REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 45 OF 2012

JAMES NJAGI MACICI.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KIRINYAGA.....DEFENDANT

JUDGMENT

INTRODUCTION

In a plaint dated 9th July 2012, the plaintiff sought from the defendant the following orders:

a. A declaration that the defendant through its employees, agents, and/or servants has unlawfully trespassed on L.R. N o. KIINE/GACHARO/467.

b. General damages for trespass.

c. Mesne profits.

d. Costs of the suit.

The plaintiff's suit was filed contemporaneously with a Notice of Motion under ***Order 40 Rule 1 (a) and 4 (b) CPR*** seeking temporary injunction orders pending the hearing of the main suit. After hearing the arguments of the parties and their submissions, this Court dismissed the said application on 16th January 2013.

By way of a defence, the defendant filed a statement of defence on 24th August 2012 denying the plaintiff's claim. On 17th November 2014, the plaintiff amended the plaint by bringing on board the County Government of Kirinyaga who was the successor to the Town Council of Sagana. On 21st April 2015, the plaintiff further amended the plaint in which an additional prayer for compensation for a portion of land out of L.R. KIINE/GACHARO/467 allegedly taken by the defendant was made.

PLAINTIFF'S CASE

The plaintiff stated that on or about 27th June 2012, the defendant through its employees, agents and/or servants trespassed upon part of L.R. KIINE/GACHARO/467 and committed acts of waste by cutting down his maize and beans and also dug and cleared a portion of land purporting to make a road of access through his land. He stated that he protested against the acts of the defendant's employees, agents and servants but to no avail. He even reported the matter to Sagana Police Station but the defendant has continued trespassing his land causing damages as enumerated hereinabove. The plaintiff adopted his statement dated 9th July 2012 and produced a list of documents dated 9th July 2012 and a further list of documents dated 30th November 2015 as Plaintiff's Exhibits 1, 2, 3 and 4 respectively.

DEFENDANT'S CASE

The defendant did not offer any evidence in their defence and opted to close their case.

ANALYSIS AND DETERMINATION

I have carefully considered the evidence adduced by the plaintiff and the submissions by the counsels. The issues for determination in this

case is whether or not the plaintiff has proved his claim on the required standard. The plaintiff's claim is hinged on the Law of Trespass. According to the ***Black's Law Dictionary, Tenth Edition***, ***Trespass*** is defined as follows:

> **"An unlawful act committed against the person or property of another; especially wrongful entry on another's real property"**

When the plaintiff filed this suit contemporaneously with the Notice of Motion dated 9th July 2012 seeking for injunctive orders, the Town Council of Sagana through its Clerk one Antony G. Gatimu filed a replying affidavit on 4th October 2012 in which he deponed at paragraph 4 and 5 thereof as follows:

> **"4. That the road in issue has been in existence on the ground for over fourty years.**
>
> **5. That the Ministry of Lands approved the road after adhering to all laid down statutory formalities. (Annexed, hereto and marked AGG 1 is advertisement contained in the Daily Nation of 30th May 2012".**

The deponent of that affidavit Antony G. Gatimu annexed a Notice under the ***Physical Planning Act (Cap 286***) under the heading ***"Zoning Plan No. CK – 222 /07/01***|" dated 30th May 2007. The said notice invited persons of interest to inspect the zoning plan within Sagana Township and raise any objection or make any representation within 60 days. While referring to the said notice, Hon. Mr. Justice B.N. Olao in his ruling delivered on 16th January 2013 observed as follows:

> **"……. that notice could only have been issued under Section 19 (1) of the Physical Planning Act (Cap. 286) and if the Plaintiff/Applicant was aggrieved by it, his remedy lay in appealing to the relevant Liaison Committee or the High Court as provided for under Sub-section (4) and (5) of the said Section 19. There is no material placed before me to suggest that the Plaintiff/Applicant did that. Instead,Plaintiff/Applicant's counsel has submitted that the said notice is not dated and could have been manufactured". The notice is dated 30/5/2007 by one Kefa Omoti for the Director of Physical Planning and for my part, I see nothing to suggest that the notice could have been manufactured".**

The learned Judge went further and observed as follows:

> **"Plaintiff/applicant's counsel has also submitted that the defendant/Respondent invaded the Plaintiff/applicant's land without any right in violation of Article 64 1(a) of the Constitution. However, Article 66(1) of the Constitution also empowers the State to regulate the use of any land or any interest over land in the interest of defence, public safety, public health, land use planning etc. Therefore, when the Government regulates the use of any land in accordance with Article 66 (1) of the Constitution, such act cannot be deemed as a violation of the Constitution if all the legal requirements are adhered to and I believe the Physical Planning Act is one such mechanism that regulates land use. In the light of the said notice under the Physical Planning Act (Cap. 286) and the Constitutional provisions that I have referred to, it cannot be said that the plaintiff/Applicant has established a prima facie case to warrant the grant of an injunction ……".**

I concur with the reasoning by the learned Judge in that ruling which I apply to this judgment mutatis mudandis. Suffice to add that the plaintiff seems to be challenging the Notice under the ***Physical Planning Act (Cap. 286)*** under the heading "***Zonine Plan No. CK – 222/07/01"*** dated 30th May 2007. That notice was issued presumably pursuant to Section ***19 of the Physical Planning Act No. 6 of 1996*** which reads as follows:

> **"19 (1) The Director shall, not later than thirty days after the preparation of a regional physical development plan, notify in writing to the Local authority who's area is affected by the plan to make representation in respect of the plan and publish a notice in the Gazette and in such other manner as he deems expedient to the effect that the plan is open for inspection at the place or places and the times specified in the notice.**
>
> **4. If the petitioner is aggrieved by the decision of the director, he may appeal to the relevant Liaison Committee under Section 13 against such decision and to the National Liaison Committee, under Section 15 if he is aggrieved by the decision of the respective Liaison Committee.**
>
> **5. A person who is aggrieved by a decision of the National Liaison Committee may appeal against such decision to the High Court in accordance with the rules of procedure for the time being applicable in the High Court".**

The plaintiff who was aggrieved by the decision of the Director of Physical Planning ought to have sought the remedy provided for under the law. He should have appealed to the Liaison Committee, the National Liaison Committee and the High Court or Courts of equal statutes by way of Judicial Review but not by way of a plaint.

The other issue I wish to address is whether the defendant trespassed the plaintiff's land. The plaintiff in his evidence was referred to a list of documents dated 9th July 2012 which contain three items being a certificate of official search for land parcel No. KIINE/GACHARU/467, photographs and a map showing the location of the suit land. The same were produced as Plaintiff's Exhibits 1, 2 and 3 respectively. He was also referred a further list of documents filed on 30th November 2015 which is a Report and Valuation on part of L.R. No. KIINE/GACHARO/467 dated 16th November 2015 which was also produced as Plaintiff's Exhibit No. 4. Plaintiff's Exhibit No. 1 is a certificate of official search for land parcel No. KIINE/GACHARO/467 which shows that the same is measuring 8 acres which is the same acreage reflected in the title deed. There is no survey records produced by the plaintiff that his land has been excised. In any event, the

notice issued by the Director, Physical Planning dated 30th May 2007 was not for acquisition of the plaintiff's land but was issued pursuant to Section 19 of the Physical Planning Act No. 66 of 1996 (Cap. 286) Laws of Kenya. I have also noted that Plaintiff's Exhibit No. 2 is a photograph of some maize plantation which in my view has no evidentiary value. Plaintiff Exhibit No. 3 is a draft of a map which is not approved by the survey of Kenya. Again, the same has no evidentiary value. Plaintiff Exhibit No. 4 is a Report and Valuation on Agricultural Property land parcel No. KIINE/GACHARO/467. The maker was not called as a witness. Being an expert report, the maker of that report was required to lay foundation to the report before producing the same. I find that the same has no much weight.

In the final analysis, I find and hold that the plaintiff has not proved his claim against the defendant on a balance of probabilities. The same is hereby dismissed with costs to the defendant.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 15th day of November, 2019.

……..

E.C. CHERONO

ELC JUDGE

15TH NOVEMBER, 2019

In the presence of:

1. Mr. Asiiimwe holding brief for Magee

2. Mbogo – Court clerk – present