



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE NO. 346 OF 2015

BENJAMIN KIPKULEI.....PLAINTIFF

VERSUS

SHADRACK KAMAAMIA.....1ST DEFENDANT

ALFRED KAMAAMIA.....2ND DEFENDANT

SIMON KILELE.....3RD DEFENDANT

MORINGASO KAMOIRO.....4TH DEFENDANT

SANAET KAMOIRO.....5TH DEFENDANT

JOSEPH NAIMODO.....6TH DEFENDANT

NGAPOE LETURA.....7TH DEFENDANT

PAPIYO PAREIYO.....8TH DEFENDANT

JUDGMENT

1. By plaint dated 3rd December 2015 and filed in court on the same date, plaintiff averred that he is the registered proprietor of land known as Title Number 79256 I.R. No. 79244/5 measuring 186.7 hectares and situated within Naivasha Sub-County (hereinafter the suit property). He further averred that he planted wheat crop on the suit property in November 2015 but the defendants and their agents and servants trespassed on it and planted bean crop on top of his wheat crop. He therefore sought judgment against the defendants jointly and severally as follows:

a) An eviction order be issued to remove the defendants by themselves, their agents and servants from the plaintiff's parcel of land known as Title Number 79256 I.R. No. 79244/5 to be executed through a court bailiff with the help of the O.C.P.D Naivasha Division and O.C.S Kongoni Police Station.

b) A permanent order of injunction restraining the defendants by themselves, their agents, their servants and all other persons acting under them from entering, remaining [sic] or dealing with or in any way interfering with the plaintiff's parcel of land known as Title Number 79256 I.R. No. 79244/5.

c) Costs of this suit inclusive of costs of the eviction exercise be borne by the defendants.

2. Upon being served with summons the defendants entered appearance on 23rd December 2015 but did not file any Statement of Defence. They later filed Notice of Motion dated 13th February 2018, seeking among others an order for enlargement of time within which to file defence. For reasons stated in this court's ruling dated 30th April 2019, the application was dismissed. Parties had been informed that in such an eventuality, the court would proceed to deliver judgment immediately.

3. The plaintiff testified as the sole witness in support of his case. He told the court that he bought the parcel of land known as LR 79244/5 I.R 79256 measuring 186.7 hectares located in Naivasha (the suit property) from Chemusian Co. Ltd. He became the registered proprietor on

8th December 2014. He produced a copy of the Certificate of Title as Plaintiff Exb. 1. He conducted a search on the property on 1st December 2015 at the Lands Registry and was issued with a certified copy of the search which he produced as Plaintiff Exb. 2. He added that there is no encumbrance registered against the title.

4. The plaintiff further testified that the defendants are his neighbours at the suit property and that there is a seasonal river separating the suit property from the defendants' properties. They were good neighbours until late 2015. In November of that year, after he had planted a crop of wheat on the suit property, the defendants came to the property and chased away his worker. They were armed with traditional weapons. They then planted maize and beans inside his wheat crop which was germinating. He added that he does not plant beans and that he did not permit the defendants to plant the beans on the property. The defendants were joined by a much bigger number of people. He produced photos which he stated showed the bean crops amidst the wheat crops as Plaintiff Exb. 3(a) and 3(b). He added that owing to the defendants' conduct, his wheat crop was totally destroyed that year. He therefore urged the court to award him damages.

5. The plaintiff added that the defendants have their own land and therefore had no good reason to invade the suit property. He requested the defendants to leave the land but they were hostile. They claimed that the land was their ancestral land and that they could not therefore move out.

6. At the conclusion of the plaintiff's evidence in chief, Mr Musembi who was then holding brief for Mr Kamwaro for the defendants sought an adjournment. Counsel for the plaintiff strenuously opposed the application. Another adjournment had been sought earlier that morning by the 1st defendant in person and the application was dismissed. For reasons on record, the court allowed Mr Musembi's application for adjournment and scheduled further hearing for 13th June 2017 so as to give Mr Kamwaro another chance to cross examine the plaintiff and to generally participate in the matter.

7. Come 13th June 2017, Ms Moenga held brief for Mr Kamwaro and sought another adjournment. Once again counsel for the plaintiff opposed the application. The application was dismissed and Ms Moenga walked out of the courtroom. There being no one to cross examine the plaintiff or to move the defendants' case, the plaintiff's case and the defence case were closed. Parties then filed and exchanged submissions.

8. For the plaintiff it is argued in the submissions that the defendants having failed to file any statement of defence or even any compliance documents as is contemplated by **Order 11** of the **Civil Procedure Rules** and the defendants having failed to cross examine the plaintiff, the plaintiff's claim is neither denied nor controverted. It is further argued that the plaintiff established through certificate of title produced in court that he is the registered proprietor of the suit property. As such, his rights are protected by the provisions of **sections 24(a), 25(1), and 26(1)** of the **Land Registration Act 2012** as well as **Article 40 of the Constitution of Kenya**. The plaintiff therefore urged the court to enter judgment in his favour as sought in the plaint.

9. On the other hand, it is argued on behalf of the defendants that since they have denied trespassing on the suit property, it was necessary to carry out a survey to establish if there was trespass; that the plaintiff had not adduced any evidence to show that the crops planted by the defendants are on the suit property; that the dispute before the court is essentially a boundary dispute and that the court has no jurisdiction to deal with boundary disputes. The defendants therefore urged the court to dismiss the suit with costs.

10. I have anxiously considered the plaint, the evidence and the submissions in this matter. From the onset, I remind myself that issues for determination arise from the pleadings. A party who wishes the court to determine a matter in a certain way must place that position before the court by way of his pleadings.

11. The Malawian Supreme Court of Appeal in **Malawi Railways Ltd vs. Nyasulu [1998] MWSC 3** quoted with approval from an article by Sir Jack Jacob titled "The Present Importance of Pleadings" published in [1960] *Current Legal problems*, at P174 where the author stated;

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...."

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

12. Closer home and more recently in **James K. Kamau v Nairobi City Council [2018] eKLR**, the appellant argued that the trial court failed to take into account certain sums which he had enumerated in his submissions. The Court of Appeal stated:

... a party is bound by their pleadings, and that the issues for determination by the court arise from the pleadings. A court is not entitled to determine issues that have not been placed before it for determination.

The submissions were filed after the close of the proceedings, and did not form part of the appellant's case. The learned judge was under no obligation to independently interrogate the submissions in order to award the sums indicated as additional claims.

The sums therein were neither pleaded, nor canvassed during the proceedings. No evidence was led in their support, and the respondent would not have an opportunity to rebut such claims. We consider the sums claimed in the submissions to have been an afterthought, and the court was under no obligation to deliberate upon or make any determination upon them. They were matters that the court rightly disregarded.

13. As previously noted, the defendants herein neither filed Statement of Defence nor pre-trial documents. They did not adduce any evidence to challenge the plaintiff's case. Whereas they have argued in their submissions that the dispute herein is a boundary dispute as opposed to a case of trespass, they filed no pleadings to put such a case before the court for determination. They equally did not adduce evidence to support such a position. In the circumstances, I disregard the defendants' submissions on the alleged boundary dispute.

14. Three issues arise for determination: firstly, whether the plaintiff is the registered proprietor of the suit property; secondly, whether the defendants trespassed on the suit property and planted bean crop on top of the plaintiff's wheat crop; and lastly, what reliefs should issue.

15. The plaintiff produced a certificate of title as well as certificate of search both of which show that he is the registered proprietor of the suit property. Pursuant to Section 26(1) of the **Land Registration Act 2012**, the certificate of title is to be held as conclusive evidence of proprietorship. I am therefore persuaded that the plaintiff is the registered proprietor of the suit property.

16. As a registered proprietor, the plaintiff is entitled to the full benefits conferred by **Section 25** of the **Land Registration Act** which provides as follows:

25. Rights of a proprietor

(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.....

17. The plaintiff also adduced uncontroverted evidence that he planted wheat crop on the suit property in November 2015 but the defendants and their agents and servants trespassed on the suit property and planted bean crop on top of his wheat crop. He further stated that the defendants have refused to vacate the suit property. In the absence of any denial and evidence to the contrary, I find that the plaintiff has proven that the defendants indeed trespassed on the suit property and planted bean crop on top of the plaintiff's wheat crop.

18. In these circumstances, what relief should issue? The plaintiff has sought an order that the defendants, their agents and servants be evicted from the suit property. He has also sought a permanent injunction to restrain the defendants, their agents and servants from returning to the suit property once evicted, from remaining on it or interfering with it. As a registered proprietor who is faced with trespassers, he is perfectly entitled to such orders.

19. In the end, I make the following orders:

a) I order the defendants by themselves, their agents and servants to vacate the parcel of land known as Title Number 79256 I.R. No. 79244/5 within thirty (30) days from the date of delivery of this judgment.

b) In default, the defendants, their agents and servants be evicted from the said property. The eviction to be done by this court's bailiff in accordance with the provisions of section 152G (1) (d) to (h) of the Land Act, 2012. The O.C.P.D Naivasha Division and O.C.S Kongoni Police Station to provide security during the eviction.

c) I grant a permanent injunction restraining the defendants by themselves, their agents and their servants from entering or dealing with or in any way interfering with the parcel of land known as Title Number 79256 I.R. No. 79244/5.

d) Costs of this suit shall be borne by the defendants.

20. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 30th day of April 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Mr J M Kariuki holding brief for Mr Karanja Mbugua for the plaintiff

No appearance for the defendants

Court Assistants: Beatrice & Lotkomo