



Nasela & Mukakaik Ltd v Kenya Urban Roads Authority & 2 others; County Government of Kitui (Interested Party) (Environment and Land Appeal 13 of 2021) [2023] KEELC 21544 (KLR) (31 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21544 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL 13 OF 2021
LG KIMANI, J
OCTOBER 31, 2023**

BETWEEN

NASELA AND MUKAKAIK LTD PLAINTIFF

AND

KENYA URBAN ROADS AUTHORITY 1ST DEFENDANT

HYDRATED BUILDING CONTRACTION 2ND DEFENDANT

HYDRATECH BUILDING CONTRACTORS 3RD DEFENDANT

AND

COUNTY GOVERNMENT OF KITUI INTERESTED PARTY

JUDGMENT

1. This suit was instituted by way of the plaint dated 11th October 2016, where the plaintiff sues as the registered owner of land parcel number L.R 4096/232 Kitui Township measuring approximately 0.3031 Ha. The plaintiff claims that the 1st defendant contracted the 2nd defendant to undertake routine maintenance of LOT 1 Road (JICA-PRISON ROAD) in Kitui Township vide contract no. KURA/RMLF/153/2015-2016. The plaintiff stated that instead of conducting maintenance on the already existing JICA-PRISON ROAD, the defendants conspired and diverted the said road to pass through its land and trespassed upon it without consent, authority, permission and/or knowledge.
2. By the road being diverted, the plaintiff stated that his land was split into two and subjected to excavation, environmental degradation and severe damage. As a result, he has suffered colossal financial losses, and inconvenience.
3. The plaintiff seeks general damages, a perpetual injunction restraining the defendants from excavating, erecting, building or in any manner constructing a road on the suit property and a further order



directing the defendant to restore the said parcel of land to its original condition and costs of the suit with interest.

The 1st Defendant's Statement of Defence

4. The 1st defendant was represented by the Attorney General's office and denied encroaching onto the plaintiff's land but admitted to contracting the 2nd defendant to carry out routine maintenance on the existing JICA-PRISON road by upgrading it to bitumen standards. The 1st defendant claims that the road has been in existence since time immemorial and the work to be carried out is already completed and being used by members of the public and an injunction cannot be issued. The 1st defendant maintained that restoring the land to its original condition would greatly inconvenience members of the public who heavily rely on the said road.
5. By an application dated 23rd May 2007 and a ruling on the said application dated 19th December 2017, the County Government of Kitui applied and was joined as an interested party in this suit.
6. When the suit came up for hearing on 14th March 2023, Mr. Muinde Advocate for the interested party applied to have his client removed as an interested party in the suit. The said order was granted and the interested party was removed as a party. The interested party had not filed any pleadings.

Evidence At The Trial

7. The hearing proceeded on 14th March 2023 when PW 1, Mumo Mwendwa, one of the plaintiff's directors testified. He adopted his witness statement and two bundles of documents as evidence in chief and exhibits respectively. The documents produced are copy of grant, photograph of sign board, survey report dated 21st September 2016, beacon certificate, board of director's resolution and certificate of incorporation.
8. The witness reiterated what was contained in the plaint as summarized above confirming the plaintiff's ownership of all that parcel of land known as LR NO.4096/232 Kitui Township measuring approximately 0.3031 Ha. He testified that on 5th September 2016 the plaintiff's property manager informed him that the JICA-PRISON ROAD had been diverted to pass through the middle of the plaintiff's land when the 1st defendant contracted the 2nd Defendant to undertake routine maintenance of LOT 1 Road (JICA-PRISON ROAD) in Kitui Township. He further stated that when he visited the land he confirmed that indeed this had happened.
9. The plaintiff hired the services of B.C Mwangunya, a licensed surveyor who made a report confirming that the defendants had indeed trespassed upon the plaintiff's land by the passage of a road, splitting it into two. He stated that this was in blatant disrespect of private property and in violation of the plaintiff's constitutional right to protection of private property.
10. The witness stated that the plaintiff has suffered and continues to suffer loss and damage as a result of the defendant's actions. In the process of the road being diverted to the suit land, adjacent buildings were built on the road and to access the adjacent building, people have had to pass through the suit land. The plaintiff claims to have been unable to carry out any development on the suit property. He stated that they have built a wall where the road enters the property.
11. All the defendants did not attend the hearing and did not adduce any evidence.



Plaintiff's Written Submissions

12. Counsel for the Plaintiff gave a summary of the evidence adduced and submitted that their evidence was not rebutted nor controverted and the title to the suit property was never impeached. Further, the illegal construction of a road passing through the Plaintiff's property was never denied.
13. Quoting from Section 25 of the *Land Registration Act* 2012, the Plaintiff submitted that it was entitled to the orders sought as the registered proprietor of the suit property. The Plaintiff stated that they have been unable to use the property for the last seven years and suffered loss and damage and proposed an award of general damages in the sum of KES.10,000,000 as well as for the orders as prayed in the plaint.

The 1st Defendant's Submissions

14. State Counsel for the 1st Defendant submitted that it is not in dispute that the 1st Defendant embarked on improvement to the bitumen standard of an existing road within the suit land which has been in existence since time immemorial without objection from the Plaintiff. It was submitted that the prayer for permanent injunction was overtaken by events since the said improvement was concluded on 24th November 2016 before the suit was filed.
15. It was further submitted that if the Plaintiff has any claim of trespass to land resulting in the creation of a public way, then the recourse would have been to sue the National Land Commission for compensation for compulsory acquisition according to Section 111(1) of the *Land Act* (No.6 of 2012). They relied on the cases of *Katra Jama Issa v Attorney General & 3 others* (2018) eKLR and *Patrick Musimba v National Land Commission & 4 others* (2016) eKLR.
16. The 1st Defendant associated with the decision in the case of *Mary Wambua Waeni vs. KURA, KERRA. Attorney General and others* (2023) eKLR where the Court grappled with a similar issue.
17. On matters of costs, State Counsel submitted that the law is well settled on costs that they follow the event, stating that the Respondent did not contribute to the filing of this suit at all but acknowledged that it is subject to the discretion of the Court. It is their submission that this discretion must be exercised judiciously and relied on the cases of *David Kiptum Korir v Kenya Commercial Bank & Another* (2021) eKLR and *Morgan Air Cargo Limited v Everest Enterprises Ltd* (2014) eKLR as they prayed that the suit be dismissed since the 1st Defendant has not breached the petitioner's rights

Analysis and Determination

18. The suit herein proceeded to hearing on 14th March 2023 when the plaintiff's witness Mumo Mwendwa testified. The defendants and their advocates did not attend court though it was shown by way of an affidavit of service that the office of the Attorney General representing the 1st Defendant had been served with a hearing notice. The 2nd and 3rd Defendants did not enter an appearance or file a defence though served with summons to enter appearance.
19. The court conducted a site visit on 16th October 2023 to confirm the existence and/or state of the road complained of. The court observed that indeed a tarmac road passes through the plaintiff's land. It was also observed that the road is blocked using concrete walls built on both ends to block any passage through the land. When the suit came up for hearing Mr. Muinde, Counsel for the interested party applied to have the name of the said interested party removed as a party to the suit and the said order was granted.
20. Based on the pleadings filed, the evidence adduced in court and the submissions filed by Counsel, the following issues arise for determination;



- a. Whether the plaintiff is the owner of land parcel number L. R. 4096/2332 Kitui Township.
- b. Whether the defendants trespassed on the said land
- c. Whether the plaintiff is entitled to the orders sought

Whether The Plaintiff Is The Owner Of Land Parcel Number L. R. 4096/2332 Kitui Township.

21. The plaintiff proved that it is the registered owner of the parcel of land known as LR NO. 4096/232 within Kitui Township measuring approximately 0.3031 Ha by producing a grant registered and issued under the Registration of Titles Act (Repealed). The said title was not challenged. The plaintiff also produced in evidence a survey report prepared by one Bartholomew C. Mwanyungu confirming the location of the land and the fact that a road has been diverted to pass through the middle of the plot hence splitting it into two portions.

Whether The Defendants Trespassed On The Said Land

22. The plaintiff's witness testified and confirmed that the defendants constructed a road that passed through its land. The 1st defendant in the defence filed denied encroaching onto the plaintiff's land but admitted to contracting the 2nd Defendant to carry out routine maintenance on the existing JICA-PRISON road by upgrading it to bitumen standards. The defendants did not give any reasons for constructing a road through the plaintiff's land. The 1st defendant did not testify or give any evidence at the trial and as such the averments made in the defence have not been supported by evidence and remain mere averments and are of no probative value.
23. The Supreme Court in *Rutongot Farm Ltd vs. Kenya Forest Service & 3 others* [2018] eKLR, expressed this position thus:

“Once proprietary interest has been lawfully acquired, the guarantee to the protection of the right to property under Article 40 of *the Constitution* is then expressed in the terms that no person shall be arbitrarily deprived of property. The same guarantee existed in Section 75 of the repealed Constitution.”

24. Article 40(3) of *the Constitution* of Kenya (2010) provides as follows:

“The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

- a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
- b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - i) requires prompt payment in full, of just compensation to the person; and
 - ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.”



25. In the case of Wilfred Juma Wasike & 11 others v Ministry of Interior And Co-ordination & another [2022] eKLR it was held that:

“Clearly, the actions of government violated the Petitioners’ right to protection of property as provided for under Article 40 (1) and (3) of *the Constitution*. The actions by the state were at best barbaric and archaic and amounted to grave violation of the Petitioners’ constitutional right to own property.

In the event that the Respondents or the state wished to acquire the land for public use, they ought to have followed the procedure of acquiring it by way of compulsory acquisition. That would have entailed just and prompt compensation at the fair market price. I agree with the Petitioners in their submissions to that end.”

25. In the present case, plaintiff has shown that the defendants unlawfully entered onto it’s land without its knowledge or consent and carried out the works stipulated in the plaint and in evidence during the trial. Trespass is an unlawful act committed against the person or property of another especially wrongful entry of another’s land. Section 3 (1) of the *Trespass Act*, Cap 294 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.”

26. The court is satisfied that the plaintiff has proved on a balance of probability that the defendants, without consent entered into land parcel No. LR4096/232 Kitui township and trespassed on it. The acts of trespass involved diverting the JICA-Prison road through the plaintiff’s land, excavation and construction of a tarmac road. The court is also satisfied that the defendant acts led to degradation of the land and severe damage to it. This also led to inconveniences and loss to the plaintiff.

27. Counsel for the 1st defendant submitted that the plaintiff’s recourse lies in suing the National Land Commission seeking a declaration that the land has been acquired compulsorily by creation of public road usage and thus seek compensation. In the courts view the submission is not supported by law. Article 40 of *the Constitution* of Kenya protects rights to property and the state can only deprive an individual of that right under circumstances specifically provided in law.

28. Section 107 of the *Land Act* No 6 of 2012 provides for compulsory acquisition of land at the instance of the national or county government stating that;

“Whenever the national or county government is satisfied that it may be necessary to acquire some particular land under section 110, the respective Cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of land to the Commission to acquire the land on its behalf.”

29. The defendants did not show that they initiated the process of compulsory acquisition of the plaintiffs land and the argument that the plaintiff ought to pursue a claim for compensation of the land is not tenable for the reason that compulsory acquisition is not initiated by the individual land owner but by the acquiring entity

Whether The Plaintiff Is Entitled To The Orders Sought

30. Having established that the Defendant trespassed onto the Plaintiff’s land, the question that arises is what orders the Plaintiff is entitled to. On quantum of damages, the plaintiff stated that it suffered



loss and damage since the JICA-Prison Road was diverted to pass through the middle of his plot. The plaintiff hired the services of B.C Mwangunya, a licensed surveyor who made a report confirming that the defendants had indeed trespassed upon the Plaintiff's land by the passage of a road, splitting it into two. The Plaintiff produced in court a sketch plan that shows the road passing through the plaintiff's plot. The plaintiff claims that this was in blatant disrespect of private property and a violation of the Plaintiff's constitutional right to protection of private property.

31. The plaintiff's witness testified that the plaintiff has suffered and continues to suffer loss and damage as a result of the defendant's actions. In the process of the road being diverted to the suit land, adjacent buildings were built on the road and to access the adjacent building, people passed through the suit land. It was further stated that the plaintiff has been unable to carry out any development on the suit property. He stated that they have built a wall where the road enters the property.
26. The Court of Appeal in the case of Kenya Power & Lighting Company Ltd v Ringera & 2 others (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR) (4 February 2022) (Judgment) dealt exhaustively with matters to be taken into account by a court when making an the award of general and compensatory damages for continuing trespass. The Court stated as follows;

“The principles both parties have relied upon in their invitation for the Court to decide either way are those enunciated by the predecessor of this Court and either crystallized or restated by this Court which we find prudent to distil and replicate as hereunder:

- i. Harlsburys Laws of England 4th Edition Vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner's land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.
- i. Duncan Nderitu Ndegwa vs. Kenya Pipeline Company Limited & Another [2013] eKLR - damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in before the infliction of harm.
- ii. Philip Ayaya Aluchio vs. Crispinus Ngayo [2014] eKLR, - the measure of damages for trespass is the difference in the value of the plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less.
- iii. Ephantus Mwangi & Another vs. Duncan Mwangi [1981 – 1988] I KAR 278, - an appellate court is not bound to accept and act on the trial court's findings of fact if it appears clearly that the trial court failed to take account of particular circumstances or probabilities material to an estimate of evidence. b) A Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.



- iv. *Kiambu Dairy, Farmers Co-operative Society Limited vs. Rhoda Njeri & 30 Others* [2018] eKLR, - the extent of an award of compensatory damages lies in the discretion of the trial court and interference therewith on appeal must be approached with a measure of circumspection and well-settled principles. *Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited vs. Janevans Limited* [2015] eKLR, - whether the claim is in contract or tort, the only damages to which an aggrieved party is entitled to is the pecuniary loss;(b) the accruing awardable damages is aimed at putting the aggrieved party into as good a position as if there had been no such breach or interference. In other words, in the position it/he/she was in with regard to the object trespassed upon before the onset of such a trespass;(c) it is meant to cushion the aggrieved party against the expenses caused as a result of the trespass and loss of benefit over the period of the duration of the trespass.
26. In the present case, the plaintiff is entitled to more than nominal damages for the reason that the trespass onto his land is a continuing act. The plaintiff testified that there was damage to the property through excavation and digging up of the land and creating the road to bitumen standard. The court has further considered that the plaintiff has not been able to make use of his land due to the trespass. The plaintiff's witness further testified that other people use his land to get onto their properties. In the court's view, the defendant's conduct is a blatant disregard of the plaintiff's right to ownership and possession of his land and protection of the same against intruders.
27. In assessing damages, the court notes that the plaintiff did not provide evidence of the value of the land before the trespass and after the trespass or the cost of restoration to the condition before the trespass. That evidence would have enabled the court to assess the diminution in value of the land due to the acts of trespass. This evidence was found to be useful in the case of *Kenya Power & Lighting Co. Ltd vs Ringera & 20 others* (supra) Further to this, the Plaintiff stated that it was not able to develop the property due to the trespass. The plaintiff did not offer any evidence of the developments it had intended or contemplated to carry out and its ability to carry out the same. They did not show that they were prevented from carrying out the developments by the acts of the Defendants.
28. I have considered that in the case of *Philip Ayaya Aluchio v Crispinus Ngayo* [2014] eKLR, the court awarded a nominal sum of Kshs 100,000/- for trespass. In the case of *Nakuru Industries Limited v S S Mehta & Sons* [2016] eKLR the court awarded general damages for trespass in the sum of Kshs 500,000 while in the case of *Johnson Mainga Mogaka v Kenya Power and Lighting Company* [2021] eKLR the court awarded damages in the sum of Kshs. 1,100,000/= .
29. Having found that the Respondent did commit trespass on the Plaintiff's land and doing the best with the evidence on record and guided by the above cases, I do award the Plaintiff the sum of Kshs 1,300,000/- for trespass.
30. On the prayer for an order of perpetual injunction, The 1st Defendant contended that the prayer for a perpetual injunction has been overtaken by events since the said road is already complete and is in use by the public. The purpose of an injunction is to prevent an action from occurring. In the case of *Habiba Ali Mursal & 4 Others V Mariam Noor Abdi* [2018] eKLR, the Court held as follows:
- “On the issue as to whether an injunction should be issued, there is nothing to restrain as the respondent has already demolished the walls of the building. According to the photographs annexed to the application for contempt which I shall shortly herein after deal with, the walls of the building have already been demolished and all windows removed. The entire building



has been fenced and sealed using iron sheets. The applicants are not on the premises. The purpose of an injunction is to restrain that which is threatened to occur or is in the process of being undertaken in breach of one's right. It is never meant to prevent what has already occurred. It will therefore be futile to grant injunctive orders.”

26. On the other hand, Olola J in the case of Jimmy Ndaka Munde & Nushka Muinde v County Government of Kilifi [2021] eKLR held as follows in allowing for orders of temporary injunction:

“In asserting that it has constructed a public road, the Defendant does not even pretend to demonstrate that the land was public. No attempt has indeed been made to demonstrate on the part of Defendant that the access road complies with the plans for the area and or that it did acquire the land from the Plaintiffs for a public purpose.

As it were, a right to acquire and own property is not absolute. Article 40 (3) (b) of *the Constitution* gives room for one to be deprived of property or interest in or right over property for a public purpose or in the public interest. There is however a rider that such deprivation must be carried out in accordance with *the Constitution* and any Act of Parliament that requires prompt payment of just compensation and allows a right of access to a Court of law. There is no evidence that Defendant has made any effort to acquire the subject properties in the manner provided in law.

Having failed to adhere to the process of such acquisition, I am unaware of any law that allows the Defendant to just walk into a private individual's parcel of land, do anything it wants thereon and claim to have done so in the public interest. Having failed to adhere to due process, the Plaintiff's private interests over the suit properties must prevail over the so-called public interest.”

26. The court has taken into account the fact that the road subject matter of this suit has already been completed and the order of injunction sought by the Plaintiff may not serve any useful purpose and it will be in vain. From the site visit the court confirmed that the road is not in use by members of the public as asserted by the defendants in submissions since it is blocked from both ends. In the present circumstances, an order in terms of restoration of the plaintiff's property to the state it was in before the trespass will serve to revert the Plaintiff to the position it was in prior to the trespass.
27. The Court finds that the claim by the plaintiff has merit and makes an order that Judgement be and is hereby entered in favour of the Plaintiff against the Defendants jointly and severally as follows;
- A. General Damages for trespass at Kshs 1,300,000/-
 - B. An order be and is hereby issued directing the 1st Defendant to restore the Plaintiff's land parcel number LR NO.4096/232 Kitui Township to its original condition by removal of the tarmacked road passing through the land within sixty days from the date of service of the order of this court.
 - C. Costs of the suit are awarded to the plaintiff.
 - D. Interest on A) and C) above at court rates from the date of judgement

DELIVERED, DATED AND SIGNED AT KITUI THIS 31ST DAY OF OCTOBER, 2023.

L. G. KIMANI

JUDGE

Judgement read in open court and online in the presence of-



J. Musyoki Court Assistant

Mutemi for the Plaintiffs

No attendance for the Defendants

