



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 264 OF 2017**

**(FORMELY NAIROBI ELC CASE NO. 394 OF 2008)**

**JOHN CHUMIA NGANGA.....PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**JOMO KENYATTA UNIVERSITY OF**

**AGRICULTURE AND TECHNOLOGY.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By an **Amended Plaint** dated 17<sup>th</sup> February 2010, the Plaintiff herein sought for the following orders as against the Defendant:-

- a) A declaration that the Defendant has by its acts of fencing complained of herein, unlawfully encroached and trespassed onto the Plaintiff's plot in LR.No.21096/115 (I.R No.75511/ 1)Thika District and thereby committed acts of private nuisance thereon and/ or converted the same.***
- b) A mandatory injunction to compel the Defendant by itself, its agents/servants/employees to pull down, uproot or otherwise remove the fencing barrier unlawfully erected and being on the Plaintiff's plot of LR.No.21096/115 (I.R No.75511/1 and cede vacant possession of such part of the said plot as has been encroached upon and alienated vide the said fencing off/nuisance.***
- c) A permanent injunction to restrain the Defendant by itself, its agents/servants/employees/students from trespassing onto and/ or converting the Plaintiff's property in LR.No.21096/115 (I.R No.75511/1)Thika District.***
- d) (i) General and Exemplary damages for trespass to and/or conversion of property, and nuisance.***  
***(ii) Special Damages of Kshs.35,000.00/=***
- e) Mesne profits effective from March 2008 until the date of vacant possession and/or abatement of nuisance.***
- f) Costs and interest.***

In his **Statement of Claim** the Plaintiff averred that he was the registered owner as Grantee from the President for a terms of **99 years** of the suit property measuring **0.0257**, and it is bordered to the East by a 35 metre public access road and its existence pre dates the construction of the Defendant's main campus but it currently serves as the main road leading to the Defendant's Headquarters.

Around **March 2008**, the Defendant unlawfully entered into and encroached onto the suit property and hived off and fenced **10 metres** purporting it to be part of the **35 metre** public access road leading to the Defendant university premises. He averred that the unlawful acts constitute trespass to property in addition to being a private nuisance.

The Plaintiff particularized the acts of trespass, forcible entry and/or conversion and nuisance by the defendant as; entering the suit property, taking dimensions, digging up trenches and holes thereon planting trees and natural hedge and installing barbed wire, Ignoring visible presence and location of beacons and imposing arbitrary boundary marks on the suit property, reducing the length of the suit property, Irregularly tampering with the Physical dimensions of the suit property and occupying the alienated portion to the exclusion of the Plaintiff, the Defendant ought to have known it was grabbing the his private land, refusing to consult him beforehand despite possession of the requisite resurveyed plans, registry maps or deed plans, Having no right to fence off a public access road hence denying him of statutorily

overriding easements and rights appurtenant to the suit property, failing to seek approval from the Commissioner of lands and Director of Survey for its unlawful acts.

He averred that due to the above acts and /or omission by the Defendant, he has been dispossessed of his lawful acquired property and has suffered unnecessary loss and damage of his utility of his land and profits thereto. He alleged that unless the defendant is restrained, it intends to further its harmful and unlawful acts. He further particularized Special Damages as costs of recent resurvey and re verification at **Kshs.35,000/=**.

The suit is opposed and the Defendant filed its statement of defence dated **30<sup>th</sup> September 2008**, and denied all the allegations made in the Plaint. It further admitted that there exists a **35 meter** wide surveyed access road leading to its land **LR.No.13094**, but denied the Plaintiffs land borders it to the East. It was its contention that even if it encroached on any piece of land, it was done on part of the public access road and for that reason the Plaintiff does not have any locus to bring the suit and it therefore prayed for the dismissal of the suit.

The Plaintiff further filed its Reply to the defence dated **7<sup>th</sup> October 2008**, in which it reiterated the contents of its Plaint and further averred that the encroachment occurred over his registered property.

The suit proceeded by way of **Viva Voce** evidence and the Plaintiff called two witnesses. The Defendant despite being served failed to appear in Court during the hearing dates of this matter and therefore failed to call any witness in support of its case.

### **PLAINTIFFS CASE**

**PW1 - John Chumia Nganga**, the Plaintiff herein adopted his witness statement dated **18<sup>th</sup> April 2011**, and filed on **20<sup>th</sup> April 2011**. It was his testimony that he is the registered proprietor of land parcel **No.21096/115**, the suit property herein and it is located at the entrance of **Jomo Kenyatta University of Agriculture and Technology**. He testified that in **March 2008**, he decided to clear the bushes on his parcel of land but was unable as he was told that the land belonged to the University. The University put up a fence, **10 metres** inside his plot and put up posts and barbed wires. Believing this was encroachment, he wrote a letter to the university dated **3<sup>rd</sup> April 2008**, informing them of the same but they did not comply. His Advocate also wrote a demand letter dated **25<sup>th</sup> April 2008**, but still the University refused to comply. It was his contention that when the University filed a defence and denied encroaching on his land, he involved the District Surveyor who came and prepared a report dated **20<sup>th</sup> July 2009**. The Surveyor prepared the said report and charged the Plaintiff **Kshs.35,000/=**. It was his testimony that he attached a certified Survey map of the area where his plot is and the University have their own parcel of land.

**PW2 - Chris Karanja Macharia**, testified that he is the District Surveyor working in **Thika District Survey office** since **2011**. He testified that from the list of documents there is a **Surveyor's Report** written by **Joseph Muchungu** dated **20<sup>th</sup> July 2009**, who has since been transferred though he is familiar with his signature. It was his evidence that he agrees with the contents of the document as they have a sketch and beacon certificate dated **20<sup>th</sup> July 2009** both signed by **Mr. Muchungu**. He testified that the findings was that there was a fence put up by the Defendant on the Plaintiff's property. Further that there were trees planted 10 metres inside the Plaintiff's property with barbed wire fence and concrete posts and a hedge running along the barbed wire fence. He testified that the Report confirmed the alleged encroachment by the Defendant. He produced the **Surveyor's Report** as exhibit. He also testified that according to their practice, the charge for coming to Court is **Kshs.2,000/=** and preparing the report **Kshs.35,000/=** and he produced the receipts as exhibits. It was his contention that the Plaintiff already paid him on **30<sup>th</sup> March 2011**.

The Plaintiff closed his case on the **27<sup>th</sup> October 2016** and through the **Law Firm of Adera & Co. Advocates**, filed his written submissions on **9<sup>th</sup> July 2018**, and submitted that his evidence has not been contradicted and that he has proved his entitlement for relief sought. He relied on various decided cases amongst them the case of **Park Towers Ltd...Vs... John Mithamo Njika et al (2014) eKLR**, where the Court held that:-

***"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."***

The Plaintiff prayed for damages as follows;

- a) **General Damages for trespass.....Kshs.4,000,000/=**
- b) **Exemplary Damages for Trespass.....Kshs.1,000,000/=**
- c) **General Damages for conversion.....Kshs.1,000,000/=**
- d) **Exemplary Damages for Conversion.....Kshs.1,000,000/=**
- e) **General Damages for private nuisance.....Kshs.1,000,000/=**
- f) **Exemplary Damages for private nuisance...Kshs.1,000,000/=**
- g) **Special Damages(Cost for survey).....Kshs.35,000/=**

**TOTAL**

**Kshs.9,035,000/=**

The Court was therefore urged to allow the Plaintiff's claim and award costs as they ought to follow the event.

The Court has now carefully read and considered the available evidence and the issues for determinations are:-

- i. Who does the disputed portion of land belong to?***
- ii. Whether there was trespass***
- iii. Whether there was nuisance***
- iv. Whether there was conversion***
- v. Whether the Plaintiff is entitled to the reliefs sought***

***i) Who does the disputed portion of land belong to?***

Though the Defendant filed a defence, it did not adduce any evidence in support of its claim and therefore all the averments in their defence remains just mere allegations as averments in pleadings are not evidence. In this instant therefore the Plaintiff's evidence remained uncontroverted. See the case of **Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR, where the Court cited the case of Janet Kaphiphe Ouma & Ano....Vs...Marie Stopes International (Kenya), Kisumu HCC No.68 of 2007,** where the Court held that:-

***“In this matter apart from filing its statement of Defence the defendant did not adduce any evidence in support of assertions made therein . The evidence of the 1<sup>st</sup> Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations....Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same.”***

The Plaintiff testified that he wanted to clear the bush on his land but his workers were chased away as they were told that the suit land belonged to the Defendant. It was his evidence that he wrote to the university notifying them that they had encroached upon his land and further a demand letter by his Advocates to the Defendant also confirmed this. Though the Defendant in their statement of defence pleaded that the suit property was a public way, PW2 the District surveyor produced a report as exhibit that indicated that the portion of land in dispute was part of the Plaintiff's land and therefore the Defendant had encroached onto the Plaintiff's suit land.

***ii) Whether there was trespass***

Trespass has been defined by ***Clerk and Lindsel on Torts, 18<sup>th</sup> edition at Pg.23*** as;

***“any unjustifiable intrusion by one person upon the land in possession.”***

I am satisfied on the material placed before me that the Plaintiff is the registered proprietor of the suit land. The Plaintiff has accused the defendant of encroaching upon his land and putting barbed wire fence and thereof annexing a portion of his land measuring 10 metres. The Defendant having entered onto the Plaintiff's suit land without any lawful or justifiable cause while the Plaintiff was in possession the Defendant was therefore a trespasser.

***iii) Whether there was Nuisance***

In the case of **Nakuru Industries Limited...Vs...S.S Menta & Sons (2016) eKLR,** the Court defined 'Nuisance' as was defined in ***Clerk and Lindsell on Torts at page 1354 para 24-01*** as:-

***“An act or omission which is an interference or with disturbance of or annoyance to a person's rights used or enjoyed in connection with land. It is caused usually when the consequences of persons actions on his land are not confined to the land, but escape to his land causing an encroachment and causing Physical damage or unduly interfering with the neighbours use and enjoyment of his land.”***

It was the Plaintiff's evidence that he wanted to clear the bushes in his portion of land when he was prevented from doing so. Going by the definition of Nuisance and the material placed before this court, it is not in doubt that the Defendant interfered with the Plaintiff's use and occupation of land. This Court therefore finds that there was nuisance caused by the Defendant.

***iv) Whether there was Conversion***

The ***Blacks Law Dictionary 9<sup>th</sup> Edition*** defines 'conversion' as;

***“the act of appropriating the property of another to ones benefit or to the benefit of another”***

In the case of Peter Ndungu...Vs...Ann Waithera Ndungu & 2 Others, the Court stated that;

The issue that then follows for determination is on the question of damages to be awarded to the Plaintiff. In determining this question, I am guided by the passage in Halsbury's Laws of England (*supra*) at Pg 389 Para 616 on the measure of damages. The authors state -

**615. Nominal measure of damages. ... In general, damages in conversion are compensatory, their object being to repair the actual loss which the claimant suffers by reason of the conversion. This conforms to the general rule that damages in tort must (so far as money can do so) put the person whose right has been invaded in the same position as if it had been respected. Accordingly, an award of damages in conversion must operate neither by way of penalty to the Defendant nor by way of windfall to the claimant. In general, there must also be a causal connection between the act of conversion and the loss sustained, and proof of actual loss.**

**616. Conventional measure: value of goods. The conventional measure of damages in conversion is the value of the goods converted together with any consequential loss which is not too remote. That measure normally applies where the conversion takes the form of a wrongful deprivation or misappropriation and the goods are not later returned.**

v) Is the Plaintiff entitled to the Reliefs sought.

The Plaintiff has sought for General and Exemplary Damages for trespass, Nuisance, Conversion, Special Damages and Mesne profits.

As to whether the Plaintiff is entitled to General Damages for trespass. In the case of Park Towers Limited versus John Mithamo Njika & 7 others (2014)eKLR, where the Court held that:-

**“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 awardable depending on the unique facts and circumstances of each case.”**

In the case of Philip Aluchio...Vs...Crispinus Ngayo [2014]eKLR, the Court held as follows:-

**“..... The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less .....**”

**The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass....”**

Having not provided the value of the land before the alleged trespass, the Court proceeds to award a nominal figure of **Kshs.500,000/=** as general damages for trespass.

Further on General Damages for nuisance there must be proof of some damage. There is proof that the Defendant did enter upon the suit land and its actions caused interference with the Plaintiff's use and occupation of the suit land. As stated, the Plaintiff did not provide the value with which the Court is to work with. The Court therefore proceeds to award a figure of **Kshs.100,000/=** considering the length of time that the trespass has occurred.

Exemplary damages should be awarded in two cases. 1<sup>st</sup> in a case of oppressive, arbitrary or unconstitutional action by the servants of government and secondly in cases where the defendants conduct has been calculated by him to make a profit for himself which may as well exceed the compensation payable to the Plaintiff

Halsbury's Laws of England 4<sup>th</sup> Edition Volume 45 para 26 1503 provides as follows on computation of damages in an action for trespass:

- 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 an amount as would reasonably be paid for that use.**
- d) **Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, damages may be awarded.**
- e) **If the trespass is accompanied by aggravating circumstances.**

The Defendant is a public institution and therefore one would automatically think its officers are public officers. In this instant therefore the Court finds that the Plaintiff is entitled to Exemplary damages and awards **Kshs.100,000/=** for Trespass and **Kshs.100,000/=** for nuisance

On the issue of conversion, the Court also having found that the Plaintiff is entitled to the same grant **Kshs.100,000/=** for Trespass and **Kshs.100,000/=** for nuisance.

Mesne profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates. It must be pleaded and proved, however where a party claims for both mesne profits and damages for trespass the Court can only grant one. In this instant as the Court has already granted General Damages, this prayer is therefore declined. See the case of Maina Kabuchwa...Vs...Gachuma Gacheru (2018)eKLR, where the Court held that:-

**“Where a party claims for both mesne profits and damages for trespass, the Court can only grant one.”**

Special Damages must be specifically pleaded and proved. As the Plaintiff pleaded the sum of **Kshs.35,000/=** being the amount paid for the preparation of the report and produced receipts for the same. The Court therefore finds that the Defendant has proved special Damages and an award of **Kshs.35,000/=** is awarded.

Having now carefully considered the available evidence and the exhibits thereto, the written submissions, cited authorities and the relevant provisions of law, the Court finds that the Plaintiff has proved his case on the required standard of balance of probabilities.

For the above reasons the Court enters Judgment for the Plaintiff against the Defendant in terms of **prayer No.(a), (b) and (c)**.

In terms of **prayer No.(d)**, the Court awards the Plaintiff General and Exemplary Damages for trespass and conversion of property and nuisance to the tune of **Kshs.1,000,000/=** and **Kshs.37,000/=** as Special Damages.

In terms of **prayer No.(e)**, no award is granted.

On costs of the suit, since the Plaintiff is the successful litigant, he is awarded costs of the suit and interest thereon from the date of filing the suit to the date of this Judgment.

It is so ordered.

**Dated, Signed and Delivered at Thika this 26<sup>th</sup> of April, 2019.**

**L. GACHERU**

**JUDGE**

**26/4/2019**

In the presence of

Mr. Adera holding brief for Mr. Maweu for Plaintiff

No appearance for Defendant

Lucy - Court Assistant

**Court** – Judgment read in open court in the presence of the above named advocate for the Plaintiff and absence of Defendant and/or its advocate.

**L. GACHERU**

**JUDGE**

**26/4/2019**