



**Catholic Diocese of Malindi Registered Trustees v Katana & 2 others (Environment & Land Case 348 of 2016) [2023] KEELC 18335 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18335 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 348 OF 2016  
EK MAKORI, J  
JUNE 21, 2023**

**BETWEEN**

**CATHOLIC DIOCESE OF MALINDI REGISTERED TRUSTEES ..... PLAINTIFF**

**AND**

**FRANKLIN NGUMBAO ..... 1<sup>ST</sup> DEFENDANT**

**PETER KATANA ..... 2<sup>ND</sup> DEFENDANT**

**MASHA KARISA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff in this suit sought the following reliefs:
  - a. A declaration that the defendants are trespassers on the plaintiff's land known as plot No Gede/Mida/Majaoni/418 measuring approximately 1.52Ha situated in Mija/Majaoni within Kilifi county.
  - b. Damages for trespass.
  - c. A permanent injunction restraining the defendants either by themselves or by their employees, heirs, assigns, relatives, and agents from interfering in any manner whatsoever with the plaintiff's quiet and peaceful occupation, enjoyment, and possession of the parcel of land known as plot No Gede/Mida/Majaoni/418 measuring approximately 1.52Ha situated in Mija/Majaoni within Kilifi county.
  - d. Costs of the suit and interest thereon.



2. The defendants were served with the summons to enter appearance and place defence. The defendants only managed to appear through the firm of Omagwa Angima & Co Advocates, however, no defence was filed. The matter proceeded by way of formal proof.
3. Plaintiff testified via one Father Albert Buijs (PW1) representing the Board of Trustees, a sole body mandated to run and operate all the catholic churches, projects, and institutions within the Catholic Diocese of Malindi which is the registered owner of all that parcel of land known as plot No Gede/Mida/Majaoni/418 measuring approximately 1.52Ha. situated in Mija/Majaoni within Kilifi County. According to the plaintiff, the defendants without any colour of right or legal justification trespassed into the plaintiff's parcel of land and embarked on cutting down trees on the said property to waste and dispossess the Catholic Diocese of Malindi of its property.
4. On several occasions, the plaintiff through its registered trustees, servants, and or employees confronted the defendants and warned them against trespassing and or encroaching on the suit property but their warning proved futile thus necessitating the plaintiff to report the matter to the area chief. Despite the meeting and a warning by the assistant chief, the defendants failed and neglected to heed the said warning. The plaintiff issued a demand notice to the defendants which the defendants failed to make good thus necessitating the institution of this suit.
5. At the close of the plaintiff's case, and there being no defence filed, the court directed written submissions based on the testimonies and evidence on record.
6. Several authorities were quoted about the proof of the prayers sought. Noteworthy that the plaintiff has established that the land in question belongs to it. There was a trespass on the land without color of right, and the court should award general damages for trespass.
7. The following issues fall for the determination of this court:
  - i. Whether the plaintiff is the registered proprietor of parcel No Gede/Mida/Majaoni/418.
  - ii. Whether the actions of the defendants on the suit property amount to trespass.
  - iii. Whether the plaintiff is entitled to the reliefs sought herein.
  - iv. Who should bear the costs of the suit?
8. On whether the plaintiff is the registered owner of the suit property, the plaintiff submits that it is - this is evidenced by the copy of the title deed produced in court as PExh – 3 and a copy of the official search dated June 8, 2016 which was produced in court as PExh – 4. That it is the general law that a title deed is conclusive proof of ownership of land. The court should be guided by the provisions of sections 24 (a) and 26 of the *Land Registration Act* which provide as follows:
  - 24 – Interest conferred by registration
 

Subject to this Act-

    - a. The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
    - b. The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant



thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

26 - Certificate of title to be held as conclusive evidence of proprietorship

1. The certificate of title issued by the registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner, subject to 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 grounds 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.
- (2) A certified copy of any registered instrument, signed by the registrar and sealed with the seal of the registrar, shall be received in evidence in the same manner as the original.

9. The defendants did not file any defence or tender evidence to controvert the confirmation, averment and the title deed produced as PExh -3 which show that the plaintiff is the registered proprietor of the suit property plot No Gede/Mida/Majaoni/418. I make a finding that the plaintiff is the proprietor of the suit property.

10. On the issue as to whether the defendants have trespassed on the suit property the plaintiff submitted that there is no evidence on record to suggest the defendants have not trespassed on the plaintiff's property. The evidence of Father Albert Buijs (PW1) went unchallenged. Given the foregoing, I will make a finding that the defendants are trespassers on the plaintiff's property. The decision cited by counsel for the plaintiff *Hexmead Investments Ltd v McDonald Mariga & 2 others* [2016] eKLR is relevant where the court held as follows:

“In the absence of any evidence from the defendants, the only conclusion this court can make is that the defendants have no justifiable cause for entering and putting up a structure on the suit property and as such they are trespassers thereon.”

11. Whether the plaintiff is entitled to the reliefs sought. The plaintiff submitted that on general damages for trespass, in *Nakuru Industries Limited v S S Mehta & Sons* [2016] eKLR the court observed that:

“In tort, damages are awarded as a way to compensate a plaintiff for the loss he had incurred due to a wrongful action on the part of the defendant. The damages so awarded are intended to return the plaintiff back to the position he was before the wrongful act was committed. In cases where trespass to land results in damage then the computation of damages is on the basis of restitution of land. The value of the soil (or trees or fruits) which have been removed from that land are all factored as well as the cost of restoration of the land to the position it was in before the wrongful act was committed.”



12. Further that *Halsbury* 4<sup>th</sup> Edition, Vol 45 at para 26, 1503 provides as follows on the computation of damages in an action of trespass: -
- a. If the plaintiff proves the trespass, he is entitled to recover nominal damages, even if he has not suffered any actual loss.
  - b. If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
  - c. Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.
  - d. Where there is an oppressive, arbitrary, or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
  - e. If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.
13. The plaintiff submitted further that In the *Nakuru Industries Limited Case* (supra) the court cited the case of *Duncan Ndegwa v Kenya Pipeline* HCC No 2577 of 1990 (Nairobi) where the court held:-
- “The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land. The overriding principle is to put the claimant in the position he was prior to the infliction of the harm.”
14. In the instant case, the plaintiff submitted that the defendants encroached into the plaintiff's parcel of land and cut down casuarina trees growing thereon to occupy the same thereby depriving the plaintiff of the use and quiet enjoyment of the suit property. The defendants' entry into the suit property without the authority, consent, or permission by the plaintiff who is the lawful owner of the property constituted trespass. The defendants thus deprived and denied the plaintiff of the use of its property and in those circumstances; the plaintiff is entitled to damages. The measure of damages according to the plaintiff is as held In *Phillip Aluchio v Crispinus Ngayo* [2014] eKLR where Obaga J. awarded a nominal figure of Kshs 100,000/= as damages for trespass. Taking into consideration that the above-stated suit was decided in 2014, that is 9 years ago, and the changes in the economic times we submit that an award of Kshs 1,000,000/= would be reasonable and sufficient to compensate the plaintiff for the damage caused on its land by the defendants.
15. I agree with the submission by counsel for the plaintiff that the plaintiff is entitled to an award of damages for trespass. Under this head, as correctly submitted, it is an award that will tend to restore the land to its original form before the trespass was complained of. The plaintiff admits that no evidence was led to show the damages as occasioned by the defendants in cutting down casuarina trees and occupying the same. The plaintiff should have called for a valuation report from an expert in this area. I will go the Obaga J. way and award Kshs 300,000/- as nominal damages for trespass.
16. The plaintiff will be entitled to the costs of the suit and interest at court rates.
17. The final orders of this court are as follows:



- a. A declaration be and is hereby issued that the defendants are trespassers on the plaintiff's land known as plot No Gede/Mida/Majaoni/418 measuring approximately 1.52Ha. situated in Mija/Majaoni within Kilifi county.
- b. An award in general damages of Kshs 300,000/- is hereby made for the plaintiff against the defendants for trespass.
- c. A permanent injunction does and is hereby issued restraining the defendants either by themselves or by their employees, heirs, assigns, relatives, and agents from interfering in any manner whatsoever with the plaintiff's quiet and peaceful occupation, enjoyment, and possession of the parcel of land known as plot No Gede/Mida/Majaoni/418 measuring approximately 1.52Ha situated in Mija/Majaoni within Kilifi county.
- d. Costs of the suit and interest thereon awarded to the plaintiff at court rates.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 21<sup>ST</sup> DAY OF JUNE 2023**

**E.K. MAKORI**

**JUDGE**

In the presence of :

M/s Mulwa for the Plaintiffs

Court Clerk; Happy

In the Absence of:

Mr. Omagwa Angima for the Defendants

