



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC NO. 128 OF 2018

KITAMAIYU LIMITED.....PLAINTIFF

VERSUS

**CHINA GANSU INTERNATIONAL CORPORATION FOR ECONOMIC
TECHNICAL CORPORATION COMPANY LIMITED.....DEFENDANT**

JUDGMENT

By a Plaint dated **18th April 2018**, the Plaintiff herein filed this suit against the Defendant seeking for orders that;

- a) An order requiring the Defendant to desist from the trespass and to restore the suit premises to the condition it was in before they commenced the trespass.***
- b) A permanent injunction restraining and / or prohibiting the Defendant whether by themselves, their servants and/ or agents from trespassing onto, entering, carting and/ or ferrying soil from demolishing structures on, occupying and or in any other manner interfering and/ or dealing in any way with the suit premises,***
- c) Aggravated damages for unlawful trespass on the suit premises.***
- d) Costs of the suit interest thereon at court rates from the date of filing the suit until payment thereof in full.***
- e) Any other or further relief this Honourable Court may deem fit and just to grant.***

In its statement of claim, the Plaintiff averred that it is the registered and lawful owner of **land Reference No. 243/2, 244, 4068 and 4698** and has had quiet and peaceful possession for **29 years**. It was its contention that the Defendant without any colour of right entered into the suit premises and carted away several lorries of murram soil from the suit premises occasioning massive damage to the topography of the suit property. It further averred that the Defendant had unlawfully trespassed and continued to trespass and intermeddle with the suit property without authorisation and thereby wasting, damaging and disposing of the suit property to its detriment and unless restrained, it will continue to deprive it of its peaceful.

Despite service the Defendant did not file any suit papers and the matter proceeded by way of formal proof wherein the Plaintiff called three witnesses and closed its case.

PLAINTIFF'S CASE

PW1 David Njuguna Mwangi adopted his witness statement dated **9th October 2018**, and testified that he is the suit property's property manager, for the suit property. He further produced the list of documents as exhibit 1 and sought for the claim to be allowed.

PW2 Ezekiel Mwaka Musau, testified that he is a valuer and worked with **Mwaka Musau Consultants**, having been in private practice since the year **1983**. It was his evidence that his company got instructions from **Samuel Maina**, a Director of the Plaintiff to value the suit property. He confirmed that the suit property was inspected and a valuation report prepared. He produced the **Valuation Report for L.R No. 243/3 Ruiru** dated **5th October 2018** as Exhibit 2.

PW3 David James Maina, adopted his witness statement as evidence in Court. He testified that he prepared an accountant report and produced it as exhibit 3.

After close of viva voce evidence, the Plaintiff filed written submissions which the Court has now carefully read and considered together

with the pleadings, the evidence adduced and the exhibits thereto and renders itself as follows;

The Defendant failed to enter appearance and thereby defend the suit. Though the suit is not been defended, that does not mean that the Court will wholly believe the Plaintiff's evidence without interrogation. Further the Court will not just enter Judgment without interrogating the veracity of the evidence placed before it as the Plaintiff is still required to prove his case on the required standard of balance of probabilities. See the case of *Shaneebal Limited ...Vs... County Government of Machakos (2018)eKLR*, where the Court cited the case of *Karuru MunyororoVsJoseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988*, where the Court held that:-

“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaint and in the absence of the Defendant's and or their Counsel to cross examine her on evidence, the Plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon”

Even if the Plaintiff's evidence remains unchallenged and uncontroverted, the Court still has an obligation to interrogate it and determine whether the same is merited to enable the Court come up with logical conclusion as *ex parte* 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*, 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...Carooline Nduku (2018) eKLR*, where 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.”

From the available evidence, the issues for determination is whether the Plaintiff is entitled to the orders sought.

The Defendant did not file his defence and therefore, there is no evidence to weigh as against the Plaintiff's evidence. However, the Plaintiff is the one who has alleged and he had a duty to call sufficient evidence to prove his case on the required standard of balance of probabilities. **Section 107** of the *Evidence Act* places such a duty on he who alleges must prove. It states as follows:-

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

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

The Plaintiff has alleged that it is the owner of the suit property and to this effect that the Plaintiff produced a sale agreement dated **23rd November 1989**, and a grant over the suit property. As already held by this Court, the Defendant did not challenge the Plaintiff's evidence and in the absence of any evidence to the contrary, this Court finds and holds that the Plaintiff is the lawful owner of the suit property. Further, it was alleged that the Defendant entered upon the Plaintiff's land without its consent and dug up murram from the said property thereby leading to wastage and damage of the suit property. This Court has seen photographs produced before it of trucks on the suit property. Therefore the Court is satisfied that indeed there was an exercise of carrying away of the murram from the suit property. Again, as already stated there is no evidence to controvert the evidence of the Plaintiff and that would only mean that the said trucks belonged to the Defendant and that indeed there was wastage and destruction of the suit property that was ongoing and the said wastage and destruction needs to be stopped.

In its Plaint, the Plaintiff has sought for aggravated damages for unlawful trespass on the suitland. Trespass has been defined by *Clerk and Lindsell on Torts, 18th edition at Pg.23* as;

“any unjustifiable intrusion by one person upon the land in possession.”

The Court has already held that the Defendant did not have permission to enter unto the Plaintiff's suit property and therefore the Court finds and holds that the said unlawful entry amounted to trespass and consequently the Plaintiff is entitled to the same.

Halsbury's Laws of England 4th Edition Volume 45 para 26 1503 provides as follows on computation of damages in an action for trespass:

- a) If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.***
- b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.***
- c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.***

d) Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, damages may be awarded.

e) If the trespass is accompanied by aggravating circumstances.

In this instant case the Plaintiff has claimed for the damages caused by the Defendant. To this effect, the Plaintiff called PW2 who produced the Valuation Report and the damages that was caused to the Plaintiff's parcel of land. Further there was a report by the Accountant, which placed the damages caused at **Kshs.55, 042,000/=**. Without any evidence to controvert the same, this Court has no reason to doubt that the Plaintiff has suffered damage as stipulated in the above report. Consequently, the Court finds and holds that the Plaintiff is entitled to damages as stated in the Valuation Report.

Having now carefully read and considered the pleadings and evidence adduced and the written submissions, the Court finds and holds that the Plaintiff has proved its case on the required balance of probabilities. For the above reasons, the Court award the Plaintiff aggravated damages for trespass to the tune of **Kshs.55,042,000/=**.

For avoidance of doubt, the Court enters Judgment for the Plaintiff against the Defendant as prayed in the Plaint in terms of prayers **No.(a), (b), (c) and (d)**. For prayer No. (c), the aggravated damages is awarded at **Kshs.55,042,000/=**.

It is so ordered.

Dated, Signed and Delivered at Thika this 8th of April 2020.

L. GACHERU

JUDGE

Lucy -Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by the Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By consent of:

Kembi Gitura Advocates for the Plaintiff

L. GACHERU

JUDGE