



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND CASE NO. 15 OF 2012

BHAGWANI SINGH KALSI.....PLAINTIFF

VERSUS

NATIONAL HOUSING CORPORATION.....DEFENDANT

JUDGMENT

By a plaint dated 3rd February 1998 the plaintiff herein sued the defendant and prayed for;-

- (a) A declaration that he is the bona fide owner of all that parcel known as ELDORET MUNICIPALITY BLOCK 13/562.
- (b) A permanent injunction to restrain the Defendant from further encroaching and/or trespassing onto the Plaintiffs said parcel of land.
- (c) The Defendants be compelled to make a provision for an easement to enable the Plaintiff access his parcel of land.
- (d) Payment of damages for loss and damage occasioned on the Plaintiff
- (e) That pending the formalization of a provision for an easement for the Plaintiff to access his parcel of land, the Defendant's and/or their servants and/or agents and/or anybody whatsoever be restrained from and/or erecting a fence constructing and/or dealing with the entire parcel of land fenced by the Defendant around the Plaintiff's parcel of land and that the Plaintiff should be given uninhabited right of ingress and egress onto and out of his parcel of land.

The defendant filed a defense and denied the plaintiff's claim and stated that the Plaintiff's acquisition of the suit parcel of land was affected after prohibition of any dealings of the said land vide HCCC Miscellaneous Civil Applicant No. 198 of 1997. The Defendant further claimed that the suit land was curved out of a larger parcel of land parcel No. Eldoret Mortgage Housing Scheme Phase III which was reserved for use by the Defendant and was therefore not available unless and until the Defendant surrendered it.

This matter is an old matter which was filed in the High Court in 1998 but later was transferred to the Environment and Land Court upon its establishment as it involves land. At one point it was listed for dismissal for want of prosecution but Counsel for the plaintiff indicated to the court that the plaintiff was still desirous of prosecuting the case. Her reason was that they have not been able to get hearing dates.

The defendant had been served with a hearing Notice but failed to attend court to defend the case on 26th

July 2017 when the matter came up for hearing. The case therefore proceeded ex parte. The plaintiff testified and stated that he is the registered owner of the suit land. He produced the certificate of lease as exhibit no. 1. The plaintiff further testified that he bought the suit plot from one Lason Mayodi Ombisa whom they entered into a sale agreement which he produced as exhibit No.2.

It was the plaintiff's evidence that the vendor gave him a certificate of lease, a consent to transfer, rates clearance certificate and transfer forms. The plaintiff produced the following documents:

- 1) letter of allotment as exhibit No.3,
- 2) Consent to transfer exhibit No. 4,
- 3) Receipt dated 15/9/97 exhibit 5
- 4) Transfer of lease dated 15/9/97 exhibit 6
- 5) Lease dated 21/8/97 exhibit 7
- 6) Official search dated 26/11/10 exhibit 8
- 7) A bundle of receipts for rates payment from 2004 -2017 as exhibit 9.

The plaintiff stated that before he bought the land his advocate carried out a search and he was given a certificate of official search. It was his case that the defendants encroached on the suit land which necessitated the filing of this suit. The plaintiff further testified that the defendant had filed an application for cancellation of his title but they later withdrew the said application. He stated that he has been paying land rates in respect of the suit plot of which he produced receipts to prove the same. He therefore prayed that the court declares that he is the rightful owner of the suit land. He also prayed that judgement be entered against the defendant as prayed in the plaint plus costs of the suit.

PLAINTIFF'S COUNSEL'S SUBMISSIONS

The plaintiff's Counsel filed written submission in support of the plaintiff's case. Counsel enumerated the issues for determination by the court as follows; -

1. Whether there existed a contract for sale of land parcel No. ELDORET MUNICIPALITY BLOCK 13/562 between the Plaintiff and the Defendant.
2. Who is the bona fide owner of all that parcel of land known as Eldoret Municipality Block 13/562?
3. Whether the Plaintiff is entitled to damages for loss and damage.
4. Whether the Defendants should be restrained from erecting a fence and/or dealing with the entire parcel of land pending creation of an easement.

Whether there existed a contract for sale of land parcel No. ELDORET MUNICIPALITY 13/562 between the Plaintiff and Defendant,

It was counsel's submission that a sale agreement of land parcel known as Eldoret Municipality 13/562 was executed between the Plaintiff and the Defendant vide sale agreement dated 4th September, 1997 which was produced by the Plaintiff as exhibit 1 and it is through this agreement that the Plaintiff obtained proprietary rights over Eldoret Municipality Block 13/562.

Miss Gerald submitted that in the said agreement, the vendor (Lason Mayodi Ombisa) agreed to and/or freely transferred the parcel of land known as Eldoret Municipality Block 13/562 to the purchaser

(Bhagwan Singh Kalsi) the plaintiff herein measuring zero decimal zero four nine seven (0.0497) hectares at the agreed purchase price of Kenya Shillings Two Hundred and Twenty Thousand (Kshs. 220,000/). She stated that the purchase price was to be paid on or before 12th September, 1997 which the plaintiff paid and immediately took possession thereof.

Counsel further submitted that the fact that a person appends his or her signature on a document means that he/she intends to be bound by it hence the legal requirement of execution of instruments by stamping. She stated that the sale agreement meets the standards of the agreement contemplated under the provisions of Section 3(3) of the law of contract Act, Cap 23, Laws of Kenya which provides that;-

"No suit shall be brought upon a contract for the disposition of an interest in land unless;-

(a) the contract upon which the suit is founded

(i) is in writing

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party."

Counsel relied on the case of **Sammy Some Kosgei vs Grace Jele Boit (2013) eKLR** where Munyao J held; "Thus it will be discerned that for an agreement for the disposition of land to be enforceable, the agreement must not only be in writing, but must be signed by the parties thereto and attested by a witness who must be present when the contract is signed". Counsel therefore submitted that the plaintiff and the seller met this threshold.

Who is the bona fide owner of all that parcel of land known as Eldoret Municipality Block 13/562?

In response to this issue Counsel submitted that the Plaintiff had proved that he is the legal and absolute owner of all that parcel of land known as Eldoret Municipality Block 13/562 having legally purchased it and cleared the purchase price as agreed in the sale agreement which was produced as an exhibit before the court. She further submitted that the Plaintiff herein is in possession of the certificate of lease of the suit land dated 12th September, 1997 which he produced in court as exhibit 2. It shows that the Plaintiff was registered as owner of lease for a term of 99 years starting from 1st July 1995.

It was counsel's further submission that the Plaintiff secured a consent for transfer produced and an executed transfer of lease document dated 15th September, 1997. Counsel cited Section 26(1) of the Land Registration Act, No. 3 of 2012 provides that ;-

"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 indefensible owner, subject to the encumbrance easements, restrictions and contortions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge..."

Miss Gerald Counsel for the plaintiff stated that in addition Section 30(3) of Land Registration Act No. 3 of 2012, also provides that, *a certificate of lease shall be prima facie evidence of the matters shown in the certificate and the land or lease shall be subject to all entries in the register "*

Counsel also submitted that the plaintiff has been paying for land rates of which he produced the rates payment receipts and notices. She stated that in 2000, the Defendant withdrew an application they had filed vide HCCC No. 34 of 1998 for cancellation of the leasehold title to the Plaintiff which conduct was to the effect that the Defendant conceded to have the Plaintiff have the full and absolute lease hold title of the land and uninterrupted possession.

3. Whether the Plaintiff is entitled to an overriding interest of easement?

It is counsel's submission that the Plaintiff having purchased 0.0497 hectares of land from the Defendant is entitled to an access and/or easement to the purchased parcel of land. Counsel cited Section 28(1) (c) of the Land Registration Act No. 3 of 2012 which creates the right of way as an overriding interest and hence the user of a given parcel of land must have and/or is entitled to a right to access the said purchased land.

Section 28(1) (c) of the land registration states that; "unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and effect the same without their being noted on the register;-

(c) Rights of way, rights of water and profits substituting at the time of first registration under the act.

She therefore submitted that the defendant should create an access to the Plaintiff since there was a valid contract for sale of land.

4. Whether the Plaintiff is entitled to damages for loss and damage suffered.

Miss Gerald Counsel for the plaintiff further submitted that the Plaintiff is entitled to damages for loss occasioned and/or caused to him by the Defendant for the period the trespass and/or encroachment subsisted. She stated that the damage and loss resulted when the Defendant erected a perimeter fence around the parcel of land denying the Plaintiff access. It was further her submission that it is trite law that trespass to land is actionable per se (without proof of any damage) as held in Paul Audi Ochuodho v Joshia Ombura Orwa(2014)eKLR where .Okong'o J stated that:

"The defendant having been proved to have entered the suit property without the permission of the proprietor or any lawful cause, the defendant is a trespasser on the suit property and the plaintiff is entitled to judgment against the defendant for an injunction to restrain the defendant from committing further acts of trespass. The plaintiff is also entitled general and special damages arising from such trespass.

5. Whether the Defendant's should be restrained from erecting a fence and/or dealing with the entire parcel of land pending creation of easement

On this limb the plaintiff's counsel submitted that the Defendant's action of erecting a perimeter wall fence amounted to trespass and/or encroachment on to the Plaintiffs rights having legally purchased the parcel of land. She finally submitted that the Plaintiff has established a case against the defendant with a probability of success and that the Defendant's actions infringed on the Plaintiffs proprietary rights and this Honourable Court ought to issue the orders sought in the plaint. The Plaintiff also prayed for costs of the suit.

Analysis and determination

As I had stated earlier in this judgement that this is a very old case which was filed in 1998 in the High court and was later transferred to the Environment and Land Court for hearing and determination. I will not repeat the background of the suit as it has been well captured by the plaintiff's evidence and his Counsel's submissions above.

The defendant did not appear in court to defend the claim against them even though they were served with a hearing notice. The plaintiff filed an affidavit of service to prove the same.

The issues for determination are very clear in this case as put by the plaintiff's counsel. I agree that the four issues enumerated by the plaintiff's counsel are relevant for the determination of this case.

On the 1st issue is as to whether there existed a contract for sale of land parcel No. ELDORET MUNICIPALITY BLOCK 13/562 between the Plaintiff and the Defendant, it is evident that the plaintiff entered into a sale agreement dated 4th September 1997. The plaintiff produced the sale agreement which gave him proprietary rights over the suit parcel of land and he confirmed having paid the purchase price in full. It is also clear from the plaintiff's evidence that he took possession of the suit premises immediately upon payment of the purchase price. The agreement met the threshold of section 3 (3) of the Law of Contract Act in respect of the requirement that disposition in land must be reduced to writing, signed and attested to.

The 2nd issue for determination is who is the bona fide owner of all that parcel of land known as Eldoret Municipality Block 13/562?. Upon entering into a sale agreement, the plaintiff took steps to enable him be registered as an owner of the suit land. He testified that the that the vendor gave him a certificate of lease, a consent to transfer, rates clearance certificate and transfer forms which he produced in court as exhibits. The plaintiff was later issued with a certificate of lease registered in his name which he produced in court. He had earlier secured a consent to transfer which he also produced in court. From the record, the defendant had filed an application to have the plaintiff's certificate of lease cancelled but it later withdrew the said application. The fact that the plaintiff is in possession of a certificate of lease gives him proprietary rights which are indefeasible as per section 25, and 26 of the Land Registration Act of 2012 so long as it was not acquired by fraud or by way of misrepresentation. There was no evidence that the plaintiff acquired his title irregularly.

Section 30 (3) further provides that “ *a certificate of lease shall be prima facie evidence of matters shown in the certificate and the land or lease shall be subject to all entries in the register.*”

I find that the plaintiff having been registered as an owner of the suit land is prima facie evidence that he is the bona fide owner of the suit land. Further the plaintiff has been paying land rates to the County government which receipts and rates demand notices he produced to prove the same.

Is the plaintiff entitled to damages for loss? The question of general damages for trespass is well settled. Once trespass is established or proved, then a party need not prove that he suffered any damage or loss. It is trite law that trespass to land is actionable per se. The plaintiff prayed for general damages for the loss occasioned by the defendant who had encroached on his suit land. Having determined that the defendant is a trespasser it follows that it should pay damages. It is at the discretion of the court to assess the reasonable damages to be awarded to the plaintiff. The court can take into account amongst other factors the length of time of the illegal occupation, nature of the trespass and whatever the trespasser was doing on the land. The discretion must however be exercised judiciously to meet the ends of justice.

The plaintiff was denied access to his land due to the encroachment of the defendant who put up a perimeter wall and construction on the land. The denial of access by the defendant occasioned this case which has been in the court corridors for the last 19 years. This must have caused the defendant a lot of anguish and anxiety.

I find that the plaintiff is entitled to general damages for trespass which was occasioned by the defendant who also denied him access to his parcel of land. The land is within Eldoret Municipality. Having taken all factors into consideration I hereby award the plaintiff Kshs. 1, 500,000 Million as general damages which I find reasonable. Having found that the defendant trespassed on the plaintiff's suit land, the Defendants should also be restrained from erecting a fence and/or dealing with the entire parcel of land pending the creation of an easement. I further find that the plaintiff is entitled to costs of this suit.

Having considered the pleadings, evidence submissions of counsel and the relevant judicial authorities thereof, I hereby enter judgement for the plaintiff against the defendant in the following terms.:

- (a) That it is hereby declared that the plaintiff is the bona fide owner of all that parcel known as ELDORET MUNICIPALITY BLOCK 13/562.
- (b) That a permanent injunction is hereby issued restraining the Defendant from further

encroaching and/or trespassing onto the Plaintiff's parcel of land known as ELDORET MUNICIPALITY BLOCK 13/562.

(c) That the Defendant is hereby compelled to make a provision for an easement to enable the Plaintiff access his parcel of land.

(d) That the defendant to pay to the plaintiff general damages for trespass of Kshs. 1,500,000/ Million

(e) That pending the formalization of a provision for an easement to enable the Plaintiff access his parcel of land, the Defendant's and/or their servants and/or agents and/or anybody whatsoever be restrained from and/or erecting a fence constructing and/or dealing with the entire parcel of land fenced by the Defendant around the Plaintiff's parcel of land and that the Plaintiff should be given uninhabited right of ingress and egress onto and out of his parcel of land.

(f) Defendant to pay the costs of the suit to the plaintiff.

Dated and delivered at Eldoret on this 14th day of December, 2017.

M.A ODENY

JUDGE

Read in open court in the presence of Miss Yebei for the Plaintiff and in the absence of the defendants.

Mr. Koech – Court Assistant