



**REPUBLIC OF KENYA**

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

**ELC NO. 12 OF 2018**

**RICHARD KIMUTAI A. MIBEL.....PLAINTIFF**

**=VERSUS=**

**JOSEPH CHERUIYOT.....1<sup>ST</sup> DEFENDANT**

**LEONARD MUTAI.....2<sup>ND</sup> DEFENDANT**

**GEOFFREY MUTAI.....3<sup>RD</sup> DEFENDANT**

**COLLINS MUTAI.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiff herein filed a suit against the Defendants for an order of permanent injunction to issue against the Defendants by themselves, their agents, servants and/or employees from further trespassing and/or encroaching onto the land parcel **L.R NO. KERICHO/KIPCHORIAN/LELU BLOCK 7(CHEPKECHEI)/379** and in default an eviction order do issue against the Defendants and they also prayed for mesne profits.

2. Despite being served with summons, the Defendants never entered appearance nor filed a Defence. The case was therefore set down for formal proof.

**Plaintiff's case**

3.The Plaintiff testified that he is the legal registered owner of land parcel **L.R NO. KERICHO/KIPCHORIAN/LELU BLOCK 7(CHEPKECHEI)/379**. He produced a copy of official search as evidence of the same.

4. He further testified that the Defendant without any color of right trespassed onto the Plaintiff's land taking up possession of approximately 2 acres, hence depriving the Plaintiff the use and enjoyment of the said 2 acres. The Plaintiff further demonstrated to the court the attempts that he had made to evict the defendants but all in vain.

**Issues for Determination**

5. I have evaluated the pleadings, evidence on record and the plaintiff's counsel's submissions and the following issues arise for determination:

- i) Whether the Plaintiff is the registered proprietor of the suit property
- ii) Whether the Defendants have trespassed onto the suit property measuring 2 acres
- iii) Whether the Plaintiff is entitled to the reliefs sought.

**Analysis and Determination**

6. As submitted by counsel for the plaintiff, Section 22 of Land Registration Act states 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 indefeasible owner....”**

7. Section 24 of the Land Registration Act No 3 of 2012 provides as follows:

**“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.”**

8. Section 25 (1) of the said Act further provides that:

**“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.”**

9. Section 26 of the same Act 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 indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except**

**a) on grounds of fraud, or misrepresentation to which to which the person is proved to be a party; or**

**b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

10. The Plaintiff testified that he is the registered owner of land parcel **L.R NO. KERICHO/KIPCHORIAN/LELU BLOCK 7(CHEPKECHEI)/379**; as demonstrated by Plaintiff's Exhibit 1.

11. Since the plaintiff's evidence was not challenged at the hearing, it is my finding the Plaintiff is the absolute proprietor of the suit property. He is therefore entitled to protection of the said title as provided for under the Land Registration Act No. 3 of 2012.

12. Additionally, Article 40 of the Constitution of Kenya, 2010 guarantees the property rights of every person and provides under Article 40(3) that:

**“no person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property.”**

13. The second issue is whether the Plaintiff has proved that the Defendants trespassed onto his land. The Plaintiff testified that he has notified the defendants to vacate the suit land but they have adamantly refused. In the case of **Nyangeri Obiye Thomas V Yunuke Sakagwa Nyoiza ELC Case No.277 of 2018** Okong'o J observed as follows:

14. Clerk & Lindsell on Torts 18<sup>th</sup> Edition at paragraph 18-01 defines trespass as follows:

**“Any unjustifiable intrusion by one person upon land in possession of another.” ....Trespass is actionable at the instance of the person in possession and that proof of ownership is *prima facie* proof of possession”**

15. From the evidence on record, it is my finding that the Defendants are unlawfully occupying the suit property. This amounts to trespass to land.

16. Regarding the third issue as to whether the Plaintiff is entitled to the reliefs sought, the Plaintiff seeks three remedies; a permanent injunction against the Defendants and in default thereof an order of eviction against them. He also seeks general damages and mesne profits

17. The principles that guide the court in granting an order of injunction are set out in the celebrated case of **Giella V Cassman Brown & Company Limited 1973. E.A 358** as follows:

**“First, the applicant must show that he has a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”**

18. From the Plaintiff's evidence stated above, it is my finding that he has met the threshold for the grant of an injunction. Similarly, the Plaintiff is entitled to an eviction order in the event that the Defendants do not vacate the suit property.

19. With regard to mesne profits, the Plaintiff did indicate that he has been deprived of the use and enjoyment of approximately 2 acres, which translates to Kshs. 20,000 per year as the lease amount for this portion. I therefore award the plaintiff the sum of Kshs. 60,000 as mesne profits for a period of three years since 2015.

20. Turning to the general damages, I rely on the case of **Park Towers Ltd V John Mithamo Njika and 7 Others 2014 eKLR** where Mutungi J stated as follows:

**“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case”**

21. Further in the case of **Duncan Nderitu Ndegwa V Kenya Power and Lighting Company Limited & Another (2013) eKLR** Nyamweya J held that once trespass to land is established, it is actionable per se and indeed no proof of damage is necessary. In the instant case I consider an award of Kshs. 100,000 to be adequate compensation for the defendant’s infringement of the plaintiff’s right to use and enjoy its land.

22. The upshot is that the Plaintiff has proved his case on a balance of probabilities. I therefore enter judgment for the Plaintiff and make the following final orders:

- a) A permanent injunction is hereby issued restraining the Defendants from trespassing upon, causing to be sub-divided, ploughing or doing any other acts which are prejudicial to the plaintiff’s proprietary interest in land parcel number L.R No. **KERICHO/KIPCHORIAN/LELU BLOCK 7(CHEPKECHEI)/379;**
- b) The Defendants are hereby ordered to vacate the suit property within three months from the date hereof failing which the Plaintiff may apply for an eviction order.
- c) Kshs. 60,000 Mesne profits.
- d) Kshs. 100,000 General Damages
- e) The costs of this suit shall be borne by the Defendants.

**Dated, signed and delivered at Kericho this 20<sup>th</sup> day of July 2018**

.....

**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Koech for Miss Ngetich for the Plaintiff
2. N/A for the Defendant
3. Court Assistant - Rotich