



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO

E.L.C CASE NO 36 OF 2017

JOEL KIPROTICH KOECH.....PLIANTIFF

VERSUS

CHINA WU YI CO LTD.....DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated 23rd March 2017 and amended on 3rd November 2017 the Plaintiff filed suit against the defendant for trespass and sought the following reliefs:

- a. An order compelling the defendant to pay Kshs. 450,000 being the cost of murrām
- b. An order compelling the defendant to fill up and level the affected portion of the plaintiff's land so as to restore it to its original position/level
- c. Special damages of Kshs. 20,000
- d. General damages for the loss suffered by the plaintiff
- e. Costs and interest

2. The plaintiff pleads that sometime in January 2017, the defendant trespassed onto his land parcel number KERICHO/KIPKELIION/CHEPSEON BLOCK 14 KAPSAENGER 157 and extracted 12 lorries of murrām valued at Kshs. 450,000 thereby causing damage on the plaintiff's land.

3. The plaintiff further pleads that despite demand and notice of intention to sue, the defendant has failed to pay the said amount.

4. Despite being served with summons to enter appearance the defendant neither entered appearance nor filed a defence. Judgment was entered on the liquidated sum pursuant to a request for judgment filed by the plaintiff. The suit was subsequently set down for formal proof on the 14th May 2018.

5. The plaintiff testified that he is the registered owner of land parcel number KERICHO/KIPKELIION/CHEPSEON BLOCK 14 KAPSAENGER 157. He produced the title deed and a certificate of official search as exhibits. He further testified that in January 2017 he received a telephone call that the defendant had entered his land and started excavating murrām. He then instructed the chief Kipkelion location to stop the defendant's agents from excavating the murrām. He later went to his land and found that the defendant had already excavated some murrām. He demanded to know why the defendant had moved onto his land without his permission but he did not get any explanation. He then engaged the services of a valuer who valued the damage done to his land. The plaintiff produced a valuation report assessing the value of the murrām at Kshs. 450,000 and a receipt for the valuer's fees amounting to Kshs. 20,000. He also produced a photo of the suit property showing the extent of damage occasioned to his land by the defendant.

Issues for Determination

6. The issues for determination are as follows:

- i. Whether the Plaintiff is the registered proprietor of the suit land.

ii. Whether the Defendants acts amounted to trespass to land.

iii. Whether the Plaintiff is entitled to the reliefs sought.

Analysis and Determination

7. The plaintiff produced a title deed showing that he is the registered owner of the suit property. Section 24 of the Land Registration Act No 3 of 2012 provides as follows:

8. 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. 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.

12. The second issue is whether the defendant unlawfully trespassed onto the suit land. The Plaintiff testified that the defendant entered his land in his absence and extracted murram therefrom. In the circumstances, it is my finding that the defendant has no right over the suit land and its acts amounted to trespass.

13. Regarding the third issue as to whether the Plaintiff is entitled to the reliefs sought, the Plaintiff seeks two main remedies; special and general damages for trespass. The plaintiff produced a valuation report and receipt for the valuer's fees all totaling 450,000 as proof of the special damages claimed. 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”

14. 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 its land.

15. 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. Special damages in the sum of Kshs. 470,000

b. General damages in the sum of Kshs. 150,000

c. Costs of this suit

d. Interest on a) and b) at court rates until payment in full

Dated, signed and delivered at Kericho this 25th day of May 2018

J. M ONYANGO

JUDGE

In the presence of:

1. M/s Koech for the Plaintiff
2. N/A for the Defendant
3. Court assistant - Rotich