REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ENVIRONMENT AND LAND COURT

ELCA NO.18 OF 2014

ESTHER WAMBUI GAKIRIA...................1ST APPELLANT

CHARLES GAKUO.................................2ND APPELLANT

VERSUS

MATHEW WAWERU GAKIRIA…...........… RESPONDENT

JUDGMENT

1. The respondent filed a suit in the lower court, Othaya PMCC No.17 of 2012, seeking the following orders against the appellant:-

(i) An order of eviction of the defendants (respondents) together with their servants and/or anyone claiming any rights through them from land parcel **Othaya/Gura/954** (hereinafter “the suit property”);

(ii) General damages for trespass and interest thereon;

(iii) Costs of the suit and interest;

(iv) Any further or better relief that the court may deem fit to grant.

2. After considering the evidence adduced in support and against the case, the trial Magistrate, Hon.R.K Langat (R.M) held:-

“...I do agree with the plaintiff’s counsel that the entry of the defendants on the suit land was lawful but upon registration of the said land by the plaintiff as the proprietor of the said land and issuance of notices to vacate upon the defendants became trespassers henceforth............the defendants’ assertion in their defence that the plaintiff does not occupy the suit property does not invalidate the trespass.

Having said that the defendants have trespassed on the plaintiff’s land, the next question is whether they should be evicted. The plaintiff is the registered owner of the suit land. The registration of the said land was done pursuant to succession cause which cause the defendants were aware of its judgment. The defendants did not seek further that the matter rested there. I do agree with the submission of the plaintiff’s counsel that the rights of the defendants on the suit land were

extinguished by the act of registration of the suit land as was held in <u>Republic v. Attorney General Exparte Kamau and Another KLR ELC, 441.</u>

The defendants through their testimony told court that they were not objected to vacation save for compensation of the structure they had erected worth Kshs. 922,000/= but failed to plead the same or counter-claim. The same cannot suffice as parties are bound by their pleadings.

The upshot of the above is that the plaintiff has proved his case on a balance of probabilities. The prayers sought in the Plaint are hereby allowed. With respect to the general damages for trespass, the court was not guided by the submission of the counsel on record. Be it as it may, this court finds that Kshs.100,000/= plus interest will be adequate compensation to the plaintiff. The same is awarded."

3. Aggrieved by the aforesaid judgment of the lower court, the appellants filed the appeal herein challenging the said judgment on the following grounds:-

a. That the learned trial magistrate erred in law and fact by holding that the appellants trespassed on the suit land yet they were in occupation even before the sub-division;
b. That the learned trial magistrate erred in law and fact by failing to hold that the appellant was not informed of the sub-division and mutation and yet she was a party to the succession proceedings;
c. That the learned trial magistrate erred in law and fact in assessing damages at Kshs.100,000/= while there was no evidence to prove or award even a single cent; and
d. That the learned trial magistrate failed to tabulate the evidence on record and as a result arrived at an erroneous decision.

4. When the appeal came up for directions on **26th January, 2015** directions were taken to the effect that the appeal be disposed off by way of written submissions. Consequently parties to the appeal filed submissions which I have read and considered.

<u>Appellants' submissions:-</u>

5. In the submissions filed on behalf of the appellants, it is stated that it is common ground that the suit property was subject to Succession Cause No.39 of 2006 at Karatina Court. The Succession Cause was completed and the suit property was shared as follows:- John Njombou Gakiria parcel No. Othaya/Gura/953; Mathew Waweru Gakiria parcel No. Othaya Gura/954 and Samuel Gakiria Gakuo parcel No, Othaya/Gura/955.

6. It is also said to be common ground that the appellants have been in occupation of the portion of land they have been sued to vacate. That portion falls on Parcel No. Othaya/Gura/954 now registered in the name of the respondent, Mathew Waweru Gakiria.

7. The appellants argue that parcel number Othaya/Gura/955 belonging to the son of the 1st defendant (in the lower court) should have been allocated where they have built structures valued at Kshs. 922,000/=. It is her argument that the plaintiff who led the surveyor to allocate him parcel No. Othaya/Gura/954 knew and saw the structures on the parcel of land now registered as his.

8. It is submitted that the respondent authored the current problem by allocating his parcel of land where the two defendants were in occupation. In view of the foregoing, it is submitted that the trial court failed to hold that it is the respondent who had trespassed into the appellants' parcel of land by causing registration of a portion of land which he had not been in occupation of, to be registered in his name.

9. It is further contended that the respondent came to the court with unclean hands and that natural justice cannot be in his favour because by his actions and/or ommissions he caused others to suffer.

10. Further, that the trial magistrate failed to hold that there was no proof of any general damages and yet he awarded compensation of Khs. 100,000 where no evidence was adduced. The judgment of the lower

court is also said to have been biased and not based on any evidence. For those reasons, this court is urged to find that the respondent failed to prove trespass and compensation. The court is also urged to order that the property be re-surveyed to ensure that the appellants' one acre is where their house is.

Respondent's submissions:

11. In the submissions filed on behalf of the respondent, it is explained that the respondent's land parcel Othaya/Gura/954 includes the portion of land that the appellants were in occupation of, prior to the sub-division and that the respondent issued the appellants with a notice to vacate his land parcel after the process of sub-division of land parcel no. Othaya/Gura/72 was completed.

12. Counsel for the respondent has referred to the case of **Republic** v. **Attorney General Ex parte Kamau and another** (*supra*) where it was held that registration of land ownership, individualises tenure and results in eradication of communal or any other right and argued that the trial magistrate was right in holding that the appellants were trespassers in the respondent's land and ordering that they be evicted.

13. Concerning the complaint by the appellants that they were not notified of subdivision of land parcel Othaya/Gura/72 yet they were parties in the succession proceedings, It is submitted that nothing can be further from the truth. The appellants failure to participating in the succession proceedings is said to have being by choice. It pointed out that the only parties in the said Succession proceedings were John Njomboa Gakiria, Mathew Gakiria and Samuel Gakiria Gakuo. (the court is referred to the Respondent's exhibit No.1 and 2 in the original file).

14. The appellants are said to have chosen not to participate in the probate proceedings because they had no claim therein and because they knew that the deceased had expressed his wish prior to his death and that the only beneficiaries were the 3 mentioned above. For those reasons it is submitted that ground 2 of the Appeal ought to fail.

15. As for the general damages awarded, it is submitted that the respondent testified and informed the court that he has been kept away from his land by the acts of the appellants who have failed to heed to the notice to vacate. The testimony of the respondent to that effect is said to have been sufficient to guide the learned trial magistrate is awarding general damages for trespass.

16. With regard to the contention that the trial magistrate did not analyze all the evidence on record thereby arriving at an erroneous decision, the trial magistrate is said to have evaluated the evidence on record, the pleadings and submissions filed. The judgment is said to be well reasoned. The trial magistrate is also said to have framed up the issues for determination, analyzed each one of them and made a finding in respect of each issue framed.

17. For the foregoing reasons, all grounds of appeal are said to be without merit and the court urged to dismiss the appeal with costs to the respondent.

The duty of this court:

18. The duty of this Court as the first Appellate Court was set out in the case of **Selle v. Associated Motor Boat Company Ltd & Others** 1968 EA 123 at 126 thus-

> **"An appeal to this Court from the trial Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial Judge findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanor of a witness is inconsistent with the evidence generally."** (emphasis supplied)

19. The aforesaid Court of Appeal decision was adopted by our own Court of Appeal in **Ndiritu Vs Ropkoi & Another** (2004)eKLR where the Court of Appeal held-

> **"As a first Appellate Court we are not bound by findings of fact made by the Superior Court and we are under a duty to re-evaluate such evidence and reach our own conclusions. We should however be slow to differ with the trial Judge and the caution is always appropriate as O'connor P. stated in Peters V Sunday Post Ltd 1958 EA 424 at page 429:-**
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> ***"It is a strong thing for an Appellate Court to differ from the finding on a question of fact, of a Judge who tried the case and who has had the advantage of seeing and hearing witnesses."***

Evidence adduced in the lower court:

20. According to the evidence adduced in the lower court, the suit property (Othaya/Gura/954 was part of Othaya/Gura/72 originally owned by Samuel Gakiria (deceased). After demise of the deceased, the 1st appellant's son (Samuel Gakiria Gakuo) instituted succession proceedings in respect of the estate of the deceased.

21. After the succession proceedings were heard and determined, the 1st appellant's son was allocated 1 acre out of the estate of the deceased to hold on his behalf and on behalf of the appellants who claimed under him.

22. Pursuant to the orders obtained in the Succession Cause the deceased estate was distributed as follows:-

a. Appellants' representative (Samuel Gakiria Gakuo) 1 acre;
b. The respondent, Mathew Waweru Gakiria) 3.65 acres and
c. John Gakiria 3.65 acres.

23. According to the testimony of the respondent, after the original parcel of land was surveyed and sub-divided, he got the parcel of land known as Othaya/Gura/954, his brother John Othaya/Gura/955 and his nephew Samuel Othaya/Gura/955.

24. The above state of affairs is confirmed by Samuel who in his testimony admitted that he was given one acre in the Succession Cause and that is what he is entitled to, as is what the appellants are also entitled to.

25. That notwithstanding, the appellants who had been living on the parcel registered in favour of the respondent for a long period of time, claim that the one acre allocated to them ought to have been carved out of the portion registered in favour of the respondent so that they continue living in the structures they had put up there. In the alternative, the appellants argue that if they are to relocate from the parcel they have been occupying and where they have put up their houses, they should be compensated to the tune of Kshs. 952,000/= being the value of their structures thereon.

26.The foregoing in brief is the case presented before the lower court.

27. Upon review of the pleadings filed in the lower court, and in particular, the defendants' statement of defence, it emerges that, whereas the appellants argue that the one acre they were allocated by the succession cause ought to be carved from parcel No. Othaya/Gura/954 and/or they ought to be compensated for the structures they have constructed thereon before they can relocate to the new site, they did not raise a counter-claim against the respondent's entitlement to the suit property or to plead the claimed compensation. That being the case the trial magistrate was right when he held:-

"**The defendants through their testimony told court that they were not objected to vacation save for compensation of the structure they had erected worth Kshs. 922,000/= but failed to plead the same or counter-claim. The same cannot suffice as parties are bound by their pleadings."** See the case of

Dakianga Distributors (K) Ltd v. Kenya Seed Company Ltd (2015) e KLR where the Court of Appeal held:-

"We are of the respectful opinion that the learned judge, after holding correctly that parties were bound by their pleadings erred in holding that the appellant was entitled to credit on sums which were not pleaded in the defence at all. The appellant was bound by its pleading in the defence where it claimed that it had issued three cheques in replacement of dishonoured cheques which its witness admitted, and the trial court so found, that they were cheques issued in respect of other independent transactions."

28. On whether the trial magistrate erred by holding that the appellants were trespassers on the respondent's parcel of land from the time the respondent issued them with notice to vacate, I adopt the reasoning in the cases of **Charles Gaitho Kiarie v Samuel Kinyanyui Gaitho (As the Personal Representative of the Estate of Mary Wambui Njabuya) & another** (2014) eKLR and **Simon Njage Njoka v. Simon Gatimu Kanyi** (2007)e KLR**.**

29. In the case of **Charles Gaitho Kiarie v Samuel Kinyanyui Gaitho (As the Personal Representative of the Estate of Mary Wambui Njabuya) & another** it was stated;

"The Respondent predicates her submission of having acquired a proprietary estopped on the ground that the Land Disputes Tribunal had awarded her a portion of the suit premises and on the basis that she was in occupation and possession. Regrettably the Respondent cannot avail herself of the doctrine of proprietary estopped because even if it is accepted that she was the wife of the applicant she would only have been entitled to the right of occupation and use and not to acquire legal title as the Land Disputes Tribunal thought she could. Hon. Justice J.B. Ojwang (as he then was) in the case of Muchoki –vs- Mwangi (2005) eKLR held that the rights of a registered proprietor could not be defeated by claims founded on the moral duties of a family as the Respondent sought to do in the present matter. Claimants founding their claims as family members can only do so in succession matters and/or in proceedings for division of matrimonial property……It is not in dispute that the Applicant was registered as the absolute proprietor of the suit property and as such registered owner his rights as a proprietor were protected under the provisions of section 28 of the Registered Land Act Cap 300 Laws of Kenya (repealed) and his rights could not be defeated otherwise than as provided by the Act. Thus the rights of ownership by the Applicant could not be defeated by the claims by the Respondent founded on family relationships. The court of Appeal in the case of Muriuki Marigi –VS- Richard Marigi Muriuki, Lydia Njoki Muriuki & Another Civil Appeal No. 189 of 1996 (unreported) while considering the rights of registered proprietors having regard to sections 27 and 28 of the Registered Land Act (repealed) being the present day sections 25 and 26 of the Land Registration Act NO. 3 of 2012 put it succinctly when it stated thus-

It is however, noteworthy that the Law of Succession Act, Cap 160 Laws of Kenya does recognize rights of wives and children over their husband's or father's estate as the case may be. Those rights accrue after death. Otherwise the rights remain a choate and are not legally enforcible in any court of law or otherwise whenever they accrue the estate is shared either according to the personal laws of the deceased in case of agricultural land or as provided in the relevant provisions of the law of Succession Act. The Appellant as the registered owner of the suit property is still alive. His property is not yet available for subdivision and distribution among his wives and children except if he personally on his own free will decides to subdivide and distribute it among them. He may not be urged directed or ordered to do it against his own will.

In the result and for the foregoing reasons, to the extent that the respondents wanted the superior court to compel the appellant to share the suit property during his lifetime in a particular manner and in designated shares, they did not have a cause of action in law respecting which the court would aid them to enforce….."

30. In the case of **Simon Njage Njoka v. Simon Gatimu Kanyi (2007)e KLR** **Makhandia J.,** (as he

then was) **stated:-**

"As I have already stated elsewhere in this judgment the issue before the learned magistrate was to determine whether the Respondent was a trespasser on the appellant's land and therefore liable to eviction. It was not her task to investigate how the appellant came by the said title. If the respondent was challenging the appellant's title he could have done so by way of a counterclaim. There was no such counter claim in his pleadings before the trial court and for the learned magistrate to have embarked on uninvited trip of establishing the authenticity or otherwise of the appellant's title, the learned magistrate fell into error…

I agree with counsel for the appellant that the appellant was a bona fide purchaser for value and without notice. Accordingly and pursuant to section 27, 28, 29 and 30 of the Registered Land Act, he acquired absolute proprietorship with appurtenant rights of use and disuse if he so wishes. His title therefore is not liable to be impeached. By frowning on the title passed to the appellant by a person who was not even a party to the suit before her, the learned magistrate gravely misdirected herself. Before impeaching the title, it behoved the learned magistrate to at least cause Michael Kagari Kanyi to be enjoined in the proceedings. As it is Michael Kagari Kanyi was condemned unheard which was an error on the part of the learned magistrate.

All in all I would say that the learned magistrate in approaching the case the way she did fell into error. It is obvious that the learned magistrate erred in law and fact in dealing with matters that had not been placed before her for trial and determination. The appellant having provided a valid title to the piece of land and the Respondent having not impugned it by way of counterclaim in the suit, the learned magistrate had no choice in the matter really than to hold that the Respondent was a trespasser to that parcel of land belonging to the appellant and liable to eviction. She should then have proceeded to evict the respondent.

The appellant has asked for an award of damages for the 7 years that the Respondent has illegally remained on the land. The Respondent has admitted that indeed he continues to occupy the suit premises. I am aware that the count of trespass is actionable *per se* and one need not prove damage. It matters not that the trespasser has been in occupation before or believes mistakenly that he has a right to land. What matters is whether he has been given notice. See generally M'Ikiara M'Rinkanya and another (supra). **There is no doubt at all that the Respondent is a trespasser. He was served with the notice to vacate the land despite his denial. In any event such notice was gratuitous as the Respondent already had such notice by virtue of the decree in the case, which decree he unsuccessfully tried to stay. He is also aware that the appeal he had filed against Michael Kagari Kanyi and which was his pretext to continue occupying the appellant's land has since been dismissed. Ideally the appellant would be entitled to damages for the period that the respondent has locked him out of his land. How are those damages to be assessed? Counsel for the appellant was not of assistance in this regard. No evidence was led evidence in the lower court that would have assisted this court to arrive at an appropriate award. Neither did the appellant's counsel submit in this court on matters that would have assisted this court in considering appropriate damages payable. One would have expected that the appellant would have led evidence to show what he intended to do with the parcel of land. It is possible that he would have wanted to do farming. It is also possible that he could have left it to remain fallow in which event he would have lost nothing. However as the tort of trespass is actionable perse without prove of any damage I am bound to award appropriate damage despite my above misgivings. Doing the best I can in the circumstances and balancing one thing against the other an award of Kshs.50,000/= for every year that the respondent has remained on the piece of land as a trespasser will meet the ends of justice in this case. The record shows that Respondent has been in occupation of the land albeit as a trespasser since 11th June 2001 when he was given formal notice by the appellant to vacate his portion of the land. He did not heed the notice according to the appellant and since then he has indulged in growing crops on the land and felling trees. That roughly works out to 6 years. Accordingly and in total I would award the appellant general damages in the total sum of Ksh.300, 000/= In the upshot, I do allow the appeal with costs to the appellant. I do set aside the judgment and order of the learned magistrate and substitute therefore with the orders as prayed in the**

amended plaint dated 14th November, 2002. I assess general damages for trespass at Kshs.300, 000/= plus interest at court rates from the date of judgment of the subordinate court. The appellant shall also have the costs in the subordinate court."

31. Having reviewed the peculiar circumstances of this appeal, there being evidence that the suit property was, after succession proceedings, registered in the name of the respondent, and despite there being evidence that the appellants had been in occupation of the suit property for a long period of time, as the appellants did not raise a counter-claim to anchor their claim to the suit property, the trial court could not have granted them orders which did not flow from their pleadings.

32. There being evidence that the respondent was the registered owner of the suit property and that the respondent had issued the appellants with notices to vacate, I agree with the trial court that the appellants were trespassers on the suit property from the date the respondent issued them with notice to vacate.

33. With regard to the damages awarded for trespass by the trial magistrate, it is trite that no prove of damage is required before general damages for trespass to land can be issued. That notwithstanding, where the claimant has not demonstrated the kind of loss and damage sustained the damages awarded for trespass to land will normally be minimal.

34. In the circumstances of this case, having taken into account the circumstances that led to the appellants being on the suit property and given that the respondent did not demonstrate the loss he sustained following the appellants' continued stay on the suit property, I find and hold the damages awarded by the trial court to have been excessive and reduce them to Kshs. 30, 000/=.

35.The upshot of the foregoing is that the judgment of the lower court on the question of trespass is upheld. The general damages for the said trespass is set aside and in its place an award of Kshs. 30,000/= awarded.

36. As the appellant's have partially succeeded in this appeal, they are awarded half costs of the appeal.

Dated, signed and delivered this 21st day of April, 2015

L N WAITHAKA

JUDGE

<u>In the presence of:</u>

Mr. Kiminda holding brief for Ms Mwai for the respondent

Mr. Wamahiu holding brief for Mr. Gacheru for the appellants

Lydiah – Court Assistant