



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 130 OF 2017

BERNARD KIOKO NGOLANIA (*Suing on his behalf and on behalf of the*

***Estate of the late KASOKOLO NGOLANIA -DECEASED)*.....PLAINTIFF**

VERSUS

RAPHAEL KAMALYA.....DEFENDANT

JUDGEMENT

1. The Plaintiff herein is the administrator of the estate of Kasokolo Ngolonia (*hereinafter referred to as the deceased*). The Plaintiff commenced this suit by way of a plaint dated 5th June, 2012 and filed in court on 6th June, 2012.

2. In his claim, the Plaintiff seeks the following orders;

1. A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession of all that piece of land known as parcel no. 3112 Kasikeu Adjudication Section.

2. A declaration that the Defendant, whether by himself or his servants or agents or otherwise are wrongfully in occupation of the Plaintiffs parcel of land number 3112 Kasikeu Adjudication Section and are trespassers thereon and should be evicted therefrom.

3. A permanent injunction restraining the Defendant whether by himself, his servants or agents or otherwise from remaining on or continuing to occupy the suit premises.

4. Vacant possession of the suit property.

5. General damages for trespass.

6. Costs of this suit plus interest thereon.

7. Any other or further relief as this honourable court may deem fit and just to grant.

3. The claim is denied by the Defendant vide his statement of defence dated 6th August, 2012 and filed in court on even date.

4. On the 13th November, 2014 the Defendant's counsel filed chamber summons application dated 4th November, 2014 where they sought leave to withdraw from representing the Defendant. The counsel did not prosecute the application and as such he remains on record for the Defendant despite the fact that hearing of the main suit proceeded ex-parte.

5. At the hearing, the Plaintiff adopted his statement which he recorded on the 5th June, 2012 as his evidence. He produced 6 documents in his list of documents dated the 5th June, 2012 as PEX Nos.1 to 6 respectively.

6. His evidence was that land parcel number 3112 is ancestral which he jointly owns with the deceased. That in the year 2009, the Defendant who is his neighbour entered into his land and proceeded to clear vegetation on the land. He went on to say that the Defendant cultivated and built a permanent home on the suit land without the Plaintiff's permission.

7. The Plaintiff therefore prays for judgement against the Defendant.

8. Ndambuki Matheka (PW1) was the sole witness for the Plaintiff. Like the Plaintiff, Ndambuki (PW1) adopted his recorded statement dated 6th June, 2012 as his evidence. He said that the Defendant has built on the Plaintiff's land despite the presence of the boundary that was fixed by the surveyor.

9. The Plaintiff thereafter closed his case. His counsel filed submissions on the 16th July, 2018.

10. The counsel framed three issues for determination. These were:-

a) Whether the Plaintiff is the registered owner of the suit land?

b) Whether Defendant is in unlawful possession and/or occupation of the suit land?

c) Whether the Plaintiff is entitled to damages?

11. On the whether or not the Plaintiff is the registered owner of the suit land, the counsel submitted that from the evidence on record, the Plaintiff has proved ownership and as such he is protected by Article 40(3) of the Constitution which provides that,

“No person shall be deprived of property or any interest in any right over property without prompt 1*-and just compensation being made to the person deprived of the property”

12. The counsel went to cite section 25 (1) of the Land Registration Act No. 3 of 2012 which provides for the protection of proprietary rights. The section provides as follows:-

“ The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of 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 –

a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register and; and

b) To such liabilities, rights and interests as affect the same and are declared by section 28 not to require nothing on the register, unless the contrary is expressed in the register.”

13. The counsel also cited section 22 of the same Act which provides that a certificate of title issued by a Registrar is to be taken by all courts as a prima facie evidence of proprietorship of the land by the person named thereof. The section provides as follows:-

“The certificate of title issued by the Registrar upon registration 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 land is the absolute and indefeasible owner thereof.”

14. On the whether or not the Defendant is in unlawful occupation of the suit land, the counsel submitted that the Plaintiff has proven that indeed that the Defendant had trespassed into the suit land and was in illegal occupation.

15. On whether or not the Plaintiff's counsel is entitled to damages arising from trespass, the counsel correctly submitted that the tort of trespass is actionable per se and there is no need of specific harm or damage to be adduced. The counsel cited the case of **Duncan Nderitu Ndengwa Vs KPLC Ltd [2013] eKLR** where Nyamwenya, J held that;

“ ... once trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs. 100,000.00 as compensation of the infringement of the Plaintiff's right to use and enjoy the property occasioned by the 1st and 2nd Defendants' trespass.

16. The counsel further cited the case of **Parktowers Ltd Vs John Mithamo Njika & 7 others [2014] eKLR** where Mutungi, J held thus;

“I agree with the learned judges that where trespass is proved a party need not to 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 circumstance of each case.”

17. The counsel did not propose the damages that would suffice under the circumstances. In my judgement, I am of the view that Kshs. 100,000 would be adequate compensation.

18. Having considered the evidence on record and the submissions filed, my finding is that there is evidence to show that the Plaintiff is the registered owner of land parcel number 3112 situated in Kasikeu Adjudication Section of Kasikeu Division. There is also evidence to show that the Defendant is in unlawful possession and/or occupation of the said land parcel number 3112. That being the case, I hold that the Plaintiff is entitled to damages which I assess at KShs. 100,000.

19. Arising from the foregoing, I hereby proceed to enter judgement for the Plaintiff and against the Defendant as follows:-

1. A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession of all that piece of land known as parcel no. 3112 Kasikeu Adjudication Section.
2. A declaration that the Defendant, whether by himself or his servants or agents or otherwise are wrongfully in occupation of the Plaintiffs parcel of land number 3112 Kasikeu Adjudication Section and are trespassers thereon and should be evicted therefrom.
3. A permanent injunction restraining the Defendant whether by himself, his servants or agents or otherwise from remaining on or continuing to occupy the suit premises.
4. Vacant possession of the suit property.
5. Kshs. 100,000 being general damages.
6. Costs of this suit plus interest thereon.

It is so ordered.

Signed, Dated and Delivered at Makueni this 24th Day of October, 2018.

MBOGO C.G,

JUDGE

In the presence of:

Mr. Hassan holding brief for Mr. Mulei for the Plaintiff

No appearance for the Defendant

Mr.Kwemboi Court Assistant

MBOGO C.G, JUDGE,

24/10/2018