materials. He made a report at the police before instituting this suit. He said he could identify some of the people who invaded the suit property to be the 2nd to 7th defendants. He told the court he was unable to develop the suit property due to threats which has occasioned him huge economic losses. He intended to put up shops and apartments for rent. The plans had already been approved. He prays that the prayers in the plaint be granted.

6. The 1st defendant closed their case without calling any witnesses. The 2nd – 7th defendants have not been attending court since 21st June 2017. They were served with a hearing notice but they neglected to attend court.

7. At the close of the trial, the parties tendered final submissions. The plaintiff submissions are dated 12th September 2019. The plaintiff referred to exhibit p6 which are minutes of a meeting indicating an intention to lease out the suit property for fifteen (15) years to Econet Wireless Limited. This would have affected the plaintiff's plans to develop the property. It was being undertaken without consulting the plaintiff.

8. Paragraph 23 of the affidavit sworn by Oscar Kiragu Bettah on 30th September 2008 confirms that he was aware the Association was negotiating with Econet Wireless Limited, which was done without the consultation and consent and authority of the plaintiff. The plaintiff had an issue with the resident members sued herein as the 2nd – 7th defendants who actively participated in the trespass.

9. The plaintiff further submitted that the defendants produced no permits, licence or authority from the 1st defendant to show that their activities were licenced and/or authorized. The 2nd – 7th defendants neglected to come to court to defend the suit. Due to the acts of trespass by the defendants, the plaintiff was not able to implement its construction plans for commercial premises which could have generated about Kshs. 7 million annually.

10. The 1st defendant submissions are dated 7th October 2019. The 1st defendant's submits that the plaintiff has not proved the acts of trespass against the 1st defendant as the demolished kiosks and structures were not within the suit property. It has put forward the cases of **Florence Mumbi Njine vs Kefa Oketch Miunde [2018] eKLR**; **Justin Gatumuta vs Kenya Power & Co. Ltd [2018] eKLR**. The plaintiff having failed to prove the tort of trespass, it is not entitled to any reliefs against the 1st defendant. It has put forward the case of **Hannington Nyandiko Odongo vs Philemon Abuto Okwengu & 2 Others [2016] eKLR**.

11. I have considered the pleadings, the evidence on record, the written submissions made on behalf of the parties and the authorities cited. The issues for determination are:-

i. Whether the defendants encroached on the plaintiff's land Parcel No. Nairobi/Block 72/2918.

ii. Is the plaintiff entitled to the reliefs sought?

iii. Who should bear costs?

12. The evidence of PW1 has not been controverted. It is not in doubt that the plaintiff is the registered owner of the suit property. It was confirmed by the 1st defendant. In the case of **Nakuru Industries Ltd vs S S Mehta & Sons [2016] eKLR**. M. Odero J observed:-

“In tort damages are awarded as a way to compensate a plaintiff for loss he had incurred due to a wrongful action on the part of the defendant. The damages so awarded are intended to return the plaintiff back to the original position he was before the wrongful act was committed. In cases where trespass to land results in damage then the computation of damages is on the basis of restitution of land. The value of the (soil or trees or fruits) which have been removed from that land are all factored as well as of restoration of the land to the position it was before the wrongful act was committed”.

13. In the instant case, the defendants, their agents, or servants on 26th August 2008 trespassed on the suit property and demolished a perimeter fence and the structures. This evidence was not challenged. It is the plaintiff's claim that he has been deprived of the use of his property. It was not however clear from his evidence whether it attempted to develop the suit property thereafter. This court is therefore unable to agree with its claim that it intended to put up a commercial building which would bring income of about Kshs. 7 million annually. There is no evidence to support this assertion. In the case of **Philip Ayaya Aluchio vs Chrispinus Ngayo [2014] eKLR** J Obaga held:

“...The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been stated that the measure of damages for trespass is the difference in the value of the plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less. (See Hostler vs Greenpark Development Co. 986 W 2d 500 (No Ct App. 1999). The plaintiff herein did not adduce any evidence as to the state of his property before and after trespass. It therefore becomes difficult to assess the general damages for trespass”

The learned judge awarded a nominal figure of Kshs. 100,000/-

I am guided by the above authority. I award Kshs. 500,000/- general damages for trespass which I think is reasonable.

14. I find that the plaintiff has proved its case against the defendants on a balance of probabilities. I enter judgment in its favour as against the defendants for:-

(a) An order of permanent injunction be and is hereby issued restraining the defendants by themselves, their servants and or agents and any other person claiming under them from further encroaching, occupying, destroying and trespassing upon the property known as Nairobi/Block 72/2918 Ngei Estate or in any other way interfering with the plaintiff's occupation.

(b) General damages for trespass Kshs.500,000/-.

(c) Costs of the suit and interest.

It is so ordered.

Dated, signed and delivered in Nairobi on this 20th day of February 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Gatheru for the plaintiff

No appearance for the 1st defendant

No appearance for the 2nd – 7th Defendants

Kajuju - Court Assistant