



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 202 OF 2012

PRABHAGAURI SHASHIKANT MARU.....PLAINTIFF

VERSUS

PEPE LIMITED.....DEFENDANT

JUDGMENT

1. In the Plaintiff dated 11th June, 2012, the Plaintiff averred that she is the rightful administrator of the Estate of the late Lalji Maru, the registered proprietor of land known as L.R. No. 337/912; that she was declared the proprietor of the suit land by the High Court in HCCC No. 2359 of 2007 (O.S) and that the court granted her leave to file the current suit.
2. The Plaintiff averred in the Plaintiff that the Defendant has put a private railway to its Inland Depot Premises in Athi River and that while doing so, the said railway line has sub-divided the suit land thereby making it unusable and unsuitable for any usage. The Plaintiff has prayed for eviction orders against the Defendant from L.R. No. 337/912, *mesne* profits and damages for occupation of the suit land since March, 2005 until the date that the Defendant will vacate the land.
3. In the Amended Defence, the Defendant denied that it unlawfully constructed or caused to be constructed a railway line in its Inland Depot Premises; that the responsibility of constructing railway lines in Kenya is and has always been vested with the Railways Corporation and that the said Corporation enjoys exclusive powers to construct railway lines.
4. It is the Defendant's case that it is a private company with no dealings with the Railways Corporation or any government Corporation; that it cannot usurp the exclusive powers of Railway Corporation or its concessionaire, the Rift Valley Railways, to construct a railway line on the Plaintiff's land and that the doctrine of easement by estoppel applies in this case.
5. The Defendant finally averred that the Plaintiff never objected to the construction of the said railway line when it was put up in 1995 and that in any event, the Corporation has been using the land for transporting general public goods to a custom area continuously for over Seventeen(17) years.
6. The Defendant finally averred that the land occupied by the railway line, whether it belongs to the Kenya Railways Corporation or the Defendant, has been used in quiet, peaceful and uninterrupted enjoyment for over twenty (20) years and that the railway line is built on a piece of land used as an easement to access the customs area which has always been there.
7. The Plaintiff prosecuted her case on 5th February, 2015. However, when the matter came up for Defence hearing, neither the Defendant's directors nor advocate were in court. The Defence case was closed by the court without hearing the Defendant.
8. The Plaintiff, PW1, informed the court that she owns parcel of land number L.R. No. 337/912 in Mavoko; that the Defendant built a railway line across his land and that she is unable to use the suit land with the railway line passing in the middle of the suit land. PW1 produced in evidence the copy of the grant in respect of L.R. No. 337/912 together with a sketch plan showing the impugned railway line.
9. It was the evidence of PW1 that the court in Nairobi HCCC No. 2359 of 2007 confirmed that she is the proprietor of the suit land and that this suit was filed pursuant to the Judgment of the Court.
10. The Plaintiff finally averred that she has never used the suit land since the year 2005 when the railway line was put up on his land; that the County Council has denied ever authorizing the construction of the railway line on his land; that Kenya Railway exonerated itself from the construction of the said railway line and that the railway line was put up in the year 2005 and not 1995.
11. The Plaintiff's advocate submitted since the court found that the land belonged to the Plaintiff in Nairobi HCCC No. 2359 of 2007 (O.S), the eviction orders should issue together with *mesne* profits and that the Defendant admitted in its Defence that the railway line has been in existence for seventeen (17) years.

12. The evidence before this court shows that Shashikant Lalji Maru (*deceased*) was registered as the proprietor of L.R. No. 337/912 on 13th February, 2007. According to the Certificate of Confirmation of Grant issued on 10th August, 1988 in Machakos High Court Succession Cause No. 40 of 1988, the Plaintiff inherited the entire Estate of the late Shashikant Lalji Maru. It would appear that another Certificate of Grant was issued to the Plaintiff on 21st March, 2007 in the same Succession Cause.

15. It is not in dispute that the Court in Nairobi ELC No. 2359 of 2007 (O.S) decreed that L.R. No. 337/912, which was formally known as unsurveyed Plot No. 6 Athi River, belongs to the Plaintiff. In the said Judgment, the court held as follows:

“In conclusion, I make a finding that the Plaintiff is the rightful and legal owner of the suit land and that she is entitled to its possession, occupation, use and quiet enjoyment. For her to be able to realize the benefits of this entitlement, leave is hereby granted to her to file a separate suit for eviction, mesne profits and damages. I ask that she be paid costs of the suit by the Defendant.”

14. The issue of whether the suit land belongs to the Plaintiff or not is therefore neither here nor there. The issue that is before me is whether indeed the Plaintiff has proved on a balance of probabilities that by constructing a railway line on the suit property, the Defendant has trespassed on the said land. The Plaintiff is also supposed to prove the payable *mesne* profits and damages.

15. It is not in dispute that a railway line passes on the suit land. It is also not in dispute that the said railway line is used to transport uncustomed goods to a custom area. What is not clear to this court is who built the said railway line on the Plaintiff's land: was it the Defendant or Kenya Railways Corporation? That is the question that the Plaintiff ought to have answered with clarity. I say so because the act of trespass complained of is in respect to a railway line and nothing else. Indeed, the order of “*eviction*” being sought by the Plaintiff means that the said railway line should be removed from the Plaintiff's land.

16. The word “*railway*” has been defined in the Kenya Railway Corporation Act to mean “*the whole or any portion of the lines of railway operated by the Corporation and all other movable and immovable property used, or placed at the disposal of the Corporation for use, in connection therewith.*”

17. Section 10 of the Kenya Railways Corporation Act (*the Act*) further provides that the Managing Director of the Corporation may establish and operate rail, road and Inland waterways transport services and facilities relating thereto (*See Section 10(a) of the Act*). Section 13 of the Act mandates the Corporation to “construct or improve any railway, Inland, waterways port, ferry, road, bridge, building or any other necessary or desirable works required for the purposes of the Corporation.”

18. The Plaintiff did not produce, or call evidence, to show that indeed it is the Defendant who put up a railway line on her land. Indeed, the Plaintiff did not point out any law which allows the Defendant or a private entity, other than the Corporation, to construct a railway line. If the Plaintiff's case is that the railway line was put up by the Defendant, then she should have called a witness from the Corporation to distance the Corporation from the railway line in question. Having not done so, and having not sued the Corporation alongside the Defendant, I am not satisfied that the Plaintiff has proved that the Defendant has trespassed on the suit land and should be ordered to remove/uproot the railway line passing on the suit land.

19. Considering that courts do not give orders in vain, and in view of the fact that the law mandates the Corporation to put up railway lines, whether on government or private land, the failure to join the Corporation in this suit or to call a witness from the corporation to testify, makes the Plaintiff's claim incompetent.

20. For those reasons, I dismiss the Plaintiff's suit but with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 11TH DAY OF MAY, 2018.

O.A. ANGOTE

JUDGE