



**Olang v Nuaga & 13 others (Civil Suit 52 of 2019)
[2023] KEELC 18313 (KLR) (26 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18313 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 52 OF 2019
SM KIBUNJA, J
JUNE 26, 2023**

BETWEEN

MARGARET AKOTH OLANG PLAINTIFF

AND

LUCAS NUAGA AND 13 OTHERS DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit against the defendants vide the plaint dated the 20th March 2019. It is the plaintiff's case that she is the registered owner of Land Parcel No. Mombasa/Block 1/MS/1668, the suit property, and was issued with a certificate of lease dated 14th June 2011. The plaintiff averred that on diverse dates the defendants trespassed and illegally occupied a portion of the suit property. That after efforts to resolve the dispute with the defendants through the Likoni Deputy County Commissioner on the 5th February 2019 failed, the plaintiff resulted to file this suit against them. The plaintiff seeks for the following orders against the defendants;
 - a. Eviction of the defendants, their agents and servants from the suit property.
 - b. A permanent injunction restraining the defendants, whether by themselves or their servants or agents or otherwise howsoever from remaining on or continuing in occupation of the suit property.
 - c. General damages for trespass and depriving the plaintiff's enjoyment and use of the plaintiff's land.
 - d. Costs of this suit.
 - e. Any other relief as may appear just and proper to this honorable court.
2. Despite being served with the summons to enter an appearance and the plaint alongside other supporting documents none of the defendants entered an appearance or filed a defence to the suit. The



suit was heard viva voce, with the plaintiff, Margaret Akoth Olang, testifying as PW1. She adopted her witness statement filed on 20th March 2019 and produced her list of documents filed on the same day. PW1 testified that she is the registered owner of the suit property and that the defendants had invaded the property without her consent. She told the court that she had reported the invasion to the area chief seeking his assistance to ask the defendants to vacate but they were defiant, and hence the filing of this suit. That the suit property was vacant when she visited it in January 2019 but when she went back in February of the same year, the defendants had occupied portions of the suit property and erected Swahili houses. She urged the court to evict the defendants, issue injunction order against them and costs.

3. The court then directed that submissions be filed. During the mention of the 15th March 2023, counsel for the plaintiff reported that he had filed his submissions. Mr Mkau advocate informed the court that his firm had come on record for the defendants on 21st September 2022. The court directed Mr Mkau to place a copy of the notice of appointment on the court file and serve counsel for the plaintiff by close of business that day. On the next mention of 27th March 2023, the court heard both counsel present and noted that though Mr Mkau had claimed to have served counsel for the plaintiff and sent a copy of his notice of appointment to the court through his clerk, none was on the record. The counsel for the plaintiff denied having been served. The court proceeded to fix a date for judgement.
4. The learned counsel for the Plaintiff, filed their submissions dated the 6th March 2023 on the 7th March 2023, which the court has given due consideration.
5. The issues before the court for determination are as follows:
 - a. Whether the plaintiff is the registered proprietor of Mombasa/Block I/MS/1668.
 - b. Whether the plaintiff has established that the defendants have trespassed onto the suit property.
 - c. Whether the plaintiff is entitled to the reliefs sought.
 - d. Who pays the costs.
6. The court has carefully considered the pleadings, oral and documentary evidence tendered by the plaintiff, submissions by the learned counsel for the plaintiff, superior courts decisions cited thereon and come to the following conclusions;
 - a. From the summary of facts as set out above, the plaintiff tendered both oral and documentary evidence in support of her claim. Among the documents she produced as exhibits is a copy of the certificate of lease for Mombasa/Block I/MS/1668 measuring 0.317ha that shows that it was issued on the 14th June 2011 in her name. It also shows that the register for the parcel was opened on the 13th October 1992 and original certificate issued to the plaintiff on the same date. That the issue of the certificate on the 14th June 2011 was pursuant to Gazette Notice No. 2936 of 25th March 2011.
 - b. The plaintiff's title to the suit property has not been challenged in any way by the defendants on any of the grounds set out in Section 26 (1) of the *Land Registration Act* No. 3 of 2012, which provides that:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that 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; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The certificate of lease produced by the plaintiff is therefore, indefeasible evidence of the plaintiff’s ownership of the suit property. The court is therefore satisfied that the suit property belongs to the plaintiff since her registration and proprietorship have not been disputed. As the absolute and indefeasible owner of the property, the plaintiff is conferred with all the rights and privileges accruing to her as provided for in Sections 24 and 25 of the Land Registration Act, including the right to possession, quiet and peaceful occupation and right to use the property.

- c. The next issue for determination is whether the defendants trespassed onto the plaintiff’s suit property. The plaintiff in the plaint pleaded that on diverse dates the defendants invaded the suit property and occupied a portion of it. Her efforts to seek the intervention of the Likoni Deputy Commissioner on 5th February 2019 in evicting the defendants were unsuccessful. During the trial, the court examined the plaintiff and she confirmed that the suit land was vacant in January 2019, but sometime in February 2019 when she returned there, she found the defendants had invaded and erected Swahili houses thereon. The plaintiff’s evidence stands unchallenged, as neither was a defence to her claim filed nor was she cross examined by the defendants. That in the absence of contrary evidence from the defendants, the court finds that the defendants’ invasion of the plaintiff’s parcel of land amounted to trespass as defined in Section 3 (1) of the Trespass Act, Cap 294 which provides that:

“ 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.”

The plaintiff is therefore entitled to an order of eviction against the defendants as prayed.

- d. Having found that the defendants are trespassers on the plaintiff’s land, it follows that they have kept the plaintiff from using, occupying, possessing and enjoying it. In her plaint, the plaintiff has sought eviction of the defendants, a permanent injunction restraining the defendants from remaining on the land as well as general damages for trespass. It is trite law that trespass to land is actionable per se, the plaintiff need not prove that she suffered any specific loss or damage. The court is however obligated to assess the damages to award depending on the facts and circumstances of each case. In Duncan Nderitu Ndegwa v Kenya Pipeline Company Limited & another [2013] eKLR, it was held that:

“ On the issue and quantum of general damages, 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 Defendant’s trespass.”



The measure is usually the value of the suit land before the trespass and immediately after the acts of trespass. The plaintiff ought to present before the court a valuation report that would paint a picture to the court as to the situation on the suit property, and the costs of restoring the suit land to its former value and guide the court in settling on a certain amount of monetary value of the damage caused. However, the plaintiff herein has neither asked for a specific figure nor has she provided the court with a valuation report for guidance. The court is therefore of the view that the plaintiff is entitled to Kshs.100,000.00, [one hundred thousand], as general damages for trespass.

- e. The actions of the defendants of trespassing onto the suit property is a serious concern and they ought to be permanently restrained, ones they give vacant possession of the suit property or are evicted.
 - f. That under the provisions of section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, the costs follow the events in a suit, unless where for good cause the court directs otherwise. In this case, the plaintiff is awarded the costs of the suit.
7. The upshot of the foregoing is that the Plaintiff has proved her case on a balance of probabilities against the defendants and I enter judgment in her favour against the defendants in the following terms:
- a. The defendants be and are hereby ordered to vacate from, Land Parcel Mombasa/Block I/ M.S/1668, the suit property, within sixty (60) days from the date of this judgement and in default eviction order to issue and to be executed in strict adherence to the law.
 - b. Upon the defendants giving vacant possession of the suit property, or being evicted, a permanent injunction be and is hereby issued restraining the defendants either by themselves, agents, or otherwise howsoever from remaining on or continuing in occupation of the suit property.
 - c. The plaintiff be and is hereby awarded general damages in the sum of Kshs. 100,000 [one hundred thousand only] against the defendants.
 - d. The defendants will pay the plaintiff's costs in the suit.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 26TH DAY OF JUNE 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of;

Plaintiff : Absent

Defendants : Absent

Counsel : Absent

Wilson – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

