



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 740 OF 2013

JAMES NJEHURI.....PLAINTIFF

VERSUS

ERICSON KENYA LIMITED.....DEFENDANT

JUDGMENT

This suit was instituted by a Plaint dated **25th June 2013**, wherein the Plaintiff averred that he is the registered owner of the property known as **L.R. No. 12715/1922**, situated in Syokimau area within Machakos County. The Plaintiff averred that sometime in **May 2013**, the Defendant wrongfully and without any lawful excuse trespassed in the suit property and destroyed perimeter fence by cutting the barbed wire, cut down trees; dug trenches and thus caused the Plaintiff to incur day and night guarding costs to prevent further trespass by the Defendant.

The Defendant filed a Defence dated **8th July 2013**, wherein it denied the allegations in the Plaint. The Defendant averred that it was contracted by Safaricom Limited to lay fibre optic line which necessitated the digging of renches in Mavoko area. It was averred that the trenches were dug along the road so as to take advantage of the road reserve and in that regard, the Defendant paid **Kshs. 2,112,950/=** being way leave charges to the Municipal Council of Mavoko. Further, that as part of due diligence, the Defendant obtained map from the Survey of Kenya which indicated a 9 meter wide road reserve and the map from Kenya Urban Roads Authority indicated that the road reserve had been widened to 15 meters. It is averred by the Defendant that in May 2013, it reached the Plaintiff's property which was unoccupied and began digging a trench. Subsequently on **18th May 2013**, a complaint was made by the Plaintiff's lawyer to the route supervisor which was followed by a demand letter dated **22nd May 2013**, that the Defendant stops further works, restores the property by filing up the trench and repairing the barbed wire. On **23rd May 2013**, the Defendant went to the site and found that the Plaintiff had backfilled the trenches. However, the Defendant states that it repaired the fence and re-routed the trench by digging across the road opposite of the Plaintiff's property.

By the time the parties filed their final submissions, they had come to a mutual agreement on liability. The parties agreed in principle that there was encroachment on the Plaintiff's property. **Erastus Chumba**, a site co-ordinator of the Defendant swore an Affidavit on **20th August 2014** detailing the events of **May 2013**. It was his deposition that he was present when the works commenced on **18th May 2013**, and that the work commenced at about 9am but stopped at about 2pm – 3pm when a complaint was made to the route supervisor that the trench was being dug in the Plaintiff's property. The deponent explained that the trench dug on the Plaintiff's property was 1 meter from the barbed wire fence erected next to drainage adjacent to the road. The trench was 40 meters long, 0.4 meters wide and 1.2 meters deep. The deponent

stated that the Defendant left the site immediately the complaint was made. However, that when he returned to the site on **23rd May 2013**, the trench had been filled up. The deponent stated that the two posts and barbed wire that had been removed to access the Plaintiff's property were replaced by the Defendant. Further, that only one tree was removed as a result of the digging.

In the submissions filed on **8th September 2014**, on behalf of the Plaintiff, counsel submitted on quantum that it was clear from the photograph evidence that there was serious damage caused by the Defendant on the suit property and as such, the Plaintiff was entitled to an enhanced award of damages. It was submitted that the Plaintiff incurred costs for filling the trench and engaging day and night guards to keep off trespassers as a result of the Defendant's action. Counsel submitted that courts have established principles guiding award of damages in cases of trespass. Counsel relied on the cases of

Kamau Macharia v Mwangi Kigundu & 2 Others HCCC No. 4067 of 1986 where Bosire J. held that:

Even without evidence of loss, the court is obliged to assess damages...The measure of damage is such sum as the court will consider reasonable, consider the size of the land involved and the length of time.

Wilksden Investment Limited v Kenya Hotel Properties Limited HCCC No. 367 of 2000 where O.K. Mutungi held that:

On quantum of general damages, no two sets of facts are exactly identical, and there is no mathematical formula. Each case has its own unique facts and circumstances.

Park Tower v Moses Chege & Others HC Civil Suit No. 1825 of 1999 (2014) eKLR where the Court held:

I agree with the learned Judges that where trespass is proved, a party need not to prove that has suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. As observed on the cases referred to there is no mathematical or scientific formula in such cases for assessment of general damages. However, in the case before me, I consider that the suit properties are sizeable parcels sitting on nearly three quarters of an acre of land located in the Central Business District. This is prime property in the City Centre and any unlawful act of aggression and/or intrusion that prevents the rightful owner of the property from enjoyment of his ownership rights of possession and use is to be frowned at and is punishable by way of an award of damages.

It was submitted that an award of **Kshs. 500,000/-** would be adequate compensation to the Plaintiff in view of the physical location of the property being prime area, the size in acreage and its market value.

For the Defendant, submissions were filed on **7th November 2014**, where counsel relied on the pronouncement on the measure of damages for trespass to land made by Nyamweya J. in the case of **Gitathiru Kariobangi Company Limited v James Gacheru Muriu & 9 Others HC Civil Suit No. 1825 of 1999 (2014) eKLR** that:

The law on the measure of damages for trespass to land is that a Plaintiff is entitled to nominal damages for trespass, even if no damage or loss to the land is caused. If damage or loss is caused to the said land then the damages awarded is the diminution in value of the land, or cost of reinstatement of the land.

It was submitted on behalf of the Defendant that the Plaintiff did not prove the allegation that he hired security guards hence incurred costs incidental to the trespass. Counsel submitted that a nominal value of no more than **Kshs. 50,000/-** would be more than adequate compensation.

Having considered the pleadings and the written submissions and the cited authorities, the Court finds

that the only issue for determination is the assessment of damages to be awarded to the Plaintiff. Both parties have referred this court to principles established by the Courts in considering a claim for damages. Of great importance is that no two cases are the same and therefore assessment can only be done based on the circumstances of each case. In the instant suit, the trespass was in form of trenches dug on the Plaintiff's property. The Defendant admits that it removed two posts and barbed wire to gain access to the property and also fell down one tree. It also admits that the Plaintiff backfilled the trenches but that it put back the posts and repaired the fence. The Defendant also pointed out that works stopped as soon as the complaint was made to the site coordinator.

On the foregoing, I am of the considered view that an assessment of damages based on the physical location of the property, the size in acreage and its market value would not be proper as the actual trespass was on the edge of the property and a strip of 40 meters in length, 0.4 meters in width and 1.2 meters deep. The damage did not affect the entire parcel and neither did it bring down the value of the property. In any event, the barbed wire fence was repaired by the Defendant and therefore the Plaintiff only incurred the expense of backfilling the trenches. With respect to the security guards allegedly hired by the Plaintiff, this item falls under the category of special damages which must not only be pleaded but specifically proved. There are no contracts signed or receipts of payments to exhibit that guards were hired as alleged.

From the above reasoning, the Plaintiff is awarded a global sum of **Kshs. 50,000/-** as general damages for trespass against the Defendant. The Plaintiff shall also have the costs of the suit.

Dated, Signed and Delivered this 19th day of May, 2015

L.GACHERU

JUDGE

In the Presence of:-

None attendance for the Plaintiff

Mr Kimani for the Defendant

Hilda: Court Clerk

Court:

Judgement read in open Court in the presence of Mr Kimani for the Defendant and non-appearance for the Plaintiff.

28 days Right of Appeal.

L.GACHERU

JUDGE

19/5/2015