



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 1037 OF 2016**

**(FORMERLY HCC NO. 489 OF 2012)**

**JUSTINE MAGARE BOSIRE..... PLAINTIFF**

**VERSUS**

**ISAAC OMBOGA .....DEFENDANT**

**J U D G M E N T**

1. The plaintiff filed the instant suit against the defendant seeking a declaration that the suit land belongs to the plaintiff absolutely, an eviction order against the defendant, a permanent injunction restraining the defendant's use and access to the property and special damages and general damages.
2. The plaintiff alleged that he was the registered owner of all that parcel of land known as **Kisii/Wanjare/Bokeire/4414** ("suit property") measuring 0.04hectares and that the defendant had trespassed onto the said property and had destroyed the plaintiff's fence and erected temporary structures thereon without the consent and/or authority of the plaintiff.
3. The defendant filed his statement of defence and denied the contents of the plaint and stated that he had been in occupation of the suit property from 1995 and that the suit land was not the property left out for his father as "**emonga**", such that his father could dispose the same to the plaintiff. The defendant denied liability for the alleged special damages.
4. When the suit was set down for hearing, Justine Magare (PW1) gave evidence that Thomas Omusaga Nyangau (Nyangau) sold to him the suit property vide an agreement for sale dated 28<sup>th</sup> November 2008 and stated that he was the registered owner of the suit property. He testified that at the time of the purchase, the defendant and Samson Onchari who were both the sons of Nyangau, were in possession. Samson Onchari moved out of the suit premises upon conclusion of the sale, the defendant however failed and/or refused to do so. The defendant has continued to remain in the suit property and has built a mad walled house as well as a kitchen on the suit property.
5. Samson Onchari Ombogo, PW2 testified that the defendant was his step brother. He stated that he was a witness to the agreement of sale of the suit property between his father and the plaintiff. He stated that his mother and defendant's mother had been allocated land and the suit property was left as "**emonga**" by his father. PW1 stated that he at the time of sale had his residence on the suit property but upon the same being sold he vacated the land. The defendant on the other hand had a change of mind and refused to move out. He further stated that he did not know who destroyed the fence put up by the plaintiff.
6. Joseph Mogire Magoma (PW3) stated that the plaintiff had asked him together with four other workers to fence his land. When they began the work the defendant tried to prevent them from fencing and that they only managed to complete the work because the police came to the site. He gave evidence that the fence was later demolished but did not know who the perpetrators were.
7. For the defence hearing, Isaac Omboga (DW1) relied on his witness statement filed on 18<sup>th</sup> January 2013. His statement was to the effect that in 2002 their father sold the suit property to the plaintiff with the intention to defraud him (the defendant). The defendant as admitted by the dispute was referred by his father to South Kisii District Land Dispute Tribunal court but the same was never finalized as the tribunal was later disbanded. Upon cross examination the defendant stated that in 1995 he was allocated the land by his father but the father did not give him any title deed. The defendant stated that the father subdivided his land into four portions, the 1<sup>st</sup> portion was retained by his father, the 2<sup>nd</sup> was given to his mother, the 3<sup>rd</sup> was given to his step-mother and the 4<sup>th</sup> was allocated to him (defendant). The defendant stated he had built his home on the said portion and his father has never asked him to vacate from there. It was the defendant's further evidence that the fence put up by the plaintiff was removed by his brother although he said he never witnessed him removing.
8. From the evidence adduced there is no dispute that the plaintiff is presently the registered owner of the suit property. The plaintiff tendered in evidence the sale agreement dated 28<sup>th</sup> November 2008 "**PEX.1**" and a copy of the title deed for land parcel **Kisii/Wanjare/Bokeire/4414** ("suit property") "**PEX.2**". The issues that arise for determination are as follows:-

(i) Whether the plaintiff obtained title to the suit property fraudulently as the defendant alleges;

(ii) Whether the defendant is in lawful occupation of the suit property and/or whether the defendant has an overriding interest over the land.

(iii) Whether the plaintiff is entitled to the reliefs sought.

9. After the conclusion of the trial, the parties filed their final written submissions which I have carefully considered and evaluated. On the issue whether or not the plaintiff obtained title to the suit property fraudulently, the court notes that the defendant has generally alleged fraud but has not pleaded any particulars thereof. It is trite law that where fraud is alleged the particulars of the facts and circumstances constituting fraud must be specifically pleaded and must be proved to a standard that is higher than on a balance of probabilities though not as high as to be beyond a reasonable doubt as is required in criminal cases. The essence in requiring the particulars of fraud to be specifically pleaded is so that the party against whom fraud is alleged knows the particulars of fraud he/she is called upon to answer. By its very nature fraud is a serious accusation as it borders on criminal liability and as such calls for a higher standard of proof than in the ordinary civil matters.

10. In **Bullen & Leake & Jacobs, Precedence of Pleadings 13<sup>th</sup> Edition** at pg 427 it is stated by the Authors as follows:

**“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford -vs- Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune -vs- Occidental [1989] 1 Lloyd’s Rep. 305,308). The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrance -vs- Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy -vs- Garrett (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.**

11. The Defendant has merely stated that the Plaintiff obtained the title of the suit property by fraudulent means but failed to concisely outline the particulars of fraud. In making a determination of whether or not a title is defeasible the court must consider the evidence adduced at the hearing. I have analyzed all the evidence before the court and find that the plaintiff entered into an agreement of sale with Nyangau (the defendant’s father) the proprietor of the parcel of land known as **Wanjare/Bokeire/1443** on 28<sup>th</sup> November 2008 to purchase a portion of the property which was subsequently subdivided to create land parcel **Kisii/Wanjare/Bokeire/4414** which was sold and transferred to the plaintiff.

12. The plaintiff gave evidence that at the time of the purchase the defendant was in possession of the suit property but the defendant’s father (owner of the property) assured the plaintiff that the defendant would vacate the property upon completion of the sale. The defendant to date has not given up possession as he claims that the suit property had been allocated to him and/or that he has an overriding interest in the same. On 11<sup>th</sup> June 2009 the Chairman of the Land Control Board wrote to the District Land Registrar to stop further transaction in regard to **Wanjare/Bokeire/1443** until the dispute between the father and the son (Nyangau and the defendant respectively) were resolved. The letter was received by the Land Registrar on 12<sup>th</sup> June 2009.

13. The defendant’s father subsequently on 10<sup>th</sup> July 2009 filed a claim before the South Kisii District Land Dispute Tribunal Court (“tribunal”) seeking the portion of land he referred to as his “**emonga**” to be restored to him. The tribunal on 1<sup>st</sup> September 2009 made a finding in Nyangau’s favour that the “**emonga**” was his rightful property. Following the tribunal’s decision Nyangau filed Miscellaneous Application Number 119 of 2009 before the Chief Magistrate Court at Kisii and the Court ordered that the matter be remitted to the Tribunal for reconsideration in view of the letter of the Chairman of the Land Control Board of 11<sup>th</sup> June 2009 although the Tribunal’s determination was made after the letter from the Chairman of the Land Control Board. The defendant claimed that the matter never proceeded as the tribunal was disbanded. The defendant’s father subsequently transferred the suit property to the plaintiff and the same was registered in favour of the plaintiff on 22<sup>nd</sup> February 2010.

14. Based on the evidence adduced and the defendant’s failure to plead any particulars of the allegations of fraud, it is my determination that the defendant failed to prove any fraud against the plaintiff. As observed above, the defendant did not plead any particulars of fraud and no fraud was established. The plaintiff properly dealt with the defendant’s father who was the registered owner of the suit property. I find that the Defendant has no overriding interest as claimed as his father (defendant’s) had distributed his property to his family and had left himself an “**emonga**” which was within his rights to dispose of to whomever he desired. The defendant’s father had allocated land to the defendant’s mother and to the co-wife which was to cater for the siblings of each of the households.

15. In regard to the second issue whether or not the defendant is in lawful occupation of the suit property, evidence was presented that the suit property was to be retained by Nyangau, the defendant’s father as his “**emonga**”. The court has considered the sequential facts that led to registration of the suit property in the plaintiff’s name and notes that even though the Chief Magistrate Court referred the dispute back to the tribunal for consideration based on the letter to the land registrar from the chairman of the Land Control Board of 11<sup>th</sup> June 2009, the defendant’s father in filing the claim before the Tribunal was in fact complying with the letter from the board. The Tribunal made a determination that the defendant’s father was entitled to retain the “**emonga**” which means he could dispose of it as he did.

16. Section 24 of the **Land Registration Act No 3 of 2012** provides as follows:

**“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”**

Section 26 of the same Act provides that:

**“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:**

**a) On grounds of fraud, or misrepresentation to which to which the person is proved to be a party;**

17. Having made a finding that the defendant has failed to prove his allegations that the suit property was fraudulently taken away from him or that the suit property was fraudulently transferred to the plaintiff, it is my further finding and holding that the defendant has no right over the suit land and is therefore occupying the same unlawfully. The defendant has continued to have possession of the suit property after his father sold and transferred ownership of the suit property to the plaintiff and has thereby deprived the plaintiff of the use and quiet enjoyment of the suit property. The defendant's continued occupation of the suit property without the authority, consent and/or permission by the plaintiff who is the lawful owner of the property constitutes trespass.

18. Regarding the third issue as to whether the Plaintiff is entitled to the reliefs sought, the Plaintiff seeks a permanent injunction against the defendant and in default thereof an order of eviction against him. The principles that guide the court in granting an interlocutory injunction are set out in the celebrated case of **Giella -vs- Cassman Brown & Company Limited 1973. E.A 358** as follows:

**“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide it will decide the application on a balance of convenience.”**

19. Evidence adduced by the Plaintiff's evidence proves that the Plaintiff has met the threshold for the grant of an injunction. The Plaintiff is the registered owner of the suit property and as a result of the defendant's possession over suit property, the plaintiff has been deprived of the use of the land.

20. The plaintiff further sought general damages for the tort of trespass against the defendant. Tort damages are awarded as a way to compensate a plaintiff for the loss he has 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 position he was in before the wrongful act was committed. **Halsbury's 4<sup>th</sup> ed, Vol 45, at para 26, 1503** provides as follows on computation of damages in an action of 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 a sum 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 or the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.**

**(e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.**

21. From the evidence before the court, I find that the plaintiff has not adduced any evidence establishing the exact value of the suit property before and after the trespass. He is however still entitled to receive by way of damages such sum as would reasonably recompense him for being denied and deprived of the use of the suit property. In **James Njeru -vs- Ericson Kenya Limited (2015)eKLR**, the Court found that damages in a case of trespass where trenches had been dug across the Plaintiff's land were assessed at Kshs.50,000/=. In the present case, the exact value of the suit land before and after the trespass has not been presented to the Court and in the circumstances damages would only by way of nominal damages, I award the plaintiff Kshs.30,000/= as general damages for trespass as it has been established the defendant is in trespass of his land.

22. The plaintiff further sought special damages of Kshs 29,610/=. The principle in law is that **“he who alleged must prove”**. Special damages must not only be specifically pleaded but must also be specifically proved by evidence. The onus thus lay on the plaintiff to prove that the fence was destroyed by the defendant. There was no evidence linking the defendant to the destruction of the fence and in those circumstances, I hold the special damages claim to be unproven and decline to make an award for any special damages.

23. The upshot is that the plaintiff, has, save for the claim of special damages proved his case on a balance of probabilities and I enter judgment in favour of the plaintiff against the defendant in the following terms:

**1. That the plaintiff is the lawful owner of LR No. Kisii/Wanjare/ Bokeire/4414.**

**2. The defendant is hereby ordered to vacate and deliver vacant possession of LR No. Kisii Wanjare/Bokeire/4414 to the**

plaintiff within 60 days from the date of this judgment failing which an order for his forcible eviction to issue upon application by the plaintiff.

3. An order of permanent injunction to issue restraining the defendant, his agents and/or servants from reentering, cultivating and/or in any manner whatsoever interfering with the suit property LR No. Kisii/Wanjare/Bokeire/4414.

4. An award of kshs.30,000/= to the plaintiff being general damages for trespass together with interest at court rates from the date of judgment until payment in full.

5. The costs of the suit are awarded to the plaintiff.

**JUDGMENT DATED, SIGNED and DELIVERED at KISII this 14<sup>TH</sup> DAY of DECEMBER 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Anyona for the plaintiff

Mr. Soire for the defendant

Ruth Court assistant

**J. M. MUTUNGI**

**JUDGE**