



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 28 OF 2015**

**OCHAKO OBINCHU.....PLAINTIFF**

**VERSUS**

**ZACHARY OYOTI NYAMONGO.....DEFENDANT**

**J U D G M E N T**

1. The plaintiff vide a plaint dated 27<sup>th</sup> January 2015 filed in court on 5<sup>th</sup> February 2015 instituted the present suit against the defendant and seeks judgment against the defendant for:-

- i) A permanent injunction restraining the defendant, whether by himself or his servants or agents or otherwise howsoever, from remaining on or continuing in occupation of South Mugirango/ Nyataaro/1554.**
- ii) Eviction of the defendant, his agents, servants from South Mugirango/Nyataaro/1554.**
- iii) General damages for trespass.**
- iv) Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable court may deem fit and just to grant.**
- v) Any other or further relief the Honourable court may deem fit and just to grant.**

2. By the plaint, the plaintiff states that he was at all material times the duly registered owner and was entitled to the possession of the property known as **South Mugirango/Nyataaro/1554 “the suit property”** located in Gucha South District within Kisii County. That on 3<sup>rd</sup> March 2013, the defendant wrongfully entered and illegally took possession of the suit property, remained in illegal possession of the suit property and started to illegally cultivate and erect temporary structures thereon. As a consequence of the defendant’s wrongful occupation of the suit property, the plaintiff stated that the defendant has cultivated, misused, damaged, wasted, cut trees, destroyed and degraded the suit property with the result that the plaintiff has been deprived of the use and enjoyment of the suit property.

3. The plaintiff has set out the particulars of damage on the suit property by the defendant under paragraph 9 of the plaint as follows:-

- a) The plaintiff has been deprived of the use and quiet enjoyment of the suit property.**
- b) The Defendant has prevented the plaintiff from accessing the suit property to carry on cultivation and harvest trees, grass, stones and other benefits arising therefrom.**
- c) The defendant has prevented the plaintiff from accessing the suit property to carry on cultivation and harvest trees, grass, stones and other benefits arising therefrom.**
- d) The defendant has threatened the plaintiff and his agents with physical violence whenever the agents and the plaintiff attempt to enter the suit property to work on it.**
- e) The defendant’s erection of houses and cutting of trees and grass among others on the suit property is an eye sore and has therefore defaced and devalued the suit property.**

4. The defendant was served with summons to enter appearance but neither entered appearance nor filed a statement of defence. The suit was thereafter listed for formal proof hearing on 5<sup>th</sup> March 2018 and though served with a hearing notice the defendant did not attend. The hearing proceeded ex parte and the plaintiff in his testimony stated that he is the registered owner of the suit property measuring about 1.19

acres which he purchased from the defendant in 1981 and that after payment of the full purchase price the defendant transferred the property to him and he was issued with a title deed in 1985. That after purchasing the suit property, he took possession of the same and planted trees on the upper side of the property while on the rest of the property, he cultivated food crops.

5. The plaintiff stated that in January 2013 the defendant illegally and forcefully entered onto the suit property and started to work on the property without the plaintiff's consent or authority. The plaintiff further stated the defendant forcefully ejected him from his house; and started using his house and also built another structure on the property prompting the plaintiff to report the matter to the Chief but the defendant refused to vacate from the property. The plaintiff clarified that after he bought the suit property from the defendant in 1981, the defendant migrated to Tanzania and only returned back in January 2013 when he forcefully entered the suit property. The plaintiff stated that before January 2013, he had peaceful occupation and use of the suit property without any interference but has since the entry by the defendant onto his land been denied the use of the property. He sought an order for the eviction of the defendant, damages and costs of the suit.

6. I have considered the plaintiff's case as pleaded and the evidence tendered in support thereof. The plaintiff's claim against the defendant is based on the tort of trespass. Trespass has been defined as any unjustifiable intrusion by one person upon the land in the possession of another. **See Clerk & Lindsell on Torts, 18<sup>th</sup> Edition at page 923.** The onus is on the plaintiff to prove that he is the owner of the suit property and that the defendant has invaded and occupied the same without any justifiable cause.

7. I am satisfied on the material presented before me that the plaintiff is the registered owner of the suit property. The plaintiff tendered in evidence a copy of the title deed for the suit property in his name and a certificate of official search in regard to the suit property which confirmed that the property is registered in the names of the plaintiff as the proprietor thereof. Under section 24(a) of the Land Registration Act, 2012, the registration of a person as the proprietor of land vests in that person the absolute ownership of that land together with all rights and privileges associated with that status. Section 26(1) of the said Act provides that the certificate of title issued by the land registrar upon registration to a purchaser of land upon transfer 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 and that the said title shall not be challenged save on the ground of fraud or misrepresentation to which the holder is shown to be party or where the title is acquired illegally, un procedurally or through a corrupt scheme.

8. The defendant on the other hand, did not defend this suit. The plaintiff's title over the suit property is therefore not challenged on any of the grounds mentioned above or at all. In the absence of such challenge, I am enjoined by law to take the plaintiff on the basis of the title deed that he holds in his name to be the absolute and indefeasible owner of the suit property. As the absolute proprietor of the suit property, the plaintiff is entitled to enjoy rights and privileges associated with such ownership which includes exclusive use, possession and enjoyment thereof without interference by any third party. The plaintiff has asserted the defendant entered the suit property forcefully and ejected him from his house which the defendant started utilizing as his property and further went ahead to build other semi- permanent structures in the suit property.

9. The plaintiff's evidence has not been challenged and on the basis of the unchallenged evidence, I am satisfied that the plaintiff has proved that the defendant entered the suit property unlawfully and ejected the plaintiff from his house, constructed on the property and occupied the property. The defendant having unlawfully entered the suit property without the permission of the plaintiff is a trespasser on the suit property and the plaintiff is entitled to judgment against him for eviction and for a permanent injunction to restrain any further acts of trespass.

10. On general damages, **In Nakuru Industries Limited -vs- S S Mehta & Sons [2016]eKLR** court observed:-

**“In tort, damages are awarded as a way to compensate a plaintiff for loss he had incurred due to a wrongful action on the part of the defendant. The damages so awarded are intended to return the plaintiff back to the position he was before the wrongful act was committed. In cases where trespass to land results in damage then the computation of damages is on the basis of restitution of land. The value of the soil (or trees or fruits) which have been removed from that land are all factored as well as the cost of restoration of the land to the position it was in before the wrongful act was committed.”**

**Halsbury 4<sup>th</sup> ed, Vol 45 at para 26, 1503** provides as follows on computation of damages in an action of 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 plaintiffs land, the plaintiff is entitled to receive 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.**

In **Nakuru Industries Limited** (supra) the court cited the case of **Duncan Ndegwa V Kenya Pipeline HCC No. 2577 of 1990 (Nairobi)** where the court held:-

**“The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land. The overriding principle is to put the claimant in the position he was prior to the infliction of the harm.”**

11. In the instant case, the defendant ejected the plaintiff from his house which he proceeded to occupy and make use of thereby depriving the plaintiff of the use and quiet enjoyment of the suit property. The defendant's entry and occupation of the suit property without the authority, consent and/or permission by the plaintiff who is the lawful owner of the property constituted trespass. The defendant has deprived and denied the plaintiff of the use of his property and in those circumstances the plaintiff would be entitled to damages.

12. In the case of **Phillip Aluchio -vs- Crispinus Ngayo [2014] eKLR Obaga, J.** held:-

**“...The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less.....”**

**The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass.....”**

13. The court proceeded to award a nominal figure of Kshs. 100,000/= as damages for trespass. However, in as much as the plaintiff in the instant suit did not lead any evidence nor attach any documentation to establish the exact value of the suit property before and after the trespass and/or how much damage was occasioned on the suit property by the actions of the defendant, he is still entitled to receive by way of damages such sum as would reasonably recompense him for being denied and deprived of the use of his house and the land for now a period of over 5 years. For this reason, I award the plaintiff damages in the amount of Kshs. 100,000/= on account of nominal general damages for trespass together with interest at court rates from the date of this judgment until payment in full.

14. In the end I will enter judgment for the plaintiff against the defendant in the following terms: -

**1. The defendant be and is hereby ordered to vacate and deliver vacant possession of land parcel South Mugirango/Nyataaro/1554 to the plaintiff within 30 days from the date of service of the decree herein upon him.**

**2. In default of compliance with (1) above as aforesaid the plaintiff shall be entitled to an order of eviction for the forcible removal of the defendant, his agents and/or servants from land parcel South Mugirango/Nyataaro/1554 upon application.**

**3. A permanent injunction be and is hereby issued restraining the defendant whether by himself or his servants or agents or otherwise howsoever, from remaining on or continuing in occupation of the suit property.**

**4. The plaintiff is awarded kshs. 100,000/= general damages for trespass together with interest at court rates from the date of judgment until payment in full.**

**5. The plaintiff shall have the costs of the suit.**

**JUDGMENT DATED, SIGNED and DELIVERED at KISII this 11<sup>TH</sup> DAY of MAY, 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Ms. Achieng for Omwega for the plaintiff

N/A for the 1<sup>st</sup> defendant

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**