



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC NO. 146 OF 2017

FORMERLY ELC NO. 29 OF 2016 – MACHAKOS

CAROLINE WANYUA MWENDWA1ST PLAINTIFF

ALPHONCE MWENDWA NYALITA 2ND PLAINTIFF

VERSUS

CHINA ROAD AND BRIDGE CORPORATION (KENYA).....DEFENDANT

JUDGMENT

1) This suit was commenced by way of a plaint dated 18th May, 2016 and filed in court on the 19th May, 2016 where the plaintiffs pray for judgment against the defendant for :-

a. Permanent injunction against the defendant, his servants, agents, employees and all those claiming through or under the defendants restraining them from trespassing on the plaintiffs land.

b. Permanent injunction against the defendant, his servants, agents, employees and all those claiming through or under the defendants restraining them from harvesting soil from the plaintiffs land.

c. Damages for trespass to land, mesne profit, cost of this suit and interest.

2) The plaintiff's claim is denied by the defendant vide its statement of defence dated 22nd July, 2016 and filed in court on 2nd August, 2016.

3) The matter came up for hearing on 20th December, 2017. The defendant though served with the hearing notice did not attend court as can be seen from the affidavit of service sworn at Nairobi on the 19th December, 2017.

4) The plaintiff's evidence was that his land is in Emali in Makueni County. He went on to say that the size of the land is 10 acres. According to him, the defendant excavated and took soil from part of his land leaving a 5 to 6 metres high wall that needs to be fixed to ensure that the land remains in the way it was before the excavation. The plaintiff went on to say that he had not allowed the defendant to excavate on his land and pointed out that the defendant was excavating in a neighbouring land when all this occurred. He said that when he enquired from the neighbour, he learnt that the neighbour had allowed them to do so.

5) The plaintiff further told the court that he warned the defendant to cease excavation on his land but it did not do so. The plaintiff said that the excavation left a hole of about 200 metres and if he was to fence his land, the fencing posts would be left hanging in the air.

6) The plaintiff went on to say that he intended to carry out farming on the land that the defendant trespassed into. He added that he bought the land in December, 2014 from one Samuel Kyama Mutui and one Denis Kilonzo Mutui and proceeded to produce land sale agreement as PEX No. 1.

7) The plaintiff further said that he had a business plan for his farm which he intended to name as Emasun Farm Ltd. He produced the business plan as PEX No. 2. He disclosed that the plan which was to run from 2014 to 2019 has detail of what he intended to do on the farm. According to the plan, the projected profits for the year 2014 were Kshs. 47,268,000 rising to Kshs. 257,000,000 in 2019.

8) Regarding the damage occasioned to his farm, the plaintiff produced a report prepared by Francis Kariuki Kiiru who is a Quantity Surveyor as PEX No. 4. He said that the report indicates that the filling of the suit ought to have been done and also recommended gabion cascade along the 200 metre area that was excavated together with the planting of the local vegetation and selective soil back filling

with imported vegetable, soil and chain link fencing with timber posts at a total cost of Kshs. 24,503, 376.

9) The plaintiff produced demand letter for Kshs. 57,000,000 being the amount he would have spent to put the land back to previous position including the loss incurred as PEX No. 5.

According to the plaintiff, the defendant trespassed into his land contrary to what it claims and asserted that the lease agreement that the defendant had with one David did not extend to the land that he bought. Finally the plaintiff produced the lease agreement as PEX no. 6.

10) Prof. Kiama Wanguai for the plaintiff filed his written submissions on the 8th February, 2018 the same being dated 7th February, 2018. In his submissions, the plaintiff's counsel submitted that the defence lacks merit, a sham and ought to be dismissed.

11) The counsel urged the court to find that the plaintiffs have discharged the burden of proof in this matter on a balance of probabilities and grant the prayers sought.

12) From the evidence on record, it is clear that the plaintiffs are yet to be registered as the proprietors of their 10 acres of land. They however have a sale agreement (PEX No. 5) between themselves and Samuel Kyama Mutui and Denis Kilonzo Mutui and as such, they have proprietary interest in the suit land.

13) From the above, the issue is, are the plaintiffs entitled to be awarded the profits they would have earned had they operationalised their business plan (PEX No.2)?

Should they also be awarded Kshs. 24, 503,376 which is the amount for restoring the suit premises to its original state?

14) It is clear that the sums of money that the first plaintiff in his evidence said that he would have earned over the period of 2014 to 2019 is not pleaded in the plaint. Equally, the sum of Kshs. 24,503,376 is not pleaded. These are essentially special damages. Parties are bound their own pleadings and in my view, the plaintiff are not entitled to special damages.

15) I am satisfied that there is evidence to show that the defendant did trespass into the plaintiffs' land. There is also evidence to show that the defendant did excavate on the said land and I am in agreement with the plaintiffs' counsel that the defence by the defendant lacks merit.

16) In the case of *Kenya Hotel Investments Limited Vs Williesden Investments Ltd [2009] eKLR*, the Court of Appeal cited the persuasive authorities of *Inverugie Investments Vs Hackell(Lord Lloyd) [1995] 3 ALL ER 842* and Stroud's Judicial Dictionary 4th Edition Volume 3 and held that;

“... once the learned judge made the award under the subhead “mesne profits” there was no justification for him awarding further Kshs. 10,000,000 under the subhead “trespass” since both mean one and the same thing” In my judgement, the plaintiffs are not entitled to both mesne profits and damages for trespass. They can only have one or the other but not both.

17) In Halsbury Laws of England 4th Ed Vol. 45 at para 26,1503 it is provided as follows:-

a) If the plaintiff proves 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 the 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

d) Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object making a gain by his unlawful conduct, exemplary damages may be awarded.

e) If the trespass is accompanied by aggravating circumstance, which do not allow an award of exemplary damages the general damages may be awarded.

18) From the evidence on record, it is clear that there was excavation and taking of soil from the plaintiffs' land thereby leaving a pit. The trespass by the defendant has caused the plaintiffs actual damage. It is also clear that the defendant has made use of the plaintiffs' land. In my view, the sum of Kshs. 10,000,000 would be adequate compensation for the plaintiffs.

19) Arising from the foregoing, I am satisfied that the plaintiffs have on a balance of probabilities satisfied this court that they have a cause of action against the defendant.

20) In the circumstance, I proceed to enter judgement for the plaintiffs and against the defendants for:-

a. Permanent injunction against the defendant, his servants, agents, employees and all those claiming through or under the defendants restraining them from trespassing on the plaintiffs land.

b. Permanent injunction against the defendant, his servants, agents, employees and all those claiming through or under the defendants restraining them from harvesting soil from the plaintiffs land.

c. Kshs. 10,000,000 being damages for trespass.

d. Costs and interest of the suit.

Signed, dated and delivered at Makueni this 22nd day of June, 2018

MBOGO C.G

JUDGE

In the presence of :

1. Mr. Kwemboi Court Assistant

No appearance for the plaintiffs and the defendants.

MBOGO C.G, JUDGE

22/6/2018