



Amani Trustees Limited v Gakuya & 2 others (Environment & Land Case E211 of 2022) [2023] KEELC 17953 (KLR) (8 June 2023) (Judgment)

Neutral citation: [2023] KEELC 17953 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E211 OF 2022**

LN MBUGUA, J

JUNE 8, 2023

BETWEEN

AMANI TRUSTEES LIMITED PLAINTIFF

AND

JAMES MWANGI GAKUYA 1ST DEFENDANT

MARVIE SAFARIS LIMITED 2ND DEFENDANT

RIKANA SUPERMARKETS LIMITED 3RD DEFENDANT

JUDGMENT

1. The plaintiffs claim to be the registered owner of the land parcel L.R.209/12002 (I.R.60669) situated along Jogoo road in Nairobi county measuring 0.150 hectares of which they have had possession of the said land from 31.12.2008 to date. The defendants however encroached upon the suit property triggering the filing of this suit vide a plaint dated 21.6.2022 where the following orders have been sought;
 - i. An order or permanent injunction restraining the 1st, 2nd and 3rd Defendants whether by themselves, their employees, proxies, servants, agents or any other persons acting under their authority / direction from disposing, selling, advertising for sale, auctioning, trespassing, entering upon, remaining thereon, constructing, erecting or carrying on with construction/ erection of any structure(s), building(s), fence, perimeter wall, or from howsoever dealing with and/or interfering with the Plaintiff's possession, occupation and/or proprietorship of all that parcel of land known as L.R. No. 209/12002, along Jogoo Road, in Nairobi County registered in the name of Amani Trustees Limited.
 - ii. An order directing the 1st 2nd and 3rd Defendants to remove any and/or all structures illegally and unlawfully constructed/erected on all that parcel of land known as L.R. No. 209/12002, along Jogoo Road, in Nairobi County registered in the name of Amani Trusteed Limited,



together with any materials and/or equipment placed thereon, within seven (7) days from the date of the judgment, failure to which the Plaintiff be at liberty to forthwith and unconditionally evict the 1st, 2nd and 3rd Defendants from all that parcel of land known as L.R. No. 209/12002, along Jogoo Road, in Nairobi County registered in the name of Amani Trustees Limited

- iii. Kshs. 24 million being mesne profits for the trespass by the Defendants
 - iv. General damages and/or exemplary damages for trespass.
 - v. Costs of the suit and interest thereof from the date of filing suit till payment in full.
2. On 16.2.2023, counsel for the plaintiffs informed the court that they had effected service of Summons to Enter Appearance upon the defendants vide an affidavit of service dated 13.7.2022. However, the defendants did not enter appearance or file a defence. This suit has therefore proceeded as a formal proof.
 3. During the trial, one Ahmed Rashid Jibril testified as PW1. He adopted his witness statement dated 21.6.2022 as his evidence. He produced the 11 documents in his bundle running from page 21-115, as P-EX 1-11. He also produced the 2 documents in his supplementary list as P-EX 12 and 13 respectively.
 4. In his recorded statement, PW1 introduced himself as the director of the plaintiffs' company. He contends that the plaintiffs bought the suit property from one Elijah Kipkemoi Langat on 31.12.2008 and was duly issued with a certificate of title to be found at page 23-25 of their bundle of documents.
 5. That on 4.9.2014, the plaintiffs found that there were trespassers/ land grabbers on their land, but they however managed to evict them. During the process of eviction, the 1st defendant turned up claiming to be the owner of the suit property of which a confrontation ensued which attracted the OCS Shauri Moyo police station. The warring parties were told to produce documents of ownership of which the plaintiffs availed their title to the suit property. The 1st defendant had no documents and he disappeared never to be heard until 29.1.2021.
 6. Pw1 further stated that on 17.9.2014 their agents were on the suit property when they found an order dated 15.9.2014 issued in MCMCC No. 5453/20014 and they thereafter started receiving threats from various quarters who were making reference to the said order. Nevertheless the said order was discharged on 26/9/2014 following an application made by the plaintiffs herein and the aforementioned suit was eventually dismissed on 13.2.2020 for want of prosecution.
 7. Pw1 also states that they had issued a 3 months eviction notice in line with the provisions of section 152E of the Land Act. Upon the lapse of the 3 months notice, the plaintiffs proceeded to take over possession of the suit property on 29.1.2021.
 8. Pw1 contends that due to the continuous acts of trespass by the defendants since year 2014, they have been unable to develop, lease out lend or sell the suit property. He added that the 3rd defendant has illegally, unlawfully and without any justification constructed a wall structure on the suit property which amounts to encroachment on the said land.
 9. The plaintiff is claiming ksh 24 million as mesne profits from year 2014 when the acts of trespass commenced.
 10. PW2 is one Felix Otieno Onyango who introduced himself as a property manager. He contends that he carried out a rental assessment of the subject property culminating in a report dated 28.2.2023 which he produced as P-EX 12.



11. The submissions of the plaintiffs are dated 24.4.2023 where they frame the issues for determination as follows:
 - i. Whether the plaintiffs have proved their case on a balance of probabilities
 - ii. Whether the plaintiffs are entitled to the reliefs sought in the plaint.
 - iii. Who bears the costs of these proceedings.
12. On the first issue it was submitted that the plaintiffs are the lawfully registered proprietors of all that parcel of land known as LR. 209/12002 of which the plaintiffs have availed a certificate of title. It was submitted that the 3rd defendant's director, one Mr. Daniel Gichanga Kariuki has acknowledged the plaintiffs as the registered owners of the suit property and he was even offering to purchase the said property from the plaintiffs (See P-EX 11). The plaintiffs contend that the defendant did not rebutte this evidence of ownership. On this point reference was made to the case of *Samwel Ambasa and 3 others vs Stella Ingasia* [2020] eKLR.
13. On the 2nd issue, the plaintiffs rehearsed the contents of the statement of PW1; adding that the encroachment of the property by the 3rd defendant was captured in the valuation report.
14. On the claim of mesne profits, it was submitted that the plaintiffs had pleaded these damages of which they had demonstrated that there was trespass on the suit property from year 2014 to date. Further the 2nd defendant has constructed a garage and derived profits therefrom while the 3rd defendant had constructed a supermarket and also gains profits therefrom.
15. To this end reference has been made to the cases of *Jacob Ernest Abara Odondi vs Violet Shikuku* [2021] eKLR, *Attorney General vs Halal Meat Products Limited* [2016] eKLR, and *Rhoda S. Kiilu vs Jiangxi Water and Hydropower Construction Kenya Limited* [2019] eKLR.

Determination

16. This suit was not defended, nevertheless, the plaintiffs are by law required to prove their case. In the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, the Court held that;

“It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”
17. Further, the provisions of Section 107 of the *Evidence Act* stipulate that;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

See - *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013] eKLR.
18. The case of the plaintiffs as particularized in paragraph 7 and 8 of the plaint is anchored on trespass. In paragraph 7 of the plaint, it is pleaded that the 1st and 2nd defendants unlawfully and illegally entered the suit land and commenced erection of a makeshift fence on the suit property. In paragraph 8 thereof, it is pleaded that the 3rd defendant entered the suit property and constructed a wall structure on a portion of the suit land.



19. The issues therefore falling for determination are whether there was trespass upon the parcel of land owned by the plaintiff, the nature and extent of such trespass, and the reliefs available thereof.
20. It was therefore incumbent upon the plaintiff to adduce evidence to support the claim of trespass as pleaded. See *Galaxy Paints Co Ltd vs. Falcon Guards Ltd* [2002] EA 385.
21. Pw1 has given an account of how their land was invaded upon on 4.9.2024, but they managed to evict the trespassers on 6.9.2014. In paragraph 10 of his recorded statement, Pw1 states that during the face off with the 1st defendant in year 2014, the 1st defendant was claiming the suit land, but he disappeared “ never to be heard thereafter, until 29.1.2021”. These averments are repeated at paragraph 18 of the aforementioned statement.
22. At paragraph 4 of the said statement, pw1 avers that it was in the month of November 2021 and January-June 2022 when the 1st and 2nd defendants invaded his land and began erection of a makeshift fence.
23. At paragraph 14-17, Pw1 gives an account of how he issued a notice of eviction in accordance with the provisions of Section 152E of the [Land Act](#), and the plaintiffs managed to get the possession of the suit land on 29.1.2021.
24. The question is, if the plaintiffs had managed to evict the trespassers on 6.9.2014, at what point was the suit land invaded all over again so as to trigger the issuance of the eviction notice dated 16.10.2020. I find that the nature and extent of the alleged trespass before year 2021 is unclear.
25. Further, the averments set out in the submissions of the plaintiffs that the 2nd defendant had constructed garages on the suit property amounts to adducing evidence on the platform of submissions which is not acceptable or tenable.
26. Nevertheless, the photographs on pages 88 and 89 of plaintiffs’ bundle do indicate that there is some kind of recent building activities going on. The same are at the infancy stage. I believe these are the invasions referred to by Pw1 at paragraph 4 of his statement. Considering that Plaintiffs have a title to the suit property, then the invasion of his land by the 1st and 2nd defendants is not justified. Nevertheless the claim of damages and or mesne profits is unwarranted.
27. As regards the claim against the 3rd defendant, I find that the nature and extent of such invasion has not been established. The 3rd defendant is not mentioned as part of the persons who invaded the land in year 2021. Further, the evidence of Pw1 is not in tandem with that of pw2 in that pw1 states in paragraph 3 of his statement that the 3rd defendant had constructed a wall on the suit property. He doesn’t indicate when this activity was undertaken.
28. On the other hand, pw2 has stated that part of the building of the 3rd defendant is on the suit land (see page 7 of pw2’s report).
29. Further, the said report still at page7 reads as follows;

“ We noted that a building constructed on the neighbouring plot (Rikana Supermarket) had encroached on part of the plot. In addition, a section of the road reserve (Jogoo Road), appears to be within the plot as per the survey maps.”



30. At page 9, the report indicates that:

“To the best of our knowledge, the subject property is not government land and had not been reserved for public utility user, neither does it lie on a road reserve. However, as per the survey plan, a section of the road reserve (Jogoo Road), appears to be within the plot.”

31. While at page 8, it is stated that:

“We recommend boundary survey and beacon re-establishment of the plot by a licensed surveyor to determine the extent of the encroachments.”

32. What emerges from the evidence of pw2 is that a portion of the road may be within the suit property, while part of Rikana Supermarket is also within plaintiff's land. Pw2 has recommended a boundary survey beacon re-establishment. In the case of *Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 others* [2020] eKLR, it was stated that, it is the *Land Registration Act* that makes provisions relating to the determination of boundaries. Similarly, the plaintiffs ought to ascertain the extent of their boundaries to their land parcel through the applicable law in so far as the purported encroachment by 3rd defendant is concerned.

33. In the final analysis, I find that plaintiffs have proved their case of trespass as against the 1st and 2nd defendants as from year 2021-2022 only. Thus an order of permanent injunction is hereby issued against the 1st and 2nd defendants and their agents restraining them from trespassing upon plaintiffs' land parcel 209/12002. The 1st and 2nd defendants are directed to remove any structures/materials which they have put on the suit property within 30 days failure to which, the plaintiff is at liberty to evict them or remove the said structures/materials. The claim against the 3rd defendant is hereby dismissed. The 1st and 2nd defendants are condemned to pay costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JUNE, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Bob Otieno for the plaintiff

