



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

E.L.C NO 81 OF 2006

LAMET LEIYAGU.....PLAINTIFF

VS

THE HON. ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

1. By an amended plaint filed on 13/12/16, the Plaintiff averred that at all material times he is the registered owner of Parcel No. NANYUKI MUNICIPALITY BLOCK 2/19(KILIMO) measuring 0.0873Ha having purchased it from one Charity Naitore Murungu on 29/1/2001. Thereafter he took possession in 1995 and constructed 3 houses for his family. The land borders Laikipia airbase (airbase) on land known as LR No 10422 Nanyuki Municipality.

2. He avers that between 5/1/2006 and early 2016 the suit land was unlawfully occupied by the airbase who evicted him and his family and destroyed property worth Kshs. 1.5m denying him the right to quiet enjoyment of his property and causing him financial loss and damage.

3. In the Plaint the Plaintiff prays for the following orders:-

- a) A declaration that the LR. NO NYANYUKI MUNICIPALITY BLOCK 2/19 (KILOMO) measuring 0.0873 belongs to the Plaintiff and a permanent injunction do issue against the Laikipia Airbase or any other person acting on its behalf from interfering with the Plaintiff's enjoyment and user of the suit land herein.
- b) General damages for unlawful, and illegal eviction, disturbance, annoyance, destruction of properties and mental torture caused to the Plaintiff and his family and for non user of the suit land from 5th January 2006 to 2016.
- c) Cost of Ksh. 1,500,000/= being the value of the properties destroyed and other costs incurred by the Plaintiff from 5th January 2006 to date.
- d) Cost of the suit and interest on (b), (c) and (d) at Court rates until settlement in full.

4. By a statement of defence dated 6/9/11 and filed on 6/2/12 the Defendant denied the Plaintiffs claims and put the Plaintiff to strict proof. Further the Defendant denied taking possession of the suit land or demolishing property and avers that no acquisition took place and no damage was caused to the Plaintiff's property.

The Plaintiff's case

5. On 3/11/17 the Plaintiff led evidence that he is the registered owner of the suit land having purchased the same from one Charity Naitore Murungu on the 29/1/2001. He produced an agreement of sale dated 29/1/2011, acknowledgement of payment dated 26/3/01, plot voting card (ballot) showing an endorsement at the rear page of transfer to the Plaintiff together a share certificate dated 29/1/94 to support his averments.

6. He stated that the said Charity Naitore Murungu acquired the suit land from Kilimo Welfare Group (Kilimo) where she was shareholder No. 000262.

7. Further that upon acquisition he took possession and occupation of the suit land in 1995 and commenced developments of interalia 2 residential houses (permanent timber houses) cow and sheep sheds, toilets and fencing.

8. He testified that he became registered as owner of the suit land on 26.3.2001. He produced a copy of title deed, green card and certificate of official search for the suit land.

9. He adduced evidence that he received verbal warnings from the Base Commander of Laikipia airbase asking him to vacate his land as it belonged to the airbase. He stated that he reported the threats to the Land Registrar, and the District Land Surveyor Laikipia who visited the locus on 30/11/05 and confirmed that the land was outside the airbase land. They advised the airbase not to interfere with the Plaintiff's land but the advice was ignored.

10. He testified that on 5/1/2006 the airbase actualized their threat and without warning, notice or colour of right, the airbase commandant together with his soldiers entered the land and using military force evicted him from the suit land and in the process destroyed his houses, household goods and motor vehicle No. KTT 877, all valued @ Kshs. 1,500,000/=. The airbase fenced the suit land into the airbase land and prevented him and his family from accessing it. That as a result of this invasion and eviction his family was rendered homeless and landless.

11. Further he stated that the suit land remained under unlawful occupation by the airbase from 5.1.2006 to February 2016, a period of 10 years when he was denied the right of usage and occupation of his land.

12. The Plaintiff referred to various correspondences between himself, the District Land Registrar, the Department of Defence Laikipia airbase in respect to the boundary dispute and the need to carry out survey to determine the boundaries between the suit land and the airbase land. That finally the survey was carried out and the airbase vacated the suit land and returned it to him in 2016.

13. He led evidence and produced a list of damaged household property on pages 36-73 and similar photographs on pages 39-49 of the damages on the property. On pages 50-76, the Plaintiff produced copies of receipts of various expenses that he avers are in relation to the damages/case in Court.

14. PW 2 – Pamela Muthoni Muthegi Land Registrar Laikipia testified on 12/3/18 and stated that a boundary dispute was reported to her office and the Land Registrar wrote on 28/11/2005 to the base commandant Laikipia airbase requesting for a site visit to determine the boundary. That the visit took place on 30/11/05.

15. She informed the Court that the suit land was part of Trench farm which was sold to Kilimo who in turn subdivided it amongst its members. That the land was initially registered under the Registration of Titles Act (RTA) tenure before being converted to Registration of Lands Act (RLA). She stated that it was the practice of Government of Kenya to be entered as the 1st registered owner on the title of land buying companies in trust for its members. That was the explanation why Government of Kenya appeared as registered owner of the suit land in the green card.

16. She further testified that the suit land belongs to the Plaintiff and that it was never part of the airbase land. She produced a copy of green card opened on 24/4/95 which showed the Plaintiff as registered owner. She took the Court through the process of registering titles hitherto in the names of land buying Companies to its members. The Register of members and area list are some of the core documents required by the Registrar for registration of titles.

17. PW 3 – Nathan Mbugua Kinyanjui stated that he is the District County surveyor in Laikipia. He informed the Court that he was part of the joint team of surveyors between the Government Surveyors and the Kenya Defence Forces (KDF) that visited the Suit land to confirm the boundaries. PW 3 informed the Court that the land in dispute had fixed beacons that were traced mathematically by joint surveyors on 24th September 2015. The team established that the Laikipia Airbase encroached onto Kilimo land and fenced it off using live cactus plants in 2006. The Beacons were confirmed as per FR 29/29 and 29/30. The Beacons were established and the Laikipia Airbase was instructed to put back its fence to enable them move out of the Kilimo Land which included LR. No. NANYUKI MUNICIPALITY 2/19 (KILIMO) belonging to the Plaintiff.

18. PW3 informed the Court that as a result of the joint Survey carried out with the Military Surveyors and his office the Airbase, it was confirmed that indeed that the two parcels are distinct and different but border each other; Kilimo land was No. 10422/6 and that of the airbase was 10422/7. That the airbase had indeed encroached on the Plaintiffs land forcing it to rectify the boundary fence. He also informed the Court that there were other land owners who were affected by the airbase encroachment onto their lands. It was then that the airbase agreed in February 2016 to relocate their boundaries and put up a permanent fence to mark its boundaries with Kilimo. Further the witness informed the Court that he witnessed broken debris on the site to confirm that indeed there was destruction of settlements on the land.

19. The Defence led evidence through DW 1- Lt Colonel Juvinalis Atancha. He stated that Laikipia Airbase has had long running battles with herders, hunters, bee keepers and charcoal burners who encroach on the facility land. He stated that the Plaintiff was given a verbal notice on 1.12.05 to vacate the Defendants land but failed to adhere to the notice. He informed the Court that the District Commissioner then was consulted on 5/1/106 when the Plaintiffs property was removed from the base land. He stated that the land that the Plaintiff occupied belonged to the airbase and the Plaintiff was part of illegal grazers who sought to graze their livestock on airbase land without permission.

20. He explained that the airbase land was fenced in a series of 3 perimeters. The 1st area containing military installations was fenced using heavy gauge chain link. 2nd and 3rd are not fenced but are marked using banners/markers for identification. He stated that he was not aware of a land buying company called Kilimo. That the reason why the Plaintiff was removed is because his house was on a fly path. He stated that he was not aware if the Plaintiff was given an eviction notice.

21. The parties elected to file written submission which I have carefully considered.

22. The issues for determination may be crystalized into:-

- a) Whether the suit land was part of Laikipia Airbase Land?
- b) Whether the Defendant trespassed on the Plaintiffs land?

c) Did the Plaintiff suffer loss and damages?

d) Is the Plaintiff entitled to general damages for trespass?

23. The commonly admitted facts on record are that the Plaintiffs land and that of airbase border each other. Evidence was led by the Plaintiff, the Land Registrar and the District Land Surveyor that the whole area belonged to a white settler namely Mr. Trench. That the Government of Kenya acquired the land that is now called Laikipia Airbase in the 1970s. Subsequently Mrs. Nancy Trench sold some parts of remainder land to among others Kilimo Welfare Group who subdivided the land amongst its members. One such member was Charity Naitore Murungi who held share certificate No. 000262 dated 29/1/94 and plot or ballot for No. Nanyuki Municipality Block 11/19(Kilimo). There is evidence of an agreement of sale between the said Charity Naitore Murungi and the Plaintiff in respect to the sale of the suit land to the Plaintiff. This evidence has not been controverted.

24. Section 26 of the Land Registration Act, 2012 states that a certificate of title issued by the Registrar of Lands to a land owner shall be taken by the Courts as prima facie evidence that the person so registered is the absolute and indefeasible owner and the said title is only subject to challenge as provided by the law. The Plaintiff produced the title deed issued on 26/3/01 for the suit property and a copy of the green card indicating that he is the duly registered owner of the suit land. This evidence was corroborated by the County Land Registrar Laikipia who confirmed to the Court that the land belongs to the Plaintiff. From the evidence so adduced, I find and hold that the Plaintiff is the registered owner of the suit land.

25. Article 40 of the Constitution states as follows;

“Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and(ii)allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

26. Section 24(a) of the Land Registration Act states that 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, (this section is similar to section 27 of repealed Registration of Land Act, Cap 300).

27. The Plaintiff has argued that the acts of the Defendants in forcefully evicting him and his family and illegally occupying his land and destroying his property amounts to acts of trespass and a violation of his rights. That the Defendant’s actions are unjustified, illegal and unlawful. It is clear from the evidence that the acts of the Defendant in forcefully evicting the Plaintiff from his land and trespassing onto it are acts that are frowned by our Constitution. They are acts that are contrary to the Constitution and the direct effect is the deprivation of the right to ownership and limitation of enjoyment of the right to property without any basis in law.

28. As to whether the Defendant evicted the Plaintiff from the suit land, evidence was led by the Plaintiff that he received verbal warning to vacate his land in 2005. That he sought intervention from the Land Registrar and the District Land Surveyor who visited the site on 30/11/05 and upon inspection confirmed that the land was outside the boundary of airbase land. The airbase despite being advised by the Land Registrar to remove their fence instead went ahead and evicted the Plaintiff. This evidence was corroborated by DW 1 who informed the Court that the Plaintiff was given verbal warning and on the day of eviction on 5/1/2006 the District Commissioner, Laikipia then was consulted about it. This confirms that indeed the Plaintiff was evicted from the suit land.

29. The District Surveyor confirmed that the boundary in respect to the boundary dispute between the Plaintiff's land and the airbase was resolved by a joint team of the surveyors from his office and KDF surveyors on 24/9/15. The team established that the airbase had indeed encroached onto the Plaintiffs land. It is after the joint re-establishment of the beacons that the airbase relocated its boundaries to its original place in February 2016. Going by the above it is evident that the suit land belonging to the Plaintiff had been encroached by the airbase and the forceful removal of the Plaintiff from the suit land had no legal basis at all. It is also evident that occupation of the suit land by the air base from 5.11.2005 – February 2016 was not based on any basis known in law.

30. The Plaintiff produced pictures to support the alleged destruction of his property on the suit land. The District Surveyor gave evidence that the suit land that had been occupied by the airbase contained debris which would denote existence of demolished settlements. That notwithstanding the DW1 stated that the property of the Plaintiff was not damaged but did not rebut the evidence given by the Plaintiff and his witnesses. From the evidence above the Court reaches the conclusion that indeed there was unauthorized entry, invasion, eviction and trespass of the Plaintiffs land by the Defendant.

31. As to whether the Plaintiff suffered loss and damage, the Plaintiff pleaded, led evidence and produced an itemized list on page 36 of the Plaintiffs bundle as well as various receipts of which he is relying on to prove special damages in the sum of Kshs. 1, 500,000/-. The Defendant submitted that this claim is not payable because the Plaintiff did not place before the Court any approved construction plans to show the houses were built, no any bills of quantities. The Defendant also discounted the facts that the Plaintiff did not prove ownership of the Motor Vehicle that he alleged was destroyed. That the receipts produced did not show any destruction of properties. The plaintiff gave uncontroverted evidence that he had developed his property and built residential houses (permanent timber houses) cow and sheep sheds, toilets and fencing. He also produced pictorials to show the destruction of the said properties by the Defendant during the wrongful eviction invasion and trespass into the Property. The eye witness, the District Land Surveyor gave evidence of broken debris on the site of the plaintiff land to denote that there were settlements that were demolished. The DWI clearly led evidence and admitted that the Plaintiff was removed from his land. All these lends credence to the plaintiff's case that his properties were destroyed and that he suffered loss.

32. It is trite principle of law that special damages must not only be pleaded but also specifically proved. **See Charles Sande Vs. Kenya Cooperative Creameries (1992) LLR 314.** I have examined the list and except for discounting the amounts for legal fees, I do not find any justifiable reason to deny the Plaintiff this claim. I do not agree with the Defendant that the approved plans should have been produced. This being a rural setup, I doubt whether houses in the rural areas require that the building plans be approved. I accept the assessment of Kshs. 1.5 million under this heading as prayed.

33. I will now look at the plea for General damages for unlawful, and illegal eviction, disturbance, annoyance, destruction of properties and mental torture caused to the Plaintiff and his family and for non-user of the suit land from 5th January 2006 to 2016. In my view that Plaintiff has not tendered evidence towards proving the claim for non-user of the suit property so as to guide the Court. It is clear from the evidence and the record that the Plaintiff was deprived of usage of his land for approximately 10 years. The Court would have expected a valuation report showing loss of income or even costs of hiring an alternative land for the activities/residential use. This was important if the Court was to make an assessment under this limb. I make no order in this respect.

34. However, having found that the eviction, occupation and trespass were illegal, unjustified and unwarranted, I award general damages to the Plaintiff having regard to the circumstances and the forceful entry, the size of the land, the length of time and the unmitigated inaction and conduct of the Defendant in the face of technical advice from the Land Registrar and the District Surveyor, Laikipia early in the dispute that the Defendant had encroached onto the Plaintiff's land. I award general damages in the sum of Kshs 1.5 million.

35. Final orders

- a. A declaration that the LR. NO NANYUKI MUNICIPALITY BLOCK 2/19 (KILIMO) measuring 0.0873 belongs to the Plaintiff.
- b. A permanent injunction be and is hereby issued against the Defendant (Laikipia Airbase /Kenya Defence Forces), its agents, servants and/or any other person acting on their behalf from interfering with the Plaintiff's enjoyment and user of the suit land.
- c. General damages in the sum of Kshs 1,500,000/-.
- d. Special damages in the sum of Ksh. 1,500,000/=
- e. Cost of the suit
- f. interest on (c), (d) and (e) at Court rates until settlement in full.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MERU THIS 28TH JUNE, 2018.

J G KEMEI

JUDGE

In the presence of:

C/A Mutua

Ms. Kaume holding brief for Abuor for Plaintiff

Kiongo for Defendant