



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 728 OF 2017

(FORMELY KISII ELCC NO. 19 OF 2012.)

ELISHAPHAN OMOLLO NYASITA.....PLAINTIFF

VERSUS

JOHN OJOWI ONUKO.....DEFENDANT

JUDGMENT

1. The property in dispute in the present suit is LR No. Kamagambo/Kanyangi/469 (hereinafter referred to as the suit land). It is situated in Migori County. The suit land is measuring approximately 0.2 hectares in area.

2. By a plaint dated 11th December 2012 and filed on 21st January 2013, the plaintiff, **ELISHAPHAN OMOLLO NYASITA**, through the firm of M/s. Oguttu Mboya and Company Advocates currently M/s. Oguttu, Ochwangi, Ochwal and Company Advocates, has sued the defendant, John Ojowi Omuko for the following reliefs:-

- a) Declaration that the plaintiff is the registered and/or lawful owner of the suit land.*
- b) An order of eviction directed against the defendant, his agents, servants and/or servants, from the suit land.*
- c) Permanent injunction restraining the defendant either by himself, agents, servants and/or anyone claiming under the defendant from entering upon, re-entering, trespassing onto, fencing, cultivating, building structures, cutting down trees, interfering with and/or in any other manner dealing with the suit land and/or any portion thereof.*
- d) General damages for trespass.*
- e) Interest on (d) hereof at court rates.*
- f) Costs of the suit, together with interests thereon be borne by the defendant.*
- g) Such further and/or other relief as the honourable court may deem fit and expedient so to grant.*

3. The gist of the plaintiff's case is that he is the registered proprietor of the suit land. That in or about February, March, 2012, the defendant destroyed the common boundary between the suit land and LR No. Kamagambo/Kameji/465 (the defendant's land parcel) and encroached upon the suit land without authority of the plaintiff. The defendant then annexed a portion of the suit land and occupied the same prompting the plaintiff to complain to the District surveyor Migori, who visited the site and restored the boundary. That the defendant yet again reverted to and destroyed the common boundary and continued with the annexation of a portion of the suit land thus provoking the instant suit.

4. In his statement of defence dated 21st February 2013 and filed on 22nd February 2013, the defendant through the firm of S.M. Sagwe and Company Advocates, denied the plaintiff's claim. He stated that on 6th March 2012, the plaintiff established a new boundary inside the defendant's land parcel and clearly away from the one re-established by the District Surveyor. That the defendant vehemently objected to the establishment of the boundary inside his land. That he used reasonable amount of verbal force to eject the plaintiff from trespassing thereon and removed the illegally planted boundary.

5. The defendant termed the plaintiff's claim illusory, unlawful, illegal, malicious, constituting wrongful process or usage of the law. He urged the court to dismiss this suit with costs to him.

6. On 20th May 2014, the plaintiff (PW1) testified that he is the proprietor of the suit land. That he bought the same from one Dande Owuor.

That the land is occupied by his son, Steve Biko Omollo, who has put up a home thereon. That the defendant destroyed the common boundary of the suit land and defendant's land parcel. He relied on PExhibits 1 to 6 which include copies of title deed dated 8th October 2012 (PExhibit 1), a certificate of official search dated 30th September 2013 (PExhibit 2) in respect of the suit land, surveyor's report dated 6th March 2012 showing that the defendant had encroached into the suit land (PExhibit 4) and the map sheet for the suit land (PExhibit 5).

7. The defendant's case was marked as closed as the defendant and his counsel failed to attend court for hearing of his case; see **Article 159 (2) (b) of the Constitution of Kenya 2010** and **section 3 of the Environment and Land Court Act, 2015 (2012)**.

8. Learned counsel for plaintiff filed submissions dated 8th March 2019 whereby he urged this court to make finding and judgment in favour of the plaintiff's case as prayed in the plaint. Counsel identified and analysed four (4) issues for determination which include whether the plaintiff's actions amount to trespass and whether he is entitled to orders sought in the plaint. Counsel relied on **section 3 of the Trespass Act (Cap 294), section 26 of the Land Registration Act, 2016 (2012), Kiplangat Shelisheli Mutarakwa –v- Joseph Rotich Kones (2018) eKLR, Daniel Toroitich Arap Moi and another –v- Mwangi Murithi and another (2014) eKLR, KPL Company Ltd –v- Nathan Karanja Gachuka and another (2016) eKLR and Dancan Nderitu Ndegwa –v- Kenya Pipeline Company Ltd and another (2013) eKLR**, to buttress the submissions.

9. I have considered the pleadings of the respective parties, the evidence of PW1 and submissions of the plaintiff's counsel. I am guided by the Court of Appeal decision in the case of **Great Lakes Company (U) Ltd –v–Kenya Revenue Authority (2009) KLR 720** and embrace the four (4) issues for determination as discerned in the plaintiff's submissions.

10. On the issue of trespass, there is no dispute that PW1 is the registered proprietor of the suit land as disclosed at paragraph 3 of the plaint and paragraph 3 of the statement of defence. PW1 stated at paragraphs 5,6,8 and 10 of the plaint that the defendant destroyed the common boundary between the suit land and the defendant's land parcel. That the plaintiff excised a portion of the suit land and occupied the same. The defendant admitted at paragraph 9 of the statement of defence that he removed the illegally planted boundary.

11. It was the testimony of PW1 that he is the registered proprietor of the suit as shown in PExhibits 1 and 2. That the defendant destroyed the boundary. In examination in chief, he stated that:-

“In the month of February, March,2012, the defendant destroyed the beacons marking the boundary of the two parcels of land.....”

12. PW1 further stated that the defendant encroached into a portion of the suit land and he continues to do so. In cross examination, PW1 testified, inter alia,:-

“The boundary of the two parcels of land was reestablished but the defendant has never respected the same. He has once again encroached on the suit property..... the defendant has only encroached on a portion of the suit property.....”

13. It is evident that PW1 is the proprietor of the suit land and I am aware of the definition of the term “**proprietor**” at **section 2 of the Land Registration Act, 2016 (2012)** and the rights and interests of PW1 under **sections 24 and 25 of the same Act**. PExhibit 1 has not been challenged under **section 26 of the said Act**. So PW1 has proved ownership of the suit land and he deserves protection under **Article 40 (1) of the Constitution of Kenya,2010** as held in **Mutarakwa case (supra)**.

14. Clerk and **Lindasell on Torts (17th Edition) paragraphed 17-01** defines the term “**Trespass**” thus:-

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

15. It is clear from the pleadings and evidence of PW1 that that the entry of the defendant on a portion of the suit land was unjustifiable. The tort of trespass is actionable per se. PW1 is entitled to general damages for trespass considering the entire case. I think an amount of **Kshs. 75,000/=** would be appropriate in the circumstances of this case. I award the same accordingly.

16. The evidence of PW1 on ownership and trespass was not controverted in evidence by the defendant whose statement of defence I take into account. However, the said statement is not supported. I find it spurious. Furthermore, cases are decided only on the evidence presented before the court as recognized in **Daniel Totoitich Arap Moi case (supra)**.

17. The plaintiff's case stand unchallenged and the defendant's defence is unsubstantiated. Thus, the statement of defence must fail; see **Linus Nganga Kiongo and 3 others –v- Town Council of Kikuyu (2012)**.

18. In the premises, I find that the plaintiff has proved his case against the defendant on a balance of probability.

19. A fortiori, I enter judgment for the plaintiff against the defendant for orders **(i) (ii) and (iii)** as sought in the plaint dated 11th December 2012. General damages for trespass assessed at **Kshs. 75,000/=** only in favour of the plaintiff together with costs of the suit and interest at court rates from the date of this judgment.

20. It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this 23RD day of July 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Mr. Oguttu Mboya learned counsel for the plaintiff.

Tom Maurice – Court Assistant.