



**Ole Shapara Properties Ltd v Abdi (Environment & Land Case
E062 of 2021) [2023] KEELC 18232 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18232 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E062 OF 2021**

**AA OMOLLO, J
JUNE 22, 2023**

BETWEEN

OLE SHAPARA PROPERTIES LTD PLAINTIFF

AND

OSMAN KHALIF ABDI DEFENDANT

JUDGMENT

1. The Plaintiff filed a suit against the Defendant vide Plaint dated 16th February 2021 seeking for the following orders; -
 - i. A permanent injunction to restrain the defendant, his agents, servants, employees or by any other person whatsoever from trespassing, demolishing the perimeter mabati hoarding and fence, stopping or in any other way interfering with the construction of the perimeter wall and or interfering with the Plaintiff's quiet possession, ownership and or disruption of the Plaintiff's development and occupation of LR No.209/11394-Nairobi South C.
 - ii. General damages
 - iii. Special damages
 - iv. Costs of the suit
2. The Plaintiff stated that they are the registered proprietor of LR.No.209/11394(Grant No.52260/1) measuring 0.4732 Hectares or thereabouts situate along Ole Shapara Road, Nairobi South C hereinafter referred to as "the suit land" and has been in possession since 1991.The Plaintiff added that it had erected temporary structure housing the caretaker and security personnel and had been paying Land Rent and Rates to the relevant authorities over the years.
3. The Plaintiff averred that they had fenced the suit land using barbed wire until 2017 when they reinforced the fence by putting up a perimeter (mabati) hoarding at a cost of Kshs.359,100 in



preparation for the construction of a perimeter boundary wall to secure the premises in readiness for its development but on 24/12/2017, the Defendant in company of goons trespassed the suit land and brought down the mabati hoarding and the same was reported to Langata Police Station under OB No.23/25/12/2017.

4. The Plaintiff averred that in January 2018, they applied for approval permit to construct a perimeter wall around the suit land, paid the requisite fee of Kshs.62,800 and restored the mabati hoarding in February 2018 at a cost of Kshs.444,450 but on 22/10/2019, the Defendant in company of violent youths again trespassed on the suit land, destroyed a portion of the mabati hoarding and the incident was reported to Lang'ata Police Station under OB No.68/22/10/2019.
5. The Plaintiff stated that they caused a cease and desist letter dated 28/1/2020 to be written to the Defendant by its Advocates but the same is yet to be responded to and in May 2020 they applied for construction permit from Nairobi Metroplitan Services which was granted on 18/6/2020. Thereafter, they procured the services of M/s Sua Works Co. Ltd to construct the perimeter wall at a cost of Kshs.2,215,580/- which amount was paid and materials delivered to the site.
6. The Plaintiff added that on 9/1/2021, the contractor mobilized and moved onto the suit land with workers and a caterpillar tractor, started excavating round its perimeter in readiness for laying the foundation stone for the perimeter wall. However, at 1:30 pm the Defendant came to the premises with hired youths and demanded that the contractor stop the works or they would torch the tractor but the Plaintiff resisted the threats and reported the matter to the police Akila Police Post and later on Langata police station under OB No.14/08/01/2021. When the policemen arrived, the Defendant and his group fled from the site.
7. The Plaintiff averred that the Defendant's threats and actions are illegal and unlawful and constitute a violation of their right to ownership and possession, right to develop the suit land without hindrance and that they are apprehensive that the Defendant will continue to interfere with its right to the suit land unless restrained by this Court.
8. The Defendant filed a statement of defence dated 16th June 2021 denying the Plaintiff's averments and stated that the documents in possession of the Plaintiff indicate that the suit land was allocated on 1st February 1991 before the Plaintiff came into legal existence on 27th March 1991, hence the authenticity of the title was in doubt.
9. The Defendant denied the unlawful trespass alleged by the Plaintiff and put them to strict proof thereof and further stated that the Plaintiff's occupation of the suit land is challenged by the local community as an illegal allocation hence several protests have been held to any attempts by the Plaintiff to occupy the same and that he has only attended such protests as a leader of the community.
10. The Defendant added that his involvement in the protests is not an indication that he was involved in the organization of the same and that the cause of action levelled against him by the Plaintiff is based on speculation hence cannot find a cause of action against him, and urged that the suit should be dismissed with costs to him.
11. Further, the Defendant stated that any property obtained in an illegal manner does not enjoy constitutional protection and that a property cannot be allocated to an entity when it does not legally exist. He also denied that there was a demand or notice of intention to sue issued served on him.
12. The Plaintiff filed a reply to the defence dated 6th September 2021 stating that the suit land was allocated to Musamarine Enterprises Ltd by letter from the commissioner of lands dated 22nd January 1991 who



in turn transferred its right to title and interest in the land to the Plaintiff by a transfer dated 2nd April 1991.

13. The Plaintiff further pleaded that on 24/12/2017, the Defendant drove his vehicle next to the fence of the suit land, made calls on his phone following which he was joined by the goons who destroyed the fence and trespassed on the suit land and also denied that its occupation is challenged by the local community as alleged by the Defendant as there been no protests by its neighbors.

Evidence

14. The Plaintiff called three witnesses in support of their case. James Kimani Horeria who gave evidence as PW1 stated that he is one of the Plaintiff's director. PW1 adopted his written statement dated 11/2/2021 as evidence in chief and produced the documents in the list of documents dated 16/2/2021 at page 8 of the bundle running from page 10-57 as exhibits 1-12.
15. Mr Kimani testified that the Defendant has been interfering with their property since the year 2017 by threatening the security guards and destroying the fence in a bid to unlawfully dispossess them of their property. PW1 continued his evidence that on 22nd October 2019, the Defendant invaded the suit land without any cause having hired goons from Mukuru kwa Njenga who destroyed a portion of the fence. That they reported the matter to Langata Police Station, the Defendant was summoned by the police but he did not respond.
16. Pw1 averred that by a letter dated 28th January 2020, they demanded that the Defendant compensate them for the loss and cease further interference. Instead, on 9th January 2021, the Defendant came with hired goons to the property demanding that the excavation works that were on going be stopped or they would bring down the fence. The Plaintiff is therefore seeking for orders against the defendant of permanent injunction and compensation for the damages caused under his command. On cross examination, PW1 stated that he did not have a certificate accompanying the photographs produced in evidence.
17. PW2 adopted his written statement dated 25/2/2022 as evidence in chief reiterating that the Defendant who was the area MCA has interfered with any developments the Plaintiff undertakes on the suit land threatening to kill them. He stated that on 9th January 2021, works were going on the suit property when the Defendant came on site accompanied by Nairobi City Council askaris and whom he asked to stop the works. He added that the Defendant made call and was shortly joined by goons who he directed to storm the site in a bid to stop the works. That despite reporting the Defendant to the police, he was not arrested.
18. PW3, a security guard in the suit land also testified and adopted his written statement dated 25/2/2022 as evidence in chief and stated that when they were putting up the fence, the Defendant stopped them and carried away the poles. PW3 corroborated the evidence of interference as given by PW1 and 2.
19. The Defendant did not adduce any evidence.

Submissions

20. The Plaintiff and the Defendant filed submissions dated 17/2/2023 and 14/3/2023 respectively. The Plaintiff submitted that it has a cause of action against the Defendant founded on trespass and that the evidence tendered demonstrated that the Defendant violated the Plaintiff's right to exclusive possession on at least three occasions. Further, the Defendant on disputing that he trespassed on the suit land and that the Plaintiff's occupation is challenged by the local community, he did not only fail to attend court to back his claims but also did not present any member of the alleged local community to give evidence.



21. The Plaintiff submitted that having proved that indeed the Defendant trespassed on the suit land, it is entitled to the reliefs sought adding that an aggrieved party in Trespass is entitled to an award of general damages without proof citing Justice Nyamweya in *Duncan Nderitu Ndegwa v KPLC and ano.* [2013]eKLR and Court of Appeal decision in *Kenya Power & Lighting Company Ltd v Eunice Ringera.*
22. The Defendant submitted that the suit land was community land and that the Title presented by the Plaintiff was Grant from the President on 1st February 1991 while the Plaintiff was incorporated on 27th March 1991, therefore speaks to the irregular and illegal allocation of the said Suit property and that the Plaintiff cannot claim trespass over the same citing the case of Caliph Properties Limited v Barbel Sharma & Another [2015]Eklr on the common law that one who comes to equity must come with clean hands and that he who seeks equity must do equity.
23. The Defendant submitted that he has an obligation to attend to any issues such a protest by his voters and that the Plaintiff failed to show the nexus between the persons bringing down the fence and him.
24. The Defendant also submitted that the Plaintiff is not entitle to the cost o the suit as he was not served with the demand notice prior to filing of the suit as required under paragraph 53 of the *Advocates Act* as was held in *Kajuna Idd Noor v Rapid Kate Services Ltd & 4 Others* [2013]eKLR;

“If the plaintiff in any action has not given the defendant notice of his intention to sue, and the defendant pays the amount claimed or found due at or before the first hearing, no advocate’s costs shall be allowed except on a special order of the judge or magistrate.”

Analysis

25. I have read the pleadings filed, considered the evidence tendered and submissions in support filed thereof and below are the issues for this court to determine.
 - a. Whether the suit land is community land?
 - b. Whether the Defendant trespassed the suit land?
 - c. Whether the Plaintiff is entitled to the reliefs sought?
 - a. Whether the suit land is community land?
26. The Defendant stated that the suit land is community land and questioned the authenticity of the title held by the Plaintiff. He correctly enunciated what entails community land as per Article 63(2) of the *Constitution* which states that land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines, ancestral land and lands traditionally occupied by hunter-gatherer communities, lawfully held as trust land by the County Governments but not including any public land held in trust by the County Government under Article 62(2).
27. In this case, the suit land is occupied by the Plaintiff who holds a title registered in its name. Section 26 of the *Land Registration Act* directs courts to take title as *prima facie* evidence of ownership. It provides as follows:
 - (1) 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.”
28. It is clear from the above section which has provisions similar to Section 23 of the [Registration of Titles Act](#), that the title can only be impeached where it has been procured by fraud, misrepresentation, illegally, unprocedurally or through a corrupt scheme. However, until such vitiating factors are proved, the court is to assume that the title presented is a good title. In this case the Defendant pleaded that the Plaintiff’s title was acquired illegally because the title held by the Plaintiff indicate that the suit land was allocated on 1st February 1991 before the Plaintiff came into legal existence on 27th March 1991. It is noteworthy that the Defendant did not bring any evidence to support the said allegation.
29. However, the Plaintiff has explained the origin of its title by stating that suit land was first allocated to Musamarine Enterprises Ltd by letter from the commissioner of lands dated 22nd January 1991. The said Musamarine Ltd later transferred its right to title and interest to the Plaintiff by a transfer dated 2nd April 1991. Subsequent to the transfer, a grant was issued in favour of the Plaintiff. The Court of Appeal in [Kinyanjui Kamau v George Kamau](#) (2015) eKLR, held that any allegation of fraud must be pleaded and strictly proved in case where fraud is alleged. It is not enough to infer from the facts. It is my view that the Defendant merely made allegations that the title held by the Plaintiff was illegally obtained without proving the same.
 - b. Whether the Defendant trespassed the suit land?
30. The Plaintiff pleaded that the Defendant trespassed on their suit land on three occasions and caused damage. This was supported by the testimonies of PW1, PW2 and PW3. The Defendant acknowledged in his statement of defence that he entered the suit land but qualified the entry not to constitute trespass because according to him, the suit land is community. That he was joining the community members in protests against developments being carried out on the suit land by the Plaintiff.
31. Section 3 (1) of the [Trespass Act](#), Cap 294 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.”

Further trespass has been defined by [Clerk and Lindsel on Torts, 18th edition at paragraph 18-01](#) as;

“ any unjustifiable intrusion by one person upon the land in possession.”
32. Proof of ownership is prima facie proof of possession. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. The Plaintiff has provided this court with proof of ownership of the suit land and therefore that is prima facie proof of possession. From the Plaintiffs’ pleadings and the evidence provided, it is clear that the Defendant trespassed on the suit property and initiated the actions which resulted in the damages of the walls and stoppage of the works.
 - c. Whether the Plaintiff is entitled to the reliefs sought?



33. Plaintiff has sought for a permanent injunction to restrain the defendant, his agents, servants, employees or by any other person whatsoever from trespassing the suit land, special damages, general damages for the trespass and cost. For special damages, the Plaintiff has claimed Ksh. 803,550 /- which include Kshs.359,100 being the loss incurred in reinforcing the barbed wire fence in 2017 and Kshs.444,450 being the cost incurred to restore the fence in 2018.
34. It is trite law that special damages require to be specifically pleaded and proved. In this case, the plaintiff has pleaded and proved this claim through production of the quotations for the works, invoices and receipts. Thus, I find the claim of special damages as proved and is allowed.
35. On the issue of general damages for trespass, the issue that arises is; what is the measure of it? In the case of *Philip Ayaya Aluchio v Crispinus Ngayo* [2014]eKLR the court held as follows:
- “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 the plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less. See *Hostler v Green Park Development Co.* 986 S. W 2d 500 (No. App. 1999).
36. In this case the Plaintiff has not adduced any evidence as to the state or the value of her property before and after the trespass. This makes it difficult to assess the general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of the case. In this case, the Plaintiff has stated that they have been unable to develop the suit land owing to the actions of the defendant which allegation has not been denied. In the circumstances, I award the Plaintiff the sum of Kenya shillings Five Hundred Thousand (Kshs 500000/=) only.
37. On the claim for cost, I find useful guidance in the following passage from the *Halsbury’s Laws of England 4th Edition (Re-issue), {2010}, Vol.10. para 16;*
- “The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice” (Emphasis added).
38. Writing on the same subject Mr. Justice (Retired) Kuloba in *Judicial Hints on Civil Procedure, 2nd Edition, (Nairobi) Law Africa) 2011*, page 94 stated: -
- “Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise...”
39. The Plaintiff is be awarded cost for having successfully prosecuted the claim against the Defendant.
40. Consequently, I enter judgement for the Plaintiff as follows;
- i. An order of permanent injunction be and is hereby issued restraining the defendant, his agents, servants, employees or by any other person whatsoever from trespassing, demolishing the perimeter mabati hoarding and fence, stopping or in any other way interfering



with the construction of the perimeter wall and or interfering with the Plaintiff's quiet possession, ownership and or disruption of the Plaintiff's development and occupation of LR No.209/11394-Nairobi South C.

- ii. General damages awarded in the sum of Kshs 500000
- iii. Special damages awarded in the sum of Kshs 803550
- iv. Costs of the suit
- v. Interest on (ii) and (iii) at Court rates from the date of this judgement until the payment is made in full

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE 2023

A. OMOLLO

JUDGE

