



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

E.L.C CASE NO 23 OF 2016

CHRISTINE CHEPKOSKEI MARITIM.....PLAINTIFF

VERSUS

KERICHO COUNTY GOVERNMENT.....DEFENDANT

JUDGMENT

Introduction

1. By a Plaint dated 28th April 2016 the Plaintiff instituted a suit against the Defendant claiming that the Defendant had encroached on her land comprised in plot number 310 situated at Kapkatet Market within Kericho County. The Plaintiff sought the following reliefs:

- a) An order of injunction to permanently restrain the Defendant from encroaching into and/or demolishing the Plaintiff's premises
- b) Damages for loss of business
- c) Costs of this suit.

The Plaintiff later sought and obtained leave to amend her Plaint to include a prayer for compensation for the value of the plot together with the developments thereon.

2. The Defendant filed a Defence on 19th May 2016 denying that the Plaintiff was the owner of the said plot. The Defendant further stated that the securing of Kapkatet stadium as a public utility is a project of the national Government undertaken through the Kenya National Youth Service.

3. When the case came up for hearing on the 16th October 2017, the Defendant and its Advocate did not attend court even though the date had been taken by consent. The case therefore proceeded ex- parte.

Plaintiff's case

4. The plaintiff testified that in March 1999 she was allocated plot no. 310 Kapkatet market within Kericho County by Litein County Council and she has been paying rates in respect of the said plot since then. She produced a copy of the letter of Allotment dated 12th March 1999. Thereafter she obtained approved building plans and commenced construction of a building in 2002. Upon completion of the building she set up a nursery school.

5. She further testified that in 2013 she noticed that the Defendant had started fencing off her plot as part of the stadium. When she went to complain to the Litein Town Council, she was given a letter stating that the fence of the stadium would be re-routed to exclude her plot. She produced a copy of the said letter as exhibit P.5. In spite of the said letter, the construction went on without rerouting the fence resulting in further encroachment to her plot.

6. The Plaintiff had her plot valued to assess the amount of damage caused. She produced a valuation report indicating that her plot together with the developments thereon was valued at Kshs. 1,950,000. Since the construction of the stadium fence interfered with her business, she was forced to move out of her plot in January 2015.

7. At the end of the case, learned counsel for the plaintiff filed his submissions.

Issues for Determination

8. The following issues emerge for determination:

- i) Whether the Plaintiff had proprietary rights over all that property known as plot no. 310 situated at Kapkatet Market within Kericho County.
- ii) Whether the Defendant unlawfully encroached onto the Plaintiff's property.
- iii) Whether the Plaintiff is entitled to the reliefs sought.

Analysis and determination

9. With regard to the first issue, the plaintiff's uncontroverted evidence is that she was issued with a letter of allotment in respect of plot No 310 Kapkatet Market. The said letter of allotment was issued under the Council By-laws which contains certain conditions that the plaintiff was required to fulfill failing which the allotment would be revoked. These include submission of approved building plans, payment of the requisite fees and completion of the building within a period of three years. It is clear from the plaintiff's testimony that she fulfilled all these conditions as she completed her building within the required period and started running a Nursery school. She also produced receipts to prove that she has been paying the land rates. In the absence of any evidence to the contrary, the plaintiff therefore acquired a right over the said plot.

10. The second issue that the court has to determine is if the defendant unlawfully encroached on the plaintiff's property. The plaintiff testified that in 2013 the Defendant started putting up a fence to secure the stadium and in the process fenced off part of her plot. She then complained to the County Council of Litein. She produced a letter from the Town Clerk, Town Council of Litein assuring her that the Council was making arrangements to re-route the stadium fence to exclude her plot from the stadium part development plan. By this letter the Town Council of Litein was acknowledging that indeed they had encroached on the plaintiff's plot thereby violating her rights over the said plot. They however failed to re-route the fence as promised.

11. Having established that the defendant unlawfully encroached on the plaintiff's property, the court has to determine if the plaintiff is entitled to the reliefs sought. The plaintiff seeks the following remedies:

- i) A permanent injunction to restrain the defendant from encroaching on or demolishing the plaintiff's premises
- ii) Loss of business from the date of closure of business until determination of the suit
- iii) Full compensation for the value of the plot and the developments thereon
- iv) Costs of the suit.

12. The first remedy has been overtaken by events as the fence has been completed. This is what prompted the plaintiff to amend the plaint to include a prayer for compensation. The court does not issue orders in vain and will therefore not issue an order of injunction.

13. With regard to the second prayer, even though the plaintiff claims loss of business, she did not produce any documentary evidence to show how much profit she was making from her business. It is trite law that special damages must not only be specifically pleaded but must be strictly proved. This particular claim therefore fails.

14. Regarding the third prayer for compensation, the plaintiff testified that owing to the construction of the stadium fence, her plot was interfered with and she was unable to continue with her business of a Nursery school and she was forced to abandon the business. She produced a valuation report assessing the value of her plot together with the developments thereon at Kshs. 1,950,000. The plaintiff is therefore entitled to compensation.

Conclusion

15. The upshot is that the plaintiff has proved part of her claim on a balance of probabilities. I therefore enter judgment for the plaintiff in the sum of Kshs. 1,950,000 being compensation for the value of her property together with the developments thereon.

The plaintiff shall have the costs of this suit.

Dated, signed and delivered at Kericho this 8th day of December 2017

J.M ONYANGO

JUDGE

In the presence of:

Miss Chelimo for Oyugi Ombui for the Plaintiff

No appearance for the Defendant

Court assistant: Rotich.