



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 299 OF 2015**

**NOAH KAISHA KEDOGO** (*Administrator of the Estate of*

*ESAU KEDOGO MIMO alias ESAU KEDOGO*) .....**PLAINTIFF**

**VERSUS**

**CHANIA CONSTRUCTION COMPANY LIMITED**.....**DEFENDANT**

**JUDGEMENT**

By a plaint dated 23<sup>rd</sup> November 2015, the plaintiff avers that he is the administrator of the estate of Esau Kedogo Mimo hereinafter referred to as the deceased. On unknown date to the plaintiff and without the consent of the plaintiff, the defendant herein entered into and started to excavate, dig and mine murram from property known as Kakamega/Tigoi/611. Sometime in the month of October, 2015, the defendant herein started to dump stones, soil and other waste material in the crater and hole they dug there when excavating, digging and mining murram from the said property. As a result of the matters aforesaid, the above named property has been and continues to be wasted, degraded, lost value and its natural environment to the detriment of the plaintiff. The plaintiff's claim against the defendant therefore is for an order of injunction restraining the defendant whether acting by themselves, agents, servants and/or employees from excavating, digging or mining murram or any other mineral or material from property known as Kakamega/Tigoi/611. The plaintiff further claims general damages from the defendant as a result of the defendant's unlawful acts. PW2 corroborated the plaintiff's evidence. The plaintiff prays for judgment against the defendants jointly and/or severally for:-

- (a) A permanent injunction restraining the defendant whether acting by themselves, agents, servants and/or employees from dumping stones, soil, waste materials excavating, digging or mining murram or any other excavating from elsewhere in property known as Kakamega/Tigoi/611, dumping stones, soil, or any other waste excavating from elsewhere in property known as Kakamega/Tigoi/611.
- (b) General damages for trespass to land.
- (c) Cost of the suit.
- (d) Any other relief that this honourable court deem fit and just to grant.

The plaintiff submitted that, in tort damages are awarded as a way to compensate a plaintiff for the loss he had incurred due to a wrongful action on the part of the defendant. Damages awarded are intended to return the plaintiff back to the position he was in before the wrongful act was committed. But for the purpose of computation the following guiding principles apply;

- (a) If the plaintiff proves trespass he is entitled to recover nominal damages even if he has not suffered any 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 plaintiff's land is entitled to receive by way of damages such a sum of damage as would reasonably be paid for that use.
- (d) Where there is oppressive arbitrary or unconstitutional trespass by a Government official or where the defendant cynically disregards the right or the plaintiff use of the land with the object of making a gain by his unlawful conduct exemplary damages may be awarded.
- (e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages the general damages may be increased.

The general principal as regards the measure of the damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value of reinstatement of the land. The overriding principle is to put the claimant in the position he was prior to the infliction of the harm. In the present case there was actual damage to the plaintiff's land arising from the acts of excavation conducted thereon by the defendant. The plaintiff therefore perfectly fits the bill espoused in the principles above and is entitled to aggravated damages. The plaintiff submitted that, there is a report that has been produced in court by an expert and which puts the restitution figure at 48 million. The plaintiff will emphasize that the court considers all the relevant materials presented before it and award the plaintiff a global figure of Ksh. 60 million in damages, loss of user in terms of mesne profits, nuisance, cost of the suit and an injunction as prayed in the plaint. They rely on the authorities below:

(a) High Court of Kenya at Nairobi (Milimani Law Courts) Civil case No. 25577 of 1990-Duncan Nderitu Ndegwa vs. Kenya Pipeline Company Ltd.

(b) High Court of Kenya at Nakuru Civil Cause No. 36 of 2013 – Nakuru Industries Ltd vs. S.S. Malita & 4 Sons.

Lastly they submit the provisions of Article 40 (2) of the Constitution must be emphasized.

“Parliament shall not enact legislations that permits the state or any person.

(a) To arbitrarily deprive a person of property of any description or of any interest in or right over any property of any description or

(b) To limit or in any way restrict the enjoyment of any right under this Article on the basis of any of these grounds specified or contemplated in Article 27 (a)

It therefore follows that the actions by the defendant violate the express provisions of the Article quoted above and it therefore violated the plaintiff's fundamental rights and freedoms.

This court has carefully considered the plaintiff's case and submissions herein. The defendant was served but failed to attend court or file any defence in opposition. The plaintiff's evidence is that the defendant trespassed onto land known as Kakamega/Tigoi/611 from January, 2014 and started excavating murrum from thereon without the consent and or authority from the plaintiff. The said unlawful intrusion by the defendant onto the plaintiff's parcel of land led to massive destructions of crops and trees that were growing thereon. A semi permanent house that was also standing on the suit property was destroyed by unlawfully and unjustifiable action of the defendant. This led to the removal of murrum from the plaintiff's land leading to creation a massive hole that was estimated to measure 30 metres long and 60 meters deep. The defendant stopped excavating the said murrum from the said suit property in October, 2015 the defendant started dumping waste, stores and soil excavated from elsewhere. As a result the plaintiffs were unable to utilize their parcel of land for either commercial or agricultural purposes and has been rendered useless to date as it remains wasteland. The plaintiff produced a copy of the official search which reveals that the land parcel No. Kakamega/Tigoi/611 belonged to their late father one Esau Kedogo. They further produced a grant of letter of administration in respect of the estate of their father estate issued by Vihiga Principal Magistrate Court. This evidence has not been challenged and I accept it. I find that the defendant unlawfully trespassed onto the plaintiff's land and caused damage to the same. The plaintiff in submissions requested for a global figure of 60 million as general damages. However, no expert witness came to give evidence in support of the damages alleged.

On the issue of quantum the court looked at the case of Titus Gatitu Njau vs Municipal Council of Eldoret (2015) eKLR. Judgement was entered for the plaintiff against the defendant in the sum of Kshs. 15, 500,000/= comprising of Kshs. 500,000/= as general damages for trespass and Kshs. 15,000,000/= as exemplary damages. The defendant was found liable of demolishing a business premises. In the case of Paul Audi Ochuodho vs Joshia Ombura Orwa (2014) eKLR the court found that the defendant without any lawful cause damaged the boundary fence of the suit property, entered therein and annexed a portion thereof measuring 1ha. In the process of taking possession of the said portion of the suit property, the defendant damaged the crops that had been planted thereon, uprooted trees and pulled down the structures that had been put up on the property. The court awarded Kshs. 500,000/- as general damages for trespass.

Finally in Bhagwani Singh Kalsi vs National Housing Corporation (2017) eKLR the defendant was ordered to pay to the plaintiff general damages for trespass of Kshs. 1,500,000/- Million. In this present case and with the evidence before me I find an amount of Kshs. 1,500,000/- Million would be adequate as general damages. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A permanent injunction restraining the defendant whether acting by themselves, agents, servants and/or employees from dumping stores, soil, waste materials excavating, digging or mining murrum or any other excavating from elsewhere in property known as Kakamega/Tigoi/611, dumping stores, soil, or any other waste excavating from elsewhere in property known as Kakamega/Tigoi/611.
2. General damages for trespass to land of Kshs. 1,500,000/- Million.
3. Cost of the suit to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 16<sup>TH</sup> DAY OF OCTOBER 2018.**

**N.A. MATHEKA**

**JUDGE**