



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

E.L.C CASE NO 90 OF 2017

VINCENT KOSKEI.....PLAINTIFF

VERSUS

BENARD KOSKEI.....DEFENDANT

JUDGMENT

Introduction

1. The plaintiff filed this suit against the defendant seeking an eviction order against the defendant. He also seeks a permanent injunction to restrain the defendant from interfering with the plaintiff's parcel of land known as KERICHO/ITEMBE /718 as well as mesne profits.
2. Despite being served with Summons to enter appearance, the defendant neither entered appearance nor filed a defence. The case therefore proceeded ex-parte.
3. When the suit was set down for hearing, the plaintiff testified that he is the registered proprietor of L.R No. KERICHO/ITEMBE /718. He produced a copy of the title deed in respect of the suit land as exhibit P.1. The plaintiff further testified that the defendant who owns an adjoining parcel of land has encroached onto approximately 0.75 of an acre of the suit land.
4. The plaintiff stated that owing to the defendant's illegal activities and he has been deprived of the use of his parcel of land measuring 0.75 of an acre.

Issues for Determination

5. From the plaintiff's pleadings and evidence as well as counsel's submissions, the following issues emerge for determination.
 - i) Whether the Plaintiff is the registered proprietor of the suit property
 - ii) Whether the defendant is in lawful occupation of the suit property
 - iii) Whether the plaintiff is entitled to the reliefs sought.

Analysis and Determination

6. The Plaintiff's counsel filed written submissions in which she states that by dint of section 22 of the Land Registration Act, the Plaintiff has demonstrated that he is the absolute and indefeasible owner of the suit property.
7. The said section provides as follows:

“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 thereof”

8. Furthermore, section 24 of the Land Registration Act No 3 of 2012 provides as follows:

“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 that the plaintiff is the absolute proprietors 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. Additionally, 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 is in lawful occupation of the suit land. The Plaintiff testified that he has notified the defendant to vacate the suit land but the Defendant has refused. In the circumstances, it is my finding that the defendant has no right over the suit land and he is therefore occupying the same unlawfully. This amounts to trespass to land.

13. Regarding the third issue as to whether the Plaintiff is entitled to the reliefs sought, the Plaintiff seeks two main remedies; a permanent injunction against the defendant and in default thereof an order of eviction against her.

14. The principles that guide the court in granting an interlocutory injunction are set out in the celebrated case of **Giella V Cassman Brown & Company Limited 1973. E.A 358** as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide it will decide the application on a balance of convenience.”

15. The first test that the court must determine is whether the plaintiff has established a *prima facie* case with a probability of success. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) defined a prima facie case as follows:

“A prima facie case is... one which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

16. From the Plaintiff’s evidence stated above, it is my finding that she has met the threshold for the grant of an injunction. Similarly, the Plaintiff is entitled to an eviction order in the event that the Defendant does not vacate the suit property.

17. In his plaint the plaintiff prays for general damages for trespass as well as mesne profits.

18. 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.

19. 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”

20. In the instant case the plaintiff needed to plead the amount that he has lost as a result of the Defendant’s unlawful use of his land. Without such evidence, it is not possible for the court to determine the claim for mesne profits. In the circumstances, I am not in a position to grant the same.

21. 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”

22. 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. 100,000 to be adequate compensation for the defendant’s infringement of the plaintiff’s right to use and enjoy his land.

23. The upshot is 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) A permanent injunction do and is hereby issued restraining the Defendant by himself, his agents or anyone acting on his behalf from trespassing upon land parcel number L.R No. KERICHO/ITEMBE /718.
- b) The Defendant is hereby ordered to vacate the suit property within three months from the date hereof failing which the Plaintiff may apply for an eviction order
- c) Kshs. 100,000 general damages for trespass
- d) The costs of this suit shall be borne by the Defendant.

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

.....

J.M ONYANGO

JUDGE

In the presence of :

- 1. Mr. Koske for Miss Ngetich for the Plaintiff
- 2. No appearance for the Defendant
- 3. Court Assistant - Rotich