



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT AND LAND CASE NO. 6 OF 2014

CHRISTINE ANDREE JOSHI.....1ST PLAINTIFF

STEPHEN ELKINGTON.....2ND PLAINTIFF

BARRY JAMES JOSHI.....3RD PLAINTIFF

VERSUS

SALLY CHEPWOGEN.....DEFENDANT

JUDGMENT

Introduction

1. By a Plaint dated 20th February, 2014 the Plaintiffs filed suit against the Defendant claiming vacant possession, mesne profits and general damages for trespass in respect of land parcel number KERICHO/CHEMAGEL/1401 which the plaintiffs' late father bought in a public action.
2. The Defendant filed a Defence and Counterclaim dated 14th June, 2014 in which she denies that the suit property was sold by public auction and prays for cancellation of the title to the suit property in the names of the plaintiffs and a permanent injunction to restrain the plaintiffs from trespassing or in any manner dealing with the suit property.
3. The suit was set down for hearing by consent on the 10th October, 2017 but the Defendant and her advocate did not attend court and the hearing proceeded *ex-parte*.

Plaintiff's Case

4. The 1st Plaintiff who is the daughter and one of the administrators of the estate of the late Jimmy Joshi testified that her late father bought land parcel number KERICHO/CHEMAGEL /1401 in a public auction in March 2002. The suit land had been charged to Oriental Commercial Bank (formerly Delphis Bank) by the Defendant's late husband, one Philip Arap Kirui to secure a loan which was not repaid.
5. Following the said sale, the Defendant filed HCCC no 1150 of 2002 against the deceased challenging the sale but the suit was dismissed for want of prosecution in July 2010. The property was subsequently transferred to the plaintiffs on 23rd March, 2012. The Plaintiffs issued a notice to the Defendant to vacate the property but she has unlawfully remained in possession of the suit land prompting the filing of this suit.
6. The 1st Plaintiff testified that as a result of the Defendant's actions, the Plaintiffs have not been able to benefit from the suit property and they have suffered loss and damage. She produced all the documents in their list of documents including the title deed in respect of the suit property, a certificate of Confirmation of grant, notification of sale among others.

Issues for Determination

7. The following issues arise for determination:

- i. Whether the plaintiffs are the registered proprietors of land parcel number KERICHO CHEMAGEL.1401
- ii. Whether the defendant is unlawfully occupying the suit premises
- iii. Whether the plaintiffs are entitled to mesne profits

iv. Whether the plaintiffs are entitled to general damages for trespass

v. Who should bear the costs of this suit?

Analysis and Determination

8. With regard to the first issue, it is the plaintiff's uncontroverted evidence that they are the registered proprietors of land parcel number KERICHO.CHEMAGEL/1401 as the said parcel was transferred to them through transmission in their capacity as the administrators of the estate of their late father, Jimmy Joshi - Deceased. The 1st Plaintiff produced the title deed in respect of the suit property together other documents to show that the said parcel of land was purchased by their late father from the bank in public auction.

9. **Section 24** of the **Land Registration Act No 3 of 2012** provides as follows:

“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.”

10. **Section 25 (1)** of the said Act further provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the 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 to any lawful encumbrances, set out in this section.

11. **Section 26** of the same Act provides that the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except;

- a. *on grounds of fraud, or misrepresentation to which 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.*

12. Since the plaintiff's evidence was not challenged at the hearing, it is my finding the plaintiffs are the absolute proprietors of the suit property. They are therefore entitled to protection of the said title as provided for under the Land Registration Act No. 3 of 2012. Furthermore, Article 40 of the Constitution guarantees the property rights of every person and provides under Article 40(3) that no person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property.

13. The second issue is whether the defendant is in lawful occupation of the suit land. The 1st Plaintiff testified that they had issued a notice to the defendant to vacate the suit land but she refused and instead filed a case to challenge the manner in which the plaintiff's late father acquired the land. The said suit was dismissed for want of prosecution. In the circumstances, the defendant has no right over the suit land and she is therefore occupying the same unlawfully. This amounts to trespass to land.

14. Regarding the third issue, the plaintiff testified that as a result of the defendant's unlawful occupation of the suit land, the plaintiffs have not benefited from it from the time it was bought in 2002. She therefore claims mesne profits at the rate of Kshs. 2000 per month.

Mesne profits are a form of special damages and it is trite law that special damages must not only be specifically pleaded but they must also be strictly proved. In the case of **Hahn V Singh Civil Appeal No 42 of 1983 1985 KLR** at p. 717 learned judges Kneller, Nyarangi and Chesoni held as follows:

“Special damages must not only be specifically pleaded but also strictly proved for they are not the direct and natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves”

15. In the instant case the plaintiffs did not produce any valuation report to show how they arrived at the figure of Kshs. 2000 per month. The material placed before the court is therefore insufficient to warrant an award of special damages.

16. Turning to the issue of the general damages, I rely on the case of **Park Towers Ltd V John Mithamo Njika and 7 Others 2014 eKLR** where Mutungi J stated as follows:

“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 general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case.”

17. Further in the case of **Duncan Nderitu Ndegwa V Kenya Power and Lighting Company Limited & Another (2013) eKLR** Nyamweya J held that once trespass to land is established, it is actionable per se and indeed no proof of damage is necessary. In the instant case I consider an award of Kshs. 150,000 to be adequate compensation for the defendant's infringement of the plaintiffs' right to use and enjoy their land.

Disposition

18. The upshot is that the plaintiff has proved its case on a balance of probabilities. I accordingly enter judgment for the plaintiff and direct as follows:

- a. The defendant shall vacate the parcel of land known as L.R No KERICHO CHEMAGEL/1401 within 3 months from the date hereof failing which the plaintiffs may apply for an eviction order.
- b. The Plaintiff is awarded Kshs. 150,000 as general damages for trespass.
- c. The defendant shall bear the costs of this suit.

Dated, signed and delivered at Kericho this 26th day of January, 2018.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Terer for Karani for the Plaintiff
2. No appearance for the Defendant
3. Court Assistant - Rotich