



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 245 OF 2017**

**GILBERT CHARO MSHANGA.....PLAINTIFF**

**VERSUS**

**CHINA HENAN INTERNATIONAL CO-OPERATION**

**(GROUP) CO. LTD.....DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 6<sup>th</sup> November 2017 and filed herein on 11<sup>th</sup> December 2017, Gilbert Charo Mshanga(the Plaintiff) prays for:-

***(i) Immediate ejectment of the Defendant from Kilifi/Gede/Mijomboni/973;***

***(ii) Special and general damages as well as mesne profits, on a quantum meruit:-***

***a) For damaged cash crops;***

***b) For wrongful use of the land from January 2017, until delivery of possession;***

***iii) Costs of the suit and interest on (ii) above at Court rates from date of taking possession of the land until delivery and restoration.***

2. The prayers are premised on the Plaintiff's contention that China Henan International Co-operation (Group) Co. Ltd (the Defendant) have broken into and entered upon the Plaintiff's said parcel of land measuring 1.21 hectares whereat they have established a site office for storage of machinery and equipment covering approximately two acres.

3. The Suit Papers were served upon the Defendant on 14<sup>th</sup> December 2017. Subsequently on 21<sup>st</sup> December 2017 Messrs P.G. Kaingu Advocates filed a Memorandum of Appearance herein dated the same day. On that very day however, another law firm M/s Michira Messah & Company Advocates also filed a Notice of Appointment of Advocate seeking to act for the Defendant. The Defendant did not however file a Defence and this matter proceeded in their absence by way of formal proof as none of the Advocates who were served with the hearing notices turned up.

4. At the trial herein, the Plaintiff called two witnesses. Testifying as PW1, the Plaintiff told this Court that he is the registered owner of the Suit Property-Kilifi/Gede/Mijomboni/973. He produced a copy of his Title Deed for the land as Plaintiff Exhibit 1(a)

5. It was the Plaintiff's testimony that the Defendant had trespassed upon his land and put up structures which they use as a storage facility. In that process, the Defendant's employees had cut down the Plaintiff's cash crops and destroyed the land.

6. The Plaintiff further told the Court that he had thereafter engaged the services of the District Land Surveyor who surveyed the land and prepared a report which confirmed that the Defendant's heavy equipment were on the Plaintiff's land.

7. According to the Plaintiff, the Defendant's entry into his land was unlawful and without his authority. As a result, he had suffered immensely as he was unable to utilize the land which he had bought for agricultural purposes. The Defendants had removed the top soil therefrom and cut down the Plaintiff's coconuts and other cash crops.

8. It is the Plaintiff's prayer that the Defendant be evicted from the land and that they return the same to its previous condition. The Plaintiff

also prays for special damages in the sum of Kshs 3 Million for the crops destroyed and the illegal use of the land.

9. The Plaintiff's second witness (PW2) Luke Omondi Achando is a Land Surveyor based at the District Land Office, Malindi. He told the Court that he received instructions from the Plaintiff in October 2017 to go and identify the position of land parcel number Kilifi/Gede/Mijomboni/973.

10. PW2 told the Court that he was able to locate the land through a Map Sheet of the area. The parcel of land was at the time of the survey fenced and PW2 was unable to gain entry thereon. The fenced area was about two acres. Inside, PW2 saw several houses and structures some of which were permanent buildings. There was also heavy machinery ordinarily used for construction inside. There were also trailers and big water pipes. PW2 then prepared his Report dated 12<sup>th</sup> October 2017(Pexh. 3)

11. I have considered the pleadings filed herein, the testimony of the two Plaintiffs witnesses and the evidence placed before me. I have equally considered the oral submissions of Mr. S.M. Kimani, Learned Counsel for the Plaintiff. Even though the case proceeded by way of formal proof, I have reminded myself that the onus remains, on the Plaintiff to prove his case on a balance of probabilities(see ***Kirngi & Another –vs- Kabiya & 3 others (1987) KLR 347.***

12. The evidence before me shows that the Plaintiff is the registered owner of the suit property. The Plaintiff accuses the Defendant of wrongfully entering the said parcel of land to establish a site office for storage of machinery and equipment. The area taken up by the site office according to the Plaintiff measures approximately two acres of his parcel of land which in itself is approximately three acres in total.

13. At the trial herein, the Plaintiff produced a Survey Report dated 12<sup>th</sup> October 2017. The Report prepared by a Land Surveyor based at the Malindi District Lands Office confirmed the Plaintiff's fears that indeed the Defendant's site office had encroached upon his land by the said two acres.

14. Despite filing a Memorandum of Appearance and a Notice of Appointment simultaneously through two different law firms, the Defendant chose not to respond to the Plaintiff's claim and or to participate in the proceedings before me. They have accordingly not explained the Plaintiff's grievances nor disputed the particulars of damage as pleaded and demanded by the Plaintiffs.

15. At the trial herein the Plaintiff produced a number of photographs showing all sorts of equipments lying on a parcel of land which he testified was the suit property. He also produced a demand letter written by his Advocates and addressed to the Defendant asking them to cease their activities on the land. The Defendant neither complied with the demand nor did it respond thereto.

16. In light of the uncontroverted evidence placed before me, I did not find any reason to doubt the Plaintiff that as a result of the Defendant's actions, he had suffered loss and damage. In that regard, I think the Plaintiff has proved his case to the required standard and in that regard, mesne profits would be available to the Plaintiff for the wrongful use of his land.

17. At the trial herein, the Plaintiff sought the sum of Kshs 3 Million for the crops and trees destroyed by the Defendant as well as the illegal use of the land. He also told the Court that he had lost rent of about Kshs 1 Million per month since the Defendant entered his land in January 2017.

18. Mesne profits is defined under Section 2 of the Civil Procedure Act to mean; in relation to property, those profits which the person in wrongful possession of such property actually received or is 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.

19. Taking into account all the factors including the period the appellant has been on the property without paying rent and the location thereof I did not find a basis for the demand for Kshs 1 Million per month. I think a sum of Kshs 200,000/- per month would be sufficient compensation. From January 2017 to-date, I would therefore award the Plaintiff a total sum of Kshs 4,800,000/-. As for the general damages for the destroyed trees and destruction to the land which he intended to use for agricultural purposes, I think a figure of Kshs 2 Million would suffice as general damages. There was however no proof of any special damages and I will decline to award any.

20. In the result, Judgment is hereby entered for the Plaintiff against the Defendant as follows:-

***i) An order is hereby issued for the immediate ejection of the Defendant from that parcel of land known as Kilifi/Gede/Mijomboni/973;***

***ii) General damages of Kshs 2 Million;***

***iii) Mesne profits of Kshs 4,800,000/-;***

***iv) Interest on (ii) and (iii) at Court rates until deliver of the land;***

***v) Costs of this suit.***

**Dated, signed and delivered at Malindi this 31<sup>st</sup> day of January, 2019.**

**J.O. OLOLA**

**JUDGE**