



Bosire v County Government of Nyamira (Environment & Land Case 87 of 2021) [2023] KEELC 17764 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17764 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ENVIRONMENT & LAND CASE 87 OF 2021

JM KAMAU, J

MAY 25, 2023

{FORMERLY AT ENVIRONMENT AND LAND COURT AT KISII CASE NO. 70 OF 2017}

BETWEEN

JOHN BOSIRE PLAINTIFF

AND

COUNTY GOVERNMENT OF NYAMIRA DEFENDANT

JUDGMENT

1. The plaintiff, the registered proprietor of LR No East Kitutu/Mwamangera / 1006 since August 8, 2011 has sued the defendant, a devolved unit for the following orders: -
 - a. A declaration be issued to the effect that the plaintiff is entitled to protection under the *Constitution*.
 - b. A declaration that the defendant has no rights, mandate and/or authority to forcefully, and/or enter upon and build a road on the plaintiff's LR No East Kitutu/Mwamangera/1006 declaration that the plaintiff herein is likely to be arbitrarily deprived of his rights and/or interests over the suit land. Consequently, the plaintiff's constitutional rights are bound to be infringed upon and/or violated.
 - c. Declaration that LR No East Kitutu/Mwamangera/1006 lawfully belongs to the plaintiff.
 - d. An order of injunction restraining the defendant either by herself, agents and servants and/or anyone claiming under the said defendant from entering upon, trespassing onto, taking possession, building on, destroying crops and/or in any other way, whatsoever, interfering with the plaintiff's rights over the suit land that is LR No East Kitutu/Mwamangera/1006.
 - e. An order of damages



- f. Costs of the plaintiff be borne by the defendant jointly and/or severally.
 - g. The honorable court be pleased to issue such orders and/or writs as the court may deem fit and/or expedient.
2. He avers that the defendant sanctioned and/or commissioned activities on the suit land namely, destroying crops and houses after which the defendant built a road on the land where there ought to be none and has further threatened to punish the plaintiff if he insists that there is no road. This, in the words of the plaintiff, is illegal and compulsory acquisition in contravention of the plaintiff's fundamental rights.
 3. In a statement of defence filed in court on June 11, 2019, the defendant denied that the plaintiff is the registered owner of LR No East Kitutu/Mwamangera/ 1006 and further denies to have ever commissioned any activities on the suit land. The defendant therefore prays that the suit be dismissed with costs.
 4. In the reply to the defence, the plaintiff reiterated the contents of the plaint. When the suit came up for hearing, the plaintiff took to the witness box and adopted his witness statement by maintaining that he is the registered proprietor of LR No East Kitutu/Mwamangera/1006. He said that the defendant commissioned through her agents, servants and/or employees, the creation of a road through the suit land although according to official survey maps no road is supposed to be on his land. This amounted to illegal compulsory acquisition. As a result of the illegality, he is bound to be deprived of and denied the right to occupy, use and/or benefit of the suit land. He has also been dispossessed of the portion on which the road has been built and consequently he is bound to suffer substantial and irreparable loss. To support his claim, the plaintiff produced the following documents: -
 1. Title deed LR No East Kitutu/Mwamangera/1006.
 2. Certificate of official search dated February 27, 2017.
 3. Copy of a map.
 4. Photographs.
 5. Any other documents as may be required at the hearing hereof.
 5. The photos show the defendant's employees and bulldozers excavating soil from the land. He also produced a valuation report prepared by Olweny Associates dated July 7, 2017 whose contents inter alia are that:
 - i. The County Government has excavated murram from within parcel 1006 covering an area of 0.17 Ha (See Ground picking map marked X')
 - ii. A disputed road of access of 8m. Passing through the parcel 1006 is 0.08 Ha approximate. This is constructed by the County Government of Nyamira.
 6. On cross examination by Mrs Asati, the plaintiff said that the portion excavated has now been converted into a livestock market. The said report was produced in court by Solomon Njoga, a licensed surveyor and it states that there is indeed an area of approximately 0.07 hectares that has been excavated and a disputed road of access of 8 metres passing through the parcel of land, approximately 0.08 hectares. And that from the PID map from survey of Kenya, there is no public road passing through the suit land.



7. The defendant was given several opportunities to give her side of the story but failed to rise to the occasion. After indulging the defendant for so long she was unable to procure any witness and at one time on November 10, 2022, the court summoned the defendant's CEC Lands to explain why he is not procuring witnesses in this case. He never turned up in court and the case was closed. Both parties filed written submissions which I have considered before writing this judgment.
8. I am satisfied on the material presented before me that the plaintiff is the registered owner of the suit property, LR No East Kitutu/Mwamangera/1006. The plaintiff tendered in evidence a copy of the title deed for the suit property in his name and a certificate of official search in regard to the suit property which confirmed that the property is registered in the name of the plaintiff as the proprietor thereof. Under section 24(a) of the *Land Registration Act, 2012*, the registration of a person as the proprietor of land vests in that person the absolute ownership of that land together with all rights and privileges associated with that status. Section 26(1) of the said Act provides that the certificate of Title issued by the Land Registrar upon registration to a purchaser of land upon transfer shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner thereof. The defendant on the other hand, did not defend this suit. The plaintiff's title over the suit property is therefore not challenged on any ground. As the absolute proprietor of the suit property, the plaintiff is entitled to enjoy rights and privileges associated with such ownership which includes exclusive use, possession and enjoyment thereof without interference by any third party. The plaintiff also produced a copy of the area map and the photographs that show the extent of damage caused on his land and the vegetation thereon. The plaintiff has on a balance of probabilities proved his case and I award him judgment in terms of prayers numbers a), b), c) and d) in the plaint dated March 15, 2017.
9. As to the prayer on damages, the plaintiff has not pleaded any special damages and therefore none can be awarded. But as for general damages, due to the excavated land, I find that the soil will have to be improved but no agricultural officer or soil expert was called upon to testify as to how much it will cost to replace the soil and the vegetation on the suit land. Nor was a witness called to say how much soil was carted away. But there are clear photographs exhibited of the excavated soil and the destroyed trees. However, in *Ochako Obinchi v Zachary Oyoti Nyamongo* [2018] eKLR, Kisii ELC civil suit No 28 of 2015, the court held that:
- Trespass has been defined as any unjustifiable intrusion by one person upon the land in the possession of another. The onus is on the plaintiff to prove that he is the owner of the suit property and that the defendant has invaded and occupied the same without any justifiable cause.”
10. In the case of *Phillip Aluchio v Crispinus Ngayo* [2014] eKLR Obaga, J. held: -
- “ ...The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of plaintiff's property immediately after the trespass or the costs of restoration, whichever is less.....”
11. The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass.....”
12. This is the scenario herein. However, as it was held in the case of *Duncan Nderitu Ndegwa v KP& LC Limited & another* [2013] eKLR P. Nyamweya J. 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.....”



13. However, in as much as the plaintiff in the instant suit did not lead any evidence nor attach any documentation to establish the exact value of the suit property before and after the trespass and/or how much damage was occasioned on the suit property by the actions of the defendant, he is still entitled to receive by way of damages such sum as would reasonably recompense him for being denied and deprived of the use of his land for now a period of over 6 years. I will therefore award a figure of Kshs 750,000/= under the head of damages being general damages for the trespass and destruction of flora on the suit land. The plaintiffs shall also have the costs of this suit.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 25TH DAY OF MAY 2023.

MUGO KAMAU

JUDGE

In the Presence of:

Court Assistant: Sibota

Plaintiff: Ms. Ndemo

Defendant: N/A

