



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 77 OF 2018

DANIEL NJENGA MUIRURI.....1ST PLAINTIFF

JOSEPH MWANIKI MUIRURI.....2ND PLAINTIFF

MOSES WAINAINA.....3RD PLAINTIFF

VERSUS

DAVID KURIA.....DEFENDANT

JUDGMENT

By a Plaint dated **6th March 2018**, the Plaintiffs herein filed this suit against the Defendant seeking for orders that;

(a) That a permanent injunction does issue against the Defendant, his servants and/ or agents from excavating, carrying out quarry activities, damaging and or in any other manner interfering with land known as L.R 9213/1 situate in Thika.

(b) Special Damages for destruction of the suit land.

(c) Costs and interests

In their statement of claim, the Plaintiffs averred that on **7th May 2013**, **Hon Luka Kimaru** conferred upon them interest as beneficiaries in the distributions of the Estate of **Titus Muiruri Doge**, in **Nairobi High Court Succession Cause No. 2099 of 2007**. They averred that sometimes in the month of **January 2018**, the Defendant, commenced excavation of building stones among other quarry activities without their consent. That despite their efforts to arrest the situation, the Defendant has refused to stop and as a result of the intermeddling and destruction by the Defendant they sought for an order of injunction and damages for the already excavated stones and degradation of the suit land .

Despite being served with the suit papers, the Defendant did not enter appearance nor file any suit papers and the suit proceeded for formal proof wherein the Plaintiffs called three witness and closed their case.

PLAINTIFFS CASE

PW1 Daniel Njenga Muiruri, adopted his witness statement as evidence in Court and produced their list of documents **exhibit 1**. He testified that the Defendant invaded his land which was previously owned by their father. He testified that a Succession Cause was done and a Ruling delivered on **7th March 2013**, and he produced the order as an exhibit in Court. He further testified that they have been trying to obtain the title deed and that they normally cultivate the land. However the Defendant invaded the land and has flattened it. It was his testimony that despite their efforts to complain about the invasion, the Defendant alleged that he had been given the suit land by Kenya Cannery. However **Delmonte Ltd** wrote a letter to them and denied having allocated their said land to anyone. He urged the Court to allow their claim.

PW2 Joseph Mwaniki Muiruri, testified that he is a businessman and the 1st plaintiff's his brother. He adopted his witness statement dated **28th May 2018**.

PW3 Moses Wanaina Muiruri testified that the other Plaintiffs were his brothers and adopted his witness statement dated **28th May 2018** as his evidence.

After close of their case, the Plaintiffs filed written submissions to which the Court has now carefully read and considered and renders itself as follows;

The suit herein is uncontested and the Plaintiffs' evidence remain uncontroverted. However, the Plaintiffs still have the duty to call evidence and prove their case on the required standard. It is trite that he who alleges must prove. See section 107 of the Evidence Act:-

“107 (1) Burden of proof

Whoever desire any court to give judgment as to legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

The fact that the evidence is not challenged does not then mean that the Court will not interrogate the evidence of the Plaintiff. The Court still has an obligation to interrogate the Plaintiff's evidence and determine

whether the same is merited so that the Court can come up with a logical conclusion as exparte evidence is not automatic prove of a case. The Plaintiff has to discharge the burden of proof. See the case of **Kenya Power & Lighting Company Limited...Vs...Nathan Karanja Gachoka & Another [2016] eKLR**, where the Court stated:-

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

Further the case of **Gichinga Kibutha...Vs...Caroline Nduku (2018) eKLR**, the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

Having considered the available evidence the court finds the issue of determination as follow:-

“Whether the Plaintiffs are entitled to the orders sought.”

The Plaintiffs have sought for orders of permanent injunction against the Defendant. It is their contention that the Defendant without any colour of right entered onto the suit property which they inherited from their father and started to excavate stones from it claiming to have acquired the property from Kenya canners. To this effect the Plaintiffs produced photographs as evidence that there were illegal excavation activities going.

Though the plaintiffs do not have a certificate of title to the said suit property, they acquired a beneficial interest on the said parcel of land as beneficiaries of the estate of the **Titus Muiruri Nduge** as is evident from **Succession Cause No. 2099 of 2007**.

Section 24 of the **Land Registration Act** gives a proprietor of land all the rights and privileges that appertain to their property. In order to prove that they are the beneficiaries and therefore the beneficial owners of the suit property, the Plaintiffs produced a decree evidencing that the suit property through a court order was granted to their father. They further produced an order dated **27th June 2013**, which confirmed that they were the beneficiaries of the suit property. This Court is therefore satisfied that in the absence of any evidence to controvert the Plaintiffs testimony, they hold the beneficial interest over the suit property. It is therefore this Court's considered view opinion that any activities being carried out without their consent is illegal and the same must be stopped. The Defendant has not controverted any allegations made by the Plaintiffs and this Court therefore finds and holds that the Plaintiffs are entitled to an order of permanent injunction as against the Defendant.

The Plaintiffs have also sought for special Damages. However it is trite that Special Damages must be specifically pleaded and proved. See the case of **Moses Mwangi Karanja v David Macharia Gakuya [2018] eKLR** where the Court held that;

“Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR, Macharia & Waiguru vs Muranga Municipal Council & Another (2014) eKLR and Provincial Insurance Co. EA Ltd vs Mordekai Mwangi Nandwa, KSM CACA 179 of 1995 (ur). In the latter case this Court was emphatic that

“... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ...”.

The plaintiffs in their pleadings have not specifically pleaded for the special Damages and therefore this Court finds and holds that the Plaintiffs are not entitled to the same.

Costs usually follow the events and though **section 27 of the Civil Procedure Act**, the Court has discretion to grant costs, it is also not in doubt that the Court can refuse to grant the costs only where there are exceptional circumstances. In the absence of any special circumstance,

this Court is satisfied that the Plaintiffs are entitled to costs of the suit.

Having now carefully considered the pleadings, the available evidence and exhibits produced in court and the written submissions, the Court finds and holds that the Plaintiff's have proved their case on the required standard balance of probabilities. Consequently, the court find that the plaintiff's are entitled to the orders of permanent injunction and costs of the suit. The upshot of the foregoing is that the court finds the Plaintiffs suit is merited and the same is allowed entirely in terms of prayer No. **a** and **c** of the Plaint only.

It is so ordered.

Dated, Signed and Delivered at Thika this 5th day of March 2020.

L. GACHERU

JUDGE

5/3/2020

In the presence of

1st Plaintiff in person

2nd Plaintiff in person

3rd Plaintiff in person

No appearance for Defendants

Court Assistant - Lucy

L. GACHERU

JUDGE

5/3/2020