



**REPUBLIC OF KENYA**

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

**ELC NO 15 OF 2017**

**ANDREW MUGANDI NURI**

**PATRICK MNYAKA CHAMBEYU**

**NYOTA MUGANDI CHAMUSUHUNI.....PLAINTIFFS**

**-VS-**

**CHINA DALIAN INTERNATIONAL GROUP .....DEFENDANT**

**JUDGMENT**

1. The Plaintiffs instituted this Suit by a Complaint dated 26<sup>th</sup> January, 2017 and filed on even date but was amended on 10<sup>th</sup> April 2017 and the amended Complaint filed on 3<sup>rd</sup> May, 2017. The Plaintiffs are seeking for judgment against the defendant for:

***i. A permanent injunction restraining the defendant either by itself,, its employees, servants and agents from trespassing into, entering onto the Suit Property thereby committing acts of waste, alienating and/or interfering with the Plaintiffs' quiet and peaceful occupation for L.R. NUMBER UNSURVEYED PLOT DERI/MWANGOLOTO in Kinango District;***

***ii. An order for special damages for Kshs.4,500,000;***

***iii. An order for general damages compelling the Defendant to pay the Plaintiffs for unlawfully degrading the Suit Property;***

***iv. Costs of and incidental to this Suit;***

2. The Plaintiffs case is that at all material times relevant to this Suit they were and are still the owners of the Suit Land. The Plaintiffs aver that the Defendant which was engaged in the construction of the Mombasa-Nairobi Highway entered into and trespassed on the Suit Land cut down bushes and proceeded to carry out acts of excavation of soil and rocks thereon and carried them without any colour of right and/or authority from the Plaintiffs. It is the Plaintiffs case that despite their demands to the Defendant to stop from the aforesaid acts of trespass, the Defendant failed to comply. The Plaintiffs further aver that they have a right to own land and have a clean and healthy environment which rights include the right to have the environment protected and that the Defendant's acts amounts to violation of these rights. The Plaintiffs further aver that as result of the Defendant's acts of trespass, they have suffered substantial loss and damage estimated at Kshs.4, 500,000.00. It is also the Plaintiffs' case that their land now looks like a quarry site in which there can be no meaningful use unless it is rehabilitated.

3. The Defendants was served with summons to enter appearance and filed a memorandum of appearance on 2<sup>nd</sup> March 2017 through M/s M J Nyambura & Associates Advocates. There was however, no defence filed either within the stipulated time or at all and upon request by the Plaintiffs, interlocutory judgment was entered against the Defendant. The matter proceeded for formal proof on 19<sup>th</sup> October 2017 in the absence of the Defendant and their advocate who was otherwise duly served but failed to attend.

4. PW1 Andrew Mugandi Nuri, the 1<sup>st</sup> Plaintiff stated that he owns the Suit Property jointly with the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs who are his uncles. He informed the Court that on 14<sup>th</sup> January 2017 he saw the Defendant's machinery excavating soil on the Suit Land and when he enquired from his co-plaintiffs whether they were aware of what was going on, none admitted giving the Defendant permission to enter the land and carry out those activities. The Plaintiffs attempted to stop the Defendant but did not succeed and the Plaintiffs instructed their Advocate to issue a demand notice (P. Exhibit 1). He stated that they instructed a valuer to carry out a valuation of the extent of the damage to the Suit Land. In the report, which was produced as exhibit 3, it was established that the affected area which was excavated was approximately 13 acres and about 4800 metric tonnes of murram moved out. The total value of the material removed was estimated at Kshs.4, 500,000.00. PW1 also produced photographs showing the area in which the excavation was carried out as well as part of the land that was not damaged. At the close of the Plaintiffs case, the Plaintiffs' Counsel urged the Court to go by the evidence on record.

5. The Court has carefully considered the evidence on record. The main issues that are for determination in this suit are whether the Defendant trespassed upon the Suit Land and unlawfully conducted excavation and removed material from thereon and what amount (if any) is payable as damages for such excavation. It is evident that the Defendant herein was served with summons to enter appearance and even though they entered appearance, the Defendant did not file any defence and the Plaintiffs' suit is therefore undefended. The Defendant did not tender any evidence to counter and or controvert the testimony of PW1. However, even if the Suit is not defended, the Plaintiffs still have the duty to formally prove their case on a balance of probability as required by law.

**6. In Clerk & Lindell on Torts (17<sup>th</sup> Edition) Para 17-01, trespass is defined thus:**

**“An unjustifiable entry by one person upon the land in possession of another. Removing any part of the soil of land also constitutes trespass.”**

From the evidence on record, I find on a balance of probability that the Defendant did enter onto the Plaintiffs land without their consent and the Defendant's action amounted to trespass. The Plaintiffs have tendered photographic evidence that show the extent of the excavation carried onto their land. The Plaintiffs' evidence was not rebutted and remains uncontroverted. The Defendant's actions on the Plaintiffs land were unlawful. In tort damages are awarded as a way to compensate a Plaintiff for the loss he has incurred due to the wrongful action on the part of a Defendant. The damages so awarded are intended to return the Plaintiff back to the position he was in before the wrongful act was committed. In cases where trespass to land results in damage then the computation of damages is on the basis of restitution of land. The value of the soil which have been removed from that land are all factored as well as the cost of restoration of the land to the position it was in before the wrongful act was committed.

7. In the present case, there was actual damage to the Plaintiffs' land arising from the acts of excavation conducted thereon by the Defendant. The Plaintiffs are therefore entitled to compensation for the value of the soil that had been removed from their land. The Plaintiffs through the report of the valuer claimed Kshs.4, 500,000.00 as the estimated value of the soil removed. The claim for compensation for the soil which was removed from the land was a claim for special damages which must be pleaded and specifically proved. The Plaintiffs pleaded and tendered evidence to support their claim. I therefore find that this claim for special damages of Kshs.4, 500,000.00 has been proved on a balance of probabilities.

8. With regard to the claim for general damages, there are several cases where the Court has awarded

general damages for trespass. In **Anthony Kolani Mwanja –v- Mwaka Omar Ali (2011) eKLR** the Court awarded a sum of Kshs.50,000.00 as general damages for trespass. Similarly in **James Njeru –v- Ericson Kenya Limited (2015) eKLR** the Court found that damages in case of trespass where trenches had been dug across the Plaintiff's land would be assessed at Kshs.50,000.00. The exact value of the land before and after the trespass has not been presented to the Court. However, as I have found that the Defendant trespassed on the Suit Land, the Plaintiffs are entitled to a reasonable sum to compensate them. I award the Plaintiffs Kshs.50,000.00 as general damages for trespass.

9. The upshot of this is that this Court is satisfied that the Plaintiffs have proved their case against the Defendant on a balance of probabilities. Judgment is entered for the Plaintiffs against the Defendant in the following terms:

- a. A permanent injunction restraining the Defendant either by itself, its employees, servants and agents from trespassing into or entering onto or committing acts of waste, alienating and or interfering with the Plaintiffs' quiet and peaceful occupation of L.R. NUMBER UNSURVEYED PLOT DERI/MWANGOLOTO in Kinango District.**
- b. Special damages of Kshs.4,500,000.00**
- c. General damages for trespass at a nominal sum of Kshs.50,000.00**
- d. Costs of the Suit.**
- e. Interest at Court rates from the date of judgment until payment in full.**

**Delivered, signed and dated at Mombasa this 5<sup>th</sup> February, 2018.**

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**C. YANO**

**JUDGE**