



**Hamisi v Mwambire & 3 others (Environment & Land Case
70 of 2015) [2023] KEELC 17841 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17841 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 70 OF 2015**

EK MAKORI, J

JUNE 8, 2023

BETWEEN

ASHA HAMISI PLAINTIFF

AND

KALUME MBITA MWAMBIRE 1ST DEFENDANT

JUMA KOMBE YERI 2ND DEFENDANT

KACHE CHARO YAA 3RD DEFENDANT

KITSAO KAZUNGU MAVUO 4TH DEFENDANT

JUDGMENT

1. In this suit, the Plaintiff seeks the following reliefs:
 - i. Declaration that the Plaintiff is the owner of all that piece of land known as Chembe/Kibabamshe/262.
 - ii. Vacant possession of the suit premises.
 - iii. Permanent Injunction restraining the Defendants, their servants or agents from further trespassing upon, utilizing, developing, disposing of or otherwise dealing with the suit premises howsoever.
 - iv. Loss of user of the suit premises.
 - v. Account of the sale of the Coral Stones harvested from the suit premises.
 - vi. Cost of this suit.
 - vii. Interest thereon at Court rates.



viii. Any other relief that this Honourable Court deems just to grant.

2. The Plaintiff testified and called two witnesses to firm her case. Her evidence was that sometime in the month of January 2014, the Defendants - Kalume Mbita Mwambire, Juma Kombe Yeri, Kache Charo Yaa and Kitsao Kazungu Mavuo, and other third parties trespassed onto the suit property without any colour of right and started constructing mud and wattle houses and utilizing her land without her consent.
3. She testified that at all material times, she was the owner entitled to possession of the suit property - measurement 6.6 hectares (16.3 acres) or thereabouts.
4. She averred that she had not sold, leased or disposed of her proprietary interest in the suit property to the Defendants or any other third party whatsoever.
5. The Plaintiff gave evidence that because of the Defendants' intrusion; the Plaintiff and her family have been unlawfully deprived of their right to use the suit premises to date.
6. The Plaintiff further stated that the Defendants have blatantly refused to vacate the suit premises despite severally being requested to do so.
7. The Plaintiff also called two witnesses to who testified on her behalf and corroborated her testimony. The first witness was her son Ali Hare Ruwa (Pw2), who filed a Witness Statement dated 18th February 2015. He stated that since their intrusion onto the suit premises in January 2014, the Defendants have been harvesting coral stones for sale from the suit premises and have failed to give any account to her about the said harvesting. He further said that the Defendants have shown no intention of vacating the suit premises and are unrelenting upon their encroaching, despite being served with a demand letter and a notice of intention to sue by the Plaintiff's advocates.
8. A valuer by the name of Samuel N. Musyoki of M/s Musyoki & Associates Valuers, who was appointed by the Plaintiff to undertake a valuation and prepare a report, produced the same as an exhibit dated 15th November 2022. The assessment report contained pictures, which showed the extent of the damage caused by the Defendants' actions on the suit property through their harvesting of coral stones and ascertained the economic loss incurred to the detriment of the Plaintiff, which amounted to an aggregate of Kshs. 24,480,000/=.
9. In a Notice of Motion dated 20th March 2019, the Plaintiff moved the Court and complained that the Defendants had also threatened to use violence against her in the event she resists the Defendants' activities on the suit property.
10. On 12th May 2022, Olola J. issued a temporary injunction against the Defendants, restraining them from trespassing onto the suit premises and from carrying out any further activity or dealing with the said land, including harvesting coral stones.
11. Despite the Court Order issued against them, the Defendants have persisted in their trespassing onto the suit premises and continue harvesting coral stones from the land and thus aggravating the trespass and as such inviting an award of exemplary damages for flagrant abuse of the Court Order.
12. The Defendants admitted, in their Defence dated 30th May 2018, that they indeed entered the suit premises but they contended that they were approached by the Plaintiff to offer her cleaning services, planting palm trees or in general caretaker services at a fee which was to be negotiated later. The Defendants averred that it was a term of the agreement that they were to construct temporary structures on the suit land to enable them to offer the requisite caretaker services uninterruptedly. The Defendants deny that the Plaintiff suffered or continues to suffer economically or that the Plaintiff is entitled to



- any damages either as sought or at all. Furthermore, the Defendants denied having been served with a demand letter or notice of intention to sue. Moreover, they argued that the Plaintiff instituted this suit in bad faith, as the Defendants are willing to vacate the suit property the moment they are paid monies owed to them by the Plaintiff.
13. Defendants nonetheless did not present evidence in support of their case, cross-examine the Plaintiff and her witnesses or mount a Defence, instead, the matter proceeded in the presence of their counsel, who as the record can show never cross-examined the plaintiff nor her witnesses or at all.
 14. At the close of the Plaintiff's case and since The Defendants offered no evidence, their advocate, Mr Mogaka closed the defence too.
 15. Parties were directed by the court to file written submissions. The Plaintiffs did, but the Defendants nor their counsel Mr Mogaka did not.
 16. The issues for the determination of this court that spring from the orders sought and the proceedings herein are:
 - a. Whether the Defendants are liable for trespassing onto the suit property.
 - b. Whether the Court should grant a Permanent Injunction against the Defendants.
 - c. Whether the Plaintiff is entitled to compensation from the Defendants' actions.
 17. As stated much of the evidence, averments and allegations levelled against the Defendants went unanswered and unchallenged. The suit property herein is private land owned by the Plaintiff; no evidence was led to show otherwise. The history given by the Plaintiff is that the Defendants were invited as caretakers but have pitched tent and refused to move out of the Plaintiff's land, even after demands being served on them by the Plaintiff and injunctive orders issued against them from this court. They qualify to be called trespassers on private land within the meaning as assigned by Section 3 of the Trespass Act which provides that:
 - “(1) 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.
 - (2) where any person is charged with an offence under subsection (1) of this section the burden of proving that he had a reasonable excuse or the consent of the occupier shall lie upon him.”
 18. In Nakuru Industries Limited v S S Mehta & Sons [2016] eKLR, in its definition of the offence of ‘Trespass’ the Court relied on Clerk & Lindell on Torts (17th Edition) para 17-01 which defined it thus;

“An unjustifiable entry by one person upon the land in possession of another. Removing any part of the soil of land also constitutes trespass”



19. Olola J. in a ruling dated 12th May 2022, which addressed the issuance of injunctive orders observed that:

“...the Defendants have no proprietary interest in or rights over the suit property. Their continued use of the land is without the authority and concurrence of the registered proprietor and their contention that the Plaintiff owes them an unspecified amount of fees for the work they have done for her on the land is no basis for their stay thereon without the Plaintiff’s approval”.

20. The evidence persuades me and material tendered in support of the Plaintiff’s case that the Defendants, without any refutation from their end, are trespassers on the Plaintiff’s land. It follows then that the Defendants entered the suit property without the consent of the Plaintiff and proceeded to erect temporary structures, utilising the suit property without the consent of the Plaintiff in the form of harvesting coral stones, which has caused severe pecuniary losses for the Plaintiff. A perpetual injunction has to issue against them to restrain them, their agents, servants and /or anyone claiming under them permanently from entering, trespassing onto, cultivating, building structures thereon, interfering with and/or in any other manner dealing with the suit land and eviction too to issue as per Section 152G of The [Land Laws Amendment Act](#), 2016.

21. On compensation from the Defendants’ actions. The defendants have been in the past communicated to vacate voluntarily but have refused even after being restrained from further use of the suit property by this court. The evidence on record shows they have in the past, and still in the present, continue with the massive excavation of coral and stones on the suit land. I am satisfied with the evidence adduced by the Plaintiff that they have to be ordered to compensate the Plaintiff for illegal excavation and use of the suit property. On the aspect of damages to be awarded as a result of the use of the suit land without consent, the Plaintiff relied on the observation made by this court in the [Nakuru Industries Limited case \(supra\)](#) where the court observed:

“...damages are awarded as a way to compensate a plaintiff for the loss he had incurred due to a wrongful act on the part of the defendant. The damages so awarded are intended to return the plaintiff to the position he was in 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”.

22. Further the Plaintiff relies on [Halsbury](#) 4th ed, Vol 45 at para 26, 1503 which 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 to 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.”

23. The Plaintiff submitted that the extent of the damage caused by the Defendants’ actions was highlighted in a valuation Report prepared by M/s Musyoki & Associates Valuers at the call of the Plaintiff which was prepared on 15th November 2022. The report established that the financial loss suffered by the Plaintiff due to the harvesting of coral stones by the Defendants from the suit property amounted to Kshs. 24,480,000/=.
24. The Plaintiff contended that in the case of *Phillip Aluchio v Crispinus Ngayo* [2014] eKLR Obaga J. held:
- “...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 Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less.....”
- The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It, therefore, becomes difficult to assess general damages for trespass...”
25. The Plaintiff ruminated that since a valuer has testified and offered a professional opinion on the matter touching on the monetary loss suffered by the Plaintiff, a sum of Kshs. 24,480,000/= should be awarded as compensation for unlawful trespass and illegal use of the suit property.
26. The decision in *Phillip Aluchio v Crispinus Ngayo* [2014] eKLR Obaga, J. (supra) discussed the factors that a party must cogitate to be awarded General Damages for loss of use. Onyango J. quoted the case with approval in *Johnson Mainga Mogaka v Kenya Power and Lighting Company* [2021] eKLR. To succeed in an award of General Damages for Trespass, one must present evidence demonstrating the state of the property before the trespass and the amount of money that can reasonably compensate a Plaintiff to restore the land to its former state. If one fails to do so, one is entitled to nominal damages.
27. The plaintiff has presented substantial evidence in this case, including the Valuation Report by M/s Musyoki and Associates Valuers, which provides an empirical measure of the market value of the property in question, the excavation and sale of coral and other material from the suit property since 2014, and the potential sale of the same over time. The plaintiff concluded that the material sold adds up to Kshs. 24,480,000/= from January 2014, when the defendants forcibly entered the land, to November 15, 2022, when the report was prepared, and the Defendants continue to excavate and sell the material without the Plaintiff’s consent to this day.
28. In this case, I find that the valuation report by M/s Musyoki and Associates Valuers went unanswered. The report captures the loss of user up to 15th November 2022. It has not captured the period after 15th November 2022 to date The report as I have stated went unrequited. I am satisfied that an award of Kshs. 24,480,000/= being damages for the loss of user of the land by the Plaintiff is germane to award.
29. In the end the Plaintiff’s suit succeeds as follows:
- a. Declaration be and is hereby issued that the Plaintiff is the owner of all that piece or parcel of land known as Chembe/Kibabamshe/262.



- b. Vacant possession of the suit premises in accordance with Section 152G of the Land Laws Amendment Act, 2016.
- c. Permanent Injunction restraining the Defendants, their servants or agents from further trespassing upon, utilizing, developing, disposing of or otherwise dealing with the suit premises.
- d. An order directing the Defendants to demolish all structures erected on the suit premises without the consent of the Plaintiff.
- e. Damages to the tune Kshs. 24,480,000/= being the loss of user.
- f. Cost of this suit and interest thereon at court rates.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS
8TH DAY OF JUNE 2023**

EK. MAKORI

JUDGE

In the Presence of:

Mr Kibunja for Plaintiffs

Court Clerk: Happy

In the Absence of:

Mr Mogaka for the Defendants

