



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ELC CASE NO. 620 OF 2017
PAMELA WAIThERA MBURU.....PLAINTIFF
VERSUS
COUNTY GOVERNMENT OF KAJIADO.....DEFENDANT
JUDGEMENT

By a Plaint dated the 20th May, 2016, the Plaintiff is seeking for judgement against the Defendant as follows:

- a) A declaration that the Defendant's actions amounts to illegal trespass onto the Plaintiff's suit land.
- b) An order directing the restoration of the Plaintiff's suit land in its prior status as existing prior to the erection of the trespassing road through the suit land.
- c) Permanent injunction against the Defendant, restraining it either by itself, its agents, officers, employees, servants or any other body or authority from interfering in any way with the Plaintiff's quiet user, occupation and possession of the suit land.
- d) In the alternative to 2 and 3 above, the Defendant be ordered to compensate the Plaintiff for the acquisition of the suit land and a relocation to another parcel at the cost of the Defendant
- e) Special damages for the costs of the barbed wire fence.
- f) General damages for trespass, psychological harm and mesne profits.
- g) Costs of this suit
- h) Any other relief that this court may deem fit to grant

The Defendant entered appearance on 21st June, 2016 but never filed a Defence. The request for interlocutory judgement was declined and the matter proceeded to hearing on 29th November, 2017 with the Plaintiff only calling one witness.

Evidence of Plaintiff

PW1 Pamela Waithera Mburu

She adopted her witness statement dated the 20th May, 2016 which was filed on 9th June, 2016 as her evidence in court. She confirmed being proprietor of land parcel number KAJIADO/KITENGELA/22811 measuring 0.09 hectares. She produced copies of her title deed, Mutation Form and Registry Index Map as exhibits '1', 2 and 2a respectively. She contended that the County Government had made an access road traversing her land to the Governor's Residence and named it the 'Governor's Road'. She noted that as per the Registry Index Map, there was no road that was meant to pass through her land and this had interfered with her plans to construct therein. She claimed she tried to block the road but the County Physical Planning Officer removed the barrier she had put thereon and also blocked her from fencing her land. She insists there was no notice of the intended road. Further that she incurred expenses amounting to Kshs. 50,000 while fencing the suit land. She reiterates that she sent a demand letter dated the 8th March, 2016 to the County Government but they were unresponsive. She tried to contact the County Government to resolve the dispute amicably but this was in vain. She states that there are other gazetted roads and even an exit as indicated in the Registry Index Map. Further that her plot was a resultant subdivision from KAJIADO/KITENGELA/3456 and the other parcels are still intact. She stated that she contracted a valuer to undertake a valuation of the suit land which Valuation Report she produced as exhibit '4'. Further that her suit land is valued at Kshs. 3.5 million. She paid Kshs. 60,000 to the Valuer and produced a receipt to that effect as exhibit '4 a'. She reiterates that with the road passing through the middle of her land, she is unable to develop it. She averred

that she wanted her land back, but if the Defendant failed to return it, then she should be restored to an alternative site or compensated. She also sought for the costs of the suit.

The Plaintiff thereafter closed her case and filed submissions.

Analysis and Determination

After perusal of the pleadings, witness statement including the documents filed herein and upon hearing the testimony of PW1, I find that the following are the issues for determination:

- Whether the Plaintiff is the legal proprietor of the suit property known as title number Kajiado/Kitengela/22811;
- Whether the Defendant has trespassed on the Plaintiff's land and demarcated a road traversing it;
- Whether the Defendant and or his agents/servants should be permanently restrained from interfering with the Plaintiff's enjoyment and quiet possession of the suit land;
- Whether the Plaintiff is entitled to Special damages, General Damages, Mesne profits and Exemplary Damages; and
- Who will pay costs of the suit.

Whether the Plaintiff is the legal proprietor of the suit property known as title number Kajiado/Kitengela/22811

PW1 who was the Plaintiff herein stated that she is the proprietor of the suit land and produced a copy of the title deed and Certificate of Official Search that all confirmed she is the registered proprietor of the suit land.

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

‘(1) 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, 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 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. ‘

Since the Defendant failed to file a defence or attend court to controvert this evidence, and in relying on the above provisions, I find that the Certificate of Title held by the Plaintiff is prima facie evidence that she is the proprietor of the suit land.

Whether the Defendant has trespassed on the Plaintiff's land and demarcated a road traversing it

It is the Plaintiff's contention that the Defendant demarcated a road that traversed the suit land and interfered with her plans to develop it. The said road passes through the Plaintiff's land to the Governor's residence. According to the RIM that PW1 produced in Court, there is no road indicated to pass through the suit land. Further, the Defendant failed to controvert the evidence presented in court. PW1 stated in court that the Defendant did not furnish her with any gazette notice to prove that the said road traversing her land had indeed been gazetted. PW1 confirmed that despite trying to block the said road, the County Physical Planning Officer removed the barrier she had put thereon including her fence. Her efforts to have the matter resolved amicably fell on deaf ears as the County Government never responded to her letters including the demand letter. It is against the foregoing that I find that the Defendant has indeed trespassed on the suit land by demarcating a road that traversed the middle of it.

Whether the Defendant and or his agents/servants should be permanently restrained from interfering with the Plaintiff's enjoyment and quiet possession of the suit land;

I note the Defendant's have not controverted the evidence of the Plaintiff regarding the encroachment on the suit land. I have made a finding above that the Plaintiff is the absolute proprietor of the suit land. Section 24 (a) of the Land Registration Act provides that: **‘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.’**

In the case of Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR Justice J.M. Mutungi stated that **' the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the Land Registration Act entitled to the protection of the law'**.

In relying on the above provisions and this authority, I find that legal provisions empower the Plaintiff by virtue of being the registered owner of the suit land with vested rights and privileges therein and which no person including the Defendant should interfere with. I further find that since the Defendant did not prove their claim over the suit land, they should be permanently restrained from interfering with the Plaintiff's peaceful and quiet possession of it.

Whether Plaintiff is entitled to Special damages, General Damages, Mesne and Exemplary Damages

The Plaintiff as PW1 claimed the Defendant demarcated a road that traversed her land in the middle, which actions have made her be unable to develop it. Further that the Defendant's agent demolished her fence and removed a barrier she had placed thereon to block the road. She was forced to engage the services of a valuer who assessed the value of the suit land, which Valuer she paid Kshs. 60, 000 as indicated in exhibit '4a'. PW1 contended that she had spent kshs. 50, 000 to fence the land which fact was not controverted by the Defendant. It is against the foregoing that I find that the Plaintiff has proved her claim for special damages amounting to Kshs. 110,000.

In terms of general damages, the Plaintiff pleaded that the Defendant had trespassed on her land and demarcated a road that traversed it in the middle. PW1 stated that she was unable to construct a house due to the Defendant's acts of trespass. I find that indeed the Defendant's action of trespassing on the suit land has interfered with the Plaintiff's rights to occupation and enjoyment of her property. PW1 however did not adduce evidence on the loss she had had incurred as a result of the Defendant's acts of trespass.

In the case of **Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013) eKLR** where 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 Defendants' trespass"

In so far as the Plaintiff did not provide evidence on the loss she had incurred due the Defendant's acts but in relying on the above case, and the Plaintiff's submissions herein, where she claimed she suffered damages amounting to Kshs. 1, 000, 000, I find the Plaintiff indeed suffered damages as a result of the Defendant's acts of trespass. I will proceed and award the Plaintiff Kshs. 1,000,000 as general damages.

On the issue as to the whether the Plaintiff is entitled to an award of exemplary damages as a result of the actions of the Defendant, I wish to interrogate the evidence presented. I note the Defendant is a local authority who is supposed to notify the Plaintiff of the intended road and serve her with a Gazette Notice, but they failed to do so.

In the case of **Titus Gatitu Njau v Municipal Council of Eldoret [2015] eKLR**, Justice Sila Munyao held as follows: ' **In my view, this is a fit case for the award of exemplary damages. In the case of Rookes v Barnard (1964) 1 All ER 367, it was held that exemplary damages may be awarded in two classes of cases; first where there is oppressive, arbitrary or unconstitutional action by the servants of the government, and secondly, where the defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff.** Rookes v Barnard, received the stamp of approval of the East African Court of Appeal in the case of Obongo v Kisumu Council (1971) EA 91. In the matter, Spry V.P stated as follows at page 95 :- "**I am therefore of the opinion that this court should regard Rookes v Barnard as authoritatively settling out the law of England as to exemplary damages in tort, which law was applied in Kenya by the Judicature Act, 1967.**" **Apart from the case of Obongo v Kisumu Council, the case of Rookes v Barnard has been applied in Kenya in various decisions. These include the cases of C A M v Royal Media Services Limited [2013] eKLR, C.A at Nairobi Civil Appeal No. Civil Appeal No. 283 of 2005, Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR, Court of Appeal at Kisumu Civil Appeal No. 84 of 2009; and, Abdulhamid Ebrahim Ahmed Vs Municipal Council Of Mombasa [2004] eKLR, High Court at Mombasa, Civil Suit No. 290 of 2000. The basis for awarding exemplary damages is to punish the defendant for its conduct. A wrong doer must not be allowed to benefit from his conduct. If this were not so, a wrongdoer could chose to commit a wrong, being alive to the reality that taking into consideration the amount to be awarded in damages, he would still be better off if he proceeds to commit the wrong. Exemplary damages are at the discretion of the court and the amount to be awarded must depend on the surrounding circumstances of each case. In our case, the defendant flagrantly disobeyed an order stopping them from demolishing a building.'**

Based on the evidence presented and being persuaded by the authority above, I find that the Plaintiff is indeed entitled to exemplary damages as against the Defendant as it failed to provide her with ample notice as regards the intended road. Further, the Defendant without any colour of right proceeded to demolish the Plaintiff's fence and remove the barrier she had put thereon, oblivious to the fact that she was the absolute and registered proprietor of the suit land. The Plaintiff was unable to develop the land because the road traversed her land in the middle. These actions are indeed a sign of impunity which is contrary to the Fair Administration Act and ought to be curtailed. It is against the foregoing that I proceed to award the Plaintiff exemplary damages amounting to Kshs. 1 million.

The Plaintiff claimed for mesne profits but as per the valuation report, the property is vacant and undeveloped. I note the Plaintiff failed to adduce any evidence to prove Mesne profits and will hence not award it.

Costs

Costs generally follow the event, and in this instant case, since the Plaintiff has been inconvenienced, I find that she is entitled to costs and will award her the costs of this suit.

In the circumstances, I find that the Plaintiff has proved her case on a balance of probability and proceed to enter judgment in her favour and make the following final orders :-

- 1) That judgement is hereby entered for the Plaintiff against the Defendant in the sum of Kshs. 2, 100,000/= comprising of Kshs. 1,000,000/= as general damages for trespass; Kshs. 1, 000,000 as exemplary damages and Kshs. 110,000 as Special damages.
- 2) That a declaration be and is hereby issued, as against the defendant, the plaintiff is the absolute proprietor of land parcel Kajiado/Kitengela/22811.
- 3) A permanent injunction be and is hereby issued restraining the Defendant either by itself, its agents and or servants from harassing, threatening, intimidating, trespassing upon, demolition and or in any manner whatsoever interfering with the Plaintiff's suit property known as title number Kajiado/Kitengela/22811.

4) The costs of the suit are awarded to the Plaintiff.

Dated signed and delivered in open court at Kajiado this 14th day of March, 2018.

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Rono holding brief for Ishmael for Plaintiff

N/A for Defendant