



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO.318 OF 2017

**ROBERT KIOKO MUTHIANI (Suing as an administrators of the estate of
MUTHIANI MUSOMBA).....PLAINTIFF**

VERSUS

MATHENGE MANOTI.....DEFENDANT

JUDGMENT

1. The Plaintiff herein is the administrator of the estate of Muthiani Musomba (deceased). He also holds in trust for other beneficiaries land parcel number Mbitini/Ngetha/390. He has brought this suit against the Defendant vide the plaint dated 26/7/2017 and filed in court on 27/7/2017. He prays for judgment against the Defendant for ;

- a) An eviction of the Defendant from the subject land.**
- b) General damages for trespass.**
- c) Costs of this suit.**

2. On the 12th August, 2017 the Defendant was served through his wife with summons to enter appearance and to file his defence. He failed to do and consequently on 10th July, 2018 the court directed that the matter do proceed as undefended suit.

3. Hearing of the Plaintiff's case commenced on 19th December, 2018 where he adopted his undated statement filed in court on 27th July, 2017 as his evidence.

4. The contents of the statement are that land parcel number Mbitini/Ngetha/390 is his property which was registered in his name in trust for other beneficiaries in equal shares.

5. That the Defendant has unlawfully trespassed onto the suit property whereby the latter has proceeded to erect a chain link thereby infringing on the Plaintiff's right to quiet enjoyment of the same.

6. The Plaintiff produced a copy of title number Mbitini/Ngetha/390 as well as a copy of certificate of confirmation of grant as PEx Nos. 1 and 2 respectively.

7. The Plaintiff's counsel filed his submissions on 29th February, 2019. The counsel cited Order 2 Rule 11(1) of the Civil Procedure Rules which provides as follows;

“Subject to Subrule (4), any allegation of fact made by party in his pleading shall be deemed to be admitted by the opposing party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 as a denial of it.”

8. The counsel urged the court to make a finding for the Plaintiff.

9. From the uncontroverted evidence on record, there is no doubt that the Plaintiff is indeed the registered owner of land parcel number Mbitini/Ngetha/390. There is also evidence to show that the Defendant has indeed trespassed into the said parcel of land. The above being the case, the issue at hand is, what are the damages that the Plaintiff is entitled to?

10. In Halsbury Laws of England 4th Edition, Vol. 45 at para 26, 1503, it is provided as follows:-

- 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 Plaintiffs' land, the Plaintiff is entitled to receive by way of damages such a sum 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, exemplary damages may be awarded.
- e. If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

11. From the evidence on record, the Plaintiff has proved trespass even though he has not proved actual loss. The Plaintiff has also proved that the Defendant has made use of his (Plaintiff's) land by erecting a chainlink. Given those circumstances, I am of the view that Kshs. 200,000/= would suffice as general damages. And being satisfied that the Plaintiff has satisfied this court that he has a cause of action against the Defendant on a balance of probabilities, I hereby proceed to enter judgement for him and against the Defendant as herein under;

a) An eviction of the Defendant from the subject land. If the Defendant fails to willingly vacate the subject land, the Plaintiff will be at liberty to file an application before this court for his eviction.

b) Kshs. 200,000 being general damages.

c) Costs of the suit

Signed, dated and delivered at **Makueni** this **20th** Day of **June, 2019**.

Mbogo C.G

Judge

In the presence of ;

The Plaintiff and in the absence of his advocates

Ms. C. Nzioka Court Assistant

Mbogo C.G., Judge

20/6/2019