



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 34 OF 2018

RHODA S KIILU.....PLAINTIFF

VERSUS

JIANGXI WATER AND HYDROPOWER

CONSTRUCTION KENYA LIMITED.....DEFENDANT

JUDGMENT

1. This suit was instituted by the plaintiff by way of a plaint dated 13.8.2018 and amended on 17.10. 2018 against the defendant, a Chinese company incorporated in China but plies its trade in Kenya. The plaintiff seeks general, special and exemplary damages, permanent injunction amongst other prayers.

2. The defendant has been contracted by the Kenyan government to construct ATHI – KIMONGORO – NKIJA – UGOTI – KATITHINE – AUKI THII-GAITI AND KIJJ THII- GAITI ROAD in Maua Meru County. The plaintiff has pleaded that at all material times, she was the owner of the suit properties comprising of parcels numbers 2451, 2394, 2397, 2403, 2398, 2400, 2401, 2399, 2396, 2453, 2452, 2338, 2402 and 2454 KIRINDINE B.

3. Plaintiff claims that the defendant unlawfully trespassed onto the suit properties without justifiable cause where it dumped and deposited waste and other useless materials into the property. The defendant cleared trees and bushes, created roads, quarries, deep gullies and proceeded to carry out acts of excavation of soil, murrum and rocks and carried them for construction.

4. A notice of appointment of advocates was filed on 28.11.2018 by Mulondo, Oundo and Muriuki advocates for the defendant. However, no memorandum of appearance or defence was ever filed. The suit hence proceeded undefended.

5. **PW1 Rhoda S. Kiilu** is the plaintiff. She adopted her statement filed on 15th August 2018 as her evidence. Plaintiff resides in Nairobi whereas the suit land is situated in Maua. She gave an account of how she got wind that her land was being used by the defendant. She visited the site and confirmed the damage occasioned unto her land. She spoke to the defendant's officials who informed her that they had the blessing and authority of the owner of the land to carry out the excavations. They went ahead and showed her the letter purporting to be from the Assistant Chief Ntoroni Location of which the sub-location and purported assistant chief is unknown to her. Furthermore, the parcels of suit land are not in the jurisdiction of the said Ntoroni Location but in Giika.

6. Plaintiff proceeded to Maua Police Station to make a formal complaint against the defendant of which she was issued with an OB No. 45/11/5/2018. When the officers wrote to the lands office seeking to establish the ownership issue, they found that plaintiff was the owner of the suit land. On 15th May 2018 the Deputy County Commissioner Igembe sub-county convened a meeting in his office between the Chief Giika Location, officials of the defendant and plaintiff where it was resolved that the ongoing illegal activities on the land be stayed pending amicable settlement or resolution of the matter. However, the defendant's blatantly ignored this and went ahead with the illegal activities up to date. The activities have reduced her parcel of land into a quarry site of which the land has no meaningful use unless it is adequately rehabilitated. She has made numerous demands and notices to the defendant but it has refused, neglected and/or failed to honor her demands. PW1 then sought the services of a valuer so as to assess the loss.

7. In support of her claim, plaintiff produced as exhibits the 9 items in the list of documents dated 13.8.2018 as PEX 1-9. The 2nd valuation report was also produced as PEX - 10

8. **PW2 David Chege Kariuki** is a licensed registered valuer. He affirmed that he carried out two valuations on the affected suit properties and the reports thereof have been availed as P-EXH 1 and 10 respectively.

9. I have considered the pleadings, the evidence and the submissions filed herein and I frame the issues for determination as follows;

- a) *Whether the defendant trespassed onto the suit properties without authority of the plaintiff;*
- b) *whether the plaintiff is entitled to damages.*
- c) *Whether the order of permanent injunction restraining the defendant from dealing with the suit property should be given.*
- d) *Whether an order compelling the defendant to carry out environmental restoration and rehabilitation of the suit premises should be given.*

Trespass

10. Section 3 (1) of the *Trespass Act, Cap 294* provides that:

"Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership

11. Through the letter dated 14th May 2018 (P-Exh5), it has been confirmed by the land adjudication and settlement officer that the suit properties are owned by the plaintiff. Plaintiff never authorized the defendant to enter her land and carry out works of construction or dumping. I am therefore inclined to find that defendant had trespassed on the suit parcels belonging to the plaintiff.

Damages

12. Plaintiff has sought for special damages, general damages for the unlawful activities of the defendant and aggravated, punitive and exemplary damages.

13. For **special damages**, the plaintiff has claimed **Kshs. 74,214, 500/-** which includes value of murrum scooped from the suit land. The initial assessment was based on the 1st valuation report of 11.7.2018. However, the excavation continued necessitating a further valuation report, the one of 25.9.2018. The fee charged by the valuer is **Kshs. 97,500/-** whereas the costs of hiring of a taxi from Nairobi to Maua and back on different occasions amounts to **Kshs. 117,000/-**. It is trite law that special damages require to be specifically pleaded and proved. In this case, the plaintiff has pleaded and proved this claim through production of the valuation report and receipts. I hence allow the claim of special damages.

14. On the issue of general damages for trespass, the issue that arises is: what is the measure of it? This question was answered by E. Obaga J in the case of **Philip Ayaya Aluchio v Crispinus Ngayo [2014]eKLR** where it was held as follows:

"The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately after the trespass or the costs of restoration, whichever is less See Hostler – VS – Green Park Development Co. 986 S. W 2d 500 (No. App. 1999).

15. In this case the plaintiff has only provided this court with the value of the excavated murrum. She has not adduced any evidence as to the state or the value of her property before and after the trespass. This makes it difficult to assess the general damages.

16. In **Nakuru Industries Limited v S S Mehta & Sons [2016] eKLR** where the court faced such a similar situation it was held as follows:

"A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the defendants did trespass onto the plaintiff's land and conduct some excavation. For this reason I award the defendant damages in the amount of Ksh 500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full."

17. In the case of **Willesden Investments Limited vs. Kenya Hotel properties limited NBI H.C.C. NO. 367 of 2000** (a case cited by the plaintiff), the court stated that;

"There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that K.Sh. 10 000 000 is a reasonable award for general damages".

18. I have taken into account the fact that the damage occurred in a rather expansive chunk of land, though the same is situated in a rural area. I am of the view that an award of Kshs.10,000,000/- as general damages is sufficient.

19. As for exemplary damages they are placed at the discretion of the court, though, they are awarded with some degree of caution and in limited situations. **Ochieng J** stated in the case of **Mikidadi –vs- Khaigan and Another [2004] eKLR 496** that:

"Exemplary damages are only to be awarded in limited instances namely. (a) oppressive arbitrary or unconstitutional action by servants of government. (b) Conduct calculated by the defendant to make him a profit which may well exceed the compensation"

payable to the plaintiff, or (c) Cases in which the payment of exemplary damages is authorized by statute.”

In the present case, the circumstances do not warrant an award of exemplary damages.

Permanent injunction

20. The defendants have no legal mandate to use the suit land in any manner. As such this prayer is meritorious.

Environmental restoration/Rehabilitation order

21. The plaintiff has pleaded that an order should be given compelling the defendant to carry out an environmental restoration process of the suit premises to the satisfaction of the plaintiff. However, the plaintiff did not adduce any evidence at all in respect of this prayer. The court is left to wonder as to what would satisfy the plaintiff. A court of law cannot give orders in vain, it can only give orders capable of being enforced. Furthermore, this court has already given an award of special and general damages which the court considers to be adequate in the circumstances. I therefore disallow this prayer.

Final orders

22. **Judgment is hereby entered in favour of the plaintiff against the defendant in the following terms:**

1) Plaintiff is awarded damages to be paid by defendant as follows;

a) **Special damages - Kshs. 74 214 500**

b) **General damages - Kshs. 10 000 000/-**

c) **Exemplary damages - Nil**

Total Kshs. 84, 214,500/-

2) An order of permanent injunction is hereby issued restraining defendant or its employees, servants and agents from further trespassing unto plaintiff's parcels of land no. 2451, 2394, 2397, 2403, 2398, 2399, 2400, 2401, 2396, 2453 and 2452.

3) The plaintiff is awarded costs of the suit.

4) The defendant is to pay interests on the figures mentioned in clause 1) but the same is to be computed after 60 days from the date of delivery of this judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 25TH DAY OF SEPTEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Muthomi J for plaintiff

Plaintiff

HON. LUCY. N. MBUGUA

ELC JUDGE