



**Mahmoud & another v China City Construction Company Limited
& another; Suleiman (Interested Party) (Environment & Land Case
50 of 2019) [2023] KEELC 18895 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18895 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 50 OF 2019**

SM KIBUNJA, J

JULY 25, 2023

BETWEEN

MAHMOUD ABDALLA MAHMOUD 1ST PLAINTIFF

MOHAMMED SALEH HASSAN 2ND PLAINTIFF

AND

CHINA CITY CONSTRUCTION COMPANY LIMITED 1ST DEFENDANT

CHINA ROAD & BRIDGE CORPORATION (K) LIMITED 2ND DEFENDANT

AND

NASIR AHMED KASSAM SULEIMAN INTERESTED PARTY

JUDGMENT

1. This suit was instituted *vide* a plaint dated March 18, 2019. It is the plaintiffs' case that they are the registered proprietors of Land Parcel No 2799/V/MN and have beneficial interest in Land Parcel No 2798/V/MN. The plaintiff averred that the defendants have wrongfully entered into the said suit properties and constructed structures. The plaintiffs maintained that they have been deprived of the use and enjoyment of the suit properties and have suffered loss and damage. The plaintiffs sought judgement against the defendants jointly and severally for:
 - a. A declaration that the plaintiffs are entitled and are the legal owners of the suit properties that Subdivision Number 2799/V/MN (CR. 72903) as delineated on Land Survey Plan Number 428756 and have beneficial interest in Subdivision Number 2798/V/MN as delineated on Land Survey Plan Number 428755.
 - b. An eviction order by way of a mandatory injunction that the defendant and or their agents, servants or other persons do demolish and/or pull down to ground level the illegal structures



standing on the suit properties known as Subdivision Number 2799/V/MN (CR. 72903) as delineated on Land Survey Plan Number 428756 and Subdivision Number 2798/V/MN as delineated on Land Survey Plan Number 428755 and thereafter vacate with immediate effect from the said suit properties under the supervision of an authorized police officer from Changamwe Police Station.

- c. A permanent injunction restraining the defendants whether by themselves, their servants, agents or otherwise howsoever from encroaching and/or trespassing and/or taking possession moving into, occupy, developing and constructing any structures whatsoever on the suit properties known as Subdivision Number 2799/V/MN (CR 72903) as delineated on Land Survey Plan Number 428756 and Subdivision Number 2798/V/MN as delineated on Land Survey Plan Number 428755.
 - d. Costs of the suit and interest thereon at costs rate.
 - e. Further and/or other relief that this honorable court shall deem fit and appropriate.
2. The plaintiffs filed an affidavit of service dated September 26, 2019 on October 4, 2019 as evidence of service effected onto the defendants of the summons to enter appearance, plaint and other supporting documents. None of the defendants entered appearance or filed a defence to the suit. On January 30, 2023, the plaintiffs filed an affidavit of service dated January 25, 2023 to confirm that they had served the defendants with a mention notice for January 30, 2023. On January 30, 2023 the matter came up for mention to take a hearing date. The court directed the matter to heard on April 27, 2023 and for the defendants to be served. On the April 27, 2023, the suit was heard viva voce, in the absence of the defendants.
 3. On the court's record is a notice of motion application dated October 30, 2019 filed through Ms Marende Necheza & Company Advocates in which one Nazir Ahmed Kassam Suleiman sought to be joined into the suit as an interested party, on the basis that he had interest in one of the suit property that is subdivision No 2799/V/MN [CR 72903] as delineated on survey plan No 428756. That on record is a consent dated October 13, 2020 between counsel for the plaintiffs and that for Nazir Ahmed Kassam Suleiman to the effect that the said Nazir be joined as an interested party in the proceedings.
 4. The plaintiff Mahmoud Abdalla Mahmoud testified as PW1 and adopted his witness statement and produced list of documents. He testified that he and the 2nd plaintiff were the registered owner of Land Parcel No 2799/V/MN while Nazir Ahmed Kassam Suleiman owned Land Parcel No 2798/V/MN. He maintained that the defendants have illegally built a wall on the suit properties and urged court to find them in trespass.
 5. The following are the issues for the court's determinations;
 - a. Whether the plaintiffs are the registered proprietors of Land Parcel No 2799/V/MN.
 - b. Whether the plaintiffs have any recognizable interests over Land Parcel No 2798/V/MN.
 - c. Whether the defendants have trespassed onto the suit properties.
 - d. Who pays the costs in the suit.
 6. The court has carefully considered the pleadings filed by the plaintiffs, the oral and documentary evidence tendered by PW 1 and come to the following findings;
 - a. That even where a suit is undefended, the court must examine the evidence adduced and make a determination whether the plaintiffs have proved their case on a balance of probabilities. The



plaintiffs have produced Certificate of Title No CR 72905, Subdivision No 2798/V/MN in the name of Nazir Ahmed Kassan Suleiman, the interested party dated February 22, 2019 and Certificate of Title No CR 72903, Subdivision No 2799/V/MN in the names of Mohammed Saleh Hassan and Mahmoud Abdalla Mahmoud, the plaintiffs, dated February 22, 2019 as exhibits. The plaintiffs title to and beneficial interest in the suit property in their names has not been challenged in any way by the defendants or any other person, under any of the grounds set out in Section 26 (1) of the [Land Registration Act](#), 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 title produced by the plaintiffs in respect of the land in their names remains unchallenged. They have established ownership of that land, and the court is therefore satisfied that the suit property belongs to the plaintiffs. The plaintiffs are conferred with all the rights and privileges set out in Sections 24 and 25 of the [Land Registration Act](#) including the right to possession, to a quiet and peaceful occupation and right to use of their property.

- b. The next issue for determination is whether the defendants trespassed onto the plaintiffs’ suit property. The plaintiffs in the plaint pleaded that the defendants have invaded into their suit premises and began construction. During examination-in-chief, the 1st plaintiff maintained that the defendants had constructed a wall into the suit premises without their consent. The Survey report dated March 7, 2019 stated that there was a concrete wall erected alongside the boundaries of the two suit properties that amounted to encroachment. A sketch plan annexed to the survey report, prepared by E. Kiguru clearly outlines the boundary features between the two suit properties and the extent of the encroachment. The report was adopted into evidence and produced as exhibit and has not been challenged by the defendants. The said report stands unchallenged and in the absence of contrary evidence from the defendants, the court finds that the defendants’ invasion of the plaintiffs’ 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.”

- c. Having found that the Defendants trespassed into the Plaintiffs’ land, the next issue is whether as a result of the same, the plaintiffs are entitled to a mandatory and prohibitory injunction against the defendants. The plaintiffs have established the principles of injunction as set out in the celebrated case of *Giella vs Cassman Brown & Co Ltd* (1973) EA 358. They have established a prima facie case that they are the registered proprietors of Land Parcel No 2799/V/MN and have proven their case to the required threshold to warrant them the grant of the permanent



injunctive orders sought. On the grant of mandatory injunction, the plaintiffs are entitled to full enjoyment and usage of their suit property. Where the defendants have been in occupation, they ought to be evicted to ensure that the plaintiffs are able to occupy and use their land as they wish.

- d. Trespass to land is actionable per se, but I have noted the plaintiff has not sought or prayed for damages in their plaint. Had they prayed for damages, they would not have needed to prove that they had suffered any specific loss or damage. The court would have proceeded to assess the damages to award depending on the facts and circumstances of the case. In the case of *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. There was no valuation report presented from which the court would have obtained a picture of the situation on the suit property, and the costs of restoring the suit land to its former value. Such a valuation would have assisted the court in settling on a certain amount of monetary value of the damage caused. In the case of *Keiyian Group Ranch v Samwel Oruta & 9 others* [2021] eKLR it was held that;

“From the evidence on record, the Plaintiff has proved trespass but there is nothing in its evidence that can be used to enable this court determine the actual damage and/or measure of the damage or loss that the plaintiff and its members suffered for them to be compensated for the loss. However, in relying on the above case law and the principles laid out, I find the Plaintiff indeed suffered damages as a result of the Defendants’ continued acts of trespass. I will proceed and award him Kshs 100,000/= as general damages.”

Had the plaintiffs sought for damages, even without asking for a specific figure or providing a valuation report, the court would have awarded them Kshs 100,000/= as general damages for trespass.

- e. The plaintiffs had in their plaint pleaded that they have beneficial interests over subdivision No 2798/V/MN but did not adduce any evidence in support of that averments. That subsequently, one Nazir Ahmed Kassam Suleiman applied to be joined in the suit as an interested party. Though a consent for joinder was filed, there was no follow up to ensure the consent was adopted as an order of the court. Further, the said Nasir did not file any pleadings or tender any evidence. The court takes note that after the plaintiffs closed their case, Mr. Shimaka advocate addressed the court on behalf of the said Nasir, indicating that he was the owner of No 2798/V/MN and that he associated himself with the pleadings and evidence of the plaintiffs. The counsel then indicated that the interested party had closed his case. The submissions by counsel were not based on any pleadings or evidence by Nasir and is not among the legal ways of initiating a civil claim on interest to land. That as evidently the plaintiffs have failed to prove the existence of any legal interests over subdivision No 2798/V/MN, and Nasir did not lodge any legal claim over the same, the court will not issue any orders in relation to that parcel.



- f. That as costs follow the events, the plaintiffs are awarded the costs of the suit.
1. The upshot is that the Plaintiffs has proved their case on a balance of probabilities and I enter judgment in their favor and against the defendants in the following terms;
 - a. The defendants are hereby ordered to vacate Land Parcel No 2799/V/MN that is in the names of Mohammed Saleh Hassan and Mahmoud Abdalla Mahmoud, the plaintiffs, and remove all the structures thereon and restore the suit property to its original condition within sixty (60) days from the date of this judgement.
 - b. In the event of the defendants failing or neglecting to comply with (a) above, eviction orders to be issued to be executed in accordance with the law, and the plaintiffs be at liberty to cause to be demolished all the defendants' structures thereon and restore the suit property to its original condition at the cost of the defendants.
 - c. A permanent injunction be and is hereby issued restraining the defendants either by themselves, agents, servants and or anyone claiming under them from re-entering, trespassing or otherwise interfering with and or in any other manner dealing with Land Parcel No 2799/V/MN.
 - d. Costs of this suit.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 25th DAY OF JULY 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF;

PLAINTIFFS : Mr Omwenga Advocate.

DEFENDANTS: None.

PROPOSED INTERESTED PARTY : Mr Ondieki Advocate.

WILSON – COURT ASSISTANT.

S. M. KIBUNJA, J.

ELC MOMBASA.

