



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 475 OF 2013

LUCY NYAMBURA GITONGA.....PLAINTIFF

VERSUS

CELTEL KENYA LIMITED.....1ST DEFENDANT

DIVERSE SUPPLIERS LIMITED.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff filed this suit against the Defendants vide the plaint dated 13/6/2008 seeking a mandatory injunction directing the Defendants jointly and severally to remove at their expense all the advertisements placed and or painted on the perimeter wall surrounding the parcel of land known as Kahawa/Mwana-Mukia/491 and restore it to its original state. She also seeks general damages for trespass, costs of the suit and interest.

2. The gist of the Plaintiff's claim is that she is the registered owner of L.R No. Kahawa/Mwana-Mukia/491 ("Suit Property") which she claims was invaded and trespassed onto by the Defendants. The Plaintiff averred that on diverse dates in March 2016 the Defendants, without her knowledge, consent or permission caused and permitted an advertisement to be painted, inscribed and placed on the entire perimeter wall surrounding the Suit Property. The Plaintiff further averred that the actions of the Defendants jointly and severally are illegal, unlawful and contemptuous to the Plaintiff's legal rights in the Suit Property and that the Defendants have continued the trespass upon the Suit Property and have failed, neglected or refused to remove and restore the perimeter wall surrounding the suit premises to its original state. It was the Plaintiff's contention that the Defendants jointly and severally are continuing to gain financially from the illegal and unlawful advertisement on her property while she gains nothing from it.

3. The 2nd Defendant did not enter appearance. The 1st Defendant in its defence dated 7/10/2008 denied invading and trespassing upon Kahawa/Mwana-Mukia/491 either by itself or its authorised agents and denied permitting an advertisement to be placed on the perimeter wall surrounding the Suit Property. Further, the 1st Defendant denied that the Plaintiff was the registered owner of the Suit Property and averred that even if she were the registered owner, she was not in possession of the Suit Property at the time of the alleged trespass and did not have any right to possession at the material time.

4. The 1st Defendant averred that its agent, who does not include the 2nd Defendant, was under strict instructions to obtain the consent from persons in possession of the Suit Property and that any acts done outside its scope of authority cannot be attributed to the 1st Defendant so as to make it vicariously liable. The 1st Defendant denied paragraphs 5, 6 and 7 of the plaint and averred that its agents had on several occasions attempted to remove the inscriptions complained of but the Plaintiff or through her agents, employees or servants had refused to permit the removal. The 1st Defendant denied that demand and notice of intention to sue was given and prayed that the Plaintiff's suit be dismissed with costs.

5. The Plaintiff filed her reply to the 1st Defendant's defence dated 15/10/2008 in which she reiterated the contents of her plaint. The case was partly heard by the Honourable Lady Justice Khaminwa in 2012.

6. The Plaintiff testified and relied on her witness statement dated 21/12/2011. She stated that she owned plot no. 491 in Githurai and tendered in evidence a copy of the title deed over Ruiru/Kiu Block 1/491. She stated that the property is developed and has residential premises on it. One morning in March 2006, she found her premises painted. When she called the 1st Defendant, she was given the phone number of the 2nd Defendant who claimed that the painting of the wall had been authorised by a female caretaker yet the Plaintiff's caretaker was a man. She instructed her advocate to write a demand letter and was thereafter sent to work in Sudan. Upon her return she filed this suit against the Defendants who had since repainted the wall with new branding. She instructed her advocate to write a protest letter dated 17/8/2010. In 2011 she was surprised to find Airtel advertisements pitched against the wall. She produced copies of the demand letters and a copy of the title in respect of Ruiru/Kiu Block 1/491 together with photographs of the painted wall in her evidence.

7. On cross-examination, the Plaintiff admitted that she did not live on the Suit Property but that there were 22 tenants residing there with

their families and that her caretaker also resided on the Suit Property. She stated that when she called the 1st Defendant she was given the number of an agent of the 2nd Defendant, who wanted to confirm who she was. She stated that she did not show him her title deed as he did not ask for it. She was emphatic that the proposal for the amount to be paid was not for restoration of the suit premises and that that offer was acceptable then, not now. She contended that based on the correspondence exchanged between the parties, the 1st Defendant cannot claim that she refused payment. The Plaintiff also admitted that her premises are on demand and that her tenants did not move out because of the paintings.

8. The Environment and Land Court heard the remainder of the witnesses. The Plaintiff's second witness was her caretaker who adopted his statement dated 21/12/2011. On cross-examination, he stated that one afternoon in 2006 he found five people wearing Celtel overalls painting the wall. He stated that when he asked them who gave them authority they told him that the owner had given them permission. He admitted that none of the tenants had refused to pay rent because of the painted wall and that rent paid by the tenants had gradually gone up since 2001.

9. The 1st Defendant's legal officer testified on its behalf and adopted her witness statement dated 1/9/2018. She produced an advertising agency agreement between Celtel and Z.K Advertising International Limited in evidence. On cross-examination she admitted that the agency agreement was valid up to 31/12/2006. She stated that the 1st Defendant does not dispute the ownership of the land but insists that the Plaintiff was not in possession. She confirmed receipt of the demand letter from the Plaintiff. She stated that the 1st Defendant did not pay the 2nd Defendant because it was not its contractor. She admitted that the branding gave the 1st Defendant visibility but did not know whether it benefited it and to what extent. She stated that the Plaintiff refused the 1st Defendant to rectify the mess.

10. The Court directed the parties to file and exchange written submissions. The Plaintiff submitted that the painting and placement of the 1st Defendant's commercial advertisement was for the benefit of the 1st Defendant and that the 1st Defendant benefited because of the proximity and visibility of the advertisement from Thika Super Highway. The Plaintiff submitted that the illegal and unlawful entry by the 1st Defendant and its agents into the Suit Property infringed on her proprietary rights protected by Sections 24 and 25 of the Land Registration Act.

11. The Plaintiff also submitted that according to clause 1.8 of the agency agreement the 1st Defendant authorised the sub-agency thus its relationship with the agent is the same as that of a sub-agent. She urged that clause 6.1 of the said agreement prohibited any engagement with suppliers or other outside parties without Celtel's authorisation. Further, that the 1st Defendant was the one to pay for the work done by the sub-contractors and further, that the agreement did not disclaim liability for acts of sub-contractors. The Plaintiff also submitted that from the agency agreement, it is clear that the agent was not an independent contractor and that the agent was under the order or control of the 1st Defendant on the manner of execution of the contracted services.

12. The Plaintiff further submitted that the 1st Defendant failed to prove that the Plaintiff is not the owner of the Suit Property and pointed out that the 1st Defendant denied liability yet it also claimed that it attempted to remove the inscriptions but was prevented by the Plaintiff. She also argued that the 1st Defendant did not cite any clause of the agency agreement which exempted it from liability for acts done by sub-contractors.

13. The Plaintiff relied on **Swordheath Properties Ltd v Tabet & others [1979] 1 All ER 240** where the Court of Appeal held *inter alia* that the measure of damages will be the value to the trespasser of the use of the property for the period during which he has trespassed. She also relied on **Drane v Evangelou & Others [1978] 2 All ER 437** where the Court gave an award of £1,000 in damages in a case where the Defendant had unlawfully evicted the Plaintiff and remained in occupation even after an injunction had been issued. The Plaintiff surmised that taking into account the conduct of the 1st Defendant and its agents in trespassing onto her land in 2006 and 2010, the commercial nature of the advertisements and the awards made in the above authorities, a sum of Kshs. 3,000,000/= would be reasonable and fair compensation.

14. The 1st Defendant submitted that the Suit Property was described as L.R Kahawa/Mwana-Mukia/491 yet the Plaintiff did not tender any evidence to prove her ownership of this land and instead produced a copy of the title in respect of Ruiru/Kiu Block 1/491 hence the Plaintiff cannot maintain a claim over property that she has no interest in. The 1st Defendant also relied on *Salmon on the Law of Torts* on the issue that a trespass is actionable only at the suit of him who is in possession of the land and that a landlord cannot sue for a mere trespass to land in occupation of his tenant; such an action can only be brought by the tenant.

15. The 1st Defendant further submitted that the Plaintiff did not suffer any loss or damage and that she did not produce evidence to show how she had suffered. Further, that the tort of trespass is not a delegated tort and since the 1st Defendant had outsourced the branding it was incapable in its individual capacity of trespassing upon the Suit Property.

16. The Plaintiff filed a reply to the 1st Defendant's submissions on a point of law, dated 29/1/2019 in which she submitted that possession does not create a legal right to sue but a title to the property trespassed upon, while relying on the Court of Appeal case of **Civil Appeal no. 181 of 1995 Charles Ogego Ochieng v Geoffrey Okumu** where the Court held *inter alia* that trespass was an injury to a possessory right and therefore the proper plaintiff in an action of trespass to land is the person who has the title to it or is deemed to have been in possession at the time of the trespass.

17. The issue for determination is whether the Plaintiff is entitled to the orders she seeks in the plaint. The Plaintiff averred that she was the owner of Kahawa/Mwana-Mukia/491 on which she claimed that the 1st Defendant had trespassed. She produced a copy of the title over Ruiru/Kiu Block 1/491 in evidence. She did not lead any evidence to show the relationship between these two pieces of land which on the face of it seem to be distinct. The Plaintiff did not also lead evidence to show on which of these two parcels of land the 1st Defendant placed the advertisement which she complains of. One cannot tell merely by looking at the photographs relied on by the Plaintiff whether the advertisement was placed on Kahawa/Mwana-Mukia/491 or Ruiru/Kiu Block 1/491.

18. Having considered the pleadings, the evidence adduced and the submissions made by the parties, the court finds that the Plaintiff has failed to prove her case on a balance of probabilities and dismisses the suit. Each party will bear its own costs.

Dated and delivered at Nairobi this 7th day of May 2019.

K. BOR

JUDGE

In the presence of:-

Ms. Moraa Nyakundi for the Plaintiff

Ms. Mumbi Mwangi holding brief for Mr. Luseno for the 1st Defendant

Mr. V. Owuor – Court Assistant

No appearance for the 2nd Defendant