



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**ELC NO. 586 OF 2012**

**REUBEN K. ARAP SEREM.....PLAINTIFF**

**VERSUS**

**ZIPPORAH MELI.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

By a plaint dated 13<sup>th</sup> November 2010, the plaintiff sued the defendant for the following orders:

1. A declaration that the defendant's entry into Parcel Number MOI'S BRIDGE/SIRIKWA BLOCK 1 (ZIWA) 282 is unlawful and a permanent injunction do issue against the Defendant, her agents, servants or assigns barring them from entering and interfering with the said parcel of land
2. An order of eviction do issue against the Defendant, her agents, servants or assigns evicting them from Parcel Number MOI'S BRIDGE/SIREKWA BLOCK 1 (ZIWA) 282.
3. General damages for trespass.
4. Costs.
5. Interest on (3), (4) above
6. Further or other relief as this Honourable court may deem fit.

This matter came up for hearing on 15<sup>th</sup> May 2017 which date was taken by consent of both Counsels for the plaintiff and the defendant. When the matter was called out Miss Adongo held brief for Mr. Melly for the defendant who indicated that he would be ready to proceed with the hearing. The defendant was not in court to prosecute her defence. Miss Adongo who held Mr. Melly's brief was also not present in court when the matter was slated for hearing at 11 a.m. The court noted that the meaning of holding brief is that Counsel has sufficient instructions to proceed with a matter if an adjournment is not granted by the court.

Miss Adongo abandoned the instructions halfway and absented herself from the proceedings. The court therefore ordered that the plaintiff do proceed with his case. From the court records, it is evident that this case has been adjourned severally on the instance of the defendant. On 27/10/15 the court noted the same

and gave the defendant the last chance to defend her case. The court also noted that parties are given dates but they do not want to proceed with their cases creating an impression of serious backlog in in the courts.

### **Plaintiff's Evidence**

It was the Plaintiff's evidence that he is the Registered Owner of a Parcel of Land known as Moi's Bridge/Sirikwa Block 1(Ziwa) 282 measuring seven decimals one two (7.12) acres and he produced a Title Deed as exhibit No. 1. The Plaintiff further stated that he exchanged Four Decimal One Two (4.12) acres with one Hellen Jelimo Cheseret on 18<sup>th</sup> December, 2002 where the said Hellen Jelimo Cheseret in exchange gave him Five (5) acres in Turbo Settlement Scheme Plot Number 464. He produced an agreement to that effect being Exhibit 2.

The Plaintiff gave evidence that he remained with Three (3) acres and to his surprise in the year 2009 he found out that the Defendant had trespassed and occupied his Parcel of Land and had been leasing the same to other Third (3<sup>rd</sup>) parties. The plaintiff stated that he instructed his lawyers M/s Birech, Ruto & Company Advocates on 28<sup>th</sup> July, 2009 to write a demand letter to the defendant which he produced as exhibit 3. He further testified that the Defendant did not vacate as demanded in the letter which led to the plaintiff filing the current suit. He also testified that he had lost the use of his land since 2009 whereby 1 acre of land is leased for a market rate of kshs. 11,000. He urged the court to grant the prayers as per pleaded in the plaint.

### **Plaintiff's Counsel's Submissions**

Counsel for the Plaintiff filed written submissions on 19<sup>th</sup> May 2017 in support of the plaintiff's case. He reiterated the plaintiff's evidence and added that the plaintiff had proved that he is the registered owner of Land Parcel No. Moi's Bridge/Sirikwa Block (Ziwa) 282 by producing the title to the same. He submitted that the defendant entered the suit land in 2009 as a trespasser. He further submitted that even though the defendant was absent during the hearing, the court would be able to look at the pleadings as a whole.

Counsel for the plaintiff submitted that the defendant's statement and that of her witness Augustine Kiprono were contradictory in respect of who bought the land from the plaintiff. It was further submitted by counsel that it is clear that the plaintiff never entered into an agreement for sale of 3 acres of land. Counsel also stated that if there was such a sale then the same would have fallen under the provisions of section 6 of the land Control Act which provides that:

#### **6. (1) Each of the following transactions -**

- a. the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land, which is situated within a land control area;***
- b. the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;.....***

#### **3. This section does not apply to –**

- a. the transmission of land by virtue of the will or intestacy of a deceased person, unless that transmission would result in the division of the land into two or more parcels to be held under separate titles; or***
- b. a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party.***

Mr. Birech Counsel for the plaintiff submitted that the remedy of a buyer in a transaction which has

become void under the provisions of the Land Control Act is as provided for under section 7 which provides that:

***7. If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.***

Counsel stated that he quoted these provisions of the land Control Act to show that even if there was a transaction that took place in 2001 as alleged by the defendant, which is denied, the same would have been null and void and the only remedy would be to seek for a refund from whoever the defendant paid the money. He further submitted that the defendant from her pleadings did not show that she has any overriding interest over the plaintiff's parcel of land.

Mr. Birech Counsel for the plaintiff therefore urged the court to find that the plaintiff had proved his case on the balance of probabilities as he is the registered owner of Parcel Number Moi's Bridge/Sirikwa Block 1(Ziwa) 282 and that the Defendant trespassed on his land.

He reiterated the plaintiff's prayers that the defendant be evicted from the said parcel of land and be barred permanently from interfering with the Plaintiff's use of the said Three (3) acres of land. He also prayed that the defendant be condemned to pay general damages for loss of use of the land from the year 2009 at the rate of Kshs. 11,000/ per acre for 9 years worked out as follows:

$Kshs\ 11,000 \times 3 \times 9 = Shs\ 297,000/=.$

Counsel further submitted that if the Plaintiff had been the one ploughing, planting and selling the farm proceeds for Three (3) acres for Nine (9) years he could gotten Kenya Shillings two Million Four Hundred and Thirty Thousand (kshs 2, 430,000/=) made up as follows:-

Thirty (30) bags per acre multiply by Three (3) acres by Nine (9) years at the rate of Kenya shillings Three Thousand (Kshs 3,000/=) per bag i.e  $30 \times 3 \times 9 \times 3000 = Shs\ 2,430,000/=.$

In conclusion, Counsel submitted that the Plaintiff has proved his case and the prayers sought in the plaint.

### **Defendant's Counsel's Submissions**

Even though the defendant and her Counsel were not present during the hearing of the case, the Counsel filed his submissions on 20<sup>th</sup> June 2017. Counsel relied on the pleadings filed by the defendant as no evidence was led during the hearing of the case. It was Counsel's submission that the defendant had bought purchased 3 acres from the Plaintiff and his wife FLORENCE SEREM. He stated that at the time of payment the plaintiff was not available and instructed the said Florence Serem to receive the cash in respect of 3 acres on L.R NO. MOI'S BRIDGE/SIRIKWA BLOCK 1(ZIWA)/ 282.

Counsel further submitted that the defendant, has been on the disputed land since 2001 to date. Counsel also stated that a trespasser in normal circumstances cannot be left to enjoy a property for that long unless there is a license to do so.

The claim for loss of user was also challenged by the defendant's counsel on the ground that it was the plaintiff who allowed the occupation due to the sale of the said parcel of land. Counsel prayed that the plaintiff's suit be dismissed with costs to the defendant. Counsel further submitted that the defendant has actually sold the said parcel to a third party, who is a church and already occupying the suit land.

### **Issues, Analysis and Determination**

The Plaintiff filed issues for determination on 15<sup>th</sup> June 2011 whereby he listed 8 issues namely:

1. Whether the plaintiff is the registered owner of all that piece of land known as MOI'S BRIDGE/SIRIKWA BLOCK 1 (ZIWA) 282 measuring 7.12 acres or thereabout.
2. Whether in the year 2009 the defendant unlawfully trespassed into the plaintiff's parcel of land and started cultivating on a portion of it.
3. Whether the defendant was given a written notice to cease her unlawful acts on the said parcel of land.
4. Whether the plaintiff had sold to the defendant 3 acres and gave her possession in 2001.
5. Whether the plaintiff is entitled to the orders sought.
6. Whether the court has jurisdiction to hear this case
7. Who is to be condemned to pay costs of the suit

I would say that the issues in this case are very clear and can be condensed to four main issues for determination.

1. Whether the plaintiff is the registered owner of all that parcel of land known as MOI'S BRIDGE/SIRIKWA BLOCK 1 (ZIWA) 282 measuring 7.12 acres or thereabout
2. Whether the plaintiff had sold to the defendant 3 acres and gave her possession in 2001.
3. Whether the defendant unlawfully trespassed into the plaintiff's parcel of land and started cultivating on a portion of it in 2009
4. Whether the plaintiff is entitled to the orders sought.

From the above issues, it is not in dispute that the plaintiff is the registered owner of all that parcel of land known as MOI'S BRIDGE/SIRIKWA BLOCK 1 (ZIWA) 282 measuring 7.12 acres or thereabout. The plaintiff produced title deed in respect of the said parcel of land to prove ownership. The production of a title deed registered in his name is prima facie evidence that the plaintiff is the rightful owner of the suit land. There was also no evidence to counter the claim that the plaintiff is the registered owner His ownership was not controverted by the defendant either in her pleadings or the Counsel's submissions. The defendant also did not file any counterclaim to demand any land or refund from the plaintiff if her allegation to have bought the land was true.

The plaintiff's rights are protected under section 24 and 26 of the Land Registration Act 2012 which vests absolute proprietorship to an individual so long as it is not fraudulently obtained.

**24. Subject to this Act—**

*(a) 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; and*

*(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.*

There was no claim that the title was either acquired fraudulently or that the defendant had an overriding interest on the same. The law provides that issuance of a title to an individual is prima facie evidence of absolute proprietorship except in the circumstances listed under section 26 below:

26. (1) *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, 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 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, unprocedurally or through a corrupt scheme.*

On the above issue, I find that the plaintiff has proved that he is the registered owner of parcel of land known as MOI'S BRIDGE/SIRIKWA BLOCK 1 (ZIWA) 282 measuring 7.12 acres or thereabout

The second issue is as to **whether the plaintiff sold to the defendant 3 acres and gave her possession in 2001**. The plaintiff produced an agreement dated 18<sup>th</sup> December 2002 between him and one Hellen Jelimo Cheseret for exchange of parcels of land. There was no agreement produced in court or filed in the list of documents by either the plaintiff or the defendant indicating that there was such sale of land between them. Agreements for sale of land must be in writing hence no suit can be based on such a contract as it would be in contravention of Section 3 (3) of the Law of Contracts Act. That is assuming that there was an agreement for sale between the plaintiff and the defendant which I find from the evidence and the court record that there was no such agreement.

The other hurdle for the defendant would be the issue of consent of the Land Control Board. The law requires that a consent of the Land Control Board must be obtained over agricultural land failure of which the same is null and void.

If there was no such agreement, then it follows that the second limb of the issue as to whether the plaintiff allowed the defendant to take occupation of the 3 acres of his land in 2001 is also not tenable. The plaintiff did not sell to the defendant 3 acres as alleged and therefore she is a trespasser.

In **Clerk & Lindell on Torts (17<sup>th</sup> Edition)** para 17-01 Trespass is defined thus

***“An unjustifiable entry by one person upon the land in possession of another. Removing any part of the soil of land also constitutes trespass”***

I therefore find on a balance of probabilities that the Defendant did enter onto the Plaintiff's land without his consent and this action amounted to trespass.

**Is the plaintiff entitled to the orders sought for in the plaint?** The plaintiff sought for an order for a declaration that the defendant's entry into Parcel Number MOI'S BRIDGE/SIRIKWA BLOCK 1 (ZIWA) 282 is unlawful and a permanent injunction do issue against the Defendant, her agents, servants or assigns barring them from entering and interfering with the said parcel of land. He also sought for an order of eviction to issue against the Defendant, her agents, servants or assigns evicting them from Parcel Number MOI'S BRIDGE/SIRIKWA BLOCK 1 (ZIWA) 282, general damages for trespass and Costs of the suit.

I would like to deal with the issue of damages which 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. The damages that are awarded are meant to return the plaintiff back to the position he was in before the wrongful act was committed. In cases where trespass to land results in damage then the computation of damages is on the basis of restitution of land.

**Halsbury's 4<sup>th</sup> ed, Vol 45, at para 26, 1503** provides as follows on computation of damages in an action of trespass:

***(a) If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he***

*has not suffered any actual loss.*

*(b) If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.*

*(c) Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use.*

*(d) Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in 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.*

In this case the I will rely on the clause that states that ,*Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use.*

In the same breath, if the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss. From the evidence, the plaintiff stated that the defendant trespassed on his land and that he suffered loss of user. He gave a figure of 11,000/ as the amount he could have gotten per acre if he was using the land. He then multiplied it by 3 by 9 years.

On the issue and quantum of general damages, once a 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. The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass.

There are several cases where the court has awarded general damages for trespass. In **ANTHONY KOLANI MWANYA Vs MWAKA OMAR ALI [2011]eKLR** the Court awarded a sum of Kshs 50,000/= as general damages for trespass. The exact value of the land before and after the trespass has not been presented to the court. As I had earlier stated that the defendant trespassed onto the plaintiff's land, I will award the plaintiff nominal damages of Kshs 60,000/.

I have considered all the pleadings, the evidence and the exhibits in support and against this case and I am satisfied that the plaintiff has established his claim against the defendant with respect to the suit land.

The upshot is that the plaintiff's suit succeeds to that extent and I make the following orders:

1. That a permanent injunction is hereby issued barring the defendant and or her agents, servants and or assigns from entering and interfering with the Parcel Number MOI'S BRIDGE/SIRIKWA BLOCK 1 (ZIWA) 282.
2. That the defendant do vacate the suit land within 60 days upon service of this judgment or decree, in default of so vacating, an eviction order be issued against the defendant from the suit land
3. General damages for trespass at a nominal sum of Kshs. 60,000/
4. Costs of the suit.

Dated and delivered at Eldoret on this 18<sup>th</sup> day of July, 2017.

**M. A. ODENY**

**JUDGE**

**In the presence of:**

Miss Tum for the Plaintiff

Mr. Koech – Court Assistant.

**In the absence of:**

Mr. Melly for Defendant