



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CASE NO. 266 OF 2008

EPHRAIM WAITHAKA RUI.....1ST PLAINTIFF

GRACE WANGUI WAITHAKA2ND PLAINTIFF

ENSLINE INVESTMENTS LTD.....3RD PLAINTIFF

VERSUS

NADIS SERVICES LTD.....1ST DEFENDANT

COMMISSIONER OF LANDS.....2ND DEFENDANT

JUDGEMENT

1. This judgment relates to two (2) issues, that is, whether damages are payable by the Defendants to the Plaintiff and who should pay the costs of this suit.
2. The Plaintiff filed suit on 4/6/2008 claiming that they were the owners of the land known as L. R. No. 2009/10999 and L. R. No. 209/11000 (the Suit Properties). The Plaintiffs claim that the 1st Defendants through its agents entered upon the Suit Property and demolished the Plaintiff's boundary fence which had been erected in 2003.
3. The Plaintiff's sought judgment against the Defendants jointly and severally for a permanent injunction to restrain the 1st Defendant from entering upon, constructing or in any other way interfering with the Plaintiffs' quiet enjoyment and possession of the Suit Properties. The Plaintiff also sought general damages for trespass and the costs of the suit. The Defendants filed defences.
4. The court notes that vide a notice of motion dated 6/7/2012 the Plaintiffs sought judgment on admission against the 2nd Defendant together with a declaration that the grant issued by 2nd Defendant to the 1st Defendant being grant number 110337 over the Suit Property was null and void since the 2nd Defendant had admitted in its defence that the Plaintiffs held the only proper titles to the Suit Properties. The court granted this application on 14/5/2013 and directed the Plaintiffs to fix the remainder of the claim for hearing.
5. Parties filed submissions. The Plaintiff urged the court to order the 1st Defendant to pay the costs of the case based on the fact that the Plaintiffs made the 1st Defendant aware of its illegal intrusion and demolition of the Plaintiffs Suit Properties way back in 2008 and that the Plaintiffs were the legal owners of the Suit Properties. The Plaintiff maintains that the litigation over the Suit Property had been unnecessarily prolonged in court through the actions of the 1st Defendant and that it therefore ought to

pay general damages for trespass and also meet the costs of the suit.

6. The Plaintiff urges the court to award them the sum of Kshs. 3 million as general damages for trespass with interest at court rates from the date of judgment until payment in full.

7. The Plaintiff also seeks punitive damages for trespass to be assessed at Kshs. 20 million. The Plaintiff relied on the decision of **Titus Gatitu Njau V. Municipal Council of Eldoret (2015) eKLR** where the court awarded Kshs. 15 million as exemplary damages. This court notes that those damages were arrived at in view of the need to deliver the message that court orders must be obeyed. The court also took into consideration the value of the property demolished and the Defendants conduct.

8. Once the court has established that there was trespass to land, no proof of damage is necessary for it to award general damages (see the case of **Duncan Nderitu Ndegwa V. Kenya Pipeline Ltd and Another [2013] eKLR**. The court is satisfied that the 1st Defendant trespassed on the Suit Properties. This fact is in any event admitted by the 1st Defendant.

9. Parties entered into a consent on 24/4/2017 where they agreed that a permanent injunction would issue restraining the 1st Defendant from entering, constructing or in any way interfering with the Plaintiffs enjoyment and possession of the Suit Properties.

10. The peculiar circumstances of this case are that the 2nd Defendant issued two different titles to different parties over the same piece of land that is, L. R. No. 209/10999. The Plaintiff's title was issued in 1993 while the 1st Defendant's title was issued in 2008.

11. The 2nd Defendant claims that the title to the 1st Defendant was issued based on the 1st Defendants fraudulent misrepresentation that the Suit Property was unalienated. When the 2nd Defendant learnt of the issuance of the two titles, it recalled the 1st Defendant's title for cancellation through its letter of 11/7/2008. The 2nd Defendant confirmed in that letter that after conducting investigations it had established that the allocation of L. R. No. 209/10999 to the 1st Defendant was erroneous since the land was privately owned.

12. In its defence filed in court on 20/9/2010, the 2nd Defendant avers that it allocated the Suit Property to the 1st Defendant based on its application for the Suit Property claiming that it was unalienated. The 2nd Defendant stated that a director of the 1st Defendant swore an affidavit to the effect that the deed plan for the Suit Property was lost and that a duplicate copy needed to be issued to facilitate the processing of a title for this land.

13. In its submissions, the 2nd Defendant maintains that if any damages are to be awarded to the Plaintiff then they should be borne by the 1st Defendant. The court notes that no evidence to prove fraud or the misrepresentation on the part of the 1st Defendant.

14. In its submissions the Plaintiff urges that they had obtained approval to put up to 36 dwelling houses. The court notes that this was to be done on the Suit Property and 3 other parcels of land.

15. The court also notes that the 1st Defendant constructed the boundary wall around the Suit Property. This is confirmed by the consent the parties recorded in court on 25/6/2008 to maintain the status quo and specified that the status quo as at that date was that the 1st Defendant had put up a perimeter wall. Parties agreed that the *status quo* would be maintained pending further orders of the court.

16. The court has considered the submissions of parties. The 2nd Defendant is charged with the responsibility of issuing titles and maintaining records. Under section 5 of the Registration of Titles Act (now repealed) the Commissioner of Lands was placed in control of land, land surveys, land registration and recorder of titles department. Under section 25, the Registrar of Titles was required to keep a register

of titles and file in it photocopies of all grants and certificates of title issued under that Act. The Registrar was also required to record the particulars of all instruments and dealings affecting the land contained in each grant or certificate of title on the register.

17. With this provision of the law in mind, it becomes untenable for the 2nd Defendant who is the custodian of the land register to claim that it should be absolved from all responsibility for having issued two certificates of title over the same piece land to the Plaintiff and the 1st Defendant. If the Commissioner of Lands had exercised due diligence and kept the register of titles as required by law, and filed in it a photocopy of the Plaintiffs' title, then it would not have relied on the 1st Defendant's misrepresentation.

18. The court awards the Plaintiffs general damages of Kshs. 500,000/= which will be paid by both Defendants equally. The Defendants will each pay half the costs of the suit to the Plaintiff.

Dated and delivered at Nairobi this 18th day of September 2017

K. BOR

JUDGE

In the presence of: -

Munene for the Plaintiffs

No appearance for the Defendants

Mr. V. Owuor- Court Assistant