



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 65 OF 2017

SARAH CHEPKEMOI BETT.....PLAINTIFF

VERSUS

RECHO KOECH.....DEFENDANT

JUDGMENT

Introduction

1. The plaintiff commenced this suit by way of a Plaint dated 7th June, 2017 seeking the following reliefs:

- a) An order of permanent injunction to issue against the defendant by herself, her agents, servants and/or employees from further trespassing and/or encroaching into the land parcel known as L.R No. KERICHO/KIPKETER/1460 and in default an eviction order do issue against the defendant*
- b) Damages for trespass and mesne profits from 1981 upto the date of judgment*
- c) Interest on (b)*
- d) Costs of this suit.*

2. Despite being served with Summons to enter Appearance, the Defendant did not file any Defence. The suit therefore proceeded ex-parte.

3. At the hearing the Plaintiff testified that she is registered as proprietor of land parcel number KERICHO/KIPTERE/1460 jointly with her son Paul Kipkurui Chebuiyot. She produced the title deed in respect of the said parcel as an exhibit. She explained that the suit property was previously registered in the name of the late Samuel Bett and after his demise they applied for a Grant of Letters of Administration and had it transferred to themselves.

4. She testified that she had sued the Defendant because the Defendant trespassed onto her land. She stated that before her husband's death, he had leased a portion of the suit property to the Defendant for purposes of grazing her cattle. After her husband died the Plaintiff sought to terminate the lease but the Defendant refused to surrender vacant possession of the land to the plaintiff prompting her to report the matter to the provincial administration before filing this case.

5. The Plaintiff called Kipkemoi Arap Biegon as her only witness. He corroborated the Plaintiff's evidence with regard to the lease and added that he had attended a meeting at the District Officer when the DO tried to resolve the dispute between the plaintiff and Defendant but the Defendant still refused to move out of the suit property and was still in occupation thereof.

7. The Plaintiff's counsel filed written submissions in which she states that by dint of section 22 of the Land Registration Act, the Plaintiff has demonstrated that she is the absolute and indefeasible owner of the suit property.

The said section provides as follows:

“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 and indefeasible owner thereof.”

8. Furthermore, 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.”

9. 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.

10. 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.

11. Since the plaintiff’s evidence was not challenged at the hearing, it is my finding the plaintiff is the absolute proprietor of the suit property. She is therefore entitled to protection of the said title as provided for under the Land Registration Act No. 3 of 2012. Additionally, 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.

12. The second issue is whether the defendant is in lawful occupation of the suit land. The Plaintiff testified that she has notified the defendant to vacate the suit land but the Defendant has refused. In the circumstances, it is my finding that the defendant has no right over the suit land and she is therefore occupying the same unlawfully. This amounts to trespass to land.

13. Regarding the third issue as to whether the Plaintiff is entitled to the reliefs sought, the Plaintiff seeks two main remedies; a permanent injunction against the defendant and in default thereof an order of eviction against her.

14. The principles that guide the court in granting an interlocutory injunction are set out in the celebrated case of **Giella V Cassman Brown & Company Limited 1973. E.A 358** as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide it will decide the application on a balance of convenience.”

15. The first test that the court must determine is whether the plaintiff has established a *prima facie* case with a probability of success. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) defined a prima facie case as follows:

“A prima facie case is... one which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

16. From the Plaintiff’s evidence stated above, it is my finding that she has met the threshold for the grant of an injunction. Similarly, the Plaintiff is entitled to an eviction order in the event that the Defendant does not vacate the suit property.

17. In her plaint the plaintiff prays for general damages for trespass as well as mesne profits.

18. With regard to mesne profits, the Plaintiff did not tender any evidence to guide the court on what should be awarded. Mesne profits are akin to special damages and must therefore not only be specifically pleaded but must strictly be proved.

19. 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”

20. In the instant case the plaintiff needed to plead the amount that she has lost as a result of the Defendant’s unlawful use of her land. Without such evidence, it is not possible for the court to determine the claim for mesne profits. In the circumstances, I am not in a position to grant the same.

21. Turning to 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”

22. 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 plaintiff’s right to use and enjoy her land.

23. The upshot is that the Plaintiff has proved her case on a balance of probabilities. I therefore enter judgment for the Plaintiff and make the following final orders:

- a) A permanent injunction do and is hereby issued restraining the Defendant by herself, her agents or anyone acting on her behalf from trespassing upon land parcel number KERICHO/KIPTERE/1460.
- b) The Defendant is hereby ordered to vacate the suit property within three months from the date hereof failing which the Plaintiff may apply for an eviction order.
- c) Kshs. 150,000 general damages for trespass.
- d) The costs of this suit shall be borne by the Defendant.

Dated, signed and delivered at Kericho this 16th day of March, 2018.

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J.M ONYANGO

JUDGE

In the presence of:

- 1. Miss Ngetich for the Plaintiff
- 2. No appearance for the Defendant
- 3. Rotich – court assistant