



**REPUBLIC OF KENYA**

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

**ELC CASE NO.11 OF 2017**

**AFRICA GOSPEL CHURCH CHEBOCHO (REGISTERED**

**TRUSTEES).....PLAINTIFF**

**VERSUS**

**PAUL MUTAI ALIAS LAIGONG.....DEFENDANT**

**JUDGMENT**

The Plaintiff filed suit against the defendant claiming special and general damages for trespass and a permanent injunction to restrain the defendant from interfering with the plaintiff's occupation of land parcel number KERICHO/KAPSUSER/4776. Together with the plaint, the plaintiff filed a Notice of Motion seeking a temporary injunction to restrain the defendant from interfering with the suit land and the same was granted pending the hearing and determination of the suit.

Despite having been served with Summons to enter Appearance, the defendant neither entered appearance nor filed a Defence. The case therefore proceeded by way of Formal Proof.

When the matter came up for hearing John Kipruto Koech who is the caretaker of the plaintiff church testified that the plaintiff purchased the suit land from the defendant's brother one Justus Mutai on 17<sup>th</sup> March 2000. The suit land was a sub-division of land parcel number KERICHO/KAPSUSER/ 1539 which was sub-divided among the defendant and his four brothers. The evidence was corroborated by Jacob Kipsang Ngetich, the Assistant Pastor who produced the sale agreement, mutation form, title deed, receipt for payment of stamp duty and certificate of official search.

After the plaintiff obtained a title deed, it took possession of the suit land fenced it and carried out some developments, including planting blue gum and eucalyptus trees as well as connecting water to the plot. It is the plaintiff's evidence that the defendant whose land shares a boundary with the plaintiff destroyed the plaintiff's fence moved into the suit land, destroyed its trees, put up a cow shed and tethered his cattle in the suit land in total disregard of the plaintiff's rights. The plaintiff therefore prays for a permanent injunction restraining the defendant from interfering with the plaintiff's quiet possession of the suit land.

The issues for determination are as follows:

1. Whether the defendant unlawfully trespassed onto the plaintiff's land
2. Whether the defendant carried out the activities complained of
3. Whether the defendant is responsible for the loss and damage
4. Whether the plaintiff is entitled to the reliefs sought.
5. What orders should be made as to costs

On the first issue, the plaintiff's evidence which is uncontroverted clearly shows that the plaintiff is the registered proprietor of the suit land and the defendant has unlawfully trespassed onto the said land.

Regarding the second and third issues, it is the plaintiff's case that the defendant cut the fencing wire, uprooted the fencing posts and destroyed some of the plaintiff's eucalyptus and blue gum trees. He also tethered his cow and calf in the plaintiff's land and he has been grazing them there without the plaintiff's permission.

With regard to the fourth issue, the plaintiff has prayed for special and general damages and I will deal with them separately. In his Further amended plaint the plaintiff states that the defendant destroyed 21/2 rolls of barbed wire, 150 fencing posts and 112 trees at a cost of Kshs 200 each. However, in his evidence, the plaintiff neither testified nor produced any documents to support the special damages.

It is trite law that special damages must not only be specifically pleaded but they must also be strictly proved. In the case of **Hahn V Singh Civil Appeal No 42 of 1983 1985 KLR** at p. 717 learned judges Kneller, Nyarangi and Chesoni held as follows:

**“Special damages must not only be specifically pleaded but also strictly proved for they are not the direct and natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves”**

In the instant case the plaintiff needed to plead not only the number of trees lost but also the value of those trees. To prove the value of the trees, he needed to produce a valuation report from the Forestry Department to guide the court in assessing the value of the trees destroyed. The plaintiff also needed to produce receipts for the barbed wire and fencing posts. Without such evidence, it is not possible for the court to determine the claim for special damages. In the circumstances, I am not in a position to grant the same.

Turning to the general damages, I rely on the case of **Park Towers Ltd V John Mithamo Njika and 7 Others 2014 eKLR** where Mutungi J stated as follows:

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

Further in the case of **Duncan Nderitu Ndegwa V Kenya Power and Lighting Company Limited & Another (2013) eKLR** Nyamweya J held that once trespass to land is established, it is actionable per se and indeed no proof of damage is necessary. In the instant case I consider an award of Kshs. 100,000 to be adequate compensation for the defendant’s infringement of the plaintiff’s right to use and enjoy its land.

The upshot is that the plaintiff has proved its case on a balance of probabilities. I accordingly enter judgment for the plaintiff and direct as follows:

1. That a permanent injunction be and is hereby granted restraining the defendant by himself, his family members, his agents, servants or anyone claiming on his behalf from trespassing, grazing his cattle or in any way interfering with the plaintiff’s quiet possession of land parcel number KERICHO/ KAPSUSER/4776.
2. The plaintiff is awarded general damages for trespass in the sum of Kshs. 100,000
3. The defendant shall bear the costs of this suit.

**DATED, SIGNED AND DELIVERED THIS 4<sup>TH</sup> DAY OF OCTOBER 2017**

**J.M ONYANGO**

**JUDGE**

**IN THE PRESENCE OF:**

**Mr. Nyaingiri for the Plaintiff**

**No appearance for the Defendant**

Court Assistant: Rotich