



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT GARISSA

ELC CASE NO.24 OF 2017

HASSAN MOHAMMED HAJI..... PLAINTIFF/APPELLANT

VERSUS

MOHAMED KEYNAN.....1ST DEFENDANT/RESPONDENT

SIYAT MUSA.....2ND DEFENDANT/RESPONDENT

JUDGEMENT

A. INTRODUCTION

1. The Plaintiff filed through his amended plaint dated 22nd June, 2015 and filed on 23rd June 2015 prays for judgment against the Defendant for;

- a. A permanent injunction restraining the Defendants whether by themselves or their servants or agents and/or otherwise howsoever from remaining on or continuing in occupation of land Reference No. 28650 (the suit property).**
- b. Vacant possession of the suit property.**
- c. General damages for trespass**
- d. Cost of this suit**
- e. Interest on (c) and (d) above.**
- f. Such other or further relief as this Honourable court may deem just to grant.**

2. The 1st Defendant in response to the suit filed his statement of defence dated 3rd March, 2014 and filed on 24th March, 2014. In addition, they filed a witness statement sworn by the 5th Defendant, their list of documents and the list of witness both filed on 1st June, 2015.

3. Vide an application dated 11/5/2018 and filed on 14/5/2018, this court allowed the Plaintiff application to serve the Defendants by way of substituted service to wit vide the standard Newspaper and the Daily Newspaper. The matter was fixed for hearing on 9th July, 2018, however the same did not proceed as the Plaintiff agent was not properly appointed. The same was rescheduled to 4th September 2018 with directions that the Defendants be served by way of substituted service.

4. On 18th December, 2018 the matter came up for hearing, despite the Defendants being served vide substituted service they did not appear or attend the hearing of the matter. The same proceeded in their absence.

B. BACKGROUND

The Plaintiff's Case

5. The Plaintiff Hassan Mohammed Haji (PW1) testified as the only witness. He stated that he is the registered owner of Plot LR No. 286650 situated in Garissa. It is his evidence that he was allotted the suit property in the year 1999, and to back this up he produced the allotment document listed as No. 1 in his list of documents filed on 18/6/2015.

6. In addition he referred the court to the various correspondence and receipts from various government Departments confirming his ownership of the suit property. He also referred the court to an official search dated 13/2/2014 confirming his ownership. Further it is his evidence that he was issued with a title document to the suit property in the year 2011, and that when he attempted to secure the suit property he encountered difficulties as the Defendant trespassed in the property and started constructing semi-permanent structures. In reference to the Defendants defence he notes that they have not challenged his title documents.

7. In sum the Plaintiff seeks the eviction of the Defendants from his property and payments of damages for their unlawful occupation of his property and costs of the suit.

Defendants Case

8. The Defendants never attended the hearing of the matter despite service vide substituted service. It is also notable that only the 1st Defendant filed his defence to the suit, where he makes general denials of the Plaintiff averments.

9. Additionally, the Defendants through the firm of J. O Otieno & Co. Advocates filed a witness statement sworn by the 5th Defendant and a list of documents they sought to rely on and a list of witnesses, however it is notable that none of the said documents sought to be relied on was filed in court.

Submissions

10. The Plaintiff filed their submissions dated 20th December 2018 and filed on 11th January 2019 in support of the Plaintiff case.

11. The Plaintiff argues that he is the registered proprietor of L.R No. 28650 situate at Garissa as per the title deed issued on 18th May 2011 and supported by letter of allotment dated 19th April, 1999 and an official search confirming the same.

12. The Plaintiff in this regard relied on Section 26 of the Land Registration Act, 2012. Further, the Plaintiff submitted on the issue of trespass arguing that it is the Defendants trespass in the year 2012 that necessitated the instant suit, and the trespass continues to date as they continue to unlawfully build structures on the land in total disregard of his rights guaranteed under Section 24 and 25 of the Land Registration Act, 2012 and the Constitution. In this regard he seeks damages for trespass at the rate of Ksh.1, 000,000/= annual from 2012.

13. The Plaintiff relies on the following authorities of **Ephantus Gathua Muiyoro –Vs- Kenya Power Company Limited [2016] eKLR** and **Eliud Njoroge Gachiri –Vs- Stephen Kamau Nganga [2018] eKLR**.

C. ISSUES ARISING

- i. Whether the Plaintiff title to this suit property is valid.
- ii. Whether the Plaintiff is entitled to the prayers sought.

D. ANALYSIS OF THE ISSUES ARISING

- i. Whether the Plaintiff title to this suit property is valid.**

14. In Civil Appeal No. 246 of 2013 between **Arthi Highway Developers Limited - Vs - West End Butchery Limited and Others the Court of Appeal** the Court expressly declared the indefeasibility of title except on allegation of fraud. It declared:-

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

15. Section 24 of the Land Registration Act provides that subject thereto:-

- a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and**
- b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of lease**

16. Section 25 of the Land Registration Act states as follows:-

“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an Order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together

with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

17. Section 26 states as follows:-

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a 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—

(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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”.

18. Section 107 of the Evidence Act Cap 80 of the laws of Kenya states that:-

“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”.

19. Therefore the onus is on the plaintiff to tender evidence proving the facts he alleges on a balance of Probability. The Plaintiff herein has produced evidence which stands unchallenged that he is the registered proprietor of Land L.R No. 28650 situate at Garissa as per the title deed issued on 18th May 2011 and supported by the letter of allotment dated 19th April, 1999 and an official search confirming his ownership.

20. In view of the foregoing Sections 24, 25 and 26 of the Land Registration Act, the Plaintiff title to the suit property would only be challenged successfully on allegations of fraud, where the plaintiff is a party to the fraud.

21. It is clear from the pleadings herein that there are no allegations tabled challenging the plaintiff title to the property on such allegations as fraud. Further, the defendants herein despite having sufficient notice to attend to the matter and challenge the plaintiff evidence and allegations chose to give these proceedings a wide berth.

22. It is trite law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue. Therefore in the circumstances this Court is inclined to find that the plaintiff is the registered owner of the suit property as his title to the property has not been challenged by the defendant's and or any evidence to the contrary presented. .

ii. Whether there was any trespass by the Defendants on the Plaintiff's land

23. This Court having found that the Plaintiff is the registered proprietor of the suit property. It is apparent from the plaintiff testimony that the Plaintiff was unable to confirm the actual date of trespass; he states that it began in 2011 thereabouts and claims for trespass from the year 2012 annually to date.

24. In regard to this issue, the plaintiff has through his submissions contended that owing to the impugned actions of the defendants regarding the alleged trespass he has suffered loss and damages. He claims the sum of KShs.1,000,000/= annually as damages for trespass.

25. It is trite law that trespass to land is actionable *per se* (without proof of any damage). See the case of **Park Towers Ltd v. John Mithamo Njika & 7 others (2014)** eKLR where J.M Mutungi J., stated:-

“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 damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. ..”

26. Further, In **Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013)** eKLR P. Nyamweya J. held:-

“...once a trespass to land is established it is actionable *per se*, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants’ trespass”

27. Granted that Trespass is actionable *per se*, the Court has noted that the Plaintiff has claimed a sum of Ksh. 1,000,000/= annually to guide the Court in assessing general damages for trespass. The Court would have expected the Plaintiff to obtain the actual benefits accrued by the defendants from the suit land for the duration of the trespass. He alleges that he defendants have erected semi-permanent structures in the property. There is no evidence as to any form of activity undertaken by the defendants in the suit property. Such information would have represented the opportunity cost of the deprivation of the use of land by the Defendant continued occupation. None was provided. That notwithstanding taking that into consideration and noting the duration of the trespass and the size of the land, this Court is inclined to award a figure being a nominal award of general damages.

I hereby enter Judgment for the Plaintiff against the Defendant as follows:

- 1. The defendant is given six(6) Months’ notice to vacate the Plaintiff Land Parcel No. 28650 situate at Garissa, failure of which an eviction Order to Issue**
- 2. The Defendants to pay the plaintiff nominal general damages for trespass in the sum of Kshs. 100,000/= plus interest at court rates from the date of delivery of this Judgment**
- 3. The defendant to bear the costs of this suit jointly and severally**

Read and delivered in the Open Court this 25th day of March, 2019.

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E. C Cherono (Mr.)

ELC JUDGE

In the presence of:

1. M/s Ndingi holding brief Karumba for Plaintiff ; Present
2. Amina Mohamed; court clerk present
3. Defendant/Advocate; Absent