



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 59 OF 2017**

**(Formerly Machakos ELC Case No. 244 of 2010)**

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

**VERSUS**

**RUTH NGONYO KANGETHE.....DEFENDANT**

**JUDGEMENT**

By a Plaint dated the 5<sup>th</sup> November, 2010, and filed on 16<sup>th</sup> November, 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) General damages and exemplary damages for trespass.
- c) Costs of this suit.
- d) Interest on ( c) and (d) above at Court rates

The Defendant filed a Defence on 3<sup>rd</sup> February, 2011 where she denied all the allegations in the Plaint except for the descriptive section, receipt of demand notice and court's jurisdiction. The Defendant did not dispute the Plaintiff contended that she is entitled to 12 acres out of land parcel number Loitokitok/ Olkaria/ 334 hereinafter referred to as the 'suit land.'. She states that her late husband Kangethe Murihia purchased 12 acres out of the suit land in 1984 and she has been in possession of the same since then. She explains that since 1984, she has established a home had has been tilling and cultivated the land as the rightful owner without any interruption or interference from anybody including the Plaintiff until November, 2010 when he started interfering with her possession. She states that in 2005, consent was given by the Land Control Board for subdivision of the suit land for purpose of transferring the Defendant and other purchasers their respective shares but the Plaintiff refused to transfer such shared. The Defendant reiterates that she has been in rightful possession and use of the distinct 12 acres being part of the suit land and denied the particulars of trespass contained in the Plaint. She denied the particulars of damages. She avers that she is entitled to ownership by way of adverse possession.

The Plaintiff filed a Reply to Defence and denied that the Defendant's deceased husband Kangethe Murihia purchased 12 acres out of the suit land or any portion thereof in 1984. He insists that the Defendant has never lived on the suit land nor established a home or cultivated it. He reiterated that the Defendant commenced interfering with the suit land from 2005 and denies that she has been in uninterrupted possession and occupation since 1984 and is entitled to ownership by adverse possession.

The matter however proceeded ex parte as the Defendant's Counsel failed to attend Court for the hearing despite being duly served as evident in the affidavit of service dated the 10<sup>th</sup> September, 2018. The Plaintiff only called one witness.

**Evidence of the Plaintiff**

The Plaintiff is the registered proprietor of land parcel number Loitokitok / Ol Karia / 334 measuring 281. 92 hectares hereinafter referred to as the 'suit land'. In the year 2005, the Defendant without consent from the Plaintiff commenced trespassing on the suit land claiming under the guise that her husband KANGETHE MURIIHIA had purchased six (6) acres out of the suit land from the Plaintiff. The Defendant does not reside on the suit land but has committed acts of waste by felling indigenous trees; burning charcoal and cultivating thereon. As a result of the intermittent acts of trespass by the Defendant, the Plaintiff has suffered damage.

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 her agents/servants should be permanently restrained from interfering with the Plaintiff's enjoyment and quiet possession of 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 various acts of destruction thereon.

It is not in dispute that the Plaintiff is the registered proprietor of land parcel number Loitokitok / Ol Karia / 334 as confirmed in the Statement of Defence as well as the copy of the title deed produced by PW1 as an exhibit in Court. It is the Plaintiff's contention that the Defendant has trespassed on his land and committed wanton acts of destruction by cutting indigenous trees, burning charcoal and cultivating thereon. The burden of proof was upon her to ensure she proves the averments she has pleaded in her statement of Defence. Insofar as the Defendant denied trespassing on the Plaintiff's land through her Defence, she never testified in Court to prove the same and it is against the foregoing that I find she 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 has not controverted the evidence of the Plaintiff regarding her acts of trespass on the suit land by cultivating the land and cutting down of indigenous trees. Since I have already made a finding above that, the Plaintiff is the absolute proprietor of the suit land and that the Defendant has trespassed thereon without the Plaintiff's consent; I note the suit land was registered under the Registered Land Act, which is now repealed, but will make reference to various provisions therein.

Section 27 (a) of the Registered Land Act 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: '**Subject to the Act, 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 is indeed entitled to 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. It is my considered view that since the Defendant failed to attend court to prove her claim against the Plaintiff, over the suit land, she should 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 her land in the middle, which actions have interfered with his peaceful occupation and possession of the suit land. 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 failed to adduce evidence on the loss he had incurred due the Defendant's acts 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 the Plaintiff 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 note the Defendant trespassed on the Plaintiff's land by cultivating it and as well as cutting down trees.

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 opine that the Plaintiff is indeed entitled to exemplary damages as against the Defendant who trespassed on his land. The Plaintiff has 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

In the current scenario, I find the Plaintiff has been inconvenienced by the Defendant's actions and will proceed to award him costs.

In the circumstances, 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 herself, her servants, agents, or otherwise howsoever from entering into the suit land, cutting down trees, burning charcoal, cultivating, interfering with the with the Plaintiff's right of occupation, possession and or use of title number Loitokitok/ Olkaria/ 334 or any part thereof.
- c) 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**