



Ikinu Ngwatio Co Ltd v Havak Enterprise Ltd (Environment & Land Case E158 of 2022) [2023] KEELC 18809 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18809 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E158 OF 2022**

BM EBOSO, J

JUNE 29, 2023

BETWEEN

IKINU NGWATIO CO LTD PLAINTIFF

AND

HAVAK ENTERPRISE LTD DEFENDANT

JUDGMENT

1. The plaintiff initiated this suit through a plaint dated 6/12/2022. It sought the following verbatim reliefs against the defendant:
 1. A permanent injunction restraining the defendant by themselves, their servants, agents and/or employees from trespassing onto and/or undertaking any construction works or any developments whatsoever on all that parcel of land known as L.R 4953/2773.
 2. General damages for trespass.
 3. Damages for loss of use for the period of 2019 until determination of this suit.
 4. Costs of the demolished perimeter wall and gate on the suit property.
 5. Costs of eviction and demolitions of structures constructed by the defendants.
 6. Costs of removal of the debris and materials left from demolition of the structures by the defendants on LR 4953/2773.
 7. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.
 8. Any such other or further relief as this Honourable court may deem appropriate.



2. On 18/1/2023, this court ordered the plaintiff to serve summons to enter appearance through a prominent notice in either The Daily Nation Newspaper or The Standard Newspaper. The defendant neither entered appearance nor filed a defence. Consequently, the suit was heard as an undefended cause. It now falls for determination.
3. The case of the plaintiff is that it is the registered proprietor of Land Reference Number 4953/2773 [the suit property], located within Thika Municipality. In 2019, goons invaded the suit property and started erecting structures on it. This prompted the plaintiff to lodge a complaint at Makongeni Police Station. Upon the defendant learning that the plaintiff had made a report at the Police Station, they filed Thika Chief Magistrate Court Land and Environment Case No 129 of 2019, falsely alleging that Land Reference Number 4953/2773 was the same as Thika Municipality Block 29/719 and that they owned it. At that point, it dawned on the plaintiff that the goons who had invaded the suit property were agents of the defendant. The said suit was struck out by the Chief Magistrate Court on the ground that the court lacked jurisdiction to entertain the suit.
4. The plaintiff contends that despite notifying the defendant to remove the illegal structures from its land, the defendant failed to do so, hence the decision to seek reliefs from this court.

Evidence

5. At the hearing, the plaintiff led evidence by three witnesses. Ann Mwangi testified as PW1. Her evidence was that she worked as a surveyor based at the Thika Sub County Survey Office. In 2021, she led a team to two parcels of land: (i) Land Reference Number 4953/2773; and (ii) Thika Municipality Block 29/719. They carried out survey with the aim of establishing the identity of the land on which a certain impugned development was taking place. The survey revealed that the impugned development was taking place on Land Reference Number 4953/2773. The survey exercise further established that the two parcels of land were located about 700 metres apart. She produced her report as Plaintiff Exhibit No 4. It was her evidence that the co-ordinates relating to the two parcels of land were not the same and that the two parcels were distinct and were located 700 metres apart.
6. Joseph Kibe testified as PW2. He adopted his written witness statement dated 30/3/2023 as part of his evidence-in-chief. His evidence was that he was a civil engineer doing private consultancy. He owned Land Reference Number 4953/2774 which abutted the suit property, Land Reference Number 4953/2773, owned by the plaintiff. He added that in 2019, goons invaded both the suit property and his property, Land Reference Number 4953/2774, and demolished structures that were on the two parcels. He subsequently established that the trespassers were Chinese nationals without known abode. He stated that those who invaded the plaintiff's land were trading as Havak Enterprises Ltd while those who invaded his land were trading as Yang Zhong Bing.
7. PW2 stated that Land Reference Number 4953/2773 was not the same as Thika Municipality Block 29/719. He further stated that Land Reference Number 4953/2774 was not the same as Thika Municipality Block 29/720. He added that no conversion had taken place in terms of survey and registration of Land Reference Numbers 4953/2773 and 4953/2774. It was his evidence that the defendant was constructing on Land Reference No 4953/2773 which belonged to the plaintiff.
8. Engineer Bernard Kihura testified as PW3. He adopted his witness statement dated 6/12/2022. He produced 21 exhibits. His evidence was that he was a director of the plaintiff company. He added that the plaintiff was allotted the suit property in 1994 and subsequently issued with a title under the Registration of Titles Act. The suit property was identifiable on Deed Plan No 194563 authenticated on 6/4/1995. In 2019, goons invaded the suit property. This prompted the plaintiff company to make a report to the Police. Upon the defendant learning that the plaintiff had made a report to the Police,



they filed Thika Chief Magistrate Court Environment and Land Case No 129 of 2019 in which they falsely misrepresented that Land Reference Number 4953/2773 was the same as Thika Municipality Block 29/719 and that Land Reference Number 4953/2773 had been converted to the block system.

9. PW3 added that at the behest of the defendant, the Chief Magistrate Court ordered the National Land Survey Office – Thika to carry out a survey exercise to establish the location(s) of the two parcels. Subsequently, the National Land Survey Office – Thika presented a report indicating that Land Reference Number 4953/2773 and Thika Municipality Block 29/719 existed as distinct parcels and were located 700 metres apart. The survey exercise further revealed that the impugned construction was taking place on Land Reference Number 4953/2773 which belonged to the plaintiff. He added that despite being aware of the above facts, the defendant had continued to undertake construction on Land Reference Number 493/2773.

Submissions

10. Upon conclusion of trial, the plaintiff filed written submissions dated 6/6/2023. I will not rehash the written submissions. It is, however, noted that whereas the plaintiff's advocates alluded to amended pleadings in their written submissions, no amended pleadings were in the trial bundle availed to the court during trial. Indeed, there was no record of any order authorizing amendments subsequent to substituted service of summons.

Analysis and Determination

11. I have considered the plaintiff's pleadings, evidence and submissions. This is an undefended cause. Two questions fall for determination in the cause. The first question is whether the plaintiff has discharged its burden of proof. The second question is whether the reliefs sought in the plaint are available.
12. The plaintiff tendered evidence showing that it is the registered proprietor of Land Reference Number 4953/2773 comprised in Grant Number 73190, measuring approximately 1.000 hectares. Evidence by the National Government Survey Directorate confirms that the land does exist. Thirdly, evidence was tendered showing that the defendant has trespassed onto the said land under the guise that it is Thika Municipality Block 29/719. The evidence led by the plaintiff is uncontroverted. In the absence of a defence and controverting evidence, this court is satisfied that the plaintiff has discharged its burden of proof to the required standard.
13. On reliefs, Prayer 1 is a plea for a permanent injunction. As a registered proprietor of the suit property, the plaintiff's rights are protected under article 40 of the Constitution and under sections 24 and 25 of the Land Registration Act. In this regard, the plaintiff is entitled to quiet possession and enjoyment of the suit property. In the circumstances, the plea for a permanent injunction is merited.
14. On general damages, no evidence was led on quantum. Trespass was nonetheless proved. Counsel urged the court to award the plaintiff nominal damages in the sum of Kshs 500,000. The prevailing jurisprudence is that where trespass is proved, the court can properly award nominal damages. I will, in the circumstances, award the plaintiff nominal damages in the sum of Kshs 400,000 together with interest at court rate from the date of judgment.
15. No evidence was tendered in relation to prayers 3, 4, 5 and 6. In the absence of evidence, no award will be made on those limbs.
16. On costs, there are no proper reasons why the general principle in section 27 of the Civil Procedure Act should not apply. The defendant will, in the circumstances, bear costs of this suit.
17. In the end, judgment is entered in favour of the plaintiff, against the defendant, in the following terms:



- a. A permanent injunction is hereby issued restraining the defendant by themselves, their servants, agents and/or employers from trespassing onto and/or undertaking any construction works or any developments whatsoever on all that parcel of land known as Land Reference Number 4953/2773 comprised in Grant Number IR 73190.
- b. Kshs 400,000 being nominal damages for trespass.
- c. Costs of the suit.
- d. Interest on (b) from the date of Judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 29TH DAY OF JUNE 2023

B M EBOSO

JUDGE

In the Presence of:

Mr Outa for the Plaintiff

Court Assistant: Ms Osodo

