



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 428 OF 2017

(FORMELY NAIROBI ELC CASE NO. 2168 OF 2007)

C.K.K ESTATE (1973) LIMITED..... PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KIAMBU.....1ST DEFENDANT

JAMES GICHERU.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff, a Limited liability company duly incorporated in Kenya under the *Companies Act (Cap 456 Laws of Kenya)* has sued the 1st defendant, a County Government established under *Article 176* of the Constitution of Kenya, 2010 and the County Governments Act, 2013 and the 2nd defendant, by way of a Plaint dated *27th September, 2007* and amended on *1st November, 2018* pursuant to leave and directions of the court given on 31st October, 2018. The Plaintiff is seeking the following reliefs:

a. Declaration that there is no public road passing through Land Parcel No. L.R. 134/8 C.K.K. Njunu Estate

b. An Injunction do issue restraining the Defendants, their servants, agents, employees and or any person claiming under them or acting under their behest from trespassing and or entering the Plaintiff's land or in any manner whatsoever erecting, developing or otherwise creating a road through the Plaintiff's premises viz L.R 134/8 C.K.K. Njunu Estate.

c. General and punitive damages for trespass.

d. Any other or further relief the court may find appropriate in the circumstances.

e. Costs of the suit and interest therein.

2. The brief background to the suit as stated in Plaint is that the suit property is Land parcel *No. L.R. 134/8 C.K.K Njunu* Estate located in Kiambu County and it is registered in the name of the Plaintiff. That in or about *August, 2007*, the defendants alleged that there was a public road through the suit property but the Plaintiff advised the defendants otherwise. However, the 1st defendant insisted by letters and memoranda to move in and open the alleged road.

3. The Plaintiff contends that on or about *25th September, 2007*, the 2nd defendant together with the agents of the 1st Defendant unlawfully entered the suit property with a grader tractor and proceeded to create and or develop a road measuring approximately 500 m by 8.1 metres through the property. The defendants declared it a public road. In the process, the defendants destroyed the Plaintiff's coffee trees without justification thus precipitating the present suit.

4. The 1st defendant denied the Plaintiff's claim in a statement of defence dated *12th August, 2009* and filed on 4th September 2009. The 1st Defendant stated that it never created the road which existed since 1958 or thereabouts. That members of the Public have been using the road since then as of right, uninterrupted and without express and implied authority from the Plaintiff.

5. The 1st defendant further stated that members of the public have used the suit property since land consolidation and demarcation hence acquired prescriptive rights and right of user of the road. That it never made any representation to the public that there was a public road passing through the suit property. That the 1st defendant wrote to the Plaintiff demanding the removal of beacons erected by the Plaintiff having blocked the road to the public. That construction of public roads falls within the domain of the Central Government.

6. The 2nd defendant denied the Plaintiff's claim in his statement of defence dated **10th December, 2007**. He stated that he neither owned a grader tractor nor was he connected with the 1st defendant and did not participate in the creation of the road which he termed a public road cutting through the suit property.

7. The 2nd Defendant further stated that the road existed and it is the duty of the 1st defendant through the Ministry of Roads and Public works, to grade public roads. That if the said Ministry carried out its duties, the 2nd defendant cannot be held responsible.

8. The Plaintiff is represented by learned Counsel, Mr. S. Musalia Mwenesi. Learned counsel, Natalia S. Sanaet appears for the 1st defendant while learned counsel, Mr. Kimani Charagu is on record for the 2nd defendant.

9. On **15th February, 2011**, **Dr. WILFRED KOINANGE** (P.W.1), a director of the Plaintiff gave evidence in support of the plaintiff's claim at the **High court, Nairobi before Justice. A Muchelule**. He relied on an amended Plaintiff's list of documents dated **11th February, 2011** (P. Exhibits 1 of pages 1 to 16), which include, copies of titles to the suit property, deed plan, correspondence between the Plaintiff and the 1st defendant as well as photographs of the subject area taken before and after the road was created through the suit property.

10. The suit was transferred to this Court on **21st March, 2017** for further hearing and determination. On **31st October, 2018**, directions were given that the matter proceeds to further hearing. Other witnesses namely EDWIN MUNOKO WAFULA (P.W.2), ONDIKO ORIRO (P.W.3) and VICTOR KIPRONO KIRUI (P.W.4) testified to the effect that the Plaintiff is the registered proprietor of the suit property and that there is no road of access through the property.

11. By Submissions dated **15th November, 2018**, learned Counsel for the Plaintiff analysed evidence of P.W.1 to P.W.4 and contended that there is no public road over the suit property and that the defendants illegally created the road of access. He identified issues for determination including whether, there is a public road through the suit property, and whether the defendants' acts amount to trespass upon the property.

12. Counsel filed list of authorities dated **15th November, 2018**, among them, **Kigika Developers Ltd- vs- Nairobi City Commission KLR (E & L) 1 217, New Munyua Sisal Estates Ltd – Vs- Attorney General (1972) EA 88, sections 86 and 144 (2)**, of the Local Government Act (repealed) and Article **40(3)** of the Constitution of Kenya, **2010**. He asserted that the defendants, trespassed into the suit property and that the Plaintiff is entitled to the relief's sought in the Plaintiff. That tort of trespass, at least, attracts nominal damages in the matter.

13. Learned counsel for the 1st defendant filed submissions dated **22nd November, 2018** whereby she framed three (3) issues for determination which include whether the 1st defendant, trespassed on the suit property. She submitted that the trespass claim is against members of the public and that the 1st defendant did not trespass into the suit property. She urged the court to dismiss the suit with costs to the 1st defendant.

14. I have carefully considered the entire pleadings, testimonies of P.W.1, P.W.2, P.W.3 and P.W.4 as well as submissions herein. I note the Plaintiffs list of proposed issues (six issues) dated **9th June, 2008** and the three (3) issues framed in the 1st defendant's submissions. To that extent and bearing in mind the decision of **Galaxy paints Ltd –Vs Falcon Grants Ltd (2000) 2EA 385** applied in **Great Lakes Transport Company (V) Ltd –Vs- Kenya revenue authority (2009)KLR, 720**, the issues for determination are condensed as to whether:-

- a) **The Plaintiff is the registered proprietor of the suit property**
- b) **The Defendants trespassed onto the suit property.**
- c) **The Plaintiff is entitled to the reliefs sought in the Plaintiff.**

15. PW1 identified the Certificate of Incorporation of the Plaintiff in page 54 of P. Exhibit 1 and documents of title in the form of conveyance at pages 3 to 8 of P. Exhibit 1 in respect of the suit property. He stated that there was no encumbrances to the conveyance. The evidence of PW1 was never challenged by the Defendants.

16. P.W.2, a Land Registrar based in Nairobi referred to the conveyance at page 3 of PExhibit 1 and stated that the Plaintiff is the proprietor of the suit property as at **13th July 2010**. That the conveyance is a title to the property under the Government Lands Act and it was made between **Emma Krag Jan Groos Helmer and Rikke Augusta Berg-Jensen** (the vendors) and the Plaintiff (the purchaser).

17. PW2 further stated that there has been no other entry after **13th July 2010** as revealed at pages 55 and 56 of PExhibit 1 and there are no encumbrances caused by the 1st Defendant or at all. He testified in part that:-

“The Plaintiff is the registered proprietor of the suit land LR.No.134/8. There are no encumbrances on the land”.

18. The 1st Defendant's counsel did not cross examine PW2. Therefore, his testimony remains steadfast in this matter.

19. As regards the 2nd issue, the evidence of PW1 was fortified by a Land Registrar (P.W.2), a manager of the Plaintiff (PW3) and a surveyor (P.W.4), all who confirmed that there was no public road of access approved to cross the suit property. PW4 presented an original deed plan (P. Exhibit 2), a survey map FR No.19/13 (Exhibit 3), a survey map FR NO. 42127 (P. Exhibit 4) and a survey map FR No.

42/172(PEXh.5). He further stated as follows:-

“There is no road of access through the suit land LR.No.134/8 as per Exhibits 1 to 5. There were no subdivision, surrender or compulsory acquisition to create a road of access thereof. (Emphasis added)

20. The Plaintiff contended that the Defendants alleged that there was a public road of access through the suit property. P. Exhibits 1 to 5 show that there is no such road passing through the property. That the Defendants trespassed upon the property.

21. Clerk and *Lindsell on Torts (17th Edition)* at *paragraph 17* defines the term ‘trespass’ as:-

“An unjustifiable entry by one person upon the land in possession of another. Removing any part of the soil of land also constitutes trespass”.

22. Similarly, it has been held that any unjustifiable intrusion of one person upon the land in possession of another, amounts to trespass. See *Zacharia Onsongo Momanyi – vs – Evans Omurwa Onchagwa (2014) eKLR*.

23. I bear in mind the protection of right to property under *Article 40* of the Constitution of Kenya, 2010 and in acquisition of land, the state has to follow due process as laid down thereunder. *Section 144 (2), 147 (a)* of the Local Government Act (repealed) provided for compulsory land acquisition by a local authority. However, the acquisition was to be upon proof of the existence of a road and involvement of inhabitants of the area, as stipulated under *Sections 147 (a) & 86* of the repealed Act.

24. **Article 10 of the Constitution of Kenya, 2010** stipulates the national values and principles of governance which include participation of the people and rule of law, which bind all state organs and all persons whenever any of them interprets the Constitution and any law. P. Exhibit 1 at Pages 11 to 27 does not discern that due process was followed to acquire the alleged public access road. Title to the suit property is inviolable and indefeasible and can only be defeated by a lawful procedure.

25. Moreover, observance of the procedural requirements for compulsory land acquisition are absolute and necessary. That such acquisitions have to be carried out in strict conformity with the Constitutional provisions and in good faith. See the decision in *Eunice Grace Njambi Kamau & Another-vs-The Hon. Attorney General & 4 others (2013) eKLR*.

26. It was submitted by the Plaintiff’s Counsel that the 1st Defendant did not follow constitutional and statutory procedures in the creation of the road of access over the suit property. That no compensation was offered or paid to the Plaintiff for the loss of part of the property including mature coffee crops.

27. The Plaintiff did not specify the value of the damage to the property. However, I would consider an award of nominal damage equivalent to the value of the land taken from the suit property to be a public access road.

28. In the case of *Philip Aluchio –Vs- Crispus Ngayo (2014) eKLR*, the court held that the Plaintiff did not adduce any evidence as to the state of his property before and after the trespass. Nonetheless, the court proceeded to award a nominal amount of **Kshs.100,000/=** as damages for trespass.

29. In the instant case, the Defendants damaged mature coffee trees and dug trenches on the plaintiff’s property to pave way for the access road. In a case where trenches had been dug across the Plaintiff’s land, the court found and assessed damages for trespass at **Kshs.50,000/=**; See the case of *James Njeru -vs- Erickson Kenya Ltd (2015) eKLR*.

30. In the premises, the Plaintiff suffered exemplary damages which are **punitive in nature as held** in *Abdulhamed Ebrahim Ahmed-vs-Municipal Council of Mombasa (2004) eKLR*. The plaintiff is entitled to damages owing to the oppressive, arbitrary or unconstitutional acts of the 1st and 2nd Defendants who created and purported to develop a road of access through the suit property. I would assess general and punitive damages for trespass at **Kshs.250, 000/=**, in the circumstances. The Plaintiff has proved his case against the Defendants on a balance of probability.

31. A fortiori, I enter judgment for the Plaintiff against the Defendants jointly and severally in terms of a declaration and permanent injunction sought in his amended Plaint as well as general and exemplary damages for trespass at **Kshs.250,000/=**. Costs of the suit shall be borne by the defendants.

Dated, signed and Delivered at Thika this 5th day of December, 2018.

G.M.A ONG’ONDO

JUDGE

Present:

Cynthia Guya holding brief for Mr. S.M. Mwenesi for the Plaintiff

Court Assistant-Tom Maurice

G.M.A ONG'ONDO

JUDGE