



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 175 OF 2017

ESTHER MUMBUA KATHENDU.....PLAINTIFF

VERSUS

MARY MAIA LOLE.....1ST DEFENDANT

MAKONDO LOLE.....2ND DEFENDANT

JOB KITHAMBI LOLE alias MAINA.....3ND DEFENDANT

JUDGMENT

1. By her amended plaint dated 22nd November, 2017 and filed in court on 16th January, 2018, the Plaintiff prays for judgment against the 1st, 2nd and 4th Defendants jointly and severally for:-

(a) A permanent injunction to issue restraining the Defendants jointly and severally, either through their servants, agents or anyone claiming under them from trespassing, cultivating, harassing, abusing, damaging, alienating, contracting or in any manner whatsoever interfering with the Plaintiff and her family's quiet use, possession and enjoyment of all that land parcel known as title Number Makueni/Kalongo/4374 with all the utilities thereon and the Defendants to demolish the structure/incomplete house erected by the 4th Defendant forthwith and in default the Plaintiff to demolish the same under the supervision of the area provincial administration or local administration at the Defendant's expense.

(b) A declaration that the Plaintiff is the legal owner/allottee of Land title Number Makueni/Kalongo/4374.

(c) General damages for trespass.

(d) Costs of this suit.

(e) Interest on b and c above at court rates.

(f) Any relief that the court deems fit to grant.

2. The Plaintiff has averred in paragraphs 3 and 4 of her amended plaint that she is the registered owner of title number Makueni/Kalongo/4374 and that on diverse dates prior to July, 2010, the Defendants without any colour of right descended upon the said land parcel number Makueni/Kalongo/4374 and committed acts of trespass by cutting down trees, cultivating, grazing and that the 4th Defendant commenced construction of a house on the said parcel of land.

3. The Plaintiff's claim is denied by the 1st, 2nd and 4th Defendants through their joint statement of defence dated 07th May, 2018 and filed in court on even date. The three Defendants have pleaded in paragraph 5 of their statement of defence that land parcel number Makueni/Kalongo/4374 is ancestral and that it belonged to Mbuli Kathungu who had three wives. That the land in question was shared amongst his thirteen sons in 1980.

4. Hearing of the Plaintiff's suit commenced on the 18th July, 2018. The Plaintiff adopted her statement dated 07th May, 2018 as her evidence. She also produced the 16 documents in her list of documents dated 07th May, 2018 and filed in court on 08th May, 2018 as P.Exhibit Nos.1 to 16 respectively.

5. Her case was that she is the registered proprietor of land parcel number Makueni/Kalongo/4374 having inherited it from her husband upon being granted letters of administration intestate on the 24th November, 2005. That when she married her late husband in 1951, they have

since then lived in the said land. That on diverse occasions and up to the period to July, 2010, the Defendants without her authority entered into the said land parcel Makueni/Kalongo/4374 and started cutting down trees, cultivating and grazing on it. That she could recall on various instances where the 1st Defendant's late husband sought legal redress to a dispute over the land and pointed out one such claim was case number KLG/COMM/173/200. That the committee members of Kalongo Adjudication Section determined the matter in favour of the Plaintiff's husband. That the 1st Defendant's husband filed an appeal which was heard on or about 12th June, 2002 and the same was dismissed. That despite the outcome of the appeal, the 1st Defendant and her late husband continued trespassing into the suit property forcing the Plaintiff to refer the matter to Land Adjudication Officer who escalated the same to the Director of Land Adjudication and Settlement. That despite being summoned to appear before the Land Adjudication and Settlement officer Kilome/Kilungu, the Assistant Director, Ministry of Lands and a Surveyor, the Defendants refused to appear. That the Defendants only appeared after the aforementioned officers had planted sisal plants along the boundaries that they had demarcated. She added that the Defendants uprooted the sisal plants resulting in their arrest and arraignment in Kilungu Law Courts vide criminal case number 489 of 2006.

6. On the other hand, the 1st Defendant's case was that the suit land was sub-divided into three portions by surveyors and adjudication officers. She said that she was allocated the area that was for Kwa Mbuya while the Plaintiff got the one that was for Munzio. That she continues to use the land allocated to her. That Makueni/Kalongo/4378 is in the name one Lole Kithambi Mbuli who is her husband.

7. The Plaintiff's evidence in cross-examination was that the land at Kalongo was acquired by the grandfather of Waema Kathendu and Maia Lole. She went on to say in her evidence in cross-examination that the clan sub-divided the land between Waema Kathendu and Maia Lole and that when the adjudication process began, the surveyors fixed the boundaries and the two were allocated their respective parcels of land. She said that Maia Lole interfered with the boundary as a result of which a report of malicious damage to boundary was made at Kilome Police Station, an issue she reiterated in her evidence in re-examination.

8. The 1st Defendant's evidence in cross-examination was that the adjudication court determination was that the suit property belongs to Lole Kithambi and not Johnson Waema Kathendu as was indicated in page 8 of bundle of receipts, proceedings and judgment of land adjudication committee case No.KLG/COMM/173/200 in respect of land title No.Makueni/Kalongo/4374 {P.Exhibit No.2(c)}. She said that neither she nor her husband appealed against the adjudication proceedings. She denied the suggestion by the Plaintiff's Counsel that she grazes her livestock on the suit land. She further said that she has never uprooted the sisal plants along the boundary. She was not re-examined by her advocate.

9. By the time of writing this judgment, it is only the Plaintiff who had filed her submissions. The submissions are dated 21st August, 2018 and were filed in court on 13th September, 2018.

10. The Counsel framed three (3) issues for determination as follows:-

(1) Whether title Number Makueni/Kalongo/4374 belongs to the Plaintiff.

(2) Whether the Plaintiff is entitled to quiet possession and enjoyment of the suit property.

(3) Whether the Plaintiff is entitled to the prayers sought in the plaint.

11. I will adopt the three issues.

1) Whether title number Makueni/Kalongo/4374 belongs to the Plaintiff

The Counsel submitted that the Plaintiff produced a title deed number Makueni/Kalongo/4374 (P.Exhibit No.10) which shows the Plaintiff is the owner of the suit property. The Counsel cited the case of **Ahmed Ibrahim Suleiman and Another vs Noor Khamisi Surur (2013) eKLR** where Mutungi, J stated thus;

“The Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title number (Nairobi) Block 61/69 in terms of Section 26 of the Land Registration Act entitled to the protection of the law.”

The Counsel further cited **Section 26(1) of the Land Registration Act** which provides as follows:-

“26(1) 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 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-

1. On the grounds of fraud or misrepresentation to which the person is proved to be a party, or

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

The Counsel added that it is also provided under **Section 30(3) of the Land Registration Act** that:-

“A certificate of title or certificate of lease shall be prima facie evidence of the matters shown in the certificate, and the land or lease shall be subject to all entries in the register.”

It was also the Counsel's submissions that the Land Adjudication Officer visited the suit land and ruled in favour of the Plaintiff. The Counsel added that the Defendants who had been notified to attend the meeting failed to do so. The Counsel pointed out that the Plaintiff produced documents from the Land Adjudication Officer to show that the suit land was hers unlike the 1st Defendant who had none despite her insistence that the land belonged to her.

12. From the evidence on record, there is no doubt that Makueni/Kalongo/4374 is indeed the property of the Plaintiff herein. The Plaintiff's evidence on this issue remained unchallenged by that of the Defendant.

2) Whether the Plaintiff is entitled to quiet possession and enjoyment of the suit property

The Plaintiff's Counsel cited the case of **Gujral Sandeep Singh Ragbir vs Minister for Public Works, Road and Transport & County government of Kajiado (2018) eKLR** where Christine Ochieng, J stated:-

"In the circumstances, I find that the Plaintiff has proved his case on a balance of probability and proceed to enter judgment in his favour and make the following final orders:-

a) That judgment is hereby entered for the Plaintiff against the Defendants in the sum of Kshs.10,000,000/= comprising of Kshs.1,000,000/= as general damages for trespass and Kshs.9,000,000/= as exemplary damages.

b) That a declaration is hereby issued, that as against the Defendant, the Plaintiff is the owner of the land parcel Noonkopir Trading Centre/195.

c) A permanent injunction be and is hereby issued restraining the Defendants either by themselves, their agents and or servants from harassing, threatening, intimidating, trespassing upon, demolition and or in any manner whatsoever interfering with the Plaintiff's stores, perimeter wall, restaurant and other structures erected on the property known as title number Noonkopir Trading Centre/195.

d) The costs of the suit are awarded to the Plaintiff."

The Counsel further cited the case of **Pamela Waihera Mburu vs County Government of Kajiado (2018) eKLR** where Christine Ochieng, J in awarding damages held that:-

"Based on the evidence presented and being persuaded by the authority above, I find that the Plaintiff is indeed entitled to exemplary damages as against the Defendant as it failed to provide her with ample notice as regards the intended road. Further, the Defendant without any colour of right proceeded to demolish the Plaintiff's fence and remove the barrier she had put thereon, oblivious to the fact that she was the absolute and registered proprietor of the suit land. The Plaintiff was unable to develop the land because the road traversed her land in the middle. These actions are indeed a sign of impunity which is contrary to the Fair Administration Act and ought to be curtailed. It is against the foregoing that I proceed to award the Plaintiff exemplary damages amounting to Kshs.1 million."

13. Arising from the above, the Counsel was of the view that the Plaintiff is entitled to prayers (a) to (e) of her amended plaint and proposed an award of Kshs.1,000,000/= as general damages.

14. I agree with the Plaintiff's Counsel that from the evidence on record, indeed the Plaintiff is entitled to the prayers she has sought in her amended plaint. The question is, what is she entitled to in terms of damages for trespass?

15. In **Halsbury Laws of England 4th Edition, Vol 45 at para 26, 1503**, it is provided as follows:-

(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 sum as would reasonably be paid for that use.

(d) --

(e) --

16. From the evidence on record, the Plaintiff has proved trespass but there is nothing in her evidence that can enable this court determine the actual damage that she has suffered so that it can order that she be compensated for the loss. In my view, the Plaintiff is entitled to nominal damages which I will assess at Kshs.200,000/=.

17. Having read the evidence on record and having considered the submissions that were filed by the Plaintiff's Counsel, I am satisfied that the Plaintiff has on a balance of probabilities satisfied this court that she has a cause of action against the Defendants jointly and severally. In the circumstances, I hereby proceed to enter judgment in her favour and against the Defendants as follows:-

a) A permanent injunction to issue restraining the Defendants jointly and severally, either through their servants, agents or anyone claiming under them from trespassing, cultivating, harassing, abusing, damaging, alienating, contracting or in any manner whatsoever interfering with the Plaintiff and her family's quiet use, possession and enjoyment of all that land parcel known as title Number Makueni/Kalongo/4374 with all the utilities thereon and the Defendants to demolish the structure/incomplete house erected by the 4th Defendant forthwith and in default the Plaintiff to demolish the same under the supervision of the area provincial administration or local administration at the Defendant's expense.

b) A declaration that the Plaintiff is the legal owner/allottee of Land title Number Makueni/Kalongo/4374.

c) Kshs.200,000/= being general damages for trespass.

d) Costs of the suit.

e) Interest on b and c above at court rates.

It is so ordered.

Signed, dated and delivered at **Makueni** this **05th** day of **February, 2019**

MBOGO C. G.,

JUDGE.

In the presence of:-

Ms. Nzioka – Court Assistant

No appearance for the Plaintiff who had notice of this judgment

No appearance for the Defendants who also had notice of this judgment

MBOGO C. G.,

JUDGE,

05/02/2019.