



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 147 OF 2012**

**ALI FARAH (SUING AS THE PERSONAL LEGAL REPRESENTATIVE OF THE  
ESTATE OF FARAH AWAD GULET (DECEASED))..... PLAINTIFF**

**VERSUS**

**MOSES OLE NASISIT ..... 1<sup>ST</sup> DEFENDANT**

**KISHOIAN NADALA ..... 2<sup>ND</sup> DEFENDANT**

**LETIMITO OLE KURARO ..... 3<sup>RD</sup> DEFENDANT**

**DAVID KANASA ..... 4<sup>TH</sup> DEFENDANT**

**KOISKIR OLE LEWOJO ..... 5<sup>TH</sup> DEFENDANT**

**NGASHAR OLE BARATA ..... 6<sup>TH</sup> DEFENDANT**

**MUSEINE OLE NKOIDILAH ..... 7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By an amended plaint dated 14<sup>th</sup> April 2015, the plaintiff herein, Ali Farah suing as the legal administrator of the estate of Farah Awad Gulet (deceased) sought the following reliefs against the defendants jointly and severally:-

**i. Declaration that the plaintiff is the registered and/or lawful owner of Plot No. Oloirien Adjudication Section, LR No. Transmara/Oloirien/9 (hereinafter referred to as “the suit property”).**

**ii. An order for eviction against the defendants, their agents and/or servants from LR No. Transmara/Oloirien/9.**

**iii. Permanent injunction restraining the defendants either by themselves, agents, servants and/or anyone claiming under the defendants from entering, trespassing onto, cutting down trees, cultivating, grazing, interfering with and/or in any other manner, whatsoever, dealing with the suit and/or any other portion whatsoever.**

**iv. General damages for trespass.**

**v. Special damages in the sum of kshs. 565,138/= only.**

**vi. Costs and interests of this suit be borne by the defendants.**

**vii. Such further and/or other relief as the honourable court may deem fit and expedient so to grant.**

2. The plaintiff is the legal administrator of the Estate of Farah Awad Gulet, now deceased, pursuant to the grant of letters of administration Ad Litem issued on the 5<sup>th</sup> day of March 2015 vide Kisii Succession Cause No. 101 of 2015. The plaintiff states that during the adjudication and demarcation process at Oloirien Adjudication Section, the deceased was awarded and registered as the proprietor of all that parcel of land otherwise referred to as the suit property. That following completion of the adjudication and demarcation process the suit property was registered on 3<sup>rd</sup> October, 2012 as **LR No. Trans Mara/Oloirien/9** and a title deed issued in the name of the deceased.

3. The plaintiff further states that by virtue of the deceased being the registered proprietor of the suit land, he was entitled to exclusive and absolute rights of ownership of the suit property. The plaintiff states that on or about 20<sup>th</sup> January 2012, the defendants without his permission or authority trespassed onto and encroached upon a substantial/portion of the suit property and commenced to cultivate on the same as well as grazing their cattle thereon. The plaintiff further states that following the actions of the defendants herein, he lodged a complaint with the chief Oloirien location with a view of having the defendants restrained from encroaching upon and interfering with the suit property but despite the intervention of the local provincial administration, the defendants have continued in trespass of the suit property. The plaintiff further states that owing to the actions of the defendants herein, he has suffered loss, including damage to assorted indigenous trees growing on the suit property and claims damage of the value of assorted trees at kshs. 565,138/= and seeks the further reliefs set out in the plaint.

4. The defendants by their joint amended statement of defence dated 26<sup>th</sup> July 2013 denied the plaintiff's claim in its entirety. The defendants' denied that they have trespassed on the suit property and contended that they are in occupation of their own respective parcels of land. The defendants contended that their parcels of land are in Kerrinkai Adjudication Section No. 1 and that they are strangers and have no interest in the suit property. The defendants contended that the plaintiff does not own and has never occupied the disputed suit property and as such the plaintiff has not suffered and is not entitled to any damages, special or otherwise.

5. The suit was fixed for hearing before me on 13<sup>th</sup> October 2016 when the plaintiff was present together with his witnesses. Mr. Oguttu advocate for the plaintiff represented the plaintiff and affirmed that the defendants advocates had been served with a hearing notice on 18<sup>th</sup> August 2016 which they received and acknowledged receipt by stamping. An affidavit of service sworn by one Joshua Otieno Okeyo on 19<sup>th</sup> August 2016 and filed in court on 13<sup>th</sup> October 2016 affirms service was duly effected. Neither the advocate nor any of the defendants attended court and the court being satisfied service of the hearing notice had duly been effected on the defendants advocates allowed the plaintiff to proceed with the hearing ex parte.

6. The plaintiff testified as PW1 and called two other witnesses, one Joseph Loronyokwe (PW2) a Forest Officer in Transmara and Joseph Omare Ogwoka (PW3), a Senior Assistant Land Registration Officer at Kilgoris, Transmara Sub County. The plaintiff testified that he was the son of Farah Awad (deceased) and that he had obtained a Ad Litem Grant dated 5<sup>th</sup> March 2015 "**PEx1**" to represent his father's estate in these proceedings. The plaintiff testified that his deceased father was a member of the Oloirien Group Ranch and that as such member was allocated Plot No. 9 in respect of which he was subsequently issued with a title deed dated 3<sup>rd</sup> October 2012. Title deed in respect of parcel **Transmara/Oloirien/9** in the name of Farah Awad dated 3<sup>rd</sup> October 2012 was produced as "**PEx2**". Certificates of Official Searches in respect of the property dated 3<sup>rd</sup> October 2012 and 12<sup>th</sup> October 2016 were produced as "**PEx. 3 (a) and (b)**" respectively, an abstract of title dated 12<sup>th</sup> October 2016 respecting the property was produced

as “**PEx.4**”.

7. The plaintiff testified that before his father died he was cultivating a portion of the property and was rearing livestock on another portion of the land which he had paddocked using poles and barbed wire. The plaintiff testified that in the year 2012 the defendants forcefully trespassed onto the farm and partially displaced the plaintiff. The defendants damaged the plaintiff’s paddocks and built temporary houses on a portion of the plaintiff’s land. The defendants also started cultivating on part of the plaintiff’s land and were grazing freely thereon. The defendants indiscriminately and wantonly damaged the plaintiff’s paddocks and trees growing on the land. Following the invasion of the plaintiff’s farm by the defendants the plaintiff approached the Forest Department to carry out an inspection and assess the damage occasioned by the defendants on his farm.

8. In response to the request by the plaintiff, PW2 visited the plaintiff’s land for purposes of assessing the damage caused by the trespassers (defendants). PW2 took photographs to illustrate and depict the extent of the damage. The photographs were produced as a bundle as “**PEx.5**”. PW2 testified that he prepared his report and as per the report he assessed the damage at kshs. 482,179/= as per the break down set out in the report. The report dated 6<sup>th</sup> August 2012 was produced as “**PEx.6**”.

9. The plaintiff further in his evidence testified that the Land Registrar, Transmara and the surveyor had pursuant to an order of court visited the site for purposes of establishing and ascertaining the boundary of the plaintiff’s land. The plaintiff stated that as per the boundaries identified by the land registrar and the surveyor the defendants had enclosed on **Land Parcel No. 9** belonging to the plaintiff. PW3 Joseph Omare Ogoka, a Senior Land Registration Officer testified and produced the report prepared by the land registrar one, S. W Githinji and the Surveyor when they visited the plaintiff’s parcel of land pursuant to the court order made on 24<sup>th</sup> July 2013 requiring them to ascertain and determine the exact boundary position in regard to the plaintiff’s land parcel **Transmara/Oloirien/9** and Plot Number I, Oloirien Adjudication Section. The report by the land registrar was produced as “**PEx.7**” and that of the surveyor as “**PEx.8**”. Both reports indicate that the plaintiff’s land parcel had been encroached upon though the two officers state they were unable to fix the beacons on the ground owing to the hostility from the community as they feared violence could erupt. The report by the land registrar observes that the ground measurement of the plaintiff’s land is about 205Ha against the documented area of approximately 926.60Ha and hence there is a huge variance. Equally the surveyor’s report indicates the ground area to be approximately 208.42Ha against the documented area of 926.60Ha. The officers were however agreed that the plaintiff’s land was clearly defined by existing boundary features. The recommendation by the land registrar was that the plaintiff’s title be amended to correspond with the acreage on the ground and the Registry Index Map (RIM) should be amended to correspond to the position on the ground.

10. I have reviewed the evidence adduced by the plaintiff and his witnesses and I have considered the documentary evidence tendered and I am satisfied the plaintiff is the registered proprietor of land parcel **Trans-Mara/Oloirien/9** as evidenced by the title deed issued to the plaintiff’s father Farah Awad on 3<sup>rd</sup> October 2012. The certificates of official search and the abstract of title produced as exhibits confirm the plaintiff’s deceased father to be the registered owner of the suit property. The evidence by the plaintiff that the defendants had encroached/trespassed onto the plaintiff’s said parcel of land was corroborated and supported by PW2 who visited the site and made an assessment of the damage caused by the intruders. The photographs produced in evidence by PW2 show there was widespread felling of trees. I accept the evidence and the assessment of the damage by PW2 in the sum of kshs. 482,179/= as detailed in the report dated 6<sup>th</sup> August 2012 produced as “**PEx.6**”.

11. The reports by the surveyor and the land registrar are clear that the defendants had encroached onto the plaintiff’s parcel of land. The defendants had no authority and/or consent of the plaintiff and their entry onto the plaintiff’s land was unlawful and therefore constituted trespass. The defendants in their defence stated they were not in occupation of any portion of the plaintiff’s land stating that they were the lawful owners of the portions they occupied and which they had occupied for many years. The evidence as per the surveyor’s and the land registrar’s report discounts the defence by the defendants and there is no contrary evidence.

12. From the evidence given by PW2 it was evident from the photographs taken at the site that the land had been freshly invaded as attested by the trees that had been felled and heaps of firewood. That is not evidence of land that had been occupied for over 40 years as alleged by the defendants. The evidence shows there was wanton destruction of trees and vegetation which clearly denotes the occupation was not peaceful but hostile.

13. The evidence by the plaintiff and his witnesses was not controverted as the defendants did not attend court to tender any evidence they may have had. After evaluating the evidence from the plaintiff and his witnesses, I am satisfied the plaintiff has proved his case on a balance of probability and he would therefore be deserving of judgment. The issue that remains is on what terms that judgment should be granted.

14. I have found and held that the defendants trespassed onto the plaintiff's land and caused damage which PW2 highlighted through the photographs he took at the site. The plaintiff would be entitled to an award of special damages commensurate with the damage as assessed by PW2. The law is settled that special damages need to be specifically pleaded and proved. See the case of **Hanh –vs- Singh [1985] KLR 716** where the Court of Appeal held thus:-

**“Special damages, must not only be specifically claimed but also strictly proved. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves.”**

In the present case the plaintiff pleaded special damages of kshs. 565,138/= being the value of assorted trees that were damaged. The assessment by PW2 which is the amount I hold as proved by the plaintiff was kshs. 482,179/=. The plaintiff also prayed for general damages for trespass. Trespass once proved is actionable per se without any proof of damage. In the case of **Duncan Nderitu Ndegwa –vs- KPLC & Another [2013] eKLR** Nyamweya, J held:-

**“...once a trespass to land is established, it is actionable per se and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of kshs. 100,000/= as compensation of the plaintiff's denial of the right to use and enjoy the suit property occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> defendants trespass.”**

15. In the case of **Park Towers Ltd –vs- John Mithamo Njika & 7 Others [2014] eKLR** this court sitting in Nairobi while ascribing tot eh view that trespass is actionable per se once established stated thus:-

**“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damages or loss to be awarded damages.”**

In the present case, having held the defendants trespassed onto the plaintiff's land, they denied the plaintiff of the use of the portion they trespassed onto and the plaintiff is entitled to an award of general damages and having regard to the circumstances I award him kshs. 150,000/=.

16. Accordingly, I enter judgment in favour of the plaintiff on the following terms:-

**i. That the plaintiff is the registered absolute owner of LR No. Transmara/Oloirien/9.**

**ii. That the defendants, their agents and/or servants are in trespass in LR No. Trans Mara/Oloirien/9 and they are hereby ordered to vacate the said land within 30 days of being served with the decree herein and failing which the plaintiff shall be entitled to an order of eviction on application to have them removed forcibly from the suit land.**

**iii. As the land registrar and the surveyor were prevented from marking the boundary of the plaintiff's land by hostility from the defendants and/or their agents, the land registrar and the surveyor are directed to revisit the suit land to mark and delineate the boundary of the suit**

land and the OCS Kilgoris Police Station is ordered to provide adequate security during the exercise.

iv. The land registrar is directed to rectify the area indicated on the records including the title to correspond with the area on the ground and if necessary to have the Registry Index Map (RIM) amended accordingly.

v. Special damages in the sum of kshs. 482,179/= awarded to the plaintiff as against the defendants jointly and severally.

vi. General damages of kshs. 150,000/= awarded to the plaintiff as against the defendants jointly and severally.

vii. Interest on (v) and (vi) above at court rates from the date of judgment until payment in full.

viii. Costs of the suit are awarded to the plaintiff.

**Judgment dated, signed and delivered at Kisii this 2<sup>nd</sup> day of December, 2016.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

N/A for the plaintiff

N/A for the 1<sup>st</sup> to 7<sup>th</sup> defendants

Mr. Ngare Court Assistant

**J. M. MUTUNGI**

**JUDGE**