



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E & L CASE NO. 376 OF 2016

REGISTERED TRUSTEES

ASSUMPTION SISTERS OF ELDORET.....APPLICANT

VERSUS

ROBERT SITIENEI.....RESPONDENT

JUDGMENT

By a plaint dated 14th December 2016 the plaintiff herein sued the defendant seeking for the following orders:

- a) A declaration that the defendant is a trespasser on land parcel known as PIONEER/NGERIA BLOCK1 (EATEC/30), PIONEER/NGERIA BLOCK 1 /31, PIONEER/NGERIA BLOCK 1 /39.
- b) A permanent injunction directed at the defendant by himself, his agents or employees restraining them from interfering with the plaintiff's possession and quiet enjoyment of parcels referred to as PIONEER/NGERIA BLOCK1 (EATEC/30), PIONEER/NGERIA BLOCK 1 /31, PIONEER/NGERIA BLOCK 1 /39.
- c) Damages for trespass and special damages for the destruction upon the plaintiff's property.
- d) Costs of this suit.

The plaintiff filed an application for a temporary injunction against the defendant contemporaneously with the plaint under certificate of urgency. The court ordered that status quo be maintained pending the hearing and determination of this suit. The matter came up for directions on 12th June 2017 and parties were granted time to comply with order 11 and a mention date given for compliance.

On 25th July 2017 Counsel for the Defendant Mr. Kamau informed the court that he had received documents from the defendant and would comply by filing the documents within 7 days. On 16th April 2018 both Counsel for the plaintiff were present and indicated that they would file issues within 21 days and requested for a hearing date which was granted by the court.

Plaintiff's Case

Sister Veronichah Rop, Superior General Assumption Sisters Eldoret Registered Trustees gave evidence on behalf of the plaintiff and produced a certified copy of certificate of registration of the plaintiff. She stated that in 2004 the plaintiff bought 3 parcels of land from one Geoffrey Munoko and the wife Winfred Munoko measuring 15 acres at a consideration of Kshs. 3 million which was paid in full.

It was the plaintiff's evidence that they entered into a land sale agreement and later applied for Land Control Board Consent for the three parcels of land which were granted. She produced the consents as exhibits before the court. The plaintiff further testified that they were issued with titles for the parcels of land of which she produced copies as exhibits before the court.

The plaintiff stated that she received a call on 5th November 2016 from Paul Wekesa a caretaker who resides on the suit land that some people had come to plot No 30 one of the parcels of land and demolished the fence. It was her evidence that when she went to the parcel of land the people took off. She later reported the matter to the local Chief and the Police.

PW1 stated that the people went to Plot No. 31 the next day and removed the fence and erected theirs without the plaintiff's permission. It was her evidence that they had a greenhouse with bananas which were destroyed by the defendant. It was also her evidence that the farm has

a dairy unit with mature cows and assorted young ones together with trees and vegetable garden. The plaintiff further stated that the suit parcel of land has a developed borehole for water needs for the farm and that before the encroachment by the defendant, the farm had a fully fenced and secured for farming but now it is exposed. The plaintiff also testified that the defendant had lodged a caution on the suit land and urged the court to order that it be removed.

PW1 therefore urged the court to enter judgment as prayed in the plaint plus costs of the suit. She therefore closed her case.

On cross examination by Counsel for the defendant she confirmed that they had entered into a written agreement with the vendor who sold to them 15 acres of which consideration was paid in full. PW1 stated that she did not know the defendant before and that she had received a letter from Kamau Lagat & Co that the land was transferred irregularly to the vendor. She stated that the said letter was responded to by her lawyers who refuted the allegation. PW1 confirmed that the vendor Geoffrey Munoko was present when they entered into the agreement and that they have been paying rates. She also stated that they bought the land and that it was not a gift. On reexamination she stated that they paid stamp duty before the transfer was done.

Defence case

Miss Awinja for the defendant submitted that they did not have the defendant in court and that they had neither filed witness statements nor list of documents to rely on. She therefore closed the defence case.

Analysis and determination

The plaintiff filed 4 issues for determination by the court namely,

- a) Whether the defendant has any claim to any portion of PIONEER/NGERIA BLOCK1 (EATEC/30), PIONEER/NGERIA BLOCK 1 /31, PIONEER/NGERIA BLOCK 1 /39.
- b) Whether the plaintiff is entitled orders of permanent injunction against the defendant by himself, his personal representatives and heirs preventing them from interfering with the plaintiff's enjoyment and quiet possession of L.R. No. PIONEER/NGERIA BLOCK1 (EATEC/30), PIONEER/NGERIA BLOCK 1 /31, PIONEER/NGERIA BLOCK 1 /39.
- c) Whether the plaintiff is entitled to general damages for trespass on L.R. No. PIONEER/NGERIA BLOCK1 (EATEC/30), PIONEER/NGERIA BLOCK 1 /31, PIONEER/NGERIA BLOCK 1 /39 against the defendant as pleaded.
- d) Which party shall bear the costs of the suit herein?

From the onset it should be noted that the defendant filed a defence on 12th June 2017 but the same was never dated. The defendant admitted in paragraph 3 of the defence the he does not dispute the ownership of plot No. 30 and 39 of the suit plot but claims plot No. 31 which was allegedly transferred to the plaintiff by mistake. The defence further states that the plaintiff's occupation and developments of plot Nos. 30 and 39 are justified save for plot No. 31.

The defendant was given an opportunity to file his documents and witness statements twice but never did so. He also did not appear during the hearing of the case though his Counsel was present and cross examined the plaintiff. Counsel indicated to court that they wished to close the defence case as they neither filed documents nor witness statements in the case. Counsel for the defendant also stated that the defendant was not in court to give evidence.

The court has considered the pleadings and the evidence on record and is of the view that the issues for determination are as to whether the plaintiff is the rightful owner of the 3 parcels of land known as PIONEER/NGERIA BLOCK1 (EATEC/30), PIONEER/NGERIA BLOCK 1 /31, PIONEER/NGERIA BLOCK 1 /39, whether the defendant is entitled to plot No. 31 as alleged in the defence and whether the plaintiff is entitled to the orders sought for injunction and general damages for trespass.

On the first issue as to whether the plaintiff is the rightful owner of the suit land, the plaintiff gave evidence and stated how they entered into an agreement for purchase of 15 acres for a consideration of 3 Million which was paid in full. It was her evidence that they later fenced the suit plot and obtained Land Control Board consent which she produced as exhibit. She also produced certified copies of the title deeds of the suit land together with a certificate of incorporation.

The defendant admitted that the plaintiff is the rightful owner of parcel Nos. 30 and 39 save for No 31 which he claims to be his. The defendant filed a defence but did not file a counterclaim for the land that he purportedly claims. The law and procedure is very clear on filing of defence and counterclaim. It states thus,

5. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

- (a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;*
- (b) a list of witnesses to be called at the trial;*
- (c) Written statements signed by the witnesses except expert witnesses; and*
- (d) copies of documents to be relied on at the trial.*

This was not done in this case. If the defendant was serious on his claim of plot No. 31 then he should have filed a counterclaim for the same to be declared as such. How was he to ventilate his claim before the court?

Further Section 26(1) of the Land Registration Act, No. 3 of 2012 provides that :-

"The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefensible owner, subject to the encumbrance easements, restrictions and contortions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge except:-

- a) *On the ground of fraud or misrepresentation to which the person is proved to be a party; or*
- b) *Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme."*

This case does not fall under the exception in the above section as there was no evidence that the title was unprocedurally procured either my fraud or misrepresentation I therefore find that the plaintiff is the rightful and registered owner of the suit land. Having found that the plaintiff is the registered owner of the suit lands and rightfully so, it therefore follows that the defendant has no legitimate claim on the suit land hence answering the issue whether the defendant is entitled to plot No 31 as alleged in the defence. The defendant had lodged a caution on the suit land which belongs to the plaintiff. I therefore find that the continued restriction on the plaintiff's land is unlawful and should therefore be removed.

On the issue of general damages for trespass, it is trite law that trespass to land is actionable per se (without proof of any damage) as was held in Paul Audi Ochuodho v Joshia Ombura Orwa(2014)eKLR where .Okong'o J stated that:

"The defendant having been proved to have entered the suit property without the permission of the proprietor or any lawful cause, the defendant is a trespasser on the suit property and the plaintiff is entitled to judgment against the defendant for an injunction to restrain the defendant from committing further acts of trespass. The plaintiff is also entitled to general and special damages arising from such trespass.

The plaintiff led evidence that the defendant had trespassed on the suit land and removed the fence. Having found that the defendant is a trespasser on the suit land, it therefore follows that the defendant should pay damages for trespass. I will award a minimal figure of Kshs 150,000/ being general damages for trespass against the defendant.

The defendant trespassed on the plaintiff's suit land by removing the fence and destroying the bananas and trees. However the special damages was not specifically pleaded or proved. The laws is very clear that special damage must be specifically pleaded and proved with evidence of the damage caused and the amount in special damage. This was lacking and the court cannot guess what special damage was occasioned by the defendant's acts and how much the plaintiff spent in rectifying the damage or the value of the damage. It should be noted that not all damage is a direct consequence of the acts complained off. Some parties can take advantage of pre-existing conditions to benefit from a suit.

As much as I may sympathize with the plaintiff on the damage caused on the suit land, I find that the claim for special damage must fail as it has not been proved. I will rely on the case of **Zacharia Waweru Thumbi v. Samuel Njoroge Thuku (2006) eKLR** where it was held:-

"The law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Law Reports and Text Books on Torts, are replete with authorities on this, which need not be reproduced here. Suffice it to quote from the decision of our Court of Appeal in HAHN V. SINGH, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – held:

"Special damages must not only be specifically claimed (pleaded) but also strictly proved...for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

I have considered the pleadings, evidence on record and the relevant judicial authorities and come to the conclusion that the plaintiff has proved her case against the defendant to the required standard and make the following orders.

- a) It is hereby declared that the defendant is a trespasser on land parcel known as PIONEER/NGERIA BLOCK1 (EATEC/30), PIONEER/NGERIA BLOCK 1 /31, PIONEER/NGERIA BLOCK 1 /39.
- b) A permanent injunction is hereby issued restraining the defendant by himself, his agents or employees from interfering with the plaintiff's possession and quiet enjoyment of parcels referred to as PIONEER/NGERIA BLOCK1 (EATEC/30), PIONEER/NGERIA BLOCK 1 /31, PIONEER/NGERIA BLOCK 1 /39.
- c) Minimal damages for trespass at Kshs. 150,000/
- d) Caution on the suit land should be removed forthwith by the land Registrar.
- e) Claim for special damages fails.

f) Costs of the suit to be paid by the defendant.

DATED and DELIVERED at ELDORET this 30th day of July, 2018

M.A ODENY

JUDGE

Judgment read in open court in the presence of Miss Kibichy holding brief for Miss Musundi for Plaintiff and in the absence of Kamau Lagat for the defendant.

Mr. Koech: Court Assistant