



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC NO 283 OF 2017

JAMES MULWA MALUNDA.....1ST PLAINTIFF

CHARLES MUTISYA KYENZE.....2ND PLAINTIFF

ELIZABETH MBAIKA NZANGI.....3RD PLAINTIFF

VERSUS

NATIONAL WATER CONSERVATION & PIPELINE CORPORATION.....DEFENDANT

JUDGMENT

- 1) James Mulwa Malunda who is the first plaintiff herein is an accountant by profession. He also owns land parcel numbers Sultan Hamud 188 and 260 Situated in Sultan Hamud in Makueni County.
- 2) The second plaintiff is an auditor and owner of Plot no. 189. Both claim that the defendant through its servants, workmen and agents wrongfully entered into the three properties and thereafter proceeded to erect a fence around them thereby denying them access and the right to use the said properties.
- 3) By their plaint dated 23rd May, 2017 and filed in court on the 24th May, 2017 the plaintiffs pray for judgment against the defendant for;
 - a) **An injunction as pleaded above**
 - b) **Damages for trespass**
 - c) **Interest thereon**
 - d) **Costs of this suit**
 - e) **Any other relief the court deems fit to grant**
- 4) On the 26th May, 2017, the defendant was served with summons to enter appearance, plaint, verifying affidavit, plaintiff's witness's statements and list of documents but it failed to enter appearance and file its defence within the prescribed period.
- 5) Consequently, on the 1st November, 2017 the court directed that this matter do proceed as undefended suit.
- 6) The case came up for hearing on the 16th January, 2018 where the first plaintiff adopted his statement dated 23rd May, 2017 and his list of documents as his evidence.
- 7) His evidence was that on the 4th March, 2016 the defendant erected a fence around his properties number Sultan Hamud 188 and 260. He went on to say that the defendant did so through its servants, workmen and agents, an act that he termed as wrongful. He added that as a result of the fence that had been erected by the defendant, he was denied access and the right to use and enjoy the properties in question.
- 8) He prays that he be awarded damages for wrongful entry by the defendant into his properties and an injunction to restrain it, its servants, workman and agents from entering on the said property, or from destroying or other wise injuring the hedge or fence thereof or from erecting or causing to be erected a fence thereof, or from in any way interfering with his use and enjoyment of the suit property.

9) The second plaintiff Charles Mutisya Kenze too adopted his witness statement dated 25th May, 2017. He said that he owns plot number 189 which he acquired in June, 1996. He added that his plot is adjacent to those of the first plaintiff. He said that he acquired his property from the Ministry of Lands and the Commissioner of Lands and that he followed all the relevant procedures to acquire it.

10) The plaintiffs' counsel in his written submissions dated 8th March, 2018 and filed in court on 9th March, 2015 termed the defendant's actions as trespass because it constituted an "**unjustifiable intrusion by one person upon the land in the possession of another**" The counsel relies on the case of Mwita Merengo Vs Joseph Tunei Marwa & 2 others [2012] eKLR and Clerk and Lindel on Torts 7th Edition 17-07.

11) The counsel further submitted that the plaintiffs are entitled to mesne profits from the date when the defendant trespassed up to the time the defendant will cease to trespass.

12) The counsel framed three issues for determination, namely;

1. Did the defendant trespass into the suit land?

2. Did the defendant unlawfully enter the plaintiffs' said properties and thereafter proceeded to erect a fence around the said properties thereby denying the plaintiffs access and the right to use and enjoyment of the said property?

3. What amount (if any) is payable as damages for such excavation?

13) On the first and the second issues, the plaintiffs' counsel submitted that the plaintiffs have on a balance of probabilities shown that the defendant entered into their land without their consent.

14) And on the third issue, the counsel submitted that trespass is actionable per se without proof of damage.

15) Regarding computation of damages, the counsel referred to **Halsbury's 4th ed, Vol 45, at para 26,1503** which provides as follows;

a) If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.

b) If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.

c) Where the defendant has made use of the plaintiffs' land, the plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use.

d) Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.

e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

16) The counsel further referred to the case of Duncan Ndegwa Vs Kenya Pipeline in HCC no. 2577 of 1990 where it was held;

"The general principle as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land. The overriding principle is to put the claimant in the position he was prior to the infliction of the harm."

17) The counsel went on to submit that even though there is no actual damage to the plaintiff's land arising from the act of the defendant, the same falls within the category of an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the right of the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded. The plaintiffs' counsel cited Clerk & Lindell on Torts (Supra) at page 874 para 17-67.

18) The counsel further relies in the case of Abdulhamid Ebrahim Ahmed Vs Municipal Council of Mombasa [2004] eKLR where Maraga J, as he then was, stated thus regarding exemplary damages,

"Exemplary damages on the other hand are damages that are punitive. They are awarded to punish the defendant and vindicate the strength of the law. They are awarded in actions in tort, and only in three categories of cases. The first category relates to the oppressive, arbitrary or unconstitutional actions of servants of government. The other two categories are where the defendant's conduct is calculated to earn him profit and the third one is where exemplary damages are expressly authorized by statute."

19) The counsel pointed out that the plaintiffs have demonstrated that they fall within the category that requires punitive damages against the defendant be made and opined that Kshs. 2,000,000 per parcel would suffice. The counsel went on to submit that in any event the tort of trespass is one on which is actionable without proof of any damage and referred to the case of Anthony Kolani Mwanja Vs Mwaka Omar Ali [2011] eKLR where the plaintiff was awarded Kshs. 50,000 general damages for trespass. The counsel further cited the case of James Njeru Vs Ericson Kenya Ltd [2015] eKLR where the plaintiff was awarded Kshs. 50,000 for trenches that had been dug in his land.

The counsel also cited the case of **Philip Aluchio Vs Crispine Ngayo [2014] eKLR** where E. Obaga J helds as follows;

“ ... The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately after the trespass or the costs of restoration, whichever is less....

The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass...”

The learned judge proceeded to award a normal figure of 100,000.

20) Finally, the counsel cited the case of **Nakuru Industries LTD Vs S.S Mehta & sons [2016] eKLR** where the plaintiff was awarded Kshs. 500,000 for trespass.

21) In the case before me, it is clear that the plaintiffs have been prevented from accessing their property by the actions of the defendant who has fenced off their parcels of land. In light of the title documents that the plaintiffs produced in evidence, I am convinced that they have satisfied this court on a balance of probabilities that they have a cause of action against the defendant.

22) In the circumstances, I will assess a nominal figure of Kshs. 100,000 per parcel of land.

23) From the foregoing, I hereby proceed to enter judgement for plaintiffs and against the defendants as hereunder;

a. Injunction as pleaded in the plaint

b. Kshs. 100,000 per parcel

c. interest of the suit

d. cost of the suit

Signed, dated and delivered at **Makueni** this **24th** day of **April, 2018**

MBOGO C.G

JUDGE

In the presence of:

Mr. Mulei holding brief for Kisaka for the plaintiff

Mr. Kwemboi Court Assistant

MBOGO C.G,

JUDGE

24/4/2018