



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 10 OF 2019

“FAST TRACK”

WILSON BOINETT.....PLAINTIFF

-VERSUS-

RODNEY KIPLIMO.....1ST DEFENDANT

MWIKALI KEMBOI.....2ND DEFENDANT

JUDGMENT

By a plaint dated 24th January 2019 he plaintiff herein sued the defendants jointly and severally seeking for the following orders:

- a) A permanent injunction restraining the Defendants jointly and severally whether by themselves, their agents and/or servants from in any way whatsoever interfering with the Plaintiff's quiet possession and occupation of all that property known as **LR. NO. ELDORET MUNICIPALITY/BLOCK/14/488** (the suit property).
- b) General damages;
- c) Costs of this suit

The plaintiff contemporaneously filed an application for temporary injunction with the plaint which orders were granted pending the hearing and determination of this suit. The plaintiff further moved the court for leave to serve summons by substituted service vide a Notice of Motion Application dated 31st May 2019 which was granted on 19th June 2019.

The plaintiff complied with the order and on 24th September 2019, the Daily Nation Newspaper advertised the Summons for Substituted Service at page 41. The defendant neither entered appearance nor filed a statement of defence. The matter therefore proceeded by way of formal proof.

PLAINTIFF'S CASE

PW1 gave evidence and stated that he is the registered owner of all that property known as **LR. NO. ELDORET MUNICIPALITY/BLOCK/14/488** which property was acquired after the shareholders of the now defunct Great Rift Transporters (K) Limited, in which the Plaintiff was a shareholder, unanimously agreed to distribute the company's assets to its shareholders on a pro rata basis. PW1 stated that he was issued with a Certificate of Lease dated 15th June 2005 for a period of 99 years from 1st June 1984.

It was PW1's testimony that on diverse dates between 25th July 2016 to date, the Defendants forcefully encroached and/or trespassed upon his property, destroyed the live fence forming demarcation of its boundaries and acquired benefits from it by cultivating beans on it.

PW1 produced the copy of certificate of title as pex no.1, copy of Memorandum of Understanding with other shareholders as pex no. 2. PW1 also stated that he was a shareholder together with Joshua Kulei, David Komen, Jonathan Moi and Anne Bassi.

PW1 also stated that it was agreed that he takes plot No. 448. That the defendants forcefully entered the land, which prompted him to report the matter to the Police station. PW1 urged the court to enter judgment as prayed in his favour.

PLAINTIFF'S SUBMISSION

Counsel listed 3 issues for determination as follows

- a) Whether the Defendants trespassed the Plaintiff's land.
- b) Whether permanent injunctive orders restraining the defendants from dealing with the suit property should be given.
- c) Whether the Plaintiff is entitled to damages

On the first issue on whether the defendants trespassed on the plaintiff's land counsel cited

Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 that defines trespass as follows:

“Any unjustifiable intrusion by one person upon land in possession of another.” ...Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”

Section 3 (1) of the Trespass Act, Cap 294 provides that:

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

Counsel therefore submitted that the defendants intruded on the plaintiff's land hence they are trespassers. It was counsel's further submission that the plaintiff proved ownership of the suit land by production of a Certificate of Lease dated 15th June 2005 for a period of 99 years from 1st June 1984 and Certificate of Official Search dated 2nd August 2016.

Counsel also submitted that it is trite law that a Certificate of Title is prima facie evidence of ownership of land as per **Section 26** of the **Land Registration Act 2012** which provides thus:

“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 and 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 the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

It was counsel's further submission that the Plaintiff adduced photographic evidence to prove intrusion upon the land which showed beans plantation and the destroyed live fence along the property boundaries.

On the issue as to whether the plaintiff is entitled to injunctive orders, counsel relied on the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others, CA No. 77 of 2012; [2014] eKLR**, where the Court of Appeal reiterated the conditions to be met by a litigant who seeks injunctive relief as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. establish his case only at a prima facie level,*
- b. demonstrate irreparable injury if a temporary injunction is not granted, and*
- c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.*

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”

In the **Nguruman Ltd case (supra)** the Court Of Appeal further held that if a party fails to establish a prima facie case, there is no reason to deal with the other threshold principles thus:-

“If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not

established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

On the second limb, counsel submitted that the Plaintiff will suffer irreparable injury if the permanent injunction is not granted as damages would not adequately compensate the Plaintiff.

On the final limb of the test, counsel stated that the balance of convenience tilts in the Plaintiff’s favor in granting the injunctive orders since the Defendants are not the registered owners of the suit property.

On the issues for damages for trespass, counsel relied on the case of **Nakuru Industries Limited v S S Mehta & Sons [2016] Eklr**, where the Court held that the tort of Trespass is one which is actionable without proof of any damage. That there exist legion authorities in law regarding the amount which a court may award as general damages. The Court relied on the case of **Anthony Kolani Mwanja 16 Vs Mwaka Omar Ali [2011] Eklr** where the Court awarded a sum of Kshs 50,000/= as general damages for trespass. Similarly 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 would be assessed at Ksh 50,000/=.

Counsel also relied on the case of **Philip Aluchio Vs Crispinus Ngayo [2014]Eklr Hon. Justice E. Obaga** held as follows:

“..... The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less

The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass....”

The court proceeded to award a nominal figure of **Ksh 100,000/=** as damages for trespass.

It was counsel’s submission that in the **Nakuru Industries Limited Case (supra)** the exact value of the land before and after the trespass was not proved, however as the defendants did trespass onto the plaintiff’s land and conduct some excavation, the court awarded the defendant damages in the amount of **Ksh 500,000/= (five hundred thousand only)** plus interest and costs of the suit from the date of the judgment until payment in full.

Counsel urged the court to award the Plaintiff of Kenya Shillings Five Hundred Thousand (Ksh 500,000/-) as general damages for trespass plus costs of the suit.

ANALYSIS AND DETERMINATION

This matter proceeded by way of formal proof after the defendant was duly served but failed to enter appearance and defence. The issues for determination are whether the defendants are trespassers and whether the plaintiff is entitled to an order of permanent injunction together with damages for trespass.

It is not in dispute that the plaintiff is the registered owner of the suit parcel of land having produced a certificate of lease and official search in his name. This has not been controverted and the plaintiff explained how he got the property. The plaintiff stated that property known as **LR. NO. ELDORET MUNICIPALITY/BLOCK/14/488** property was acquired after the shareholders of the now defunct Great Rift Transporters (K) Limited, in which the Plaintiff was a shareholder, unanimously agreed to distribute the company’s assets to its shareholders on a pro rata basis.

The plaintiff also produced photographic evidence to show the extent of the destruction by the defendants who have no right on the suit property. The plaintiff has demonstrated that he is the rightful owner of the suit land and any intrusion on the suit land amounts to trespass whereby the plaintiff should be protected by the law.

I find that the plaintiff has proved his case against the defendants and is therefore entitled to the orders sought. It is trite law that trespass is actionable per se and having found that the defendants are trespassers I order that the defendant pay general damages for amounting to Kshs 250,000/ together with costs to the plaintiff. A permanent injunction is hereby issued restrain the defendants from interfering with the suit land.

DATED and DELIVERED at ELDORET this 29th DAY OF October, 2020

DR. M. A. ODENY

JUDGE