



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 122 OF 2017

(Formerly Kisii ELC No. 166 of 2015)

THE REGISTRERED TRUSTEES,

LEGIO MARIA AFRICA CHURCH MISSION.....PLAINTIFF

Versus

SIMEON NYAMWEYA OBWOCHA.....DEFENDANT

JUDGMENT

1. By a plaint dated 4th May, 2015, and filed on 6th May 2015, the plaintiff namely the Registered Trustees Legio Maria of Africa Church Mission has sued the defendant, Simeon Nyamweya Obwocha for the following reliefs;-

- i. Declaration that the plaintiff is the registered and/or lawful owner of LR NO. BUKIRA/BUHIRIMONONO/1576. (Herein after referred to as the suit property).**
- ii. An order of eviction against the defendant, his agents and/or servants from the suit property**
- iii. Permanent injunction restraining the defendant either by himself, agents, servants and/or anyone claiming under the defendant from entering upon, re-entering trespassing onto, fencing, planting tree, cultivating, building structures, alienating selling, leasing, interfering with and/or in any other manner dealing with the suit property, and/or any portion thereof.**
- iv. General damages for trespass.**
- v. Interest on (iv) above hereof at court rates.**
- vi. Costs of this suit be borne by the defendant.**

2. Briefly, the plaintiff's claim is that the suit property is registered in the name of the plaintiff with effect from 18th September 2001. The plaintiff entered and constructed a church house thereon for use by members and faithful of the plaintiff's church for prayers and other evangelical activities to further the gospel. That the plaintiff is the absolute owner of the suit property to the exclusion of all others including the defendant.

3. The plaintiff further claims that in the year 2013/2014, the defendant trespassed into the suit property and commenced fencing of a portion of the property, planted trees and demolished the church house thereon without the consent and or permission of the plaintiff. The defendant threatened the plaintiff's faithful and members including the Vicar in charge. He also threatened to take over the entire suit property. The defendant's actions denied the plaintiff the use and development of the suit property thus provoked the filing of the instant suit.

4. In his statement of defence dated 22nd May, 2015, the defendant stated that whereas the plaintiff is the registered owner of the suit property, the same shares a common boundary with the defendant's land LR NO. BUKIRA/BUHIRIMONONO/621. That the matter was determined by the Land Registrar between the year 2005 and 2006. He denied the plaintiff's claim and termed it incurably defective, bad in law, misconceived, frivolous, legally untenable and an abuse of the process of the honourable court hence it should be struck out and or dismissed with costs.

5. The plaintiff is represented by M/s Oguttu Mboya and Co. Advocates. The defendant is represented by M/s Nyagesoa and Co. Advocates.

6. Learned counsel for plaintiff filed as statement of agreed issues (plaintiff's version) dated 29th June, 2016. The issues include; whether the

suit property lawfully belongs to and or is registered in the name of the plaintiff who has exclusive rights of ownership, possession, use and occupation of the property and whether the suit property shares a common boundary with LR NO. BUKIRA/BUHIRIMONONO/621 (neighbouring property). I consider the issues and embrace them accordingly.

7. On 18th September 2017, counsel for the respective parties informed the court that the suit property shares a common boundary with the neighbouring property. Pursuant to Section 18 and 19 of the Land Registration Act 2012, the court directed and ordered the Land Registrar and surveyor, Kehancha to visit the suit property and the neighbouring property to establish and fix their respective boundaries and file reports(s) within ninety days from the date of the order.

8. Further to the court order, the Acting Sub-County Surveyor Kuria East/West Sub-county confirmed that they visited the parcel of land. He filed his report Ref no. CSCO/KUR/SUR/VOL. III/71 together with a sketch map of the parcel of land on 8th January 2018. The report reads;-

“THAT there was an encroachment into parcel no. Bukira/Buhirimonono/1576 by parcel no. Bukira/Buhirimonono 621 by approximately 7m on the western side of the parcel.

The temporary structure purportedly constructed on parcel no. 621 should therefore be on the church’s land (1576).

THAT after the measurements were taken and the correct position of the **boundary establishes** boundary marks were placed to **demarcate** the same.

THAT **sketch map has been attached to show the extend of the encroachment.**” (Emphasis added)

9. Following the filing of the report, the matter was fixed for directions on 29/9/2018. The defendants counsel was duly served on 30th August, 2018 as per affidavit of service sworn on 21st September 2018 by a licensed court process server, Jushua Otieno Okeyo. There was no appearance on the part of the defendant and his counsel, hence the plaintiff’s counsel sought adoption of the report and entry of judgment in favour of the plaintiff against the defendant in terms of the orders sought in the plaint.

10. The court limited the time for oral submissions by M/s W. Ochwal, learned counsel for the plaintiff. Counsel submitted that the defendant entered the suit property, started fencing a portion of the property and planted trees thereon. That it was a boundary dispute which prompted the court to order and receive the surveyor’s report filed in court on 8th January 2018. That the report proved that the defendant trespassed into the suit property thus the plaintiff is entitled to the reliefs sought in the plaint.

11. Counsel further submitted that the tort of trespass is actionable per se. She urged that the court exercises its discretion judiciously and assess general damages for trespass in favour of the plaintiff. Counsel cited the case of **Bhagwani Singh Kalsi- v- National Housing Corporation (2017) eKLR** as shown on the plaintiff list of authority dated 1st October 2018 and filed in court on 2nd October 2018.

12. I consider the entire pleadings the surveyor’s report and oral submissions by the plaintiff’s counsel. The surveyor’s report is an expert opinion which is admissible in evidence under **Sections 48 and 54 of the Evidence Act (Cap 80 Laws of Kenya)**.

13. Generally expert opinion is not considered binding on the court; see **Amosam Builders Developers Ltd –v- Gachie & 2 others (2009) KLR 648**.

14. Be that as it may, it is common ground that the dispute relates to the boundaries of the suit property and the neighbouring property. The surveyor’s report clearly shows that there was encroachment into the suit property by the neighbouring property by approximately seven (7) metres as shown on the sketch map. The boundaries of the suit property which is registered in the name of the plaintiff, have been determined and fixed in accordance with **Sections 18 and 19 of the Land Registration Act 2012** as shown on the report.

15. Moreover, this court is deprived of jurisdiction over a dispute as to boundaries of registered land unless the boundaries have been determined in accordance with **Section 18 of the Land Registration, 2012**. I approve the position taken by J.M. Mutungi J in **Andrew Marigwa –v- Josephat Ondieki Kebati Kisii ELCC no. 1163 of 2016** that the mandate to determine, establish and fix boundaries of registered land is bestowed upon Land Registrar and surveyor as envisaged under **Sections 18 and 19 of the Land Registration Act, 2012**.

16. The plaintiff’s bundle of documents (numbers 1 to 3) dated 4th May 2015 clearly show that the plaintiff is the registered owner of the suit property. **Under Section 152 A of the Land Act, 2016 (2012)** a person shall not unlawfully occupy private, public or community land. The plaintiff is the absolute and indefeasible owner of the suit property as provided under Sections 24, 25 and 26 of the Land Registration Act 2012.

17. It is abundantly clear from the report that the defendant has encroached into the suit property of the plaintiff. It amounts to trespass thereon as he did not get consent of the plaintiff to occupy part of the suit property.

18. Black’s Law Dictionary 10th Edition has fashioned a definition of “trespass” as follows;-

“An unlawful act committed against the person or property of another especially wrongful entry on another’s real property.”

19. It follows that the plaintiff has established that the defendant is a trespasser on the suit property. Therefore he is entitled to evict him from the property. However, eviction is to be undertaken in accordance with **Section 152 B of the Land Act, 2016 (2012)**.

20. This court is empowered to grant permanent preservation orders including an injunction **under Section 13 (7) (a) of the Environment and Land Court Act, 2015 (2011)**. An injunction is equitable remedy and its duration is the discretion of the court and depends on the circumstances of each case; see **National Bank of Kenya Ltd –vs- Shimmers Plaza Ltd (2009) KLR 283**.

21. The plaintiff has proved that the defendant has trespassed into his property. He has sought general damages for the tort of trespass which is actionable per se.

22. In that regard, I endorse the decision in **Bhagwani Kalsi case (supra)** whereby M.A. Odeny J, rendered herself, inter alia;-

“Once trespass is established or proved, then a party need not prove that he suffered any damage or loss. It is trite law that trespass to land is actionable per se. The plaintiff prayed for general damages for loss occasioned by the defendant who had encroached on his suit land.”

23. In the circumstances and considering the entire case, I am of the considered view that the plaintiff is entitled to Kshs. 35,000/=being minimum amount in general damages for trespass; see **Erick Adome and Anor –v- Pauline Kasumba Osebe & Anor (2014) eKLR**. I find that plaintiff has proved his case against the defendant on a balance of probability.

24. A fortiori, I enter judgment for the plaintiff against the defendant in terms of orders (i) to (iii) sought in the plaint dated 4th May 2015 as well as general damages for trespass assessed at Kshs. **35,000/=** and costs of the suit.

DELIVERED, DATED and SIGNED at MIGORI this 16th day of October 2018.

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr.Oguttu Mboya learned counsel for the plaintiff.

Mr. Nyamori Nyaimi learned counsel holding brief for Mr. Nyagesoa learned counsel for the defendant.

Tom Maurice – Court assistant