



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 62 OF 2017**

**(Formerly Machakos ELC Case No. 207 of 2010)**

**NTUKUSOI OLE LETIRIA.....PLAINTIFF**

**VERSUS**

**JAMES CHEGE GITAU.....DEFENDANT**

**JUDGMENT**

By a Plaint dated the 11<sup>th</sup> October, 2010, the Plaintiff prays for judgment against the Defendant for:

- a) A permanent injunction restraining the Defendant by himself, servants, agents or otherwise howsoever from entering into the suit land, cutting down trees, burning charcoal, cultivating, interfering with the Plaintiff's right of occupation, possession and or use of title number Loitokitok/ Olkaria / 334 or any part thereof.
- b) Eviction orders be issued as against the Defendant, his agents and or servants from the parcel of land known as title Loitokitok/ Olkaria/ 334 and such orders be enforced with the assistance of the Officer Commanding Loitokitok Police Station.
- c) General damages and exemplary damages for trespass.
- d) Costs of this suit.
- e) Interest on ( c) and (d) above at Court rates

The Defendant though duly served as evidenced by the affidavits of service sworn on 29<sup>th</sup> May, 2018 and 10<sup>th</sup> September, 2018 failed to attend Court and the hearing proceeded ex parte. The Plaintiff only called one witness.

**Evidence of the Plaintiff**

The Plaintiff is the registered proprietor of land parcel number Loitokitok / OI Karia / 334 measuring 281. 92 hectares hereinafter referred to as the 'suit land'. In the year 2005, the Defendant commenced trespassing on the suit land claiming he had purchased four (4) acres from the Plaintiff and committed acts of waste by felling indigenous trees; burning charcoal; cultivating and constructing a temporary structure thereon. On 21<sup>st</sup> February, 2006, vide the Kajiado Senior Resident Magistrate's Court Criminal Case No. 489 of 2006, the Defendant caused the Plaintiff to be charged with the offence of obtaining money by false pretenses regarding the said four (4) acres he claimed to have purchased, but the Plaintiff was acquitted. The Plaintiff relied on the proceedings and judgement in the said Criminal Case.

The Plaintiff thereafter closed his case and filed submissions that I have considered.

**Analysis and Determination**

Upon perusal of the materials presented in respect of the suit herein, the following are the issues for determination:

- Whether the Defendant has trespassed on the Plaintiff's land and undertook acts of destruction thereon.
- Whether the Defendant and or his agents/servants should be permanently restrained from interfering with the Plaintiff's enjoyment and quiet possession of the suit land;
- Whether the Defendant, his agents or servants should be evicted from the suit land.
- Whether the Plaintiff is entitled to General Damages and Exemplary Damages; and

- Who will pay costs of the suit.

As to whether the Defendant has trespassed on the Plaintiff's land and committed acts of destruction thereon.

It is not in dispute that the Plaintiff is the registered proprietor of land parcel number Loitokitok / Ol Karia / 334. PW1 produced a copy of the title deed in court to prove so. It is the Plaintiff's contention that the Defendant has trespassed on his land and committed wanton acts of destruction by cutting trees, burning charcoal and constructed a temporary structure thereon. There was no evidence of a Defence on record to rebut the Plaintiff's averments. Since his averments were not controverted, I hold that the Defendant indeed trespassed on the suit land.

As to whether the Defendant and or his agents/servants should be permanently restrained from interfering with the Plaintiff's enjoyment and quiet possession of the suit land;

I note the Defendant's have not controverted the evidence of the Plaintiff regarding his acts of trespass on the suit land. I have made a finding above that the Plaintiff is the absolute proprietor of the suit land. I note the cause of action herein arose before 2010 under the regime of the Registered Land Act which is now repealed. I wish to make reference to section 27 (a) of the Registered Land Act which provides that: '**Subject to this Act - (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;**

Further section 28 of the Registered Land Act provides that: '**The rights of a proprietor, whether acquired on first registration or whether acquired 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) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register: Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.'**

The provisions I have cited above from the Repealed Registered Land Act are similar to section 24 (a) of the Land Registration Act provides that: '**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.'**

Further Section 26(1) of the Land Registration Act provides that: '**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..... and the title of the proprietor shall not be subject to challenge.'**

In the case of **Dr. Joseph N. K. Arap Ng'ok Vs Justice Moiwo Ole Keiwua & 4 others CA Nai 60 of 1997**, the Honourable Judges held as follows: '**Section 23(1) of the Act 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 bestowed upon the title holder under the Act. It is out 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.'**

I find that the Plaintiff having been registered as proprietor of land parcel number Loitokitok/ Olkaria/ 334 and have been issued with a title deed to that effect is entitled to the protection of the law'.

In relying on the above provisions and this authority, I find that the above cited legal provisions in the repealed Registered Land Act and Land Registration Act empower the Plaintiff by virtue of being the registered owner of the suit land with vested rights and privileges therein and which no person including the Defendant should interfere with. I hold that since the Defendant did not prove his claim over the suit land, he should hence be permanently restrained from interfering with the Plaintiff's peaceful and quiet possession of it.

As to whether the Plaintiff is entitled to General Damages and Exemplary Damages

The Plaintiff as PW1 claimed the Defendant trespassed on his land and cut down indigenous trees and cultivated it, which actions have interfered with his peaceful occupation and possession of the said land. He stated that through the defendant's instigation he was charged with a criminal offence as regards the suit land but later acquitted. His averments were not controverted by the Defendant. PW1 however did not adduce evidence on the loss he had incurred as a result of the Defendant's acts of trespass.

In the case of **Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013) eKLR** where **P. Nyamweya J.** held that:-

**"...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"**

In so far as the Plaintiff did not provide evidence on the loss he had incurred due the Defendant's acts of trespass but in relying on the above case, I find the Plaintiff indeed suffered damages as a result of the Defendant's acts of trespass. I will proceed and award him Kshs. 100,000/= as general damages.

On the issue as to the whether the Plaintiff is entitled to an award of exemplary damages as a result of the actions of the Defendant, I wish to interrogate the evidence presented. I note the Defendant trespassed on the Plaintiff's land and conducted wanton destruction thereon.

In the case of **Titus Gatitu Njau v Municipal Council of Eldoret [2015] eKLR**, Justice Sila Munyao held as follows: 'In my view, this is a fit case for the award of exemplary damages. In the case of **Rookes v Barnard (1964) 1 All ER 367**, it was held that exemplary damages may be awarded in two classes of cases; first where there is oppressive, arbitrary or unconstitutional action by the servants of the government, and secondly, where the defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. **Rookes v Barnard**, received the stamp of approval of the East African Court of Appeal in the case of **Obongo v Kisumu Council (1971) EA 91**. In the matter, Spry V.P stated as follows at page 95 :- "I am therefore of the opinion that this court should regard **Rookes v Barnard** as authoritatively settling out the law of England as to exemplary damages in tort, which law was applied in Kenya by the Judicature Act, 1967." Apart from the case of **Obongo v Kisumu Council**, the case of **Rookes v Barnard** has been applied in Kenya in various decisions. These include the cases of **C A M v Royal Media Services Limited [2013] eKLR**, C.A at Nairobi Civil Appeal No. Civil Appeal No. 283 of 2005, **Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR**, Court of Appeal at Kisumu Civil Appeal No. 84 of 2009; and, **Abdulhamid Ebrahim Ahmed Vs Municipal Council Of Mombasa [2004] eKLR**, High Court at Mombasa, Civil Suit No. 290 of 2000. The basis for awarding exemplary damages is to punish the defendant for its conduct. A wrong doer must not be allowed to benefit from his conduct. If this were not so, a wrongdoer could chose to commit a wrong, being alive to the reality that taking into consideration the amount to be awarded in damages, he would still be better off if he proceeds to commit the wrong. Exemplary damages are at the discretion of the court and the amount to be awarded must depend on the surrounding circumstances of each case. In our case, the defendant flagrantly disobeyed an order stopping them from demolishing a building.'

Based on the evidence presented and being persuaded by the Case above, I find that the Plaintiff is indeed entitled to exemplary damages as against the Defendant that trespassed on his land and made him be charged with a criminal offence, which he was subsequently acquitted from. The Plaintiff has demonstrated that he had not been able to freely enjoy his land. It is against the foregoing that I proceed to award the Plaintiff exemplary damages amounting to Kshs. 100,000/=.

### **COSTS**

Costs generally follow the event, and in this instant case, since the Plaintiff has been inconvenienced, I find that he is entitled to costs and will award him the costs of this suit.

It is against the foregoing that I find that the Plaintiff has proved his case on a balance of probability and will proceed to make the following orders:

- a) That judgement is hereby entered for the Plaintiff against the defendant in the sum of Kshs. 200,000/= comprising of Kshs. 100,000/= as general damages for trespass; and Kshs. 100,000 as exemplary damages.
- b) A permanent injunction be and is hereby issued restraining the Defendant by either himself, his agents and or servants from harassing, threatening, intimidating, trespassing upon, demolition and or in any manner whatsoever interfering with the Plaintiff's land known as title number Loitokitok/ Olkaria/ 334.
- c) The Defendant be and is hereby directed to grant vacant possession of land parcel number Loitokitok/ Olkaria/ 334 to the Plaintiff.
- d) The Officer Commanding Station (OCS), Loitokitok Police Station be and is hereby directed to supervise the execution of the eviction order against the Defendant after 90 days from the date hereof.
- e) The Costs of the suit is awarded to the Plaintiff

**Dated signed and delivered in open court at Kajiado this 11<sup>th</sup> day of March, 2019**

**CHRISTINE OCHIENG**

**JUDGE**