



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 319 OF 2015

FRANCIS MUNYAO MULINGE.....PLAINTIFF

VERSUS

JUMWA CHARO AND 9 OTHERS.....DEFENDANTS

JUDGMENT

1. By a plaint dated 23rd November 2015 and filed on even date, the plaintiff sought for judgment against the defendants in the following terms:

- a) A declaration that the plaintiff is the rightful and/or lawful owner of that parcel of land known as plot Number MN/VI/1815 (“the suit property”) and they are (sic) entitled to exclusive and unimpeded right of possession and occupation of the suit property.
- b) A declaration that the Defendants whether by themselves, their servants, agents or otherwise howsoever are wrongfully in occupation of the suit property and are accordingly trespassers on the same.
- c) A permanent injunction restraining the defendants whether by themselves, their servants, agents, employees or through anyone deriving title through them or otherwise howsoever from selling, transferring, charging, leasing, deposing (sic) building materials. Erecting further structures and/or in any other manner whatsoever dealing or interfering with the suit property.
- d) A mandatory injunction compelling the defendants to demolish and remove the structures erected on the suit property failing to which the plaintiff be authorized to demolish and remove the said structures at the defendants’ expense.
- e) Vacant possession of the suit property.
- f) General damages for trespass.
- g) Costs of this suit and interest at such rate and for such period of time as this Honourable Court may deem fit to grant.
- h) Any such other or further relief as this Honourable Court may deem appropriate.

2. The plaintiff avers that he has and was at all material times the registered and/or beneficial owner and entitled to the possession of the suit property measuring approximately 0.7352 hectares, and that in or about the year 2008, the defendants wrongfully entered onto the suit property without the knowledge and/or consent of the plaintiff and took possession and erected structures thereon and have remained thereon to date. The Plaintiff contends that by virtue of the defendants' acts of trespass the suit property has been misused, damaged, wasted, destroyed and/or degraded and the plaintiff has been deprived of its use and enjoyment and has therefore suffered loss and damage.

3. Though served with summons to enter appearance and the plaint and hearing notice by way of substituted served by advertisement in the Standard Newspaper of 20th April 2017 pursuant to leave granted by the court on the 16th January 2017, the defendants did not enter appearance or file defence and the suit came up for formal proof on 3rd May 2017 when the plaintiff testified and did not call any witness.

4. In his testimony, the plaintiff testified that he is the registered owner of the suit property and produced a copy of the title document (exhibit 1). The plaintiff informed the court that the original Grant is in the bank where he has charged it. The plaintiff also produced a certificate of official search (exhibit 2) which shows that he is the registered owner of the suit property. He stated that he was allocated the Suit Property in 1996 and was issued with the title document in the year 2010. The plaintiff stated that the defendants invaded the land and started constructing structures on it and he produced photographs (exhibit 3) showing the alleged structures. The plaintiff further stated that on the 10th April 2015, he wrote a demand letter to the defendants (exhibit 4) but the defendants failed to comply with the said demand, hence filed this suit. The plaintiff stated that he took up a loan of Kshs.3,000,000.00 with a view to put up 13 rooms on the said plot and that each room could have earned him about kshs.2,000.00 per month, but has been unable to do so because the defendants have denied him access.

5. At the end of the Plaintiff's case, his advocates, M/S Mwangi Njenga & Company Advocates filed written submissions. It was submitted that the plaintiff has proved that he is the registered proprietor of the suit property and is by section 24 (a) of the Land Registration Act entitled to enjoy the rights and privileges associated with such ownership which includes exclusive use possession and enjoyment thereof without interference from third parties. With regard to the claim for general damages for trespass, it was submitted that the plaintiff had proved that he had taken a loan of kshs,3000,000.00 so as to develop the plot but he has not been able to carry out any development due to the defendants actions. I was urged to award a sum of Kshs.1,000,000.00 as general damages for trespass. Counsel relied on the case of **Ephantus Gathua Muiyaro vs- Kenya Power Company Ltd (2016)eKLR**. Further, counsel submitted that the plaintiff has proved his case and should be granted the orders sought in the plaint.

6. I have carefully considered the plaintiff's evidence, the documentary exhibits produced and the submissions filed. The issue that calls for determinations is whether the defendants have trespassed in the plaintiff's property and whether the plaintiff has hereby suffered loss and damage. It is not in dispute that the plaintiff is the registered proprietor of the suit property holding a 99 year leasehold interest from 1st July 1999. The plaintiff has tendered photographic evidence that show structures allegedly put up by the defendants on the suit property. The plaintiff's evidence was not rebutted as the defendants did not file any defence. The plaintiff's evidence remains uncontroverted. The plaintiff also produced a demand letter that he stated he wrote to the defendants and which the defendants ignored. I find the evidence on record sufficient to prove that the defendants have jointly and severally trespassed unto the plaintiff's property and the plaintiff is therefore entitled to the orders sought in the plaint. With regard to damages for trespass, the plaintiff is entitled to a reasonable sum to compensate him. In this regard, I concur with the sentiments of **Olao , J in Ephantus Gathua Muiyuro -v- Kenya Power Company Ltd (2016)eKLR** in which he stated as follows: -

“There is no mathematical formula to guide the court in assessing the quantum payable and each case has to be considered on its own peculiar circumstances remembering always that no two cases can ever be the same. However, in assessing the damages payable, the court will consider among other factors the size and location of the property and the length of time that the trespass

has taken. If there is damage to the property, then that would have a bearing on the amount of damages.”

7. The plaintiff has tendered documentary evidence that shows that he charged the said property to secure a loan of Kshs.3,000,000 vide a charge dated 14th October 2011 so as to develop the plot by putting up 15 rooms that could fetch Kshs.2,000 per room per month. This translates to about Kshs.30,000 per month or Kshs. 360,000 per annum. However, there was no evidence to support the plaintiff’s contention that he intended to utilize the loan taken to put up the alleged rooms or to support the anticipated monthly income of Kshs.2,000. I am aware that he plaintiff does not need to prove damage or loss before he can be awarded general damages for trespass to land. However, such evidence could have given the court a guide on the amount of damages that can be awarded in the circumstances of this case. I would consider the sum of Khss.1,000,000 suggested by the plaintiff’s advocates as quite high in the circumstances. Doing the best I can, I find that general damages of Kshs.500,000.00 will adequately compensate the plaintiff for the wrongful entry to his land and the infractions carried thereon.

8. The upshot of this is that this court is satisfied that the plaintiff has proved his case against the defendants on a balance of probability. Judgment is entered for the plaintiff against the defendants jointly and severally in the following terms:

a) A declaration that the plaintiff is the rightful owner of that parcel of land known as Plot No.MN/V/1815 and is entitled to the exclusive and unimpeded right of possession and occupation of the same.

b) A declaration that the defendants by themselves, their servants agents or otherwise howsoever are wrongfully in occupation and have trespassed onto the plaintiff’s plot No.MN/V/1815.

c) General damages of Kshs.500,000.00 for trespass.

d) An order for eviction from Plot No.MN/V/1815 by compelling the defendants to forthwith and in any case within 60 days from the date of delivery of this judgment to demolish and remove the structures erected on Plot NO.MN/V/1815 failing to which the plaintiff to demolish and remove the said structures at the defendants’ expense.

e) A permanent injunction restraining the defendants whether by themselves, their servants, agents, employees or anyone deriving title through them or otherwise howsoever from entering, remaining or dealing with or interfering with the suit property in any other manner whatsoever.

f. Costs of the suit

g) Interest at court rates from the date of judgment until payment in full.

Judgment dated, signed and delivered at Mombasa this 2nd day of October 2017

C. YANO

JUDGE