



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 90 OF 2019

WAIG LIMITED.....PLAINTIFF

VERSUS

FRANCIS KARIUKI.....1ST DEFENDANT

JOSEPH MWAURA.....2ND DEFENDANT

JOHN KANYI.....3RD DEFENDANT

JUDGMENT

By an Amended Plaint dated **25th June 2019**, the Plaintiff sought Judgment the Defendants for the following orders;

- a. That the Defendants, their servants and / or agents be restrained from in any way interfering with the Plaintiff's quiet user of L.R No. Thika Municipality Block 29/644**
- b. An order for declaration that the Plaintiff is the bonafide owner of L.R No. Thika Municipality Block 29/644**
- c. An order directing demolition of all the illegal structures erected by the Defendants on L.R Thika Municipality Block 29/644.**
- d. That the Defendants do pay General Damages for trespassing on L.R No. Thika Municipality Block 29/644.**
- e. Costs of this suit**
- f. Interest on (c) and (d) above**

The Plaintiff averred that it is the registered owner of the suit property having been registered as such on **28th November 2012**, after which it applied to be granted the approval to subdivide the suit property into plots. That on **9th March 2018**, the Plaintiff was granted the approval and it proceeded to subdivide the property and sold some of the properties to some interested parties.

Further that in **March 2019**, the Defendants trespassed on the Plaintiff's parcel of land and started construction. That the 1st and 2nd Defendants started constructing a **Perimeter wall** on plots marked **No.1 to 24** on the suit property and the 3rd Defendant started constructing a **Perimeter wall** on plots marked as numbers **7, 8 and 9** of the suit property. That the Defendants invaded the Plaintiff's parcel of land without any authority and that the Plaintiff reported the matter to the police who instructed the Defendants to stop constructions, but the Defendants have refused to do so.

Despite service of Summons, the Defendants did not enter appearance and therefore failed to defend the suit. The matter proceeded by way of **Formal Proof**, wherein the Plaintiff's Director testified as the only witness herein.

PLAINTIFF'S CASE

PW1 Jacinta Mary Wanjiru testified that she is the Director of the Plaintiff and adopted her witness statement as part of her evidence. She produced the list of documents as Exhibit 1. Further that the Plaintiff got the suit property on **28th November 2012**, and she had a Certificate of title. She further testified that the Company subdivided the suit property into **24 plots**. However, the Company found the land

had been invaded and encroached on and a **Perimeter wall** was erected thereon. That the matter was reported to the police and the police advised them to file a Civil suit in Court. She produced the certificate of search as Exhibit 2. Further that the Plaintiff learnt that the Defendants were the encroachers. She urged the Court to allow her claim.

After close of viva voce evidence, the Court directed the Plaintiff to file written submissions and in compliance with the said directives, the Plaintiff through the **Law Firm of Kamau Kinga & Company Advocates** filed its written submissions on **29th June 2020**, and submitted that it has adduced enough evidence to show that it is the registered owner of the suit property. Further its Director had testified that the 1st and 2nd Defendants constructed a Perimeter wall around the suit property. Therefore the Plaintiff is entitled to the prayers sought in the Amended Plaint.

The issue for determination is *whether the Plaintiff is entitled to the orders sought.*

The Defendant failed to enter appearance and thereby defend the suit. The Plaintiff's suit remains uncontroverted and as was held in the case of **Shaneebal Limited ... Vs... County Government of Machakos (2018)eKLR**, where the Court cited the case of **Karuru MunyororoVs ...Joseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988**, 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 exparte evidence is not automatic prove of a case. The Plaintiff had a duty to discharge its 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.”

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

The Defendants did not file their defences and therefore, there is no evidence to weigh as against the Plaintiff's evidence. However, the Plaintiff is the one who has alleged and it 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 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 support its case ,the Plaintiff through its Director produced in evidence a certificate of title, issued to the Plaintiff dated **28th November 2012**. It is not in doubt that as per **section 26 of the Land Registration Act**, the registered proprietor of a property is the **absolute** and indefeasible owner of the said property. See **Section 26 (1) of the Land Registration Act of 2012** which provides as follows:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all Court s 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

b. Where the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme.

The Plaintiff is the registered owner herein, and in the absence of any evidence to the contrary, the Court finds that it is the **absolute** and **indefeasible** owner and is entitled to all the rights and privileges as provided by **Section 24 and 25 of the said Land Registration Act**. The said rights include the right to peaceful and quiet occupation and use of the suit property.

The Plaintiff has sought for a declaration that it is the **bonafide owner** of the suit property and for orders restraining the Defendants from interfering with its quiet user and for demolition of the said structures.

As the Court has already noted the Plaintiff's testimony is uncontroverted, and the evidence of PW1 to the effect that the Defendants have erected Perimeter walls on the suit property is not controverted in the absence of any evidence to the contrary, the Court finds that the said evidence is the truth on the ground. The Plaintiff is entitled to all the rights and privileges appertaining to the suit property, and therefore the Court finds that it is entitled to the orders sought, in the Plaint

The Plaintiff has also sought for General Damages for trespass. 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 testimony of PW1 that the Defendants encroached onto the suit property without the Plaintiff’s permission has not been rebutted. As per the definition of **trespass**, it is clear that the Defendants did not have any justifiable cause to enter upon the suit property. The Court further finds and holds that the said unlawful entry amounted to trespass and consequently the Plaintiff is entitled to the General Damages.

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.**

The Plaintiff has proved that the actions of the Defendants amounted to trespass upon its land. Since the Plaintiff has proved trespass, it is entitled to recover a nominal amount. However, in this instant the Plaintiff has not provided the value of the suit property and therefore the Court holds and finds that the Plaintiff is only entitled to Kshs. 200,000/= as General Damages for trespass.

Having now carefully considered the available evidence as adduced in Court and the written submissions, the Court finds and holds that the Plaintiff has proved its case on the required standard of balance of probabilities. Consequently, the Court enters Judgment for the Plaintiff against the Defendants herein jointly and severally as sought in the Amended Plaint dated 25th June 2019. The Court enters Judgment for the Plaintiff against the Defendants herein jointly and severally as sought in prayers No **(a), (b) (c), (d)** and **(e)**.

In respect of prayer **No.(d)** the Plaintiff is awarded General Damages of **Kshs. 200,000/=** with interest from the date of this Judgment to the date of payment in full.

It is so ordered

Dated, signed and Delivered at Thika this 10th day of December, 2020.

L. GACHERU

JUDGE

10/12/2020

Court Assistant –Lucy

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 His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. 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.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Ms. Waweru for the Plaintiff

No Appearance for Defendants

L. GACHERU

JUDGE

10/12/2020