



REPUBLIC OF KENYA



KENYA LAW
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Muchiri v Wachira; Mhasibu Runda Welfare Association (Interested Party) (Environment & Land Case 55 of 2020) [2023] KEELC 19257 (KLR) (25 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19257 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 55 OF 2020**

JG KEMEI, J

JULY 25, 2023

BETWEEN

KENNETH MBAABU MUCHIRI PLAINTIFF

AND

KENNEDY WACHIRA DEFENDANT

AND

MHASIBU RUNDA WELFARE ASSOCIATION INTERESTED PARTY

JUDGMENT

1. Vide a plaint dated the 30/7/2020 the Plaintiff filed suit against the Defendant seeking the following orders;
 - a. A permanent injunction restraining the Defendant by himself, servants, legal representatives' agents or howsoever from entering into pulling down barbed wire fence blocking the Plaintiff's agents erecting structures or any other manner interfering with the Plaintiff's peaceful and quiet enjoyment of his properties known as L.R NO. s 5973 and 5973/77 (suit properties) situate at Runda in Kiambu County
 - b. General damages
 - c. Costs of the suit plus interest
2. The Plaintiff avers that he is the registered owner of the suit properties and that in the month of May 2020 he entered into a contract with four men to fence the properties but in the month of June 2020 the Defendant, his servants and or agents illegally entered the suit properties stopped the fencing work and threatened to pull down the perimeter fence already put up. As a result, the mixed materials being sand cement and ballast went into waste due to the stoppage of the works by the Defendant. He reported the matter to Thindigua Police Station where the Police visited the site and recorded



statements from his workers and promised to take legal action against the Defendant. That on the 18/6/2020 the Defendant entered the properties a second time and chased away the workers who were erecting the perimeter fence, an act which he again reported to the Police Station. That the actions of the Defendant are illegal and contrary to the Plaintiffs right to own and enjoy property.

3. The Plaintiff's claim is denied by the Defendant vide his statement of defence dated the 2/11/2020. The Defendant admits that the Plaintiff is the registered owner of the suit properties situate at Mhasibu Runda Welfare Estate (the association) which estate is governed by the association under rules and bylaws aimed at promoting security and good living environment in the estate. That he is the Chairperson of the Association. He denied that he entered into the suit properties and neither did he authorise anyone to block and or chase away the Plaintiff's workers erecting the perimeter wall. That by virtue of being a land owner the Plaintiff is a member of the association and that he has defaulted in paying service charge. That on the 7/12/2019 the association in its AGM resolved that default in payment of service charge would attract consequences such as denying defaulters access to their plots, naming and shaming and breaking walls erected by such defaulting members at owners' costs. That despite the said bye laws the Plaintiff has defaulted and continues to default in paying the service charge and other costs towards the common facilities and yet continues to enjoy the facilities as a member and a land owner. The Defendant also denied that the Plaintiff has been denied access to his land nor that he has interfered with the Plaintiffs lands. He reiterated that the Plaintiff should comply with the bye laws and pay the balances therewith before proceeding to develop his land.

The evidence

4. At the hearing, the Plaintiff's case was led by Kenneth Mbaabu Muchiri who testified as PW1. He relied on his witness statement dated the 30/7/2020 in evidence in chief and produced documents marked as PEX No. 1 - 4 in support of his case. By and large the witness reiterated his evidence as set out in the plaint.
5. In cross, the Plaintiff stated that though he was aware of the association, he was not a member. He also denied any knowledge that he was a member of the said association. He stated that he has not been asked by anyone to pay monies to the association.
6. That he has evidence of the Defendant's interference with his property through the witnesses who saw him. He informed the Court that he is not calling any of the witnesses to testify in support of his case. That on the material dates he did not see the Defendant enter or interfere with his workers on site as he was not present. He stated that though he put his complaint in writing at the Police Station he has not presented evidence of the same before the Court. Neither did he present any photograph of the Defendant or his agent stopping his workers from erecting the wall. He informed the Court that he was told that the agent was sent to stop the fencing works by the Defendant who lives in the same estate. That at one time he visited the Defendant in his house and expressed his dissatisfaction in the manner that his workers were being stopped from erecting the wall.
7. The witness further stated that he incurred a loss of KShs. 152,000/- being the cost of materials which was wasted on site. His evidence was that he did not have any receipts in support of the amount. Further he stated that the Defendant intimidated him and his workers and stopped him from accessing his properties.
8. The Defendant and the Interested Party intimated to the Court that they shall not be calling any witnesses.



The submissions

9. The Plaintiff submitted that his case was uncontroverted as the Defendant and the Interested Party never called any witnesses to testify nor file any witness statements. That the Plaintiff was never a member of the association and therefore the Defendant's position that the Plaintiff was obligated to pay service charge was untenable given that no evidence was presented before the Court in support of the allegation.
10. That the Plaintiff being the undisputed owner of the suit properties enjoys absolute and indefeasible rights under the law which rights can only be defeated as provided for in the law. That under Section 24 and 25 of the [Land Registration Act](#) he is entitled to quiet and peaceful enjoyment of his title.
11. It was further submitted that the Plaintiff has met the conditions set out in the grant of a permanent injunction set out in the case of *Giella Vs. Cassman Brown & Co Ltd* [1973] EA 358.
12. That as a result of the Defendants' actions of stopping the construction of the perimeter wall and chasing away his workers on site, he lost material that had already been mixed in the sum of Kshs 152,000/- for which the Plaintiff is entitled to be paid by the Defendant as special damages.
13. On general damages for trespass, the Plaintiff submitted that the Plaintiff was prevented from accessing and developing his properties by the Defendant by threatening and intimidating and chasing his workers since the 10/6/2020. Relying on the cases of *Shalom Levi Vs Karny Zahrya & Anor*; *Park Towers Limited Vs John Mithamo Njika & 7 Others* (2014) eKLR; *John Nganga Vs AG & Anor* (2019)eKLR, the Plaintiff urged the Court to award him the sum of Kshs 7.0 Million as general damages for trespass.
14. The Defendant filed written submissions through the law firm of Simba & Simba Advocates. As to whether the Plaintiff has proven his case, the Defendant submitted in the negative. The Defendants argued that the Plaintiff did not place any evidence showing the Defendant or his agents entered his properties and blocked him from erecting the perimeter fence. The Plaintiff failed to prove that the Defendant threatened to pull down the perimeter wall.
15. Whether the claim for special damages was proven? The Defendant submitted that the sum claimed is a direct cost and as such the onus to proof the same lies with the Plaintiff. That the Plaintiff failed to support this claim.
16. Is the Plaintiff entitled to general damages on trespass? It was submitted that the Plaintiff failed to prove that the Defendant entered and remained on the properties. Failure to prove trespass therefore does not entitle the Plaintiff of an award of damages.

Analysis and determination

17. The key issues for determination are;
 - a. Whether the Plaintiff has proven his case
 - b. Who meets the cost of the suit?
18. It is the Plaintiff's case that he is the owner of the suit lands and that the Defendant has trespassed onto the lands, threatened, intimidated and chased away his workers from erecting the perimeter wall and inter alia threatened to pull down the already erected wall. That the acts of the Defendant are illegal and have interfered with the quiet enjoyment of his properties. He sought a permanent injunction, special and general damages against the Defendant.



19. The Defendant denied the Plaintiffs claim and averred that the Plaintiff being the registered owner of the suit lands is a member of the Interested Party by virtue of his ownership of land in the estate. That members of the Interested Party vide minutes of the association held in December 2019 resolved that members should pay service charge together with other payments geared towards funding common facilities in the estate for the enjoyment of plot owners and members. That the said association also resolved that any default would be met with consequences which included among others; the denial of access to the properties, and demolition of any walls erected by the defaulters. Further the Defendant denied ever entering the suit land, threatening and or intimidating the Plaintiff or his workers and sought to put the Plaintiff to strictest of proof.
20. Though the Defendant successfully enjoined the Interested Party as a party. The said Interested Party failed to file any defence nor present any evidence against the Plaintiff's claim.
21. It is not disputed that the Plaintiff is the registered proprietor of the suit lands. Section 24 and 25 of the [Land Registration Act](#) provides as follows;
 - “(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.
25. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-
 - a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - b. to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”
22. It therefore follows that the Plaintiff being the registered owner of the land is entitled to absolute indefeasible ownership free from any interference from third parties.
23. It is trite that he who alleges must prove. See Section 107 of the [Evidence Act](#) is apt in this regard. It states as follows;
 - “(1) 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.”



24. Though the case of the Plaintiff has not been controverted in evidence by the Defendant or the Interested Party, the Plaintiff bears the responsibility to proof his case on a balance of probabilities. See the case of Gichinga Kibutha Vs. Caroline Nduku (2018) eKLR.
25. The gist of the Plaintiff's claim is trespass. Trespass has been defined by Clerk and Lindsel on Torts, 18th Edition at Page 23 as; "any unjustifiable intrusion by one person upon the land in possession." In the case of Park Towers Limited Vs. John Mithamo Njika & 7 Others (2014) eKLR, the Court held that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages awardable depending on the unique facts and circumstances of each case.
26. During the hearing of the suit the Plaintiff informed the Court that he was not present when the Defendant interfered with the workers on site. That he was called by one of his workers. He failed to present any evidence from an eye witness or the workers who were allegedly intimidated and threatened by the Defendant. He stated that he recorded a statement at the Police Station but failed to present the same in Court. In the absence of any evidence linking the Defendant to the trespass and interference of the works on site the Court finds that the Plaintiff failed to adduce cogent evidence and on a balance of probabilities, the Court holds that the Plaintiff has failed to proof trespass on the land.
27. Having failed to proof trespass, then the general damages sought on trespass are not awardable.
28. With respect to special damages in the sum of Kshs 152,000/- the Court holds that the Plaintiff failed to produce evidence in form of receipts in support of this claim. It is trite that special damages must not only be pleaded but must be proven. The Court finds that the special damages have not been proven and therefore not payable.
29. In the end I find the Plaintiff's claim unmerited. It is dismissed with no orders as to costs.
30. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 25TH DAY OF JULY, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Moranga HB Ondabu for Plaintiff

Ms. Muga HB Ms. Marasi for Defendant

