



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE NO. 102 OF 2013**

**DR ALI LEKOLELA MONTET.....PLAINTIFF**

**VERSUS**

**RIGOGO CHONJO FARMERS CO. LTD .....DEFENDANT**

**JUDGMENT**

1. By plaint filed on 31<sup>st</sup> January 2013, the plaintiff averred that he is the registered owner of the parcel of land known as L.R. No. 10984/2 while the defendant is the owner of the parcel of land known as L.R. No. 10984/R. He stated that the defendant has refused to vacate form a portion of L.R. No. 10984/2 measuring 15.64 acres despite demands to do so. He added that he litigated with the defendant over the issue of encroachment before the Bahati Land Dispute Tribunal whereupon the tribunal held on 2<sup>nd</sup> March 2007 that the defendant had encroached on his land. There were appeals resting with an appeal to the High Court which was determined in the plaintiff's favour on 21<sup>st</sup> March 2012. He therefore seeks judgment against the defendant for:

- a. Eviction from LR. No. 10984/2.
- b. Mesne profit.
- c. Perpetual injunction restraining the defendant, its agents and or servants from trespassing, remaining, interfering and or dealing with L.R. 10984/2 in any manner whatsoever.
- d. Cost of this suit.

2. The defendant filed statement of defence in which it admitted being the registered owner of L.R. No. 10984/R. It also admitted the existence of the litigation referred to by the plaintiff and added that it filed Notice of Appeal against the decision of the High Court dated 21<sup>st</sup> March 2012 and that there is therefore an appeal to the Court of Appeal. It denied the other allegations made by the plaintiff and urged the court to dismiss the suit with costs.

3. The matter then proceeded to hearing at which only the plaintiff and one defence witness testified.

4. The plaintiff stated in his testimony that he is a doctor by profession residing in Nairobi. That he is the registered owner of LR. No. 10984/2 measuring about 150 acres and located in Nakuru County while the defendant is the owner of the neighbouring parcel of land known as LR. No. 10984/R. He added that the defendant encroached a portion of his land measuring about 15.64 acres as a result of which he filed Nakuru CMCC No. 2001 of 2002 court seeking to remove the defendant from the land. The case was dismissed on 2<sup>nd</sup> March 2004 on the ground that the court lacked jurisdiction. He later filed Land Dispute No. 39 of 2005 against the defendant at the Bahati Land Dispute Tribunal. The tribunal made its decision on 2<sup>nd</sup> March 2007 and found that the defendant had encroached on his land. The decision was later overturned by the Provincial Appeals Committee whereupon he filed Nakuru H.C.A. No. 167 of 2008 and the High Court set aside the decision of the Provincial Appeal Committee and restored the decision of Bahati Land Disputes Tribunal. That he demanded that the defendant vacate his land but the defendant has refused to do so. He added that the defendant has been on his land since 1998 and that if he had cultivated the land during that period he would get about 30 bags of beans and about 20 bags of maize per acre per year and that at the time of his testimony a 90kg bag of maize was costing around KShs 3,000 to KShs 3,500. He produced several exhibits and further stated that he has sold around 60 to 70 acres of his land but he is yet to issue titles to the buyers. He closed his case at that point.

5. The defendant's sole witness was Godfrey Magwi Kamau, its treasurer. He stated that the defendant is the owner of the parcel of land known as L.R. No. 10984/R which measures 400 acres. Within the plot are the defendant's 668 members who have each been allocated half an acre plot while the remaining 100 acres is occupied by public utilities. The plot does not yet have a title but the defendant is on the verge of getting one. He added that the plaintiff has been unsuccessfully filing suits left right and centre trying to the defendant's land and has been

very unsuccessful. He too produced several exhibits and denied that the defendant has encroached on the plaintiff's land. He confirmed that the tribunal found that the defendant had encroached on the plaintiff's land, that the defendant appealed and the Provincial Appeals Tribunal overturned the earlier award only for the plaintiff's appeal to the High Court to result in reinstatement of the initial decision of Bahati Land Dispute Tribunal. Defence case was thereby closed.

6. Parties filed and exchanged written submissions. For some reason the defendant filed submissions first and argued that the plaintiff's claim is one of the tort of trespass whose cause of action accrued in 1988. That **Section 4 (2)** of the **Limitation of Actions Act** sets a limitation period of 3 years in respect of claims founded on tort and that since the plaintiff commenced proceedings before the Bahati Land Dispute Tribunal on 21<sup>st</sup> June 2005, this claim is time barred. It is further argued that even the plaintiff were to argue that trespass is a tort whose cause of action accrues on day to day basis, the plaintiff filed Nakuru Chief Magistrate CMCC No. 2001 in the year 2002 and that from 1988 to 2002 is 14 years and that therefore the plaintiff's claim is still time barred by virtue of **Section 7** of the **Limitation of Actions Act** sets a limitation period of 12 years in respect of claims to recover land. Regarding the issue of encroachment, it is argued that the plaintiff has failed to adduce any evidence on the encroachment or its extent contrary to **Section 107** of the **Evidence Act** which places the burden of proof squarely on him. It is further argued that since the plaintiff's land has a title, the boundaries are fixed in terms of **Sections 18** and **19** of the **Land Registration Act** and that it is impossible to tell whether there is encroachment in the absence of a report from the Land Registrar or a registered surveyor. The cases of **Mohamed Mahmood Awadh v Abdulwahab Abdulrahman & 3 others [2019] eKLR** and **Isaac Mochabo v Richard Ongeri & another [2017] eKLR** among others are cited to buttress these submissions. Regarding the proceedings all the way from the Bahati Land Dispute Tribunal up to the High Court, the defendant argued on the one hand that those proceedings and decisions are not binding on this court and on the other that this case is *res judicata* in view of those decisions. The defendant therefore urged the court to dismiss the case with costs.

7. For the plaintiff, it is argued that the plaintiff's claim is one based on the tort of trespass and that since as at the time of hearing the defendant's members were still within the plaintiff's property, the trespass was continuous and therefore the claim is not barred by **Section 4 (2)** of the **Limitation of Actions Act**. The cases of **Telkom Kenya Limited v County Government of Muranga [2019] eKLR** and **Stephen Karanja Chege v Rural Electrification Authority [2019] eKLR** are relied on in that regard. As for the defendant's submissions with regard to **Section 7** of the **Limitation of Actions Act**, it is pointed out that no claim for adverse possession has been lodged by the defendant and that the defendant's possession has been challenged in litigation until as recently as 21<sup>st</sup> March 2012 when the High Court determined the appeal that was before it. Thus, the defendant's possession was not quiet.

8. As to whether the matter should have been determined by the land registrar, it is argued that the dispute before the court is not one of boundary but of eviction and that the issue of boundary was conclusively determined by the tribunal. The defendant's arguments on *res judicata* are also met with the same argument that the claim before this court is not that of boundary which was determined by the tribunal but a new one of eviction. It is further argued that owing to the serious nature of evictions, the plaintiff had to move the court to get orders. The plaintiff therefore urged the court to grant him judgment as prayed and to award him damages for trespass in the sum of KShs 100,000 from 1988 to date. The case of **Eliud Njoroge Gachiri v Stephen Kamau Ng'ang'a [2018] eKLR** is relied on to support the quantum of damages.

9. I have considered the pleadings, the evidence and the submissions herein. The issues that arise for determination are whether the suit is barred by **Limitation of Actions Act**, whether the claim is a boundary dispute, whether the claim is *res judicata* and finally whether the reliefs sought are available.

10. Parties are in agreement that the plaintiff's claim is founded on the tort of trespass. The arguments on limitation revolve around **Section 4 (2)** of the **Limitation of Actions Act** which provides that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued and **Section 7** of the same Act which provides:

**An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.**

11. There is further no dispute that the defendant is still in possession of the contested portion of the suit property. As long as the trespass continues, time begins to run afresh every new day. The Court of Appeal reiterated as much in **Isaack Ben Mulwa v Jonathan Mutunga Mweke [2016] eKLR** when it stated:

**... It is a well-settled principle that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts. As explained by the learned authors Winfield and Jolowicz in WINFIELD AND JOLOWICZ ON TORT, 11<sup>th</sup> Edition, Sweet and Maxwell, London, 1979 at page 342:-**

**“Trespass, whether by way of personal entry or by placing things on the plaintiff's land may be continuing and give rise to actions de die in diem so long as it lasts. Nor does a transfer of the land by the injured party prevent the transferee from suing the defendant for continuing trespass.”**

12. Regarding **Section 7** of the **Limitation of Actions Act** which embodies the doctrine of adverse possession in Kenya (See **Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR**), there is no dispute that the parties have been litigating on the issue of encroachment which amounts to possession as recently as 21<sup>st</sup> March 2012. Time could therefore only run from that date. This suit was filed 31<sup>st</sup> January 2013, less than a year after the litigation. Certainly, 12 years had not lapsed from the date of the judgment. The claim is thus not barred either under **Section 4 (2)** or **7** of the **Limitation of Actions Act**.

13. Is the claim herein a boundary dispute? I do not think so. Under **Section 18 (2)** of the **Land Registration Act** the court is precluded from entertaining any action relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with the said section. The plaintiff averred in the plaint that the defendant encroached on his parcel of land which is L.R. No. 10984/2 and is

seeking its eviction therefrom. There is no dispute that the plaintiff is the registered proprietor of the said property. He produced a certificate of title issued to him on 23<sup>rd</sup> October 1987 which states that the land measures 60.33 hectares and is delineated on land survey plan number 114686. The survey plan was also produced as an exhibit. The boundary of the plot is therefore a fixed one by virtue of **Section 19 (3) of the Land Registration Act** which provides:

**Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.**

14. Indeed, counsel for the defendant has conceded in his submissions that the boundary is fixed. On the other hand, the defendant concedes that its parcel does not yet have a title document. Thus, the boundary between the plaintiff's and the defendant's land has been determined in accordance with the Act. The issue in this case is simply that of the plaintiff being allowed to have the full benefit of its property which is already delineated on land survey plan number 114686. The plaintiff seeks to achieve that through eviction of the defendant from his land. I hold that the claim is not a boundary dispute and that therefore the court can deal with it.

15. The next question is whether the claim is *res judicata*. The doctrine of *res judicata* is embodied in **Section 7 of the Civil Procedure Act** which provides:

**No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.**

16. For *res judicata* to apply in a particular matter, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. See **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**. *Res judicata* operates as a complete estoppel against any suit that runs afoul of it. See **Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others [2018] eKLR**.

17. It is argued by the defendant that this case is *res judicata* in view of the proceedings all the way from the Bahati Land Dispute Tribunal up to the High Court. I have looked at the ruling delivered on 2<sup>nd</sup> March 2004 in Nakuru CMCC No. 2001 of 2002. The case was dismissed on the ground that the court lacked jurisdiction since the matter was a boundary dispute. Eviction was neither raised nor determined in the ruling. I have also perused the decision of the Bahati Land Dispute Tribunal in Land Dispute No. 39 of 2005 dated 2<sup>nd</sup> March 2007. The tribunal held that the defendant had encroached on the plaintiff's land. Once again, eviction was neither considered nor ordered. The decision was later reinstated by judgment dated 16<sup>th</sup> March 2012 in Nakuru High Court Civil Appeal No. 167 of 2008. As I have previously held, the claim herein is one of eviction and not a boundary dispute. I therefore hold that *res judicata* does not apply herein.

18. The last issue for determination is whether the reliefs sought are available. The plaintiff seeks eviction of the defendant from LR. No. 10984/2, mesne profits and a perpetual injunction restraining the defendant, its agents and or servants from trespassing, remaining, interfering and or dealing with L.R. 10984/2 in any manner whatsoever. In view of the findings in Bahati Land Dispute Tribunal Dispute No. 39 of 2005 and judgment in Nakuru High Court Civil Appeal No. 167 of 2008, there is already a finding that the defendant has encroached on plaintiff's LR. No. 10984/2. Although the defendant has argued that the extent of the encroachment has not been established, I note that the plaintiff produced land survey plan number 114686 which shows the extent of his land and a survey map by G. W. Werugia, a land surveyor which indicates the extent of the encroachment as 6.33 hectares. In any case, the issue can simply be resolved by evicting the defendant and its agents from L.R. 10984/2 as delineated on land survey plan number 114686. I am thus satisfied that an order of eviction as well as the injunction sought should issue.

19. The plaintiff has also prayed for mesne profits. Mesne profits are what a person who is a victim of wrongful occupation of his land by another receives from the aggressor. In **Mistry Valji v Janendra Raichand & 2 others [2016] eKLR** the Court of Appeal stated:

**Mesne profit is defined in section 2 of the Civil Procedure Act to mean; - "in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession". ... Measure for mesne profit was described in the Privy Council decision in Invergue Investments v Hackett (1995) 3 All ER 842 cited with approval in the Kenya Hotel Property Ltd case (supra) as follows:**

**"This is form of an ordinary claim for mesne profit, that is to say, a claim for damages for trespass to land....The question for decision is the appropriate measure of damages."**

**The privy council observed that that measure of damages must be reasonable rent. The usual practice is to assess mesne profits down to the date when possession is given.**

20. The plaintiff has sought mesne profits at the rate of KShs 100,000 per year from 1988 to date. I note that G. W. Werugia the land surveyor put the portion of the land encroached on as 6.33 hectares which translates to 10.49% of plaintiff's 60.33 hectares. I note that the land was described in an assessment by the agricultural officer as being semi-arid with rocky spots. I therefore consider a sum of KShs 60,000 per year for the entire 6.33 hectares as appropriate. The amount will be due from 2<sup>nd</sup> March 2007 when the tribunal made a finding that there was encroachment which finding was affirmed by judgment dated 16<sup>th</sup> March 2012 in Nakuru High Court Civil Appeal No. 167 of 2008.

21. In the result I enter judgment in favour of the plaintiff and against the defendant as follows:

**a. I order the defendant and its agents to vacate the parcel of land known as LR. No. 10984/2 as delineated on land survey plan number 114686 within 60 (sixty) days from the date of delivery of this judgment. In default, the defendant and its agents be evicted from the said property.**

**b. I award the plaintiff mesne profits of KShs 60,000 per year from 2<sup>nd</sup> March 2007 until vacant possession is delivered to the plaintiff.**

**c. A permanent injunction is issued restraining the defendant, its agents and or servants from trespassing, remaining on, interfering and or dealing with L.R. 10984/2 as delineated on land survey plan number 114686 in any manner whatsoever.**

**d. The plaintiff shall have costs of this suit.**

22. This judgment is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17<sup>th</sup> April, 2020).

**Dated, signed and delivered at Nakuru this 4<sup>th</sup> day of June 2020.**

**D. O. OHUNGO**

**JUDGE**