



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MURANG'A
ELC NO.46 OF 2017

PRISHAR WAMBUI KAGUURA.....PLAINTIFF

VS

PETER WAITHAKA KAGUURA.....1ST DEFENDANT

ELIZABETH WANJIRU WAITHAKA.....2ND DEFENDANT

PETER KANINI MUGO.....3RD DEFENDANT

JUDGMENT

1. The Plaintiff claims a proprietorship right over all that parcel of land known as LOC 2/KANDERENDU/1511(suit land), hitherto owned jointly between the Plaintiff, the 1st Defendant and the 2nd Defendant.

2. By a plaint dated 12th November 2014 the Plaintiff sued the 1st, 2nd and 3rd Defendants jointly and severally for the following reliefs;

a. A permanent injunction restraining the 1st and 2nd Defendants by themselves from entering into agreements affecting the land known as LOC 2/KANDERENDU/1511 with third parties without involving the Plaintiff.

b. A permanent injunction restraining the 3rd Defendant himself, his employees, servants or agents barring him from trespassing, disposing, wasting, transferring, alienating, charging, encroaching or in any other manner dealing in or selling the land reference no. LOC 2/KANDERENDU/1511.

c. General damages for trespass be borne by the 3rd Defendant

d. Costs of the suit

e. Interest on a,b c and d above

3. The Plaintiff's case is that she, the 1st and 2nd Defendants are the registered owners of the suit land which is occupied by the 1st and 2nd Defendants in which they practice tea farming while the Plaintiff lives on a different parcel of land. That the 1st Defendant is the Plaintiff's son and the 2nd Defendant is the Plaintiff's daughter in law and wife to the 1st Defendant. The Plaintiff claims that she and the other two joint owners enjoyed the quiet possession of the suit land until the year 2014 when the 3rd Defendant encroached on the suit land with his employees / agents and started plucking the tea leaves without her consent. The Plaintiff learnt from the employees of the 3rd Defendant that the 3rd Defendant had entered into a long term lease with the 1st and 2nd Defendants to pluck tea from her land for delivery to Makomboni tea factory vide plucking number 210 at Kaguura tea buying centre without her involvement. The Plaintiff avers that the acts of the Defendants are wanton and unless they are stopped she stands to suffer irreparable loss and damage.

4. The Plaintiff further disclosed the existence of the ongoing suit before the ELC Court at Kerugoya vide ELC No 278 of 2014 at the time of filing the suit which has since been concluded. I shall return to this judgment later because it has a bearing on this suit.

5. The 1st and 2nd Defendants defended the suit by denying all the allegations made in the plaint and included a counterclaim claiming that the 1st and 2nd Defendants were the initial registered owners of the suit land being a resultant parcel after subdivision of land parcel number LOC 2/KANDERENDU/640 that yielded parcel No. s LOC 2/KANDERENDU /1511 and 1512. That after the transfer of parcel number

LOC 2/KANDERENDU /1511 into their joint names they later in the year 2014 discovered that the Plaintiff had fraudulently caused her name to be added as a joint owner of the parcel number LOC 2/KANDERENDU /1511 and have pleaded several particulars of fraud against the Plaintiff thereunder among them being fraudulent transfer of the parcel into her name; failure to obtain land control board consent; causing insertion of her name in the title deed and conspiracy to defraud.

6. The 1st and 2nd Defendants went ahead to disclose that the 3rd Defendant was a purchaser for value having purchased 1.5 acres of the suit land from the 1st and 2nd Defendants at a purchase price of **Kshs. 2,000,000/-**. That after the purchase, the 3rd Defendant took possession of the purchased land and tea bushes.

7. It was also the 1st and 2nd Defendants' contention that the Plaintiff was not in possession of the suit land as alleged. That she resides on land parcel number LOC 2/ KANDARENDU/645 where she farms and has constructed a house.

8. The 1st and 2nd Defendants then prayed for cancellation of the registration of the Plaintiff as one of the proprietors of the suit land and subsequent registration of the 1st and 2nd Defendants as the only proprietors of the suit land plus costs.

9. The Plaintiff did reply to the defence and counterclaim in which she denied the averments therein and asserted her ownership rights over the suit land as a joint owner along with the 1st and 2nd Defendants.

10. This case was initially filed at Kerugoya before it was transferred to this Court. In the same Court ELC Number 278 of 2014 was concluded and a judgment delivered on 31/5/17 by Hon Mr Justice B.N. Olao. In that judgment the title to the suit land, the subject matter of this suit and that of parcel number 1512 were cancelled and reverted back to the original parcel of land being LOC 2/ KANDERENDU/640 on grounds of fraudulent subdivision and transfer and issuance of titles.

11. At the hearing, PW1, the Plaintiff herein reiterated the averments in her plaint and witness statement which she adopted as part of her evidence. In addition, she stated that she was one of the registered owners of the suit land as per the green card and denied the allegations that had caused her name to be irregularly inserted in the title. She was aware of the judgment in the ELC NO. 278 of 2014 in which titles number LOC 2/ KANDERENDU /1511 and 1512 were cancelled and reverted back to the original parcel number 640 formerly registered in her name and the 1st Defendant. She denied any knowledge of the lease and or sale agreement between the Defendants. She was categorical that she did not give her consent nor did she participate in the lease /sale transaction involving the Defendants. That the 1st Defendant had no right to sell a jointly owned land without involving the other joint owners, in particular herself. She prayed for damages for trespass against the 3rd Defendant for picking tea from 3063 tea bushes in her farm for over two years without her consent. The 3rd Defendant used the same number belonging to the 1st Defendant to sell tea to the factory.

12. The 1st Defendant testified on his behalf and that of the 2nd Defendant, his wife. He conceded that it was improper for him to have entered into a lease agreement with the 3rd Defendant allowing the 3rd Defendant to pick tea from the suit land without informing the Plaintiff. He also admitted having executed the sale agreement and transfer of the land and tea bushes to the 3rd Defendant for a price of Ksh 2.0 Million without involving the Plaintiff and that the proceeds of the sale were not shared with the Plaintiff. He went ahead to recant the averments he had made in their statement of defence and counterclaim by clarifying that the initial registered owners of the original parcel of land were him and the Plaintiff in absence of the 2nd Defendant. He also recanted the allegations of fraud against the Plaintiff in the counterclaim and stated that the Plaintiff was a co-owner. He also confirmed that the 3rd Defendant had been earning an income from picking of tea from the tea bushes on the suit land for nearly 2.5 years. He was aware of the concluded ELC suit case No.278 of 2014 in which the title to the suit land was revoked and cancelled. He denied that he was paid the full sum of kshs. 2.6 million as per the agreement and admitted he did not refund the monies he was paid to the 3rd Defendant. That he was currently cultivating the entire 6 acres of parcel LOC 2/ KANDERENDU/1511.

13. After learning of the delivery of the judgment in ELC suit case No.278 of 2014 the 3rd Defendant herein who was not a party in the concluded suit sought leave to amend his defence and include a counter claim seeking a refund of the purchase price in the sum of **kshs.2,600,000/-** plus interest at 50% and costs. That application was declined vide a ruling delivered on 31.10.2018 by this honourable Court.

14. DW2 the 3rd Defendant testified that the 1st and 2nd Defendants were known to him. That they entered into an agreement to buy a portion 1.5 acres from land parcel number 1511 at a price of kshs 2.6 million which he paid leaving a balance of **kshs. 100,000/-** only. He claimed to have been in possession of the suit land for only one month before he was evicted through a Court order emanating from the Kerugoya ELC Court. He has no means to prove the allegations of fraud against the Plaintiff and was categorical that the Plaintiff did not sell to him any land. That land remained in the use of the 1st and 2nd Defendants.

15. In submissions the Plaintiff concedes that prayer 1 and 2 of the plaint were substantially dealt with by the judgment in in ELC suit case No.278 of 2014 and is therefore overtaken by events. In the premises they sought to pursue prayer No. 3 in respect to trespass against the 3rd Defendant over the suit land which now form the larger part of parcel No LOC 2/KANDERENDU/640. She submitted that it was undisputed that the 3rd Defendant gained entry into the suit land without the consent of the Plaintiff who was a joint owner of the suit land. The Plaintiff states that the 3rd Defendant was in possession of the suit land from October 2014 to April 2016 in which time he earned income from picking and selling to the tea factory. The 1st and 3rd Defendants also conceded to the fact that the 3rd Defendants entry in the suit land was not permitted by the Plaintiff. The Plaintiff prayed for an award of general damages for trespass against the 3rd Defendant to the tune of kshs. 1,500,000/- and relied on the case of **Duncan Nderitu Ndegwa vs. KPLC Limited & another [2013]eKLR** where the Court held that

“...once a trespass is established it is actionable per se , and indeed no proof of damage is necessary for the Court to award general damages...”

16. No submissions were filed by the 1st and 2nd Defendants.

17. The 3rd Defendant submitted that by dint of the judgment in Kerugoya ELC suit case no.278 of 2014 the subject matter of this suit ceased to exist therefore the entire suit should be dismissed. That the Plaintiff had the opportunity to amend their pleadings in view of the new developments which they failed to. He urged the Court to dismiss the entire suit but in the event that the Court decides otherwise in respect to the issue of trespass, the 3rd Defendant claims that he picked tea for less than a month before he was evicted through a Court order in respect of that he opines an award of **kshs. 10,000/-** would be more than compensatory in the circumstances. He has relied on the award made in the concluded Kerugoya ELC suit case no.278 of 2014 of **kshs. 300,000/-** while the respondents had been in possession of the suit land since 2010 and had even built houses.

18. The Plaintiff 's case is premised on two limbs; first one is to stop the illegal dealings with land parcel number LOC 2/KANDERENDU/1511 by the 1st and 2nd Defendant either by way of sale or leasing of the suit land without her consent. The Plaintiff claims that she is a co-owner of the suit land along with the 1st and 2nd Defendants. That sometimes in the year 2014 the 3rd Defendant with his employees and agents entered into the suit land without her consent and started picking tea. She would later learn from the 3rd Defendants' employees that the 1st and 2nd Defendants had leased the suit land to the 3rd Defendant allowing the 3rd Defendant to gain entry to the suit land and pick tea. She testified that the 3rd Defendant continued picking the tea from the suit land for more than 2 years. The 1st Defendant recanted his claims made in his defence challenging the ownership right of the Plaintiff over the suit land in oral evidence and affirmed that the Plaintiff was a joint owner to the suit land. The 1st Defendant also conceded that he had together with his wife unprocedurally sold the suit land to the 3rd Defendant without informing and involving the Plaintiff. The 3rd Defendant stated that he bought the suit land from the 1st and 2nd Defendant. It is thus evident that the Plaintiff is a rightful joint owner to the suit land, and hence she is entitled to be involved in all dealings that would adversely affect her ownership rights over the suit land.

19. Following the judgment in Kerugoya ELC suit case no.278 of 2014 which involved the Plaintiff herein and the 1st and 2nd Defendant among others, I agree with the Plaintiff that the findings made thereunder sufficiently dealt with the 1st and 2nd prayers in the present suit and shall be adopted as such. The only prayer subsisting in this suit therefore shall be that of general damages for trespass.

20. On the second limb the Plaintiff claims for payment of general damages by the 3rd Defendant for the acts of trespass committed on the suit land. The Plaintiff claims that the 3rd Defendant entered the suit land sometime in October 2014 and remained in possession until the year 2016 without her knowledge and consent. That during that period the 3rd Defendant picked tea from 3064 tea bushes and used to sell the tea produce to Makomboni tea factory. That from the delivery of the tea produce to the factory the 3rd Defendant earned income from her land without any color of right for a period in excess of two years. The 1st Defendant supported that contention by the Plaintiff by testifying that immediately after the impugned sale of the suit land to the 3rd Defendant he (the 3rd Defendant) took possession of the suit land and started picking tea from the tea bushes. The 3rd Defendant also concedes that he gained entry into the suit land but contests the period he remained in possession, was less than a month as he was evicted through a Court order obtained by the Plaintiff. The 3rd Defendant also contends that the prayer for damages in respect to trespass on the suit land has been overtaken by events following the orders issued by B. N Olao J in Kerugoya ELC suit case No.278 of 2014 revoking and cancelling the title to the suit land herein. He avers that by dint of that judgment the subject matter of this suit has ceased to exist.

21. The findings in that judgment were as follows;

“Ultimately therefore, there shall be judgment for the Plaintiff against the Defendants in the following terms;

- a. A permanent injunction against the 1st and 2nd Defendants barring them from disposing, wasting, transferring, alienating, charging and/ or selling any portion of the land parcel No. LOC 2/KANDERENDU/640 without involving the Plaintiff.
- b. An order for revocation and cancellation of the subdivision and title deeds for the land parcels no. LOC 2/KANDERENDU/1511 and No. LOC 2/ KANDERENDU/1512.
- c. An order for the reinstatement and merger of the original land parcel No. LOC 2/KANDERENDU/640 to what it was before.
- d. An order that the 3rd and 4th Defendants do vacate the suit land within six (6) months from the date of this judgment and in default the Plaintiff may evict them as provided under section 152 of the Land Act.
- e. An order of permanent injunction against the 3rd and 4th Defendants barring them from trespassing and / or entering into, wasting, alienating, or encroaching upon the suit land upon compliance with (4) above.
- f. An order barring the 5th Defendant from effecting any registration regarding disposing, transferring, alienating, charging or selling any portion of the suit land without involving the Plaintiff upon complying with (2) and (3) above.
- g. General damages of Kshs. 350,000/-payable to the Plaintiff by the 3rd and 4th Defendants.
- h. Costs of the suit to be borne by the 3rd, 4th and 6th Defendants.”

22. The title to the suit land was therefore reverted to the original title LOC 2/KANDERENDU/640 which was jointly owned by the Plaintiff and the 1st Defendant, it thus means that the Plaintiff 's interest over the suit land still remains, the portion of the land the 3rd Defendant

claims to have allegedly purchased a portion of 1.5 acres from the LOC 2/KANDERENDU/1511 which has now been reverted back into LOC 2/KANDERENDU/640. Put in other words the 3rd Defendant entered and took possession of a portion of the LOC 2/KANDERENDU/1511 without the consent of the Plaintiff, the acts of the 3rd Defendant therefore amounted to trespass.

23. Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 defines trespass as follows:

“Any unjustifiable intrusion by one person upon land in possession of another.” ...Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”.

24. On general damages, I rely on the case of **Park Towers Ltd V John Mithamo Njika and 7 Others 2014 eKLR** where Mutungi J stated as follows:

“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 general damages. The Court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case.”

25. Halsbury’s Laws of England 4th 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 which do not allow an award of exemplary damages, general damages may be increased.”*

26. In respect to quantum the Plaintiff claims that the 3rd Defendant derived profits from sale of tea from the suit land for over two years and was of the view that an award of Kshs. 1,500,000/- would be sufficient. The 3rd Defendant on the other hand claims to have been in possession and use of the suit land for a short period of less than a month and opines that an award of Kshs. 10,000/- would be compensatory in the circumstances.

27. I am guided by the above principles and consider the circumstances under which the 3rd Defendant came into possession of the suit land; that is to say without the authority and consent of a joint owner of the land. The 3rd Defendant did occupy the suit land through an act of proven trespass for a period from the 24/9/14 or thereafter to sometime in 2016/2017. I say so because upon the delivery of the temporary injunction orders by the Court on the 9/10/15, the 3rd Defendant did not vacate the suit land. He stayed on and the Plaintiff filed an application for contempt on the 29/1/16 which appears not to have been prosecuted. However, the record shows that on the 7/4/16 the Plaintiff’s Advocate informed the Court that the 3rd Defendant was still in occupation of the land contrary to the Court orders. The 3rd Defendant’s counsel informed the Court that the 3rd Defendant had promised to vacate. It is only in 6/12/17 that the Court was informed that the 3rd Defendant had vacated the suit land. It is therefore not true that the 3rd Defendant occupied the suit land for one month. In the estimation of the Court taking the date of occupation to be immediately after the signing of the agreement in September 2014 to December 2017 when the confirmation was given to the Court, it is evident that the 3rd Defendant was in unlawful occupation of the suit land for well over 3 years if not more.

28. Taking all the evidence in this case, the length of the trespass and the circumstances of this case, I award Kshs. 500,000/- to the Plaintiff in general damages.

29. **Final orders;**

- a. Spent.
- b. Spent.
- c. General damages for trespass to be borne by the 3rd Defendant in the sum of Kshs 500,000/- in favour of the Plaintiff.
- d. The Defendants shall meet the cost of the suit jointly and severally.

Orders accordingly.

DELIVERED, DATED & SIGNED AT MURANG’A THIS 31ST DAY OF JULY 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms Maina HB for Kaguura for the Plaintiff

1st and 2nd Defendants – Absent but served.

Njuguna Muri for the 3rd Defendant

Irene and Njeri, Court Assistants