



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC CASE NO. 138 OF 2016**

**MARY NDUTA NGUGI.....PLAINTIFF**

**VERSUS**

**BEATRICE NGELESAL.....1<sup>ST</sup> DEFENDANT**

**JUDY CHELONGEI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The plaintiff commenced this suit vide a plaint dated **14/9/2016** and filed in court on **15/9/2016** seeking the following orders against the defendants jointly and severally for:

**(a) A declaration that the land comprised in the Title No. Kitale Municipality Block 3/1002 measuring 0.1286 hectares belongs to the plaintiff and the defendants have no interest therein at all.**

**(b) A declaration that the defendants are trespassers in part of the plaintiff's land comprised in Title No. Kitale Municipality Block 3/1002 and who should be ordered to vacate therefrom and failing which they be evicted and the structures demolished.**

**(c) General and exemplary damages for trespass.**

**(d) Cost.**

**(e) Interest.**

2. The defendants filed defence dated **2/11/2016** on **4/11/2016** and the plaintiff's reply to this defence was filed on **28/11/2016**.

3. On **15/3/2018** the matter was fixed for hearing on **30/7/2018**. On **30/7/2018** the defendants were absent though served. The case proceeded *ex-parte* and plaintiff's case was closed on that date.

4. On **11/1/2019** the defendants filed an application seeking that the judgment entered **20/9/2018** be set aside and the 1<sup>st</sup> defendant be given leave to defend the suit at a fresh hearing. Ruling was delivered on **8/4/2019** and judgment delivered on **20/9/2018** and all other consequential orders was set aside. The suit was set down for hearing within 14 days. The court fixed matter for hearing on **29/7/2019** when the plaintiff's and defendants' case was closed.

**THE PLAINTIFF'S CASE**

5. The plaintiff pleaded in the body of the plaint that she was the registered proprietor of the lease hold interest over land comprised in **Title No. Kitale Municipality Block 3/1002** measuring **0.1286 hectares** for a period of 99 years from **1/10/1993**, while the defendants have been in occupation of the land neighbouring the plaintiff's

6. However, sometime in **2016** the defendants encroached onto the plaintiff's portion of the land which prompted the plaintiff to request the Trans-Nzoia County Surveyor to visit the suit land for purpose of re-establishing the boundary/beacons between her land and that of the defendants.

7. The plaintiff avers that after receipt of the plaintiff's request the County Surveyor responded by informing the plaintiff that the survey

would take place on **14/7/2016** at a cost of **Kshs.25,000/=** which amount the plaintiff paid. Thereafter, the exercise was carried out in the presence of the defendants and the beacons were properly put in place clearly marking the boundary between the plaintiff's land and the land occupied by the defendants.

**8.** However, sometime in mid-August, **2016**, the defendants removed the beacons marking the common boundary, trespassed onto the plaintiff's land and proceeded to build temporary corrugated iron sheet structures thereon.

**9.** Despite the plaintiff raising concerns and even lodging a complaint regarding the intrusion at the County Surveyor's office vide a letter dated **15/8/2016**, the defendants went on with the construction aforesaid and completed the structure. The plaintiff avers that the trespass and construction in the plaintiff's land has been confirmed by surveyors vide a letter dated **16/8/2016**. In his report the surveyor has also confirmed that the portion which has been forcefully and intentionally taken by the defendants from the plaintiff measures **0.0628 hectares**.

### **THE JOINT DEFENCE OF THE DEFENDANTS**

**10.** The defendants filed statement of defence in this suit on **4/11/2016** denying the claim. The plaintiff filed a reply to defence dated **28/11/2016**. However the defendants did not attend court or call evidence in aid of their defence when this suit came up for hearing on **31/7/2018** despite the fact that they had notice of the hearing date. The hearing proceeded *ex parte*.

### **THE EVIDENCE OF THE PARTIES**

#### **The Plaintiff's Evidence**

**11. PW1, Mary Nduta Ngugi**, the plaintiff testified on **29/7/2019**. He gave evidence in support of her claim and substantially reiterated the matters raised in the plaint. She produced a copy of the lease issued by the Commissioner of Land as **P. Exh 1**, a copy of the Certificate of lease as **P.Exh 2**. She testified that the plot was 0.1286 ha and that beacons were placed in the ground after the survey. After obtaining title she wanted to fence the land. She found one beacon missing. She wrote to the district surveyor to come and show her the full extent of her plot and re-establish the beacons. The survey office wrote to her and asked for a payment which she settled. She produced a copy of the letter that they wrote as **P.Exh 3**. The surveyor came to her lands on 14/7/2016 and re-established the boundary between her and the defendant's land and planted beacons in the ground using iron in concrete. Later the plaintiff and her son noticed that the beacons had been removed. The plaintiff asked the surveyor's help again vide a letter dated 16/8/2016. The surveyor from the district survey came to the site again. However before the surveyor's second visit the defendants built an iron sheet structure that encroached on the plaintiff's land by 0.0628 ha. She produced photographs of those houses as **P.Exh 5(a) (b) and (c)**. She averred that she had not consented to the entry of the defendants on her plot and that they should therefore vacate her land.

**12. PW2, Emmanuel Mutange**, a Surveyor from the County Government of Trans Nzoia testified in favour of the plaintiff. He gave his qualifications. He has been a surveyor in Trans Nzoia for 8 years. In **2016** the plaintiff officially asked the survey office to re-establish her beacons. The plaintiff paid **Kshs. 25,000/=** for the exercise and subsequent to that payment she and the defendants were notified of date of the surveyor's intended visit. He visited the site on 14/7/16. The plaintiff, her worker and some tenants from an adjacent plot were present. There was some vegetation on site but no built structures. He re-established 3 beacons. One beacon still existed and was not to be re-established. Later in August 2016 the plaintiff came back and reported that the re-established beacon had been uprooted. PW2 was assigned the task. He went to the site on 15/8/2016 and confirmed that 2 of the 3 beacons he had re-established had been uprooted. The two which were on the boundary with the defendant's land were the ones uprooted. A corrugated iron sheet structure was still in progress at the site. He visited the site and was involved in the replacing of the beacons on **14/7/2016** after they had been uprooted. The iron sheet structure had been built on the plaintiff's land.

**13. PW3, Simiyu Edmund Davies Wekesa**, a Land Surveyor, also testified for the plaintiff. He gave his qualifications. He has 40 years' experience and is in private practice. He was approached by the plaintiff to ascertain the occupation of **Plot No. 1002**. He visited the ground and positively identified the suit land by its co-ordinates. After computations he found the area encroached by the defendants to be 0.628 ha or almost half of the plaintiff's plot. There are iron sheet structures on the encroached area. As at the time of carrying out his task the structures appeared to have been recently constructed. He produced his report on the matter as **P.Exh 6**. Mr. Wena for the defendants opted not to cross examine him on his evidence.

#### **The Defendants' Evidence**

**14. DW1, Beatrice Ngelesai**, the 1<sup>st</sup> defendant, testified on **29/7/2019**. She adopted her witness statement filed on **20/2/2018** as her evidence-in-chief in this matter. She stated that she does not know the plaintiff; that she does not own or occupy land next to her land as she claims; that the land next to the plaintiff's land has an allotment in the name of Anthony Kiprotich and she has nothing to do with it. On cross examination by Mr. Kiarie she denied having erected the iron sheet structures on the plaintiff's land and averred that she does not know the location of the plot.

**15.** The plaintiff filed his submissions on **20/8/2019**. The submissions of the defendants were filed on **9/9/2019**. I have considered those submissions.

### **DETERMINATION**

#### **Issues for Determination**

**16.** I have considered the pleadings, the evidence of the parties and their submissions. The issues that arise from the pleadings in this suit are as follows:-

*(a) Whether the defendants have trespassed onto the plaintiff's land.*

*(b) What orders should issue?*

***(a) Whether the defendants have trespassed onto the plaintiff's land.***

17. It is beyond doubt that the plaintiff holds a lease over the suit land.

18. The plaintiff's counsel submitted that the plaintiff failed to prove that it is the defendants who are in occupation of the suit land.

19. However, I agree as submitted by counsel for the plaintiff that the defendants have admitted some things which make the evidence of **DW 1** untenable.

20. The names and descriptions of the parties were admitted. The defendants filed a defence disputing in the defence the size of the plaintiff's plot and asserting that one *Anthony Kiprotich*, whom **DW 1** admitted to be her son, was the allottee of land next to the plaintiff's and that he was the one who had trespassed onto the plaintiff's land. They also alleged that the plaintiff had trespassed on land owned by the said *Anthony Kiprotich*. The defendants are bound by their own pleadings. The defendants revealed that they knew more than they told at the hearing.

21. Further the surveyor, **PW2** testified that he re-established the beacons in the presence of the defendants. The evidence of the two surveyors, which is expert evidence and which was not shaken in cross examination, revealed that the iron sheet structures were partially built on the suit land.

22. I agree that the defendants turned from their own pleadings when they presented evidence at the hearing through the oral testimony of **DW1**. In this court's view **DW1**'s evidence showed that she was not speaking the truth and her evidence is not credible.

23. As pointed out by the plaintiff in her submissions the defendants admitted the names and descriptions of the parties and never denied that they occupied land adjacent to the plaintiff's.

24. I also agree that by alleging that the plaintiff had encroached onto her son's plot the 1<sup>st</sup> defendant demonstrated that she had been in occupation of a plot adjacent to the plaintiff's plot. I find that the plaintiff has established on a balance of probabilities that the 1<sup>st</sup> defendant is liable for trespass on her plot.

25. The 2<sup>nd</sup> defendant never testified in the matter and I agree that the 1<sup>st</sup> defendant did not purport to be appearing on behalf of the 2<sup>nd</sup> defendant. Consequently I find that the suit against the 2<sup>nd</sup> defendant proceeded without any evidence given by her to oppose the plaintiff's claim.

***(b) What Orders Should Issue?***

26. I therefore find that the plaintiff has established her claim of trespass against the defendants on a balance of probabilities.

27. The plaintiff has also sought an award of exemplary damages. Exemplary damages are awarded against a party who has wronged another party. In this case I find that the conduct of the defendants of trespassing on the plaintiff's land was wrongful and unjustified. The plaintiff relied on the case of **Abdulhamid Ebrahim Ahmed -vs-The Municipal Council Of Mombasa MSA HCCC No 290 Of 2000 [2004] eKLR** where it was stated as follows:

**“Exemplary damages on the other hand are damages that are punitive, they are awarded to punish the defendant and vindicate the strength of the law. They are awarded in actions in tort, and only in three categories of cases. The first category relates to the oppressive, arbitrary or unconstitutional actions of servants of government. The other two categories are where the defendants conducted is calculated to earn him profit and the third one is where exemplary damages are expressly authorized by statute.”**

28. Citing the awards in the cases of **Francis Kimani Njoroge -vs- Municipal Council Of Limuru Nbi Hccc No 1294 Of 2005 [2010] eKLR** and **Rinyamwaya Vs Nairobi City Commission NBI HCCC No. 1805 of 1984 [1985] eKLR**, it is proposed that the plaintiff be awarded Ksh 500,000, general damages and a similar sum as exemplary damages with costs and interest.

29. The plaintiff has not led evidence as to the quantum of general damages she seeks. This court therefore awards her a nominal sum of **Ksh 50,000/- (Kenya Shillings Fifty Thousand Only)** as general damages.

30. I note that the defendant's willful occupation of the plaintiff's land commenced in the year **2016**, the same year that the plaintiff filed this suit.

31. I am satisfied that the defendants conducted themselves in the manner that they did so as to gain an unlawful advantage by use of part of the plaintiff's land and that an award of exemplary damages is in order in the instant case. I assess the exemplary damages at the sum of **Kshs. 100,000/= (Kenya Shillings Two Hundred Thousand Only)**

32. I therefore enter judgment in favour of the plaintiff against the defendants jointly and severally and I issue the following final orders in

the instant suit:

**(a) An order of declaration declaring that the land comprised in the Title No. Kitale Municipality Block 3/1002 measuring 0.1286 Hectares belongs to the plaintiff and the defendants have no interest therein at all.**

**(b) An order of declaration declaring that the defendants are trespassers on part of the plaintiff's land comprised in Title No. Kitale Municipality Block 3/1002 and they are hereby ordered to vacate therefrom and failing which they be evicted and their structures falling with the boundaries of title No. Kitale Municipality Block 3/1003 be demolished.**

**(c) An order that the defendants shall pay to the plaintiff Kshs. 50,000/- (Kenya Shillings Fifty Thousand only) being general damages for trespass.**

**(d) An order that the defendants shall pay to the plaintiff Kshs. 100,000/= (Kenya Shillings One hundred thousand only) being exemplary damages for trespass.**

**(e) An order that the defendants shall bear the costs of the suit.**

**(f) The amounts in (c) and (d) above shall bear interest from date of judgment at court rates till settled in full.**

**Dated, signed and delivered at Kitale on this 13<sup>th</sup> day of November, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**13/11/2019**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bisonga holding brief for Wena for defendant

N/A for the plaintiffs

**COURT**

Judgment delivered in open court at 2.50 p.m.

**MWANGI NJOROGE**

**JUDGE**

**13/11/2019.**