



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 176 OF 2015

JOSEPH KIPTONUI RUTO.....PLAINTIFF

VERSUS

ANNAH MARITIM.....1ST DEFENDANT

MWALIMU LABOSO.....2ND DEFENDANT

JUDGMENT

Introduction

1. By a Plaint dated 27th November 2008 the Plaintiff filed suit against the Defendant seeking inter alia the following: an order of eviction and mesne profits. In his Plaint he pleads that in the year 2003 the defendants unlawfully trespassed onto his parcel of land known as KERICHO/LONDIANI/KEDOWA BLOCK 1/134 and have been excavating building stones therefrom thereby denying the plaintiff the use of his property and occasioning him loss and damage.
2. The 1st Defendant filed her defence dated 23rd September 2009 in which she denies that she has trespassed onto the defendant's land and states that she bought the suit land from one Kiprono Kauria in 1999. She further alleges that she took possession of her portion while awaiting sub-division after which the said Kiprono Kauria sold the remaining portion to the Plaintiff.
3. Despite being served with a hearing notice, the defendants did not attend court on the hearing date and the case proceeded ex-parte.
4. The Plaintiff testified that he bought the suit property from one Kiprono Kauria in 1999. He produced a copy of the sale agreement. Sub-division was subsequently carried out after which he was issued with his title deed. He produced the said title deed together with a certificate of official search as exhibit.
5. He further testified that when he visited his land in 2003, he found that the defendant had cultivated part of the suit land and constructed a house on the same. The 1st defendant then sold a portion of the suit land to the 2nd defendant. He stated that both defendants have been excavating building stones for the suit land. His demand for them to vacate the land went unheeded.
6. The plaintiff testified that the size of land where the defendants have excavated stones would yield about 40 lorries of building materials at a cost of 30,000 per lorry. He testified that the gaping hole left where stones have been excavated would cost about Kshs. 1,000,000 to fill up as he would be required to hire a caterpillar and buy soil from elsewhere.
7. At the close of the case learned counsel for the Plaintiff filed his submissions in which he summarized the plaintiff's evidence and submitted that as a result of the defendants' acts of trespass the plaintiff had been denied the use and enjoyment of his land.
8. Counsel relied on the case of **Muriuki Marigi V Richard Marigi Muriuki & Others (1997) eKLR** where the court held that according to section 28 of the Registered Land Act under which the suit property was registered, the rights of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of the Court, shall not be liable to be defeated except 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.

Issues for Determination

9. From the pleadings, the plaintiff's testimony and counsel's submissions, the following issues emerge for determination:

- i. Whether the plaintiff is the registered proprietor of land parcel number KERICHO/LONDIANI/KEDOWA BLOCK 1/134

- ii. Whether the defendants are unlawfully occupying the suit premises
- iii. Whether the plaintiff is entitled to the reliefs sought
- iv. Who should bear the costs of this suit?

Analysis and Determination

10. With regard to the first issue, it is the plaintiff's uncontroverted evidence that he is the registered proprietor of land parcel number KERICHO/LONDIANI/KEDOWA BLOCK 1/134. He produced the title deed in respect of the suit property as an exhibit.

11. Sections 24-26 of the Land Registration Act No 3 of 2012 which capture the provisions of section 27 and 28 of the Registered Land Act (repealed) provide as follows:

12. Section 24. 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.

13. 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.

14. 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.

15. 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. He is 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.

16. The second issue is whether the defendants are in lawful occupation of the suit land. The Plaintiff testified that he had notified the defendants to vacate the suit property but they refused to do so. In the circumstances, it is my finding that the defendants have no right over the suit property and they are therefore occupying the same unlawfully. This amounts to trespass to land.

17. 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.

18. 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”

19. In the instant case the plaintiff needed to plead the economic loss occasioned by the defendants acts of trespass. To prove the economic loss from the excavation of building stones, he needed to produce a valuation report from a credible institution to guide the court in assessing the economic value of the stones. Without such evidence, it is not possible for the court to determine the claim for special damages. In the circumstances, I am not in a position to grant the same.

20. 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”

21. 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. 200,000 to be adequate compensation for the defendants' infringement of the plaintiff's right to use and enjoy its land.

22. From the Plaintiff's evidence stated above, it is my finding that the Plaintiff has proved his case on a balance of probabilities. I therefore enter judgment for the Plaintiff and make the following final orders:

- a) That is hereby declared that the defendant's continued occupation of land parcel number KERICHO/LONDIANI/KEDOWA BLOCK 1/134 is unlawful and constitutes trespass to land.
- b) The Defendants is hereby ordered to vacate land parcel number KERICHO/LONDIANI/KEDOWA BLOCK 1/134 within three months from the date hereof failing which the Plaintiff may apply for an eviction order.
- c) General damages of Kshs. 200,000
- d) The costs of this suit shall be borne by the Defendants.

Dated, signed and delivered at Kericho this 19th day of April 2018.

J.M ONYANGO

JUDGE

In the presence of:

Miss Cherotich for Mr. Joshua Mutai for the plaintiff

No appearance for the Defendants

Court Assistant; Rotich