



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC 336 OF 2017

MARY JUSTER MAKAU.....PLAINTIFF

VERSUS

NASHON KINGOO WAMBUA.....DEFENDANT

JUDGMENT

1) By her plaint dated 18th September, 2017 and filed in court on the 19th September, 2017, the Plaintiff, Mary Juster Makau, prays for judgment against the Defendant for;

a) Orders of permanent and mandatory injunction to restrain the Defendant whether by himself, his servants and or agents or others whomsoever from continuing with the acts of trespass complained of or in any other manner howsoever from interfering with the Plaintiff's peaceful occupation and use of his parcel of land number Makueni/Nguu Ranch/1535 in Makueni County.

b) An order of possession and eviction of the Defendant from the Plaintiff's parcel of land number Makueni/Nguu Ranch/1535 in Makueni County.

c) General damages for trespass on the Plaintiff's land.

d) Cost of this suit and/with interests thereon of (c) at court rates from the date of judgment until payment in full.

2) The matter proceeded as an undefended suit after the Defendant failed to enter appearance and to file his defence within the prescribed period after being served with summons.

3) When the matter came up for hearing on the 5th March, 2018 the Plaintiff in her evidence in chief told the court that she owns land parcel number Makueni/Nguu ranch/1535. The Plaintiff proceeded to adopt her witness statement dated 18th September, 2017 as her evidence. In her statement, the Plaintiff says that she became aware of the Defendant's entry into her land in the year 2011. She said that she reported the Defendant to the area Assistant Chief who summoned her and the Defendant to appear before him. She said that at the meeting before the chief, the Defendant promised to let her take possession of the suit land after he had harvested his cow peas crop at the end of that year. She said that to date, the Defendant is yet to do so and prayed for the grant of the orders in her plaint.

4) The Plaintiff called Eliud Musyoka Kioko (PW1) who is her brother in law. His evidence was that he knows that the Plaintiff owns land parcel number Makueni/Nguu ranch/1535. He went on to say that for a long time, the Plaintiff used to send her to the farm to check on it and that in the year 2012 during his routine tour of the farm, he found the Defendant having trespassed into the farm.

5) He pointed out that the Defendant declined to listen to him as a result of which he and the Plaintiff approached the Chief.

6) The Plaintiff produced the title deed for Makueni/Nguu ranch/1535, the certificate of official search and demand letter dated 13th January, 2012 as Pex Nos. 1, 2 and 3 respectively.

7) In his written submissions, the Plaintiff's counsel cited Article 40 of the Constitution which protects the right to acquire and own property of any description in any part of Kenya. The counsel further submitted that under section 24(a) of the Land Registration Act, 2012, the registration of a person as a proprietor of land vests upon that person the absolute ownership of that land together with all rights and privileges belonging and appurtenant thereto.

8) The counsel submitted that the Plaintiff has proved her case on a balance of probabilities. He further submitted that the Plaintiff's evidence and documents were not challenged by the Defendant who chose not to defend the claim despite being served. The counsel added that in line with Section 24(a) of the Land Registration Act, 2012, the registration of the Plaintiff as the proprietor of title number Makueni/Nguu ranch/1535 vests upon her absolute ownership of that land together with all rights and privileges belonging and appurtenant thereto.

9) The counsel relied on the case of **NJUGUNA MWAURA VS ROSEBELLA CHAPCHUMBA KEMBO, & ANOTHER [2015] eKLR (E & L No. 980 of 2012)** where an order of permanent injunction and eviction was issued against the Defendant.

Regarding damages, the counsel urged the court to award the Plaintiff Kshs. 1,000,000 since the Defendant has been drawing profits from the suit land by growing cowpeas.

10) From the evidence on record, there is no doubt that the Plaintiff is the registered proprietor of land parcel number Makueni/Nguu ranch/1535. There is no doubt that the Defendant is in occupation of the Plaintiff's land and has been cultivating on it. I see no reason why I should not issue a permanent order of injunction and eviction against the Defendant.

11) As for damages, **Halsbury's Laws of England 4th Ed, Vol 45, at paragraph 26, 1503** it is provided as follows regarding trespass:-

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 Plaintiff's land, the Plaintiff is entitled to received by way of damages such 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 or 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.

12) From what I can gather from the evidence before me, it is clear that the Plaintiff has proved that the Defendant has trespassed into her land. She has also proved that the Defendant has made use of her land but there is no evidence upon which the court can assess what would be reasonable sum to be paid for such use in awarding damages. In my view, therefore, I will award the nominal sum of Kshs.100,000.

13) Arising from the foregoing, I will proceed to enter judgment for the Plaintiff and against the Defendant as hereunder

a) Orders of permanent and mandatory injunction to restrain the Defendant whether by himself, his servants and or agents or others whomsoever from continuing with the acts of trespass complained of or in any other manner howsoever from interfering with the Plaintiff's peaceful occupation and use of his parcel of land number Makueni/Nguu Ranch/1535 in Makueni County.

b) An order of possession and eviction of the Defendant from the Plaintiff's parcel of land number Makueni/Nguu Ranch/1535 in Makueni County.

c) Kshs. 100,000 being general damages.

d) Cost of this suit and/with interests thereon of (c) at court rates from the date of judgment until payment in full.

Signed, dated and delivered at Makueni this 14th day of May, 2018.

MBOGO C.G

JUDGE

In the presence of :

Mr. Mukule holding brief for Mr. R.M Mulwa for the plaintiff

Mr. Kwemboi.

MBOGO C.G

JUDGE

14/5/2018