



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO 75 OF 2018

JOHN BAPTISTA MURIRA KWERI ALIAS MURIRA KWERI - PLAINTIFF

VS

JENIFFER NJERI GITHENGI - 1ST DEFENDANT

GEORGE MWICIGI GITHENGI - 2ND DEFENDANT

EUNICE WAIRIMU GITHENGI - 3RD DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendants on the 20/11/2012 seeking the following orders:-

- a. An order removing the caution lodged on L.R LOC.16/KIARUTARA/43.
- b. An order restraining the Defendant their agents and /or servants from entering L.R LOC.16/KIARUTARA/43.
- c. Mesne profits and /or damages
- d. Costs and interest of the suit.
- e. Such further orders as this honorable Court may deem fit and just to grant.

2. It is the Plaintiff's case that he is the registered owner of LOC16/KIARUTARA/43. He averred that the Defendants without the Plaintiff's consent entered his suit land in 2002 and has continued in their trespass and are unlawfully picking green tea thereof.

3. That on the 5/10/12 he obtained an official search of his suit land from the lands office and discovered that the Defendants had lodged a caution on the said property claiming beneficial interests. He averred that the Defendants have no known beneficial interest or claiming the suit land. That despite demand to vacate the suit land the Defendants have been adamant in their trespass.

4. The Defendants filed a statement of defense on the 11/3/13 in which they made general denials against the Plaintiffs claims and sought to put the Plaintiff to strictest proof.

5. Despite service of the hearing notice the Defendants did not attend Court on the hearing date. The case proceeded undefended.

6. At the hearing the Plaintiff testified and stated that the Defendants are his nephews and nieces, being the children of his brother. He stated that he lives on the suit land with his family. That the Defendants have their own land elsewhere and only come to pick the tea leaves which belong to him. He produced in evidence copies of the official search of the land as well as the original title marked as PEX1 & PEX2.

7. PW2 – Henry Macharia testified that the Plaintiff is his brother and the Defendants are his nephews and nieces. He confirmed that the suit land belongs to the Plaintiff. He stated that the Defendant's father was given land in Block 44 where he lives but his children have not stopped picking the Plaintiff's tea. They are supposed to cease picking tea on the Plaintiff's land, he testified. He stated that he too lives on the suit land and he has tea which he picks with the permission of the Plaintiff. He reiterated that the Defendants have no claim whatsoever on the suit land. That they should move to their fathers land in block 44.

8. Having review the pleadings, the evidence and the material placed before me in the case the issues for determination are; whether the caution should be removed; whether the Plaintiff is entitled to mesne profits and or /damages and whether the Defendants should be restrained from entering the suit land.

9. Section 26 of the Land Registration Act No 3 of 2012 states that such person named as proprietor is the absolute and indefeasible owner but subject to encumbrances restrictions easements and conditions contained or endorsed in the certificate of title.

10. In the instant case the Plaintiff has persuaded the Court that he is the registered proprietor of the suit land and is entitled to quiet possession among other rights. The copy of the title was produced in evidence. In the absence of any contrary evidence, the Court holds that the Plaintiff is the duly registered owner of the land.

11. The law is that the proprietor's rights are absolute, exclusive and indefeasible and are only subject to encumbrances restrictions easements and conditions which must be endorsed on the register. The right to property is also part of our Constitution and has been affirmed under Article 60 as a fundamental principle to ensure that property is not just owned by people but their property rights are protected.

12. The Defendants have not established their claim against the suit parcel and their rights, if any, do not form part of encumbrances or restrictions that would limit the proprietor's privileges. Their presence and right over the land and caution purportedly lodged have not been premised on any legal basis.

13. The Plaintiff has instead put up a solid and satisfactory case that the Defendants are trespassers on his land. It is trite that trespass is actionable *per se* and is a tort that is defined as any unauthorized entry whether present or continuous is trespass. Reliance is placed in the decision of Lady Justice J Onyango in Vincent **Koskei v Benard Koskei [2018] eKLR**. In **Park Towers Ltd V John Mithamo Njika and 7 Others 2014 eKLR** Mutungi J stated as follows:

“ 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”

14. Further in the case of **Duncan Nderitu Ndegwa V Kenya Power and Lighting Company Limited & Another (2013) eKLR** Nyamweya J held that once trespass to land is established, it is actionable *per se* and indeed no proof of damage is necessary. The judge considered an award of Kshs. 100,000 to be adequate compensation for the Defendant's infringement of the Plaintiff's right to use and enjoy his land.

15. The Plaintiff claims that the Defendants entered in the year 2002 and continue to pluck tea to date. PW2 states that the Defendant's land is in Block 44 but they continue picking tea in the suit parcel despite his disengagement with the Defendant's parents when he employed new workers and /or the Defendant's father having passed on. The facts in this case also confirm that there is a continuing trespass.

16. In **BLACK'S LAW DICTIONARY 8TH EDITION**, a continuing trespass is defined as:-

“A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property”.

17. In **CLERK & LINDSEL ON TORTS 16th EDITION**, paragraph 23 - 01, it is stated that:-

“Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues”.

18. This Court is inclined to award damages in favour of the Plaintiff and finds that the Defendant's actions on the land have been unauthorized since entry in 2002. The actions have infringed the Plaintiff's proprietary rights of exclusive user control and possession of his land. They still continue to pluck the Plaintiff's tea. The Court considers a sum of Kshs 3,000/- annually from 2002 for the continued trespass.

19. The claim for mesne profits is under the limb of special damages. These require the Plaintiff to specifically plead and prove the loss suffered. This is declined.

20. The Court also finds that the Plaintiff has established a prima facie case since firstly he is the registered proprietor and secondly his proprietary rights have been infringed by the Defendants. It is his prayer that the Defendant be stopped from further dealings with his land. The Court has not found a justifiable reason to maintain the caution that was lodged against his title. The continued existence of the caution contravenes the intention of Sec 25 of the Land Registration Act by limiting his absolute and indefeasible rights and privileges to the suit land.

21. Going by the well known case of **Giella -vs- Cassman Brown & Co. Ltd [1973] EA 358**, this Court is satisfied that the Plaintiff has established a prima facie case to warrant restraining the Defendants from trespassing on to the suit land.

22. Final orders

a. The caution lodged on L.R LOC.16/KIARUTARA/43 be removed forthwith.

b. An order restraining the Defendants their agents and /or servants from entering L.R LOC.16/KIARUTARA/43 do issue.

c. General damages for trespass are assessed at Ksh 3,000/= per year from 2002 when the Defendants entered the land to date of the judgment.

d. Costs of the suit in favour of the Plaintiff.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 11TH DAY OF FEBRUARY, 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Mwaura HB for Ms Wangare for the Plaintiff

Defendant 1st: Absent

2nd: Present in person. Advocate Absent.

3rd: Absent.

Njeri and Kuyiki, Court Assistants