



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 48 OF 2018

EWM (suing in his capacity as the

Guardian Ad litem & Next Friend to EWM).....PLAINTIFF

- VERSUS -

THE COUNTY GOVERNMENT OF LAIKIPIA.....DEFENDANT

JUDGEMENT

1. By a plaint dated the 12th November 2018, the Plaintiff herein instituted the present suit against the Defendant seeking for orders that:

i. A permanent injunction restraining the Defendant by itself, servants, agents, contractors, employees, officials, proxies and any other person claiming any right under it from entering, remaining on, fencing off, constructing buildings, erecting any kiosk, structures, distributing, sub dividing, issuing cards, tenancy rights to any third party or in any way interfering with the Plaintiff's property known as LR Nanyuki/Municipality Block [...].

ii. General damages for trespass and encroachment on the Plaintiff's property or in the alternative without prejudice to the foregoing the honorable court do order that the Defendant compensate the Plaintiff for the suit property at the prevailing market rate

iii. Costs of the suit and interests

2. Together with the Plaint, the Plaintiff filed an application dated the 12th November 2018 under certificate of urgency wherein he sought for injunctive orders against the Defendant, pending the hearing of the suit. On the 13th November 2018 interim orders were issued pending the hearing of the application inter-parties.

3. There having been service effected upon the Defendant with the Plaintiff's pleadings and there having been neither response nor appearance at the hearing of the application, the Plaintiff vide his application dated the 17th September 2019 sought for interlocutory judgment against the Defendant. On the 16th October 2019, the Plaintiff sought for judgment to be entered against the Defendant and the matter be set down for hearing on formal proof.

4. On the same day, the 16th October 2019, judgment was entered against the Defendant since they have not filed any papers, and a date for formal proof was fixed wherein the matter proceeded for hearing on the 31st October 2019.

Plaintiff's Case.

5. PW 1, EWM testified to the effect that he was the administrator representing the estate of EWM who was suffering from dementia and was of unsound mind. That they were three administrators including JWN a family friend and EWM his sister.

6. That EWM was his father. That he remembered filing the case on 12th November, 2018 alongside a verifying affidavit sworn on the same date, and his witness statement which he wished to adopt.

7. That he also filed a list of documents dated 12th November, 2018 to which he also wished to adopt. That he had applied for guardianship in the Nairobi HCC No. 586 of 2012 wherein the order was issued to the 3 of them on the 9th May, 2013 which order dated the 9th May, 2013, he produced as Pf exh 1.

8. He also produced a letter of allotment dated the 23rd June, 1995 Ref No. 25859/XXII/219 for plot No. R 54/94/50 issued in the name of E M W his father which letter was attached with the Part Development Plan, as Pf exhibit 2(a) and 2(b).

9. The witness testified that he had with him a lease that had been issued on 1st July, 1995 to his father Mr. E W as well as the receipt dated 23rd June, 1995, No. P237723 for Kshs.28,830/= being payment before the lease was issued. He produced the lease dated 1st July, 1995 in reference to Nanyuki Municipality Bloc 8/661 as Pf exh 3(a).

10. He also produced the receipt dated the 23rd June, 1995 for the payment of requisite fee for Kshs.28,830/- as Pf exh. 3(b).

11. Alongside these documents, the Plaintiff also testified that he had with him a form of transfer from Mr. Murage W.N.K. to Mr. E M which transfer took place on the 12th November, 1996 and was in consideration of a sum of Kshs.150,000/= in relation to plot No. LR Nanyuki Municipality parcel No. [...], at which time the lease had not been issued.

12. That when the lease was issued, the property became Nanyuki Municipality Block 8/661. He produced the transfer as Pf exh 4 and testified that the certificate of lease which was in favour of Mr. EWM in reference to Nanyuki Municipality Block [...] was for a period of 99 years with effect from 1st July, 1997 having been issued on 12th November, 1997. He produced the lease as Pf exh 5.

13. The witness also produced the land rate of 5th November, 1998, which was paid by Mr. EWM in reference to Nanyuki Block [...] for Kshs.4,400/=, s Pf exh 6.

14. He testified that the property was invaded by people wherein mobile kiosks were put up by the Nanyuki Council making the property to lose its value. That the kiosks were still on his father's property and he therefore sought that the court evicts them and issues permanent injunction against the Defendant so that they do not stay on that land. He also sought for general damages for trespass and encroachment as well as the cost of the suit. The Plaintiff closed its case and filed their written submissions to wit;

Plaintiff's written submissions.

15. The Plaintiff's written submission were that he had he filed this suit, on behalf of his father Mr. EMW who is of sound mind, upon being appointed as one of the Guardians and next friend, so as to protect his father's estate.

16. The Plaintiff's evidence and testimony was to the effect that his father was the registered owner of parcel of land known as LR Nanyuki/Municipality Block [...] situated in Laikipia County, having been issued with a certificate of lease dated 12th July 1997.

17. That sometime in the year 2018 the Defendant without any color of right or unlawfully excuse unlawfully entered into the Plaintiffs property, graded and sub divided the same into small plots and was in the process of allocating the plots to third parties particularly kiosk owners whose kiosks, which had been situated in front of Marina Restaurant, Barclays Bank and Family Bank areas, in Nanyuki town, and which kiosks had been demolished by the Defendant.

18. That the Defendant's action was illegal and an indication of impunity and the same amounted to illegal and unlawful compulsory acquisition of private land and trespass because the Plaintiff had not disposed of his property to the Defendant nor had he permitted the Defendant to have kiosks built on his land.

19. That after the orders of the court of 28th November 2018 the Defendant dumped the movable steel made kiosks on the Plaintiff's land and the same remain thereon the Plaintiff's property to date. The Plaintiff therefore prayed for an order of permanent injunction restraining the Defendants by itself, servants, agents, contractors, employees, officials, proxies and any other person claiming any right under it from entering, remaining on, fencing off, constructing buildings, erecting any kiosk, structures, distributing, sub dividing, issuing cards, tenancy rights to any third party or in any way interfering with the Plaintiff's property known as LR Nanyuki/Municipality Block [...].

20. It was the Plaintiff's submission further that the Defendant was in contravention of Articles 19, 20, 21, and 40 of the Constitution. That the court had jurisdiction as provided for under Articles 22, 23 and 162 (2)(b) of the Constitution to issue the orders sought in the plaint in favour of the Plaintiff so as to protect his rights under the Bill of Rights and particularly in Article 40 of the Constitution.

21. Lastly, the Plaintiff submitted that he had proved his case to the required standard on a balance of probability. That the Defendant deliberately failed to enter appearance and to file any defence to rebut or challenge the Plaintiff's suit and submission, therefore the Plaintiff's case was unchallenged, unrebutted and not controverted and therefore the he should be granted the prayers sought in his plaint.

Analyses and determination.

22. I have considered the uncontroverted evidence adduced in court, the documents produced as exhibits and the fact that the Defendant neither entered their appearance nor filed their defence herein. I have also considered the fact that the Plaintiff's contention that the registration of the suit property in his father's name vested in him the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

23. It is evident that the Defendant herein was served with the summons to enter appearance but they chose not to defend the case. Although the suit was undefended, yet the Plaintiff still had the duty to formally prove his case on the balance of probabilities as required by law.

24. I have also considered the fact that the Defendant herein without color of right trespassed into the Plaintiff's suit land and graded the

same thereafter sub dividing it into small plots wherein it was in the process of allocating the plots to third parties

25. I find the issue for determination as being whether the Plaintiff is entitled to the orders so sought in his plaint and who is to pay for costs of the suit.

26. From the documentary evidence, vide a copy of the certificate of lease for title No Nanyuki Municipality block [...] herein produced as Exh. 5 for 99 years from 1st July 1997, the Plaintiff herein proved that he was the registered proprietor of the said parcel of land on the 12th November 1997, his registration as owner of the suit lands was also a first registration.

27. The provision of Section 24(a) and 25(1) of the Land Registration Act No. 3 of 2012 outlines the interests and rights of a registered proprietor as follows;

Interest conferred by registration

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

Rights of a proprietor

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

28. The law is very clear on the position of a holder of a title deed in respect of land.

29. **Section 26(1)** of the **Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible ownerand the title of that proprietor shall not be subject to challenge except—

a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

30. It will be seen from the above provisions that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme.

31. The Defendant did not adduce any evidence that the Plaintiff acquired Title to the suit land illegally, un-procedurally or through a corrupt scheme.

32. Based on the evidence adduced above, and in relying on section 26(1) of the Land Registration Act, the Court finds that the Plaintiff has indeed satisfied the legal proviso that he is the proprietor of the suit land and hence has absolute ownership including all rights and privileges appurtenant to it.

33. As to whether the Defendant has encroached on the suit land, the uncontroverted evidence adduced by the Plaintiff as well as the production of the Certificate of Lease are proof enough that indeed the Defendant had encroached on the Plaintiffs land.

34. Section 24 (a) of the Land Registration Act stipulates as follows:

' subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....'

35. These provisions empower the Plaintiff by virtue of being registered owner of the suit land with vested rights and privileges therein and which no person should interfere with it.

36. I find that the Plaintiff is indeed entitled to protection by the law from the Defendant who has interfered with his rights and privileges over the suit land.

37. The issue as to whether the Plaintiff suffered any loss or damage on account of the impugned activities by the Defendant, I find that there being no evidence that the Defendant's action of entering into the Plaintiff's land and carrying out the impugned activities was lawful or otherwise legally sanctioned, the Defendant's action therefore constituted trespass to land.

38. It is trite law that trespass to land is actionable *per se* (without proof of any damage). See the case of **Park Towers Ltd v. John Mithamo Njika & 7 others (2014)** eKLR where J.M Mutungi J., stated:-

‘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 damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. ...’

39. In the case of **Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013)** eKLR P. Nyamweya J. held:-

“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1st and 2nd Defendant s’ trespass”

40. The net result is that I find and hold the Plaintiff’s suit against the Defendant has been proved on a balance of probabilities. I accordingly enter judgment in favor of the Plaintiff as against the Defendant in the following terms:

i. A permanent injunction is herein issued restraining the Defendant by itself, servants, agents, contractors, employees, officials, proxies and any other person claiming any right under it from entering, remaining on, fencing off, constructing buildings, erecting any kiosk, structures, distributing, sub dividing, issuing cards, tenancy rights to any third party or in any way interfering with the Plaintiff’s property known as LR Nanyuki/Municipality Block [...].

ii. I find that general damages of Kshs.100,000/= shall be paid by the Defendant to the Plaintiff to compensate him for the wrongful entry onto his Land or in the alternative without prejudice to the foregoing the Defendant compensate the Plaintiff for the suit property at the prevailing market rate

iii. Costs of the suit and interests

Dated and delivered at Nyahururu this 17th day of December 2019

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE