



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT EMBU**

**E.L.C. CASE NO. 95 OF 2014**

**(FORMERLY HCCC NO. 123 OF 2012)**

**JAMES MWANGI GATUNDU.....PLAINTIFF**

**VERSUS**

**MASTERMIND TOBACCO (K) LIMITED.....DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 13<sup>th</sup> February 2006 the Plaintiff sought the following reliefs against the Defendant;

*a. Orders of permanent injunction against the Defendant either by themselves, their agents, servants or persons acting under them, restraining from interfering, invading, intruding, alienating wasting, trespassing or in any way dealing with the plaintiff's land parcel No. Nthawa/Riandu/1029. (sic)*

*b. Orders of eviction against the Defendant.*

*c. Special and general damages for loss of user for the plaintiff's parcel of land No. Nthawa/Riandu/1029 for a period of 10 years as set out in the paragraph 6 of the plaint mesne profits and aggravated damages. (sic)*

*d. Costs and interest of the suit.*

2. The plaintiff pleaded that at all material times he was the registered proprietor of *Title No. Nthawa/Riandu/1029* (hereinafter the *suit property*) measuring about 13.85 acres. It was further pleaded that on or about 24<sup>th</sup> February 1994 the Defendant unlawfully and without any justifiable excuse invaded and trespassed upon the suit property and established thereon a tree nursery project.

3. The Plaintiff further pleaded that he intended to utilize the suit property for banana production for sale which project could not be undertaken due to the Defendant's alleged invasion and trespass. He pleaded that he had thereby suffered loss of user and mental torture and anguish in respect whereof he sought Kshs.12,628,000/- as special damages for loss of user and loss of indigenous trees as particularized in paragraph 6 of the plaint.

4. By a defence dated 19<sup>th</sup> April 2006 and amended on 30<sup>th</sup> September 2013 the Defendant denied the Plaintiff's claim in its entirety. The Defendant pleaded that it was a stranger to the Defendant's alleged registration as proprietor of the suit property. The alleged invasion, trespass and particulars of loss of user were also denied and the Plaintiff put to strict proof thereof.

5. The Defendant further pleaded that pursuant to a tenancy agreement between itself and one Alexander Nyaga Mwake who represented himself as owner of the suit property, the Defendant leased and occupied 0.4 Ha of the suit property for a period of five (5) years between 1<sup>st</sup> July 2004 and 30<sup>th</sup> June 2009 at a monthly rent of 4,500/-. It was further pleaded that the Defendant duly vacated the suit property upon expiry of the tenancy agreement on 30<sup>th</sup> June 2009.

6. At the trial hereof the Plaintiff called two witnesses and closed his case. The Plaintiff adopted his witness statement dated 20<sup>th</sup> July 2018 as his sworn testimony. His case was that he acquired the suit property in 1993 and that he intended to use it for commercial production of bananas for sale. His evidence followed the script of his pleading dated 13<sup>th</sup> February 2006. During cross-examination by the Defendant's advocate, he stated that he did not give any notice to the Defendant to vacate the suit property at any time. The Plaintiff's witness who testified as PW1 was an agricultural officer who prepared the report in support of the claim for special damages.

7. The Defendant's sole witness was Henry Kamau Chege (DW1) who described himself as the Defendant's Area Leaf Growing Manager based at Muchonoke in Embu County. He adopted his witness statement dated 19<sup>th</sup> November 2018 as his sworn testimony. His evidence simply followed the script of the amended defence. His evidence was to the effect that the Defendant was not aware that the Plaintiff was the owner of the suit property and that the Defendant made a tenancy agreement with Alexander who held out himself as the owner thereof. It was his evidence that it was the tradition of the Defendant to lease only one (1) acre of land near a river for the purpose of seedling production and that it was impossible to occupy the entire suit property of 13.85 acres.

8. When the hearing was conducted on 19<sup>th</sup> November 2018 the Plaintiff was granted 30 days within which to file and serve his written submissions. The Defendant was also granted 30 days to file and serve its submissions upon the lapse of the period granted to the Plaintiff. The record shows that the Plaintiff filed his submissions on 25<sup>th</sup> January 2019 whereas there is no indication of the Defendant having filed any by the time of preparation of the judgement.

9. The court has considered the pleadings, the oral evidence of the parties and the documentary evidence tendered by and on behalf of the parties. The court has noted that the parties did not file an agreed statement of issues for determination. Under the provisions of **Order 15 Rule 2 of the Civil Procedure Rules**, the court can frame issues from any of the following;

- a. Allegations made on oath by or on behalf of the parties.
- b. The pleadings.
- c. The contents of documents produced by either party.

10. Bearing the above provisions in mind, the court is of the opinion that the following issues arise for determination in this suit;

- a. Whether the Plaintiff was at all material times the registered proprietor of the suit property.
- b. Whether the Defendant without lawful justification or excuse invaded and occupied the suit property, and if so, for how long.
- c. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
- d. Who shall bear the costs of the suit.

11. The court has considered the evidence on record on the first issue. Although the Plaintiff submitted that it was never contested that he was the owner of the suit property, the amended defence on record states otherwise. The Defendant pleaded in paragraph 3 of both the original and amended defences that it did not admit the Plaintiff's ownership and put him to strict proof thereof. The court, therefore, considers the question of ownership of the suit property to be a legitimate issue for determination herein.

12. The court has considered the Plaintiff's list of documents dated 20<sup>th</sup> July 2017. It contains copies of the documents which the Plaintiff relied upon at the trial. The relevant document for the purpose of proving ownership of the suit property is a copy of the green card for the suit property. An examination of the said card indicates that it contains only four entries, that is, from No.1 – No.4 none of which indicate that the Plaintiff is the registered proprietor of the suit property.

13. It may be the case that there could be further entries in the land register and that the one in the court file is incomplete. However, it was the duty of the Plaintiff to tender a complete copy of the land register. As of now, there is no evidence on record to demonstrate the plaintiff's ownership of the suit property. The first issue is consequently answered in the negative.

14. The second issue is whether the Defendant trespassed into the suit property and, if so, for how long. The court is of the view that the tort of trespass to land involves some form of unlawful interference with one's proprietary rights. A plaintiff must demonstrate some violation of his proprietary rights such as ownership or leasehold rights. As the Plaintiff has failed to demonstrate his pleaded claim of ownership, the court finds that the alleged trespass has not been proved to the required standard.

15. Even if the Plaintiff had succeeded in proving ownership of the suit property, the court would not have found that the trespass lasted for 10 years as pleaded but for a period of 5 years only. There was no credible evidence tendered to demonstrate that the Defendant's occupation was for a period of 10 years or more. There was no evidence of any demand letter(s) having been issued to the Defendant to vacate the suit property or when the first demand was issued. In fact, the Plaintiff conceded during cross-examination that no notice to vacate was ever issued to the Defendant. The court would, therefore, have been inclined to go by the period of the tenancy agreement of five (5) years, that is, the period between 2004 and 2009.

16. The court is further of the view that even if the Plaintiff had demonstrated ownership of the suit property, it would not have found that the Defendant occupied the entire 13.85 acres. The court is satisfied from the copies of the tenancy agreements that the Defendant most probably leased and took possession of only one (1) acre out of the suit property. The monthly rent of Ksh.4,500/- seems quite consistent with a tenancy of one acre as opposed to 13.85 acres. The court also finds the Defendant's explanation for leasing only one acre which is close to the river to be quite reasonable. It would not make sense for a person to lease 13.85 acres of land for the purpose of seedling production if most of the land would be far from the source of water.

17. The third issue is whether the plaintiff is entitled to the reliefs sought in the plaint. The first relief sought is an order of permanent injunction to restrain the Defendant from trespassing upon the suit property. The court is of the view that the Plaintiff is not entitled to the relief for two reasons. First, the Plaintiff has failed to prove his ownership of the suit property. This would apply to all the reliefs sought.

Second, there is no evidence on record to demonstrate that the Defendant has any intention of invading, occupying or dealing with the suit property. On the contrary, the evidence on record demonstrates that the Defendant vacated in 2009 and has never interfered with the suit property since then.

18. The second relief is an order of eviction. It is clear from the evidence at the trial that the Defendant vacated the suit property on or about 30<sup>th</sup> June 2009. Consequently, this relief has been overtaken by events. The court is of the view that the Plaintiff is not entitled to such order. It would be an order made in futility.

19. The third relief is an order for special damages in terms of loss of user for 10 years and destruction of indigenous trees. As indicated before, this claim for special damages must fail for the reason that the plaintiff has failed to demonstrate his ownership of the suit property and the alleged trespass by the Defendant.

20. There are other reasons why the court would not have been inclined to award the special damages sought even if the Plaintiff had proved his ownership of the suit property. First, there was no evidence to demonstrate that the Defendant had occupied the entire 13.85 acres comprised in the suit property. There was also no evidence to demonstrate the location of the one (1) acre which the Defendant occupied and how many indigenous trees were destroyed on that portion. Secondly, there was no credible evidence to demonstrate that the Defendant had destroyed the trees in the rest of the suit property which was not required for production of seedlings.

21. Even if the Plaintiff had proved trespass against the Defendant, the court would not have been inclined to award him damages for loss of user even for 5 years for the following reasons. First, the Plaintiff did not take any steps to mitigate his loss. He simply sat back and watched the Defendant occupy part of the suit property for years. He did not issue any demand notice or notice to quit on the basis that he was the owner of the suit property. He waited until nearly the last minute just to file suit and claim millions for loss of user. See **African Highland Produce Ltd Vs John Kisorio (2001) eKLR**.

22. The second reason why the court would not have awarded him damages for loss of user is that the assessment report he produced did not clearly explain how the Plaintiff could not have made a net profit of Kshs.10,269,000/- from the sale of bananas. There was no clear breakdown of the cost of production (e.g. capital and labour), the gross sales, as well as the how the net profit was arrived at. The report simply provided a figure of a net profit of Kshs.10,269,000/-. It was not clear if provision was made for income tax due to the government of Kenya in that figure.

23. In the case of **Chief Land Registrar & 4 Others Vs Nathan Tirop Koech & 4 Others [2018]eKLR** (consolidated with *Civil Appeal No. 58 of 2016 – National Land Commission Vs Nathan Tirop Koech & 3 Others*, the Court of Appeal held, *inter alia*;

**“It is not evident how the judge arrived at the determination that the sums in the Reports were reasonable. The fact that a valuation report is not controverted does not make the report reasonable. A court has a duty to exercise an independent mind and determine if the valuation report is reasonable. The court is to undertake analysis and determine the accuracy, quality and appropriateness of the report, and ascertain relevance of data used, enquiries made and suitability of methods and techniques employed, and finally, the court is to determine whether the analysis, opinions and conclusions in the report are reasonable.”**

24. The third reason why the court would not have been inclined to award the Plaintiff damages for loss of user is that there was no demonstration of the Plaintiff's financial ability to make the investment of commercial production of bananas for export. The cost of production was not identified in the report by the agricultural officer. By the Plaintiff's own admission at the trial, the Defendant vacated the suit property in 2009. By the time of trial in 2018, that is, about 9 years down the line there was no evidence of the Plaintiff having undertaken the project or any other income generating project on the suit property. That is not to say that the Plaintiff could not have recovered damages under a different category such as general damages for trespass.

25. The court has noted from the Plaintiff's written submissions that his advocate sought Kshs.100,000,000/- (Kshs. One hundred million) as damages for loss of user. This submission is grossly at variance with the Plaintiff's own pleading and evidence. His claim for loss of user was specific and in the nature of special damages. The special damages were particularized in paragraph 6 of the plaint in the total sum of Kshs.12,628,000/- only.

26. In case the Plaintiff's advocate intended to refer to general damages as opposed to special damages for loss of user then the sum of Kshs.100 million is not supportable even if the Plaintiff had proved his case for trespass to land. The Plaintiff's advocate relied on Eldoret *ELC case NO. 112 of 2016, National Land Commission Vs The Estate of Sisiwa Arap Malakwen & Another [2017]eKLR*. It would appear that the property in issue was a large tract of land which was valued at 2.85 billion and the award of Kshs.100 million was for loss of user for 36 years. That case is not comparable in the remotest sense to the instant suit.

27. The fourth and final issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event in accordance with **section 27 of the Civil Procedure Act (Cap. 21)**. Consequently, a successful litigant should normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. In the instant suit, the court finds no good reason why the successful litigant should not be awarded the costs of the suit.

28. The upshot of the foregoing is that the court finds that the Plaintiff has failed to prove his claim to the required standard. Accordingly, the Plaintiff's suit is hereby dismissed with costs to the Defendant.

29. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 16<sup>TH</sup> day of MAY 2019.**

In the presence of Mr. Gachuba holding brief for Mr. Momanyi for the Plaintiff and in the absence of the Defendant.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**16.05.19**