Ngeno v Mosonik (Environment and Land Appeal E001 of 2022)
[2024] KEELC 4251 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4251 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT AND LAND APPEAL E001 OF 2022

MC OUNDO, J

MAY 16, 2024

BETWEEN

GEOFFREY NGENO ..... APPELLANT

AND

CHARLES CHERUIYOT MOSONIK ..... RESPONDENT

(Being an Appeal from the Judgment of Honorable S. M. Mokua, Chief Magistrate at Kericho dated 16th December, 2021 and delivered on 27th January, 2022 by Honourable S.K Ngetich in Kericho Principle Magistrate's Court Environment and Land Case No. 14 of 2019)

JUDGMENT

1. What is before me for determination on Appeal is a matter which was heard and determined by Hon. S.M. Mokua, Chief Magistrate vide his Judgement dated 16th December, 2021 and delivered on 27th January, 2022 by Hon. S.K Ngetich in Kericho Principle Magistrate's Court Environment and Land Case No. 14 of 2019. Upon considering the evidence of both parties, judgment was entered on the 16th December, 2021 in favour of the Plaintiff to the effect that indeed he had proved his case on a balance of probability that he was the absolute owner of land Parcel No. Kericho/Kaptebengwet/463 and was entitled to protection as per the provisions of Sections 24, 25 and 26 of the *Land Registration Act*.

2. The Learned Magistrate thus ordered that the Plaintiff be awarded Kshs. 1, 104, 000/= in mesne profits and Kshs. 200,000/= in General Damages. The Learned Magistrate had also issued an injunction against the Defendant, his servants and agents retraining them from trespassing into the Plaintiff's land parcel No. Kericho/Kaptebengwet/463. Costs and interest were awarded to the Plaintiff.

3. The Defendants/Appellant, being dissatisfied with the Judgement of the trial Magistrate has now filed the present Appeal based on the following grounds in his Memorandum of Appeal:

i. That the learned trial Magistrate erred in law and in fact in disregarding the Appellant's evidence thus arriving at a wrong judgement.

ii. That the learned trial Magistrate erred in law and in fact in finding that the Plaintiff is the absolute owner of the parcel No. Kericho/Kaptebengwet/463 in disregard of the evidence before him.

iii. That the learned trial Magistrate erred in law and in fact in issuing a permanent injunction against the Appellant.

iv. That the learned trial Magistrate erred in law and in fact in making an award of mesne profits and general damages.

v. That the learned trial Magistrate erred in law and in fact in failing to consider all the issues in controversy.

vi. That the learned trial Magistrate erred in law and in fact in awarding costs to the Respondent.

vii. That the learned trial Magistrate erred in law and in fact in finding in favour of the Respondent

4. The Appellant thus sought that the instant Appeal be allowed and the judgment of the Honorable S.M Mokua, Chief Magistrate dated 16th December, 2021 be varied, set aside and/or reviewed accordingly. That further, the cost of the instant Appeal and the suit in the subordinate court be provided for.

5. The Appeal, was admitted on 7th December, 2023 and directions issued for the same to be disposed of by way of written submissions.

Appellant's submission

6. The Appellant vide his written submissions dated 16th January, 2024 framed his issues for determination as follows; -

i. Whether the learned Magistrate erred in law and fact in disregarding the Appellant's evidence thus arriving at a wrong judgement.

ii. Whether the learned trial Magistrate erred in law and in fact in finding in favour of the Respondent contrary to the evidence on record.

iii. Whether the learned trial Magistrate erred in law and fact in issuing a permanent injunction restraining the Appellant.

iv. Whether the learned trial Magistrate erred in law and fact in awarding the Plaintiff mesne profits and damages.

7. That Appellant first placed his reliance on the Provisions of Section 78 of the *Civil Procedure Act* as well as on a combination of decisions in the cases of Peter M. Kariuki v Attorney General [2014] eKLR, Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123 and *Mursal & another v Manese (Suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021*) [2022] KEHC 282 (KLR) (6 April 2022) (Judgement) where the court had cited a decision in the case of Kurian Chako v Varkey Ouseph AIR 1969 Kerala 316, to submit that since this was a first Appeal, it was the duty of the court to thoroughly review and analyze all the evidence and the previous judgement, with a view of forming its own determinations on the case. That the court had jurisdiction to reverse or affirm the findings of the trial court.

8. On the first issue for determination, the Appellant submitted that although he had clearly indicated that he was not the right party to be sued in the lower court yet the learned trial Magistrate had erred in law and fact in disregarding this evidence and/or not considering that position. That the evidence had been that the registered owner of land parcel No. Kericho/Kaptebengwet/462 was his late father Alfred Maina Goymur as per a copy of title deed and Official Search therein produced in evidence. That he had also informed the court that he was neither a legal representative nor an administrator of his late father's estate hence he could not be sued on behalf of the estate. Further, that the issue of the boundary and acreage of the suit land had arisen as between his late father and the late Peter Tengecha Serem.

9. That indeed, from a cursory look at the pleadings, the court would note that the Respondent had sued the Appellant on behalf of the estate of his father Alfred Maina Goymur. That however, a careful analysis of Paragraphs *7* to *13*th of the Respondent's Plaint dated 30th April, 2018 led to a conclusion that the late Peter Tengecha Serem, the Plaintiff's father, had lawfully sold parcel No. Kericho/Kaptebengwet/462 to the late Alfred Maina Goymur, the Respondent's deceased father. That the Respondent had also stated in the said Plaint that the late Alfred Maina Goymur had continuously raised concerns that the land that had been sold to him was smaller than what had been agreed upon which concerns had prompted the said Alfred to seek orders of 9th May, 2007 which had allowed the deployment of a surveyor to establish the precise boundaries and acreage of the suit land.

10. That it had been the Respondent's admission under paragraph 9 of his Plaint, that pursuant to the late Alfred's determination to pursue clarity and resolution, his estate had informed the Respondent of their intention to proceed with the resurvey hence the family had engaged qualified surveyors in November, 2011 who had proceeded with the resurvey and demarcated the suit lands. That as the Respondent had admitted in his pleadings, all the actions had been undertaken by the estate of the late Alfred and not individually by the Appellant herein. Further, that the said actions had been initiatives to fulfil the intent of the court order hence could not be considered as trespass in the absence of any mala fide actions on the part of the Appellant.

11. That the letters dated 11th October, 2012 and 19th January 2012 from the Chief of Kaptengwet Location had also confirmed that the dispute on boundary had been between the estate of Alfred Maina Goymur and the estate of Peter Tengecha Serem. That whereas the Chief seemed to have suggested that the said boundary dispute had been resolve by the late Alfred and Peter, that position was not true as even the Respondents in his Plaint under paragraphs *8* and *9* had confirmed that the issue had not been resolved.

12. That summons dated 14th January, 2013 and 21st March, 2013 had been addressed to the deceased Alfred Maina Goymur further confirming that indeed, the boundary dispute had not been between the Appellant and the Respondent but between the Respondent and the estate of the late Alfred Maina Goymor. That it also showed that the said boundary dispute had not been resolved. He thus submitted that he had been wrongly enjoined into the instant proceedings.

13. That indeed, the Respondent had testified to the effect that the Appellant herein was a son of his neighbor Alred Maina Goymur and that he could not confirm who had interfered with the boundary. On cross-examination he had testified that the sons of the late Alfred Maina Goymur had been utilizing his land wherein the Appellant had been sued as he was the one managing the said farm. The Appellant maintained that he was not an administrator of the estate of Alfred Maina Goymur.

14. That as it had been indicated by the trial court under paragraph 12 of its judgement, trespass is an entry on another's land without lawful authority, but in the instant case, the Respondent had produced a court's order allowing the late Alfred Maina Goymur to demarcate and ascertain boundaries to his 3

acres of land comprised in Kericho/Kaptebengwet/462 and that nothing had been tabled before the trail court to suggest that he had either been occupying more than 3 acres or that he had been on the land without lawful authority. Further, that there had not been evidence showing that the Appellant had actually been occupying the suit land since no succession with regards to the estate of Alfred Maina Goymor had been undertaken.

15. The Appellant's relied on the decided case of Julian Adoyo Ongunga v Francis Kiberenge Abano, Migori Civil Appeal No. 119 of 2015 to submit that without locus standi, the court was devoid of jurisdiction. That it was not in contention that the issue therein had been a boundary dispute between Land Parcel No. Kericho/Kaptebengwet/462 and 463 and that parcel No. Kericho/Kaptebengwet/462 was registered in the name of the deceased Alfred Maina Goymur. That it was also not in dispute that the Appellant was not the legal representative of the estate of the late Alfred Maina Goymur. Further reliance was placed in the decided case of Melickzedeck Shem Kamau v Beatrice Waithera Maina & 2 Others [2020] eKLR.

16. His submission was that the provisions under Section 2 of the *Civil Procedure Act* were clear on the definition of a Legal Representative and that a suit against the estate of a deceased person could only be brought by or against the legal representative of the estate. Further reliance was placed on the decision in the case of Mohammed Abushin Mkullu v Suleiman Abdalla Hassan [2012] eKLR to submit that it was the responsibility of the party bringing the suit to ascertain the correct party against whom the claim was being made. It was thus his submissions that he was not the right party to be sued as he did not possess any grant of letters of administration.

17. He also placed reliance on the decided case of Beatrice Tilitei & another v William Kibet Chiboi [2017] eKLR to submit that the issue of capacity to sue or be sued went to the heart of the case and was key. That from the Plaint, it had been clear that he was being called upon to move and/or adjust the boundaries of the land parcel No. Kericho/Kaptebengwet/462 and divest his late father's land which powers he did not possess as he was not a legal representative of his father's estate.

18. On the second issue for determination as to whether the learned trial Magistrate had erred in law and fact in finding in favour of the Respondent contrary to the evidence on record, the Appellant's submission was that there was no cogent evidence that had been presented to the court to support the allegations that indeed there had been trespass. That PW2, the District Surveyor, had confirmed that he never visited the suit land in the company of the Land Registrar.

19. That it was trite law that there were two forms of survey, that is, cadastral survey and the ground survey. That to conduct a cadastral survey, one needed to have the registry index map, mutation forms, pocket file and official search. That PW2 did not have any of the above requirements. That subsequently, it was unclear as to how PW2 had managed to identify the boundaries in the absence of the key documents being that he was not in the company of the Land Registrar. That further, the said PW2 had testified that the boundaries were supposed to be as per the mutation form, which form he neither had at the time of the purported survey nor at the time of testifying in court.

20. That whereas in conducting a ground survey, one needed to look at the natural resources to confirm the boundaries of a land and also confirm with the area elders and neighbor's, in the instant case, no summons had been issued to the Appellant and there had not been an indication that the parcels of land had been visited and the people who had been present at the time of the survey. Further, that the sketch map that had been produced in court had not even showed the acreages of the two parcels of land as juxtaposed with the records in the land registry. That the said sketch map had no probative value and should have been disregarded by the trial court.

21. That indeed, there was nothing on record to show that the estate of the late Alfred Maina Goymur had not been in occupation of the 3 acres portion of the land as had been granted by the Sotik Resident Magistrate's Court Case No. 12 of 2006 order dated 9th May, 2007. Further, that there was no evidence to support the Respondent's position that there had been any form of trespass by the Appellant.

22. It was the Appellant's submission on the issue as to whether the learned trial Magistrate had erred in law and fact in issuing a permanent injunction restraining him that an injunction could only be granted upon substantive evidence of a legal right being infringed which right had not been established in the instant case. That pursuant to lack of evidence of encroachment by the Appellant, the court had erred in law and fact in issuing the permanent injunction.

23. The Appellant faulted the learned trial Magistrate's decision in awarding the Respondent mesne profits and general damages by submitting that such calculation on award of damages must be rooted in established legal principles and factual evidence, neither of which had been adequately provided by the Respondent.

24. The Appellant concluded by submitting that since the Respondent had failed to prove his case against him on a balance of probabilities, the learned trial court had erred in law and fact in finding in his favour and therefore the instant Appeal should be allowed and the judgement and decree of the court dated 16th December, 2021 be set aside, varied, and or reviewed accordingly with costs of both the lower court and the Appeal.

Respondent's submissions

25. In response to the Appellant's Appeal and in opposition thereto, the Respondent vide its written submissions dated 13th December, 2023, after giving a brief history of the matter in question, raised a preliminary point to the effect that the instant Appeal was incompetent due to failure by the Appellant to attach a Certified copy of the decree being Appealed against. That the decree that the Appellant had attached at page 3 of the Record of Appeal was not certified. He placed reliance on the provisions of Order 42 Rule 2 of the Civil Procedure Rules to submit that failure to file a certified copy of the decree was fatal to the Appellant's Appeal hence the said Appeal was liable for sticking out. Reliance was placed in a combination of decisions in the cases of Tebere Concrete Co. Limited v Simon Kariuki Ngugi [2012] eKLR, Boniface Ochieng Onono v Anderson Ogawo Achola (Suing as father and Administrator of the Estate of Reisa Getura Ogawo (Deceased) [2011] eKLR, Anthony Kanyi Mathenge v Ephrem Gitari Njuguna & Another [2009] eKLR and Lucas Otieno Masave v Lucia Olewe Kidi [2022] eKLR where the court cited the case of Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR in urging the court to strike out the instant Appeal with costs to the Respondent.

26. The Respondent went on to rely on the Provisions of Section 78 of the *Civil Procedure Act* and the decided case in Peter M. Kariuki v Attorney General [2014] eKLR, to submit that the court had a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis while bearing in mind that it did not have an opportunity to see and hear the witnesses first hand.

27. The Respondent then reiterated the evidence that had been adduced before the trial court to submit that the case before the subordinate court had been that of trespass and not a boundary dispute as had been insinuated by the Appellant in his pleadings and in his testimony. That whereas the Appellant had contended that the learned trial Magistrate had erred in declaring the Respondent as the owner of land parcel No. Kericho/Kaptebengwet/463, the Respondent was indeed the registered owner of the said parcel of land and that he had produced in evidence a certificate of title and a certificate of official

search, which evidence had not been challenged. Reliance was placed on the Provisions of Section 26(1) of the *Land Registration Act* and the decided case of Margaret Njeri Wachira v Eliud Waweru Njenga [2018] eKLR to submit that a title document was a prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land that could only be challenged on grounds of fraud or misrepresentation.

28. That grounds 2 of the Appeal should fail because upon evaluating the pleadings and the evidence tendered before him, the learned trial Magistrate had held as follows:

> " so far, the defendant is not contesting the ownership of the plaintiff of the aforesaid parcel. Further, he didn't contest the size of the plaintiff's land. Therefore, the Plaintiff is the absolute owner of parcel No. Kericho/Kaptebengwet/463."

29. With regards to ground 3 of the Appeal, it was his submission that as per the evidence he had adduced, the Appellant had encroached unto his land parcel No. Kericho/Kaptebengwet/463, fenced off part thereof and planted tea bushes therein. That the same had been confirmed by the District Surveyor who had testified as PW2 to the effect that his (Respondent's) land on the ground was not 1.20 hectares as indicated in the title. That the land adjacent to it being Kericho/Kaptebengwet/462 had "ballooned" beyond the acreage on the title. That the said PW2 had produced a sketch map in exhibit showing that indeed there had been an encroachment unto the Respondent's land. That the said evidence had not been challenged in anyway by the Appellant who had failed to either call a professional surveyor or produce a counter report, or even challenge the allegation that he was a trespasser.

30. That the Appellant had only concentrated on whether or not he was an administrator of the estate of his late father, an issue which the Respondent had neither raised in the pleadings nor in evidence. That it was clear from the evidence as adduced before the trail court that the Appellant had not been willing to have the issue of trespass resolved since he had been exhibiting violence as per the correspondences that had been produced in court, and which correspondence he had not challenged.

31. That in issuing an order of injunction, the learned trial Magistrate had observed as followst:

> " I also note from the evidence that the Plaintiff is not using half of his land; unless an injunction is issued he shall continue to suffer irreparable loss. The defendant would like to continue with the trespass simply because the neighboring parcel is subject to succession. His actions call for a remedy in this forum. There is need for an injunction to issue against the defendant, his servants and agents restraining them from trespassing into the Plaintiff's land parcel no. Kericho/Kaptembegwet/463"

32. That the said finding by the learned Magistrate was based on the evidence that had been tendered in court by PW2 and the Respondent which evidence had not been challenged in anyway by the Appellant. That instead, the said Appellant had in fact confirmed that PW2 had visited the disputed parcels of land. The Respondent hinged his reliance on the decided case of Paul Audi Ochuodho v Joshia Ombura Orwa [2014] eKLR, to submit that ground 3 of the instant Appeal should also fail.

33. On ground 4 of the Appeal as to whether the learned trial Magistrate had erred in awarding mesne profits and general damages, it was the Respondent's submission that when trespass had been proved, then it was actionable per se hence the court was duty bound to assess damages that could be awarded. Reliance was placed in the case of David Kimugun Koskei v Benjamin Tuwei & another [2019] eKLR.

34. That the Respondent had asked for special damages (mesne profits) of Kshs. 1,104,000/=. That it was trite law that special damages must not only be specifically pleaded but must also be strictly proved and that the Respondent had based the said amount on the report that had been compiled by the

agricultural officer which report had been produced as Plaintiff Exhibit 15. That the agricultural officer had estimated the amount which was to be earned by the Respondent as the aforementioned amount which evidence had not been challenged by the Appellant at the trial court by way of a counter-report. That the Respondent having specifically pleaded and strictly proved the said amount, the awarded amount had been justified.

35. That indeed, the learned trial magistrate in awarding the said amount had observed as follows:

> " The contention by the defendant was that the Agricultural officer wasn't called to testify. This was raised at submission stage after failing to contest the report. In any event, he would have dismantled it by calling an expert in that field. P. exhibit 15 demonstrates how the amount was arrived at, therefore what was specifically pleaded is proved."

36. Regarding general damages, the Respondent reiterated that trespass was actionable per se thus the court was under an obligation to assess the damages that could be awarded. That the Respondent had urged the trial court to award a sum of Kshs. 500,000/= as general damages for trespass and in its judgment, the court having taken into consideration the extent of trespass, had assessed general damages at Kshs. 200,000/=. He thus submitted that general damages being discretionary, the learned trial Magistrate had not erred in fact and in law in making such a finding. That this line of argument thus ought to be dismissed.

37. Regarding ground 6 of the Appeal as to whether the learned trial Magistrate had erred in awarding costs to the Respondent, it was his submission that it was now a well-established principle of law that costs follow the event. That the Respondent having proved his claim in the trial court, the learned trial Magistrate had been right in awarding costs of the suit. He thus submitted that the said ground of Appeal should also fail.

38. The Respondent's submissions on grounds 1, 5, 7 of Appeal that were general in nature was to the effect that the learned trial Magistrate analyzed the evidence that had been tendered by the parties and arrived at the correct decision on a balance of probabilities as depicted at paragraphs 6,7,8 and 10 of the judgment. That the learned trial Magistrate had identified 4 issues for determination under paragraph 11 of the judgment thus the Appellant could not be heard to say that the learned trial Magistrate had not considered all issues in controversy. Further, that issues were deduced from the parties' pleadings which bound them.

39. The Respondent further submitted that the Appellant had misapprehended the facts of the matter in the trial court being that he had been sued as a trespasser for having encroached on the Respondent's property and planted tea bushes, which tea bushes he had been plucking and selling, to the detriment of the Respondent. That the suit before the trial court had not been one revolving around a boundary dispute between the two adjacent properties but the evidence had been that the Appellant had, in the year 2011, hived off part of the Respondent's property measuring about 2 acres wherein he had proceeded to plant tea bushes. That there had been established boundaries of the two properties hence the issue of a boundary dispute could not arise. He reiterated that the issue before the court had been whether the Appellant action of encroaching part of the Respondent's property and planting tea bushes, as had been pleaded under paragraphs 10, 14 and 15 of the Plaint was legal.

40. That the encroachment having been done in the year 2011, long after the death of the Appellant's father, the issue of succession of his late father's properties or administration of his estate could not therefore arise. The Respondent urged the court to dismiss the Appeal with costs.

Determination

41. I have considered the record of Appeal, the judgment by the trial Magistrate, the written submissions by learned Counsel as well as the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the same, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the trial Magistrate, of seeing and hearing the witnesses as they testified. (See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384). I also remind myself that this Court will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. (See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278).

42. According to the proceedings herein, the Respondent instituted suit against the Appellant vide a Plaint dated the 30th April 2018 where he had sought for a declaration that he was the proprietor of land parcel No. Kericho/Kaptebengwet/463 and therefore there be a permanent injunction issued against the Appellant restraining him from trespassing, cutting down trees, cultivating and erecting any structure or dealing whatsoever with the said suit property. The Respondent further sought for Mesne profit of Ksh. 1,104,000/= costs of this suit and interest therein.

43. In response to the case filed against him, the Appellant had filed his statement of defence dated 4th June 2018 generally denying the allegations contained in the Respondent's Plaint stating that his father the deceased, Alfred Maina Goymur was the registered proprietor of parcel of land known as Kericho/Kaptebengwet/462.

44. After confirmation of the preliminaries, the matter proceeded for hearing before Hon S. M Mokua the Chief Magistrate sitting in Kericho on the 4th February 2020 wherein the Respondent relied on the sequence of the 15 documents filed as his exhibits and proceeded to testify to the effect that he was the proprietor of land parcel No. Kericho/Kaptebengwet/463 (Pf exh 1) which land he had inherited from his father and which neighbored the Appellant's deceased's father's land parcel number Kericho/Kaptebengwet/462 (Pf exh 2) and therefore the Appellant was his neighbor. That the Appellant's father had bought his portion of land from his (Respondent's) father and that both parcels of land measured three acres respectively.

45. That whereas there had been tea planted on parcel of land Kericho/Kaptebengwet/462 his own land being Kericho/Kaptebengwet/463 was used as a grazing ground. That there had been no disputes during the lifetime of their fathers. However in the year 2011 after correcting a boundary dispute, he had later learnt that the Respondent who was a manager in his deceased father's farm, had encroached on his side of the land by moving the demarcation by two acres into his side (Respondents) wherein he had proceeded to plant tea. That he had called PW 2, a surveyor who had drawn a sketch plan showing the intrusion on his land. The Respondent had also obtained a valuation report from an agricultural officer (Pf exh 15) on which he sought compensation of the land he had not utilized. That it had been because the Appellant had become hostile to him, that he had filed suit against him. His evidence was that he had no claim against the deceased's estate.

46. In support of his case the Respondent had called PW 2 as his witness who had produced the sketch plan he had drawn as Pf exh 16 wherein he had proceeded to testify that the area on the ground was different from the one in the Registry Index Map wherein land parcel No. Kericho/Kaptebengwet/462 had encroached into land parcel No. Kericho/Kaptebengwet/463 and that this was not a land boundary dispute.

47. In his defence, the Appellant had testified and confirmed that his late father Alfred Maina was the registered proprietor of land parcel No. Kericho/Kaptebengwet/462 as per Df exh 1, land which he had bought from one Peter Tengecha. That he had a decree from the Sotik Magistrates Court over a land dispute between his father and the Respondent's father which Decree had never been set aside. The decree was however not produced as an exhibit. That he was not an administrator of his father's estate, had never trespassed on the Respondents' suit land and did not know why the Respondent filed suit only against him and not his siblings. That the land in question had no crops on it, the valuation report had not been produced by an agricultural officer and the claim of Ksh. 1,104,000/= had no legal basis he sought for the suit to be dismissed with costs.

48. With the said background in mind, I find the issues arising for determination as follows:

    i. Whether the learned trial Magistrate erred in law and in fact in finding that the Respondent was the absolute owner of the parcel No. Kericho/Kaptebengwet/463.

    ii. Whether the learned trial Magistrate erred in law and in fact in issuing a permanent injunction against the Appellant.

    iii. Whether the learned trial Magistrate erred in law and in fact in making an award of mesne profits and general damages.

49. The provision of Section 24(a) of the of the *Land Registration Act* outlines the interests and rights of a registered proprietor of land as follows;

> 'the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....'

50. Section 25(1) of the *Land Registration Act* also stipulates that ;

> 'The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...'

51. The law is very clear on the position of a holder of a title deed in respect of land. Indeed Section 26(1) of the *Land Registration Act* provides as follows:

> " the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all counts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –
>
> a. On the ground of fraud or misrepresentation to which the person is proved to be a party
>
> b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme

52. It will be seen from the above provisions of the law, that title to land is protected, but the protection can be removed and title impeached, if it is procured through fraud or misrepresentation, to which the

person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme.

53. The Appellant did not adduce any evidence to the effect that the Respondent had acquired title to land parcel No. Kericho/Kaptebengwet/463, the suit land herein through fraud or misrepresentation or that his certificate of title had been acquired illegally, un-procedurally or through a corrupt scheme.

54. Indeed based on the evidence adduced herein above, and while relying on Section 26(1) of the *Land Registration Act*, we cannot ran away from the fact that the Respondent had indeed satisfied the legal proviso that he was the proprietor of the suit land No. Kericho/Kaptebengwet/463 and hence had absolute ownership including all rights and privileges appurtenant to it. This issue thus rests.

55. On the second issue for determination being whether the learned trial Magistrate erred in law and in fact in issuing a permanent injunction against the Appellant, the answer is in the negative given the above captioned provision of the law that the Respondent having discharged the onus of proof that he was the registered proprietor land parcel No. Kericho/Kaptebengwet/463, he had the absolute ownership of the same together with all rights, privileges and appurtenances belonging thereto and therefore the learned trial Magistrate rightly issued a permanent injunction against the Appellant in relation to the said parcel of land.

56. On the last issue for determination as to whether the learned trial Magistrate erred in law and in fact in making an award of mesne profits and general damages, it is clear from the Respondent's Plaint that he had sued the Appellant for trespass on his land parcel wherein he had proceeded to cut down the Respondent's trees and put up a tea plantation thereby depriving the Respondent his rights to property.

57. After hearing the matter before it, the learned trial magistrate had found vide a judgment delivered on 27th January 2022 in favour of the Respondent to the effect that indeed the Appellant had trespassed on his parcel of land, wherein the Respondent had been awarded general damages at Ksh 200,000/, and mesne profits of 1,104,000/= as had been pleaded.

58. Trespass has been defined by the 10th Edition of Black's Law Dictionary as;

> " an unlawful act committed against the person or property of another; especially wrongful entry on another's real property."

59. Section 3 (1) of the *Trespass Act*, also defines trespass as follows;

> " Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."(Emphasis mine)

60. The Court in John Kiragu Kimani vs Rural Electrification Authority [2018] eKLR also in defining trespass relied on Clark & Lindsell on Torts, 18th Edition on page 923 which defines trespass as;

> 'any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to proof that the Defendant invaded his land without any justifiable reason'.

61. The evidence adduced in court, was that the Respondent had utilized the suit parcel of land No. Kericho/Kaptebengwet/463 as a grazing ground wherein the original boundary had been removed and the demarcation pushed on his side hence reducing the acreage of the same. This evidence had been

supported by the production of a sketch map as Pf exh 16 which showed the encroachment of parcel of land No. Kericho/Kaptebengwet/463 by parcel of land No. Kericho/Kaptebengwet/462. In cross examination the Respondent had submitted that the Appellant was ''doing the management of the farm'' wherein the sons of the late Alfred Maina were utilizing his land.

62. It is trite law that trespass to land is actionable per se (without proof of any damage). See the case of Park Towers Ltd vs. John Mithamo Njika & 7 others (2014) eKLR where J.M Mutungi J., stated:-

> 'I agree with the learned Judges that where trespass is proved a party need not prove that he 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...'

63. In the case of Duncan Nderitu Ndegwa v. Kenya Pipeline Company Limited & another [2013] eKLR, Hon justice P. Nyamweya (as she then was) held:-

> " ...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants' trespass"

64. I find that the learned trial magistrate had rightly found that there had been trespass on the Respondents' parcel of land by the land parcel number No. Kericho/Kaptebengwet/462 for which the Appellant was the manager. Given that it is trite law that once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages, the learned trial magistrate cannot be faulted for granting the Respondent Ksh. 200,000/= as general damages.

65. On the issue for determination as to whether the trial learned magistrate had erred in granting the Respondent Ksh.1,104,000/= as mesne profits, I find that the evidence relied on was based on the production of Pf exh 15 which was in the form of a letter on land/enterprise valuation from Department of Agriculture County Government of Bomet dated 8th January 2018 which was to the effect that the Respondent had been deprived of income of two acres of land, based on the tea that had been planted therein by the Appellant, from the year 2012 to date thus making it a total of Ksh. 1,104,000/=

66. The evidence on record was that the suit land had been used for grazing and therefore it could not possibly be said that the Respondent had lost income based on the tea that the Appellant had planted therein. I therefore find that there was no material evidence placed before the Court to demonstrate how the amount that was claimed as mesne profits had been arrived at. It is trite that mesne profits, being special damages must not only be pleaded but also proved.

67. The Court of Appeal in the case of Peter Mwangi Mbuthia & another vs Samow Edin Osman [2014] eKLR was of the opinion that it was upon a party to place evidence before the Court upon which an order of mesne profits could be made. The Court stated as follows:-

> " We agree with Counsel for the Appellants that it was incumbent upon the Respondent to place material before the Court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established."

68. In the end, I up hold the finding by the trial learned Magistrate in his Judgment delivered on 27th January, 2022 save for the award on mesne profits which award is herein set aside. The Appellant shall have cost of the instant Appeal and the suit in the subordinate.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 16TH DAY OF MAY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE