



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 492 OF 2017

(Formerly Kisii ELC No. 415 of 2014)

JOHNSON OTIENO ADERA.....PLAINTIFF/APPLICANT

VERSUS

DICKENS ODHIAMBO

ALICE MIJWANG'A

JAMES MIJWANG'A.....DEFENDANTS

JUDGMENT

1. By a plaint dated 27th October 2014 filed on 29th October 2014, the plaintiff namely JOHNSON OTIENO ADERA sued the defendants namely DICKENS ODHIAMBO, ALICE MIJWANGA and JAMES MIJWANGA for the following reliefs:-

i. A permanent injunctions restraining the Defendants from in any way trespassing on the suit land or carrying out any acts of trespass such as ploughing, developing or occupying the suit land.

ii. General ,punitive and exemplary damages

iii. Costs of the suit.

iv. Any other reliefs.

2. Okoth and Co. Advocates are on record for the plaintiff.

3. The plaintiff claimed that he is the registered proprietor of all the parcel of land known as LR. NO. KAMAGAMBO/KANYIMACH/629 (hereinafter referred to as the suit land) situated within Rongo Sub- County in Migori County of the Republic of Kenya. He learned from one Mbaja in the year 2014 that the defendants were tilling the suit land and had planted sugarcane on it, harvested the same for commercial gain through South Nyanza Sugar Co. Limited and embarked on further development of the land to his detriment as the registered and beneficial owner of the suit land. The plaintiff reported the matter to the local Assistant Chief who tried to stop them from tilling the land but they continued to cultivate the suit land with impunity.

4. The plaintiff further pleaded particulars of trespass on the part of the defendants. The particulars include:-

a) Without the plaintiff's prior consent or authority or agreement, farming the suit land by developing, planting weeding and harvesting sugarcane.

b) Denying the plaintiff quite and peaceful enjoyment and use of the suit land by developing and planting sugar cane and other crops on the suit land.

c) Ignoring the plaintiff's repeated request to them to desist from working or farming the suit land in any way.

d) Threatening to continue farming and ploughing the suit land continuously and repeatedly.

5. The acts of the defendants jointly and severally have breached the statutory and constitutional rights of the plaintiff rendering the instant

suit necessary. The plaintiff pleaded particulars of breach of his rights, thus:-

- i. Upsetting the concept of exclusivity of use by the plaintiff as the registered and equitable owner of the suit land.**
- ii. Denying the plaintiff his proprietary rights.**
- iii. Precluding the plaintiff from quite and peaceful enjoyment of the suit land as the registered and equitable owner.**
- iv. Forceful use and occupation of the plaintiff's land without compensation or consent.**
- v. Illegally occupying the plaintiff's land.**
- vi. Without any colour or right, occupying and farming the plaintiff's land.**

6. The defendants were duly served on 4th November, 2014 as proved through an affidavit of service sworn on 17th November, 2014 by Mr. ERNEST KEROSI, a dully licensed process server. They never entered appearance nor filed defence within the stipulated period of time or at all.

7. A request for judgment dated 11th May, 2015 pursuant to **Order 10, Rule 4 of the Civil Procedure Rules, 2010** was filed by the plaintiffs' counsel on 9th June 2015. Interlocutory judgment was entered for the plaintiff against the defendants as prayed on 18th June 2015.

8. On 14th March, 2017, hearing of the plaintiff case proceeded ex-parte. Mr. M. Mwangi, learned counsel holding brief for learned counsel G.S. Okoth called the plaintiff (PW1) who testified. In his evidence PW1 relied on his list of documents dated 28th October, 2014, which entails the following:-

- a) Demand notice (PEXhibit 1)**
- b) Title deed issued on 23/5/2013 (PEXhibit 2)**
- c) Certificate of official Search dated 1st October 2014 (PEXhibit 3)**
- d) Receipt for official search (PEXhibit 4)**
- e) Sale agreement (Pexhibit 5)**

9. The plaintiffs' counsel informed the court that he wished not to file any submissions herein. There were no submissions in this matter.

10. I have carefully studied the plaint and evidence of PW1. The issues to resolve are whether:-

- (a) The defendants trespassed into the suit land of PW1.**
- (b) The defendants breached constitutional and statutory rights of the plaintiff (PW1).**
- (c) The plaintiff PW1 is entitled to the reliefs sought in his plaint dated 27th October ,2014.**

11. The evidence of PW1 was that he was the registered owner of the suit land. He testified in part that:-

“ I am the registered owner of the suit land LR. NO. KAMAGAMBO/KANYIMACH/629 approximate 10 acres in size. I learned from one Mbaja that the defendants were tilling my land and planting sugar cane.”

12. The testimony of PW1 was in line with the contents of paragraphs 5 and 8 of his plaint. The Particulars of trespass and PEXhibit 1 to 3 render firm support to his sworn testimony.

13. The term trespass refers to one's intrusion into another person's land without justification: see **Clerk and Lindsell on Torts, Sweet and Maxwell, 18th Edition at 923.**

14. PW1 was very categorical in his evidence that he did not consent or permit the defendants to enter the suit land and cultivate it. The conduct of the defendants in this matter clearly amounts to unjustified intrusion into the suit land thus trespass thereon.

15. At paragraph 9 of the plaint, PW1 stated that the defendants have breached his statutory and constitutional rights rendering him to seek protection of this court. He pleaded particulars (1) to (iv) of breach thereof to fortify his claim.

16. **Article 40 (1) of the Constitution of Kenya, 2010**, reads:-

“Subject to Article 65, every person has the right either individually or in association with others to acquire and own property

a) of any description

b) In any part of Kenya (Emphasis added)

17. Property envisaged under Article 40(1) herein above includes the suit land and PW1 has exclusive right to the registered land. Section 24 of the Land Registration Act, 2012, provides:

“Subject to this Act.

a) The registration of a persons as the proprietor of land shall rest in that persons the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto, and (Emphasis provided).

18. The rights of PW1 as the proprietor of the suit land are secured under Section 25 of the Land Registration Act, 2012. Moreover, PE Exhibit 2 is to be held as conclusive evidence of proprietorship of the suit land and there are no exceptions applicable in the circumstance, See Section 26 of the Land Registration Act, 2012.

19. PW1 has proved that he has exclusive rights to the suit land. This court has power to make permanent preservation orders including injunctions under Section 13 (7) (a) of the Environment and Land Court Act 2015, (2011). The duration of an order of injunctions is the sole discretion of the trial judge and depends on the circumstances of each case; See National Bank of Kenya –v- Shimmers Plaza Ltd (2009) KLR 278 at 283.

20. General damages, sought by PW1 are within the discretion of the court. This relief can be a token, modest or substantial depending on the circumstances of each case. The court has applied correct principles and considered the relevant factors to ascertain the real or approximate financial loss to compensate the plaintiff for the loss. I have to arrive at a figure which is not inordinately high or low in awarding general damages in this matter, see Jiranji –v- Sanyo Electrical Co. Ltd (2003) KLR 425.

21. In the instant suit, PW1 has established that the defendants have denied him access to and use of the suit land for the last four years. Consequently he has suffered loss thereof. He is entitled to the reliefs sought herein and general damages are assessed at Ksh **60,000/= in the present circumstances.**

22. I find that the plaintiff has proved that he is the absolute proprietor of the suit land into which the defendants have trespassed. His claim is firm and unchallenged. He has proved the claim against the defendants jointly and severally on a balance of probability.

23. A fortiori, I enter judgment for the plaintiff against the defendants jointly and severally for a permanent injunction as sought in the plaint dated 27th October 2014, general damages of **Kshs. 60,000/= and costs of the suit.**

DELIVERED, SIGNED and DATED in open court at MIGORI this 5th day of April 2018.

G. M. A. ONGONDO

JUDGE

In the presence of:

Nonappearance for Plaintiff counsel

Tom Maurice Court Assistant