



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**ELC NO. 32 OF 2017**

**JOHN K KOECH.....PLAINTIFF**

**VERSUS**

**PETER CHEPKWONY.....DEFENDANT**

**JUDGMENT**

**Introduction**

1. By a Plaint dated 24<sup>th</sup> March 2017 the Plaintiff instituted this suit against the Defendant claiming that the Defendant had trespassed on his parcel of land known as L.R No. Kericho/Kapsuser/3159 and caused damage to a portion thereof measuring 0.2 acres.

2. In the said Plaint the Plaintiff seeks the following prayers:

*a) A permanent injunction*

*b) General damages for trespass*

*c) Special damages*

*d) Costs of this suit*

3. The Defendant filed a Defence dated 24<sup>th</sup> April 2017 in which he denies the Plaintiff's claim.

4. The suit was set down for hearing and the Plaintiff testified and called 3 witnesses.

**Plaintiff's case**

5. The Plaintiff testified that he is the registered proprietor of land parcel number Kericho/Kapsuser/3159. He produced the title deed as Plaintiff's exhibit 1. He testified that the Defendant had since 2014 encroached on a portion of his land measuring 0.2 acres and had destroyed his barbed wire and 15 fencing posts. He stated that he had filed a case against the Defendant in lower court in which he obtained an injunction but he same had been withdrawn as the court did not have jurisdiction at the time. Upon cross-examination, he stated that his land borders the road and his neighbours who pass through his land pay him for it. Samuel Kiprotich Towet and Julius Tonui who testified as PW1 and PW2 testified that they sold the suit land to the plaintiff and the only available route to the main road was through a footpath. They stated that the motorable access road was a private road belonging to the plaintiff.

6. Geoffrey Kibowen, the District Surveyor, Kericho who testified as PW4 stated that the Plaintiff's parcel of land borders parcels number Kericho/Kapsuser/445, 3564, 3155, 3920 and 3152. He stated that the road in dispute was on the plaintiff's land and is meant for his personal use. He explained that upon sub-division each parcel of land that is created must have an access road in order for each land owner to access the main road.

**Defendant's case**

7. The Defendant testified that he is the owner of land parcel number 3562 which borders the Plaintiff's land. He stated that he bought the land from one Simon Kiplangat Bett. He produced the sale agreement as Defence Exhibit 1. He later bought additional parcels of land from Julius Kibii and Zakayo Korgoren. He stated that when he bought his land the road in dispute was already being used by the Plaintiff and other neighbours. He stated that he used the road for a short while. He testified that the Plaintiff had filed a suit against him in 2016 and obtained an order of injunction against him to stop using the said road and since then he had changed his route as he now passed through

another neighbour's parcel of land.

8. Reuben Kipchumba Rono who testified as DW2 stated that he was the Defendants neighbour as he bought a parcel of land from the same person who sold land to the Defendant. He confirmed that at the time he bought his land, there was only a footpath leading to his land. The Plaintiff stopped him from using the access road on his land claiming that it was his and he had bought it from the vendor at Kshs. 17,000. He then agreed to pay the Plaintiff Kshs. 8,500 in order to use the road. He explained that the person who sold them the land had intended that the road be used as an access road by everyone who bought land from him but the Plaintiff was now claiming it as his road. DW3 testified that both the Plaintiff and Defendant bought land from his late father who showed them the access road that was currently in use. He said he was surprised that the Plaintiff was claiming that the land was his.

9. The court visited the suit property on 13.7.18 in the company of the District Surveyor, Kericho in order to get a clear picture of the access road in relation to the suit property. The Surveyor then filed his report in court.

10. At the close of the defence case both the Plaintiff and the Defendant filed their submissions which I have considered.

#### **Issues for determination**

- i. Whether the defendant has trespassed on the plaintiff's land parcel known as Kericho/Kapsuser/3159.
- ii. Whether the plaintiff is entitled to the reliefs sought.

#### **Analysis and determination**

11. With regard to the first issue, Clerk & Lindsell on Torts 18<sup>th</sup> Edition at paragraph 18-01 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”***

12. There is no dispute that the Plaintiff is the registered proprietor of the land parcel known as Kericho/Kapsuser/3159. The Plaintiff and the Defendant bought land from the same person and the Defendant's parcel no. Kericho/Kapsuser/3562 is adjacent to the Plaintiff's land. The Plaintiff claims that the Defendant trespassed onto his land and destroyed some barbed wire and fencing posts. It is the Defendant's testimony that when he bought his land there was already a road of access in existence which was being used by all the neighbours including the original vendor and the Plaintiff yet he is the only one who has been sued by the Plaintiff.

13. However, the District Surveyor, Kericho who testified as PW4 confirmed by the said access road is part and parcel of the Plaintiff's land and is meant for the Plaintiff's use. He explained that upon demarcation, each parcel number is given an access road to the main road. During the site visit the surveyor showed the court where the Defendant's access road was but said that the same had not yet been opened.

14. It is therefore clear that the Defendant had been using the Plaintiff's access road. The Defendant however explained that he had only used the said road for a short while up to the year 2016. Thereafter the Plaintiff filed a case against him in the lower court and obtained an order of injunction to restrain the Defendant from using the road. He stated that he had not used the road since he was served with the said court order and he had negotiated for access through a neighbour's parcel of land.

15. PW2 and who testified that they sold land to the Plaintiff confirmed that there was no access road at the time as there was only a footpath. DW2 and DW3 testified that the road was being used by the owners of the neighbouring plots although DW2 said that he had paid the Plaintiff Kshs. 8,500 to allow him to use the road. The site visit confirmed that indeed the road was being used by the owners of the neighbouring parcels. Even though the Defendant admitted to having used the said road up to the year 2016, it is evident that by the time this suit was filed he had stopped using it. It is therefore my finding that the Plaintiff did trespass on the Plaintiff's land albeit for a very short time. The trespass is therefore not continuing in nature. The facts of this case are distinguishable from the case of **Abdallah Mohamed Abdalla v County Government of Mombasa 2018 eKLR** cited by counsel for the Plaintiff where the Plaintiff wanted the access road relocated.

16. The second issue I must determine is if the Plaintiff is entitled to the special and general damages for trespass.

17. The Plaintiff testified that in the course of passing through his land the defendant destroyed his barbed wire and fencing posts. His attempt to produce the receipts in respect of these items was successfully resisted by the Defendant's counsel. It is trite law that special damages must not only be pleaded but must be strictly proved.

18. In the case of **Hahn V Singh Civil Appeal No 42 of 1983 1985 KLR** at p. 717 learned judges of Appeal Kneller, Nyarangi and Chesoni held as follows:

***“Special damages must not only be specifically pleaded but also strictly proved for they are not the direct and natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves”***

19. In the instant case the Plaintiff did not produce any receipts to show the loss he incurred. Without such evidence, it is not possible for the court to determine the claim for special damages. In the circumstances, I am not in a position to grant the same.

20. Turning to the general damages, I rely on the case of **Park Towers Ltd V John Mithamo Njika and 7 Others 2014 eKLR** where

Mutungu J stated as follows:

***“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case”***

21. Halsbury’s Laws of England 4<sup>th</sup> 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 which do not allow an award of exemplary damages, general damages may be increased”***

22. In the instant case, the Plaintiff has not proved actual loss. The road which the Defendant is alleged to have used without the Plaintiff’s permission was in use long before the Defendant started using it and continues to be used by the Plaintiff and his other neighbours. The plaintiff did not produce any evidence of destruction by the defendant. Even though he has given the value of the portion on which the road passes as Kshs. 300,000, there is no evidence that it is the Defendant who created this road nor is there evidence that he has deprived the Plaintiff of the use of this portion of his land. Against the foregoing background the Defendant is only entitled to nominal damages. I consider an award of Kshs. 30,000 to be fair in the circumstances.

23. The upshot is that the Plaintiff has proved his case on a balance of probabilities and I enter judgment for him and make the following final orders:

- a) A permanent injunction is hereby issued restraining the defendant from interfering with the plaintiff’s land comprised in L.R No Kericho/Kapsuser/3159.
- b) General damages in the sum of Kshs. 30,000.
- c) Costs of this suit

**Dated, signed and delivered at Kericho this 26<sup>th</sup> day of February, 2019.**

.....

**J.M ONYANGO**

**JUDGE**

**In the presence of:**

- 1. Mr. Orina for the Defendant
- 2. Plaintiff present in person
- 3. Court assistant – Rotich