



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 94 OF 2017

(Formerly Kisii ELCC No. 230 of 2013)

PHILIP OLALI OCHARO.....PLAINTIFF

VERSUS

WALTER ODHIAMBO OGWADA t/a MAROWA HARDWARE....DEFENDANT

JUDGMENT

1. By a plaint dated 22nd May 2013 and filed on 4th June, 2013, the plaintiff **PHILIP OLALI OCHARO**, through the firm of M/s Oguttu Mboya, Ochwangi, Ochwal and company Advocates formerly M/s Oguttu Mboya and Company Advocates, has sued the defendant, **WALTER ODHIAMBO OGWADA** trading as Marowa Hardware represented by the firm of Bosire Gichana and Company Advocates. He is seeking the following orders:-

- a) Declaration that the plaintiff is the lawful, bona-fide and registered owner of LR NO. 8534/48, (hereinafter referred to as to suit premises).*
- b) Permanent injunction restraining the defendant either by himself, agents, servants and/or anyone claiming under the defendant from entering into re-entering, mixing concrete, hoisting props on, trespassing onto, interfering with and/or in any other manner dealing with the suit premises, that is LR NO. 8534/48 ,whatsoever and/or howsoever.*
- c) Special damages in the sum of Kshs. 2,262,000/= only*
- d) General damages for trespass.*
- e) Interest on (c) and (d) above at court rates.*
- f) Costs of this suit be borne by the defendant*
- g) Such further and/or other relief as the Honourable court may deem fit and expedient so to grant.*

2. The gist of the plaintiff's case as per the plaint is that he is the registered proprietor of the suit premises, situated within Migori Town in Migori County since 4th August 1999 and he is entitled to exclusive rights to the same. That the suit premises adjoins and or shares a common boundary with LR NO. 853/19 which has been converted into lease holded assigned LR NO. MIGORI TOWN/BLOCK I/17 registered in the name of the defendant (otherwise referred to as the defendant's adjoining land).

3. The plaintiff claims that in or about the year 2012, the defendant commenced construction and or development of his adjoining land and caused assorted quantities of building materials in front of the suit premises which are fully developed and rented out to various tenants thereby causing substantial restriction of access to and or out of the suit premises. That on 25th December 2012, the defendant permitted his contractor to use the 1st floor slab of the suit premises for the purposes of mixing concrete and hoisting props to anchor and or propel mixed concrete to the upper floors of the defendant's multi -storey building on the defendant's adjoining land. So, the actions of the defendant and that of his contractor resulted into serious structural damage to the suit premises which thus caused rain water to seep and or percolate into the slab thereby making the premises cold and dump.

4. The plaintiff claims further that due to the structural damages to the slab, the plaintiff's items including chairs, cabinets and other paraphernalia which were housed in the suit premises got damaged. The plaintiff was constrained to instruct a structural and Civil Engineer who carried out structural survey of the suit premises and ascertained the extend of the damage. Thus it precipitated the present suit whereby the plaintiff has pleaded particulars of damages which include damage to the balcony and weakening of the walls and general structure of the suit premises and particulars of special damages at Kshs. 2,262,000/=.

5. In his written statement of defence dated 12th July, 2013, the defendant denied the plaintiffs' claim. He contends that if the alleged defects if at all exists, which is denied, occurred prior to the material period and were occasioned by poor construction of the suit premises and have nothing to do with the defendant and or his contractor. In the alternative, the defendant sought to avail relevant documents including a parallel report to confirm that the report by the plaintiff's engineer is a sham misleading and a deliberate design to enable the plaintiff unlawfully gain from the defendant.

6. The defendant did not contest the plaintiff's ownership of the suit premises which were fully occupied by three (3) different tenants as at the date of filing the suit. He termed the prayers including special damages sought in the plaint, unlawful, unnecessary and a concoction actuated by malice and brought in bad faith. The defendant has sought dismissal of the entire suit with costs.

7. A statement of agreed issues (the plaintiff's version) dated 8th August 2013 was filed on 13th August 2013. It is comprised of fifteen (15) issues which include:-

Whether the plaintiff is the lawful and registered proprietor of the suit premises and whether the plaintiff's case is legally tenable.

8. On 27th April 2016, the plaintiff (PW1) testified in support of his claim at Kisii Environment and Land Court before Mutungi J. He was recalled on 21st July 2016. In his testimony, PW1 relied on the following documents in respect of the suit premises;-

- i. A copy of provisional certificate of title to the suit premises initially registered as I.R.N. 257611 (PEXhibit 1).
- ii. A copy of grant No. I.R.N 2576 of 1st July, 1970 (PEXhibit 2).
- iii. Photographs taken on 28th December 2012 (PEXhibit 3 (1) to (11)).
- iv. A Civil and structural engineer's report dated 11th January 2013 (PEXhibit 4 produced by PW2 herein)
- v. Photographs taken on 20th March 2013 (PEXhibits 5 (a) (b) and (c)).
- vi. Approved building plans (PEXhibit 6).
- vii. A demand letter dated 2nd April 2013 from the Plaintiff's counsel to the defendant (PEXhibit 7).
- viii. Original building plans (PEXhibits 8a and (b)).

9. **PW2, RIANGA HURRON OBUYA**, a registered Civil and structural Engineer of Bunyan Civil and structural Engineering Company Ltd told the court that he visited and inspected the building on the suit premises on 4th January 2013. He made an assessment of the damage to the premises at **Kshs. 2,240,000/=** as per PEXhibit 4.

10. On 16th March 2017 and further to the transfer of this suit from Kisii Environment and Land Court to this court, I ordered that the matter proceed from where it had reached.

11. The defendant (DW1) testified on 12th March 2018 and made reference to a report dated 29th August 2013 by Mr. Oketch Stephen County Quality Surveyor Kisumu (DMFI-1) and accompanying photographs (DMFI-2) (a) to (d). He termed the plaintiff's claim false as the slab of the suit premises had been defective and exposed, hence he can be held liable.

12. Learned counsel for the plaintiff filed submissions dated 19th January 2019 wherein he gave the background of the suit and identified four (4) issues for determination which include whether the plaintiff is the lawful proprietor of the suit premises and whether the defendant and or his agent carried out the alleged offensive activities to entitle the plaintiff to compensation and if so, the quantum thereof. Counsel also referred to PEXhibits 1,2 and 4 and cited **Sections 24,25 and 26 of the Land Registration Act,2016 (2012)** as well as **sections 107 and 108 of the Evidence Act (Cap 80)** to fortify the submissions.

13. In support of the submission, counsel also relied on the case of **Hellen Wangari Wangechi –v- Larumera Muthoni Gathua (2015) eKLR** on the burden of proof as to existence of any particulars fact in a matter and **Selle and another –v- Associated Motor Boat Company Ltd (1968) EA 123 at 128** regarding liability of the employer due to negligence of an agent or independent contractor. Counsel further relied on the case of **Viram t/a Kisumu Beach Resort –v- Phoenix of East Africa Insurance Company Ltd (2004) 2 KLR 269 - 280 and Farah Awad –v- CMC Motors Ltd, Court of appeal at Nyeri, Civil Appeal No. 206 of 2015 (UR)** in respect of a claim for special damages and costs in a suit respectively.

14. Learned counsel for the defendant filed submission dated 26th February 2019 whereby he submitted that the present suit is founded on tort. He sought to reproduce rival evidence including that the plaintiff failed to shed light on the condition of the suit premises before the complaint herein.

15. Counsel submitted that the parties did not consent to the agreed issues and he proposed two (2) issues for determination and analysed them. The twin issues are whether the defendant trespassed into the suit premises as alleged and whether the plaintiff is entitled to the reliefs sought in the plaint. Therefore he summed up that the plaintiff has failed to prove his case on a balance of probabilities as required by law and sought dismissal of the plaintiff's case with costs.

16. I have anxiously considered the entire pleadings, evidence and submission of both parties in this matter. I bear in mind the Court of Appeal decision in **Galaxy Paints Company Ltd –v- Falcon Grounds Ltd (2000) 2EA 385** applied in **Great Lakes Transport Company (U) Ltd –v- Kenya Revenue Authority (2009) KLR 720**, regarding issues for determination in a suit. A also note the statement of agreed issues (plaintiff's version) and the issues in the submissions of counsel for the respective parties. To that extent, the issues for determination herein boil down to whether :-

a) **The plaintiff is the lawful proprietor of the suit premises.**

b) **The defendant trespassed into the suit premises and caused serious structural damages to the premises.**

c) **The plaintiff is entitled to the reliefs sought in his plaint.**

17. On issue number one (1) at paragraph 5 of the plaint the plaintiff stated that he is the lawful proprietor of the suit premises. Additionally, paragraph 2 of the written statement of defence reads:-

“paragraph 5 details the obvious position of ownership”

18. After PW1 was recalled, he testified, inter alia, that he is registered owner of the suit premises and that he purchased the same when the same were already built. PExhibits 1,2,6 and 8 (a) and (b) point to the fact that PW1 is the proprietor of the suit premises. DW1 confirmed in his testimony that PW1 owns the suit premises. So, it is common baseline that PW1 is the lawful proprietor of the suit premises.

19. In respect of issue number two (2), the plaintiff stated at paragraphs 6 to 12 of the plaint that the defendant commenced construction of his (defendant) adjoining land and caused damage to the slab of the suit premises. In his examination in chief, PW1 stated that :-

“The defendant in undertaking the construction was depositing building materials in a manner which was hampering my tenants. As the defendant building was going up, the defendant started using the roof top of the 1st floor of my building. The defendant cut off the steel rods and were using the top of my roof to do mixing of concrete. The building was in November /December 2012. My roof started leaking and my tenants started complaining. “

20. It was further testimony of PW1 that during in his visit to the site on 27/12/2012 and 28/12/12 he found workers of the defendant busy on the top of his (plaintiff) roof and he took PExhibit 3 (1) to (11). He also took PExhibit 5 (a) (b) and (c) at the suit premises on 20/3/2013 in the presence of DW1.

21. PW2 testified that on inspection of the suit premises, he observed remnants of materials comprised of sand, ballast and stones on the 1st floor slab of the suit premises, an indication that work had been going on thereon. That next to the remnants, were wooden blocks leading to the neighbouring building of the defendant which was under construction and the blocks could cause cracks on the slab. That the construction material were being mixed both at the rear of the building and on the 1st floor slab of the premises. He prepared PExhibit 4 which reveals his findings after inspection and evaluation of the suit premises.

22. During cross-examination, PW2 stated, inter alia,

“The frontage balcony was badly damaged at the verge of collapsing. There was a huge crack at the joinery with the column/beam”.

23. According to DW1 at paragraph 7 of his written statement of defence, the alleged defects existed prior to the material period and that the same must have been accessioned by poor construction on the suit premises and have nothing to do with him (DW1) or his contractor. He admitted to having commenced construction of Creadex Hotel on his adjoining land in the year 2012 and that same is completed. He stated that the 1st floor slab of the suit premises is exposed and that he did not touch the slab. However, he told the court that he did not obtain consent of PW1 to do all the activities on the slab of the suit premises. That PExhibit 4 is disputed by DMFI-1 and 2 (a) to (d) which he failed to produce in evidence.

24. Thus, the activities of DW1 on the suit premises amounted to trespass thereon. **Clerk and Lindsell o Torts 18th Edition at paragraph 18-01**, defines the term **“Trespass”** as follows:-

“An unjustifiable entry by one person upon the land in possession of another....”

25. Similarly, in the case of **Zacharia Onsongo Momanyi –v- Evans Omurwa Onchagwa (2014) eKLR**, Samson Okongo J, held that trespass is unjustified intrusion of one person upon the land in possession of another. The Honourable Judge also held that the tort of trespass is actionable per se and I approve the position taken by the Honourable Judge thereof.

26. On whether the plaintiff is entitled to the orders of declaration and permanent injunction sought in the plaint, there is no dispute that PW1 is the lawful proprietor of the suit premises and he is entitled to absolute ownership of the same as envisaged under **Sections 24,25 and 26 of the Land Registration Act ,2016 (2012)**. Furthermore, this court is mandated to grant permanent preservation orders including permanent injunctions as provided for under **Section 13 (7) (a) of the Environment and Land Court At, 2015, (2012)**. The plaintiff is entitled to the said orders in the obtaining circumstances.

27. With regard to general damages for trespass, PW1 has established that DW1 trespassed into the suit premises by carrying out activities on

his 1st floor of the suit premises. PW2 has presented the costs of restoration of the damaged premises by way of PExhibit 4.

28. In the case of **Philip Aluchio –v- Crispinus Ngayo (2014) eKLR**, E. Obaga J in awarding a nominal figure of **Kshs. 100,000/=** being general damages for trespass held, inter alia,

“The plaintiff is entitled to general damage for trespass. The issue is as to what is the measure of such damage. It has been held that 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 which ever is less.....the state of the property before and after the trespass” (Emphasis added)

29. In respect of the claim for general damages for trespass, all the plaintiff is entitled to is some modest amount to place him in the same situation as if his damaged 1st floor slab of the suit premises were intact prior to the material period. In my considered view, I think an amount of **Kshs. 70,000/=** general damages would be appropriate in the circumstances of the case and I award the amount to the plaintiff accordingly.

30. Regarding a claim for special damages, the plaintiff pleaded particulars of same at paragraph 12 of his plaint. I am guided by the decision in **Ouma –v- Nairobi City Council (1976)- 80) 375** where Chesoni J (as he then was) held that special damages must be specifically pleaded and proved at trial with certainty and particularity.

31. The particulars of special damages at **Kshs. 2,262,000/=** inclusive of structural Civil Engineer fees of **Kshs. 22,000/=** are set out in the plaint. The said amount is shown in PExhibit 4. However, during trial PW2 stated that :-

“I was paid for my professional services at kshs. 20,000/=.”

32. Quite plainly, PW2 rendered his professional services as shown on PExhibit 4. He stated that he charged structural and Civil engineer’s fees of **Kshs. 20,000/=** thereof. Therefore the plaintiff has proved the same amount and not **Kshs. 22,000/=** as pleaded in the plaint.

33. PExhibit 4 was prepared and signed by PW2. It is an expert opinion under **section 48 of the Evidence Act (Cap 80 Laws of Kenya)** and the court is at liberty to accept or reject it depending on the facts and circumstances of the case before it; see **Amosam Builders Developers Ltd –v- Gachie and 2 others (2009) KLR 628**. I have reviewed and considered PExhibit 4 and in light of the evidence of PW2, I see no basis for interfering with the same. So, whereas special damages were specifically pleaded at paragraph 12 of the plaint in the sum of **Kshs. 2,262,000/=** the same were only proved at the trial by the evidence of PW1 and PW2 at **Kshs. 2,260,000/=** to which the plaintiff is entitled against the defendant.

34. In the premises, I find that the plaintiff has established his claim against the defendant on a balance of probability. The defendant’s case fails.

35. Wherefore, I enter judgment for the plaintiff against the defendant in the following terms:-

- a) Declaration and permanent injunction reliefs as sought in the plaint dated 22nd May 2013.
- b) Special damages in the sum of **Kshs. 2,260,000/=** only.
- c) General damages for trespass in the sum of **Kshs. 70,000/=** only.
- d) Costs of the suit by dint of the proviso to **Section 27 (1) of the Civil Procedure Act (Cap 21 Laws of Kenya)**.

DELIVERED, DATED and SIGNED at MIGORI this 8th day of APRIL 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Mr. David Adawo learned counsel instructed by M/s Oguttu, Ochwangi, Ochwal and Co. Advocates for the plaintiff.

Tom Maurice – Court Assistant.