



Mayfair Holdings Limited v Ahmed (Sued as the Administrator of Shabir Ahmed) (Environment and Land Case Civil Suit 809 of 2015) [2023] KEELC 20875 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20875 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 809 OF 2015
SO OKONG'O, J
OCTOBER 19, 2023**

BETWEEN

MAYFAIR HOLDINGS LIMITED PLAINTIFF

AND

**SHAKEEL SHABBIR AHMED (SUED AS THE ADMINISTRATOR OF
DR.SHABIR AHMED) DEFENDANT**

JUDGMENT

1. The Plaintiff was at all material times the registered proprietor of all that parcel of land known as Kisumu Municipality/Block 8/297 (hereinafter referred to as “the suit property”) while Dr. Shabir Ahmed, deceased (hereinafter referred to only as “Dr.Shabir”) was the registered proprietor of all that parcel of land known as Kisumu Municipality/Block 8/236 (hereinafter referred to only as “Plot No. 236”). Dr. Shabir Ahmed’s lease which was for a term of 99 years with effect from 1st October 1912 expired in 2011. The lease was renewed and a new lease in respect of the suit property for a term of 50 years with effect from 1st October 2011 was granted to the Defendant, Shakeel Ahmed Shabbir on 23rd January 2017. The Plaintiff brought this suit against the Defendant claiming that in early 2003, the Defendant unlawfully and without any reasonable cause encroached on the suit property by extending his buildings thereon and also inviting 8 people whom he treated as his tenants to construct structures thereon from which the Defendant was collecting rent. The Plaintiff averred that the Defendant was collecting a total sum of Kshs. 68,000/- per month from the said purported tenants. The Plaintiff averred that it was unable to develop the suit property due to the said acts of trespass by the Defendant and his purported tenants. The Plaintiff sought judgment against the Defendant for:
 - a. A declaration that the Plaintiff(sic) had trespassed upon the suit property.
 - b. An order of a permanent injunction restraining the Defendant either by himself, his agents, servants or invitees from continuing to trespass on the suit property.



- c. General and exemplary damages for trespass.
 - d. Loss of user at the rate of Kshs. 66,000/- per month from March 2003 until vacant possession is delivered.
 - e. In the alternative to (d), an order that the Defendant does account for all the sums of money received from the persons occupying and using the suit property as Defendant's tenants.
 - f. Costs of the suit.
 - g. Interest on (c), (d),(e) and (f) above at court rates.
 - h. Any other or further remedy this court may deem just and expedient to grant.
2. The Defendant denied the Plaintiff's claim in its entirety. The Defendant denied that he was the registered owner of Plot No. 236. The Defendant averred that he was just one of the administrators of Plot No. 236. The Defendant denied that in early 2003 he encroached on the suit property and also invited 8 people to put up structures and to occupy the suit property as his tenants. The Defendant denied that he was receiving rent of Kshs. 68,000/- per month from the alleged tenants. On a without prejudice basis, the Defendant averred that he had been enjoying peaceful occupation of Plot No. 236 and the building erected thereon for close to 40 years long before the suit property came into existence and the Plaintiff acquired the same. The Defendant averred on a without prejudice that it was the Plaintiff which had trespassed on Plot No. 236 and had been harassing his tenants thereon and threatening them with eviction and demolition of their buildings.
 3. The Defendant averred that there was an existing dispute between the Plaintiff and the Defendant over the boundaries of the suit property and Plot No. 236 which the court lacked jurisdiction to determine. The Defendant averred that his structures erected on Plot No. 236 fell within the boundaries of the said parcel of land which had remained the same for over 40 years before the suit property came into existence. The Defendant denied the jurisdiction of the court to determine the suit. The Defendant urged the court to dismiss the Plaintiff's suit.
 4. At the trial, the Plaintiff's first witness was Amin Mohamed Gilani(PW1). He told the court that the Plaintiff owned the suit property which was adjacent to Plot No. 236 owned by the Defendant. He stated that the Defendant had leased the suit property to several tenants claiming that the property belonged to him. PW1 stated that the Plaintiff engaged a surveyor who confirmed the beacons and the boundaries of the two plots and prepared a report. He stated that the said surveyor's report showed that the suit property was occupied by the Defendant's tenants. He stated that the Defendant was collecting rent to the tune of Kshs. 68,000/- per month from the said tenants who were occupying the suit property. PW1 produced a copy of the certificate of lease for the suit property and the survey report as exhibits.
 5. The Plaintiff's second witness was Henry Mulwa (PW2). PW2 was a licensed surveyor. He told the court that he was instructed by the Plaintiff to survey the suit property. He stated that he undertook the assignment and prepared a report dated 26th February 2005. He stated that he concluded in that report that there were structures on the suit property which the Plaintiff claimed did not belong to it. The Plaintiff's last witness was Tobias See (PW3). PW3 told the court that he was the Managing Director of Riley Falcon Security Services Limited. He stated that his company prepared a report dated 28th October 2005 on the instructions of the Plaintiff's advocates. He stated that the report was prepared by one of his officers, Henry Wangombe who had left the company. He produced the report in evidence as an exhibit.



6. After the close of the Plaintiff's case, the Defendant gave evidence and closed his case. The Defendant adopted his witness stated filed in court on 13th July 2018 as part of his evidence in chief and produced the bundle of documents attached to his list of documents dated 11th July 2018 as exhibits. He also produced as exhibits the documents attached to his further list of documents filed on 4th August 2020. He told the court that there had been no attempt made to determine the boundaries of the suit property and Plot No. 236 with the assistance of a surveyor and the Land Registrar. He stated that the surveyor who carried out a survey on the suit property was instructed by the Plaintiff alone. He stated that there had not been a determination that there was an encroachment on the suit property.
7. After the close of evidence, the parties made closing submissions in writing. The Plaintiff filed its submissions on 28th April 2023 while the Defendant filed submissions and supplementary submissions on 18th April 2023 and 8th May 2023 respectively.

The Plaintiff's submissions

8. The Plaintiff submitted that it had proved that the Defendant had trespassed on the suit property. The Plaintiff submitted that the ownership of the suit property was not disputed. The Plaintiff submitted that the Defendant's trespass was confirmed by PW2 who was a surveyor in his report in which he stated that there were structures on the suit property that did not belong to the Plaintiff. The Plaintiff submitted that PW3 in his report stated that the Defendant was collecting rent from those who were occupying the suit property. The Plaintiff submitted that since it was the Defendant who was collecting rent from those who were occupying the suit property, he must be taken to be the one who owned the structures from where the said occupants on the suit property were operating from. The Plaintiff submitted that the Defendant admitted encroachment on the suit property in his cross-examination.
9. On whether the Plaintiff was entitled to damages, the Plaintiff submitted that once the Plaintiff established trespass, it was not necessary for it to prove specific loss to be entitled to damages. The Plaintiff submitted that it was deprived of the right to develop the suit property while the Defendant was on the other hand enjoying rent of Kshs. 68,000/- per month from the structures that were illegally constructed on the suit property. The Plaintiff submitted that it was entitled to an award of damages for trespass. On whether the order of injunction should issue, the Plaintiff submitted that it had established a case for the grant of the order.
10. The Plaintiff submitted that it had proved its case against the Defendant on a balance of probabilities and urged the court to grant the reliefs sought in the plaint.

The Defendant's submissions

11. The Defendant submitted that between 2002 and February 2010, the Defendant had tenants but they were occupying the Defendant's property, Plot No. 236. The Defendant submitted that in 2010, he evicted all the tenants from Plot No. 236 and proceeded to put up commercial premises known as Wananchi Enterprises Centre on Plot No. 236. The Defendant submitted that it was after he evicted the said tenants from Plot No. 236 that they seemed to have moved to the suit property that shares a boundary with Plot No. 236. The Defendant submitted that when the Plaintiff filed the suit herein, the tenants complained of were on Plot No. 236. The Defendants submitted that the said tenants ceased to occupy his land and to be his tenants in 2010.
12. The Defendant submitted that the Plaintiff failed to establish trespass against him. The Defendant submitted that the Plaintiff failed to prove that the land that he leased to the tenants in question was a portion of the suit property. While admitting that the parcels of land within the Municipality of Kisumu have fixed boundaries which should be determined with the help of surveyors, the Defendant



submitted that the survey report that was produced in evidence by PW3 was not sufficient to establish the boundaries of the suit property and Plot No. 236. The Defendant submitted that the report should be considered together with the other evidence that was placed before the court by the Defendant relating to the history of the two parcels of land. The Defendant also urged the court to consider the inconclusive findings in the report, particularly with regard to the boundaries of the suit property. The Defendant submitted further that there was no reference to the boundaries of Plot No. 236 in the said report by PW3. The Defendant submitted that there was also no indication that the Defendant's structures had encroached on the suit property and the extent of the alleged encroachment.

13. The Defendant submitted that he was not responsible for the actions of his tenants after he evicted them from Plot No. 236. The Defendant submitted that he had always operated within the boundaries of Plot No. 236 and that at no time did he encroach on the suit property. The Defendant submitted that the Plaintiff had failed to discharge the burden of proof of trespass that was upon it. The Defendant submitted that having failed to establish trespass, the Plaintiff was not entitled to an award of damages.

Analysis and Determination

14. I have considered the pleadings, the evidence on record and the submissions filed by the parties. I am of the view that the following are the issues arising for determination by the court in this suit;

- i. Whether the Defendant trespassed on the suit property.
- ii. Whether the Plaintiff is entitled to the reliefs sought in the plaint.

15. I will consider these issues together. The suit property was registered under the [Registered Land Act](#), Chapter 300 Laws of Kenya (now repealed). The [Registered Land Act](#) was repealed by the [Land Registration Act](#), 2012. Sections 27 and 28 of the [Registered Land Act](#), Chapter 300 Laws of Kenya (now repealed) provide as follows: b

“ 27. Subject to this [Act](#)-

- 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;
- 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 and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired 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. unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

16. The two sections have been reproduced in Sections 24 and 25 of the [Land Registration Act, 2012](#) as follows:

“24. Subject to this [Act](#)—

- 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.

(1) 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.

Section 26 of the [Land Registration Act](#), 2012 provides as follows:

26.

- (1) 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.”

17. I am satisfied from the evidence on record that the Plaintiff is the registered proprietor of the suit property. The Plaintiff produced in evidence a certificate of lease dated 1st November 1993 showing that the Plaintiff was registered as the owner of the suit property on 1st November 1993. The Plaintiff holds a leasehold interest in the suit property for a term of 99 years with effect from 1st January 1993. The Plaintiff's title was not challenged by the Defendant.
18. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, [Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph 18-01](#). In [Gitwany Investments Limited v. Tajmal Limited & 3 others](#) [2006] eKLR, it was held that title to land carries with it legal possession. This means that if one has a title to a property, he can maintain an action for trespass even if he is not having physical possession. I have made a finding that the Plaintiff is the lawful registered owner of the suit property. As the owner of the suit property, the Plaintiff was entitled to quiet possession and enjoyment of the property.
19. The burden of proof was on the Plaintiff to prove that the Defendant had interrupted or interfered with its enjoyment of the suit property. The Defendant, Shakeel Shabir Ahmed was sued by the Plaintiff in his capacity as the administrator of the estate of Dr. Shabir Ahmed (Dr.Shabir). He was not sued in his personal capacity. From the evidence that was produced by the Defendant, Dr. Shabir died on 1st October 1994 and the Defendant was appointed as the administrator of his estate on 7th January



1997. The Plaintiff's cause of action against the Defendant in his capacity as the administrator of Dr. Shabir is set out in paragraph 4 of the plaint as follows:

4. Sometimes in early 2003, the Defendant unlawfully and without any reasonable justification encroached onto the Plaintiff's parcel of land by extending his building thereon and also inviting, as tenants some 8 people, as tenants(sic), to construct temporary structures thereon for which the Defendant collects rental income." (Emphasis added).
20. The Plaintiff's trespass claim against the Defendant had two limbs. The first limb related to the alleged extension of the Defendant's building onto the suit property. The second limb related to the Defendant's alleged invitation of 8 people to enter the suit property and put up temporary structures thereon from which the Defendant collected rent. The Defendant's position in his pleadings and evidence was that he had not extended any building beyond the boundary of Plot No. 236 and that the people that the Plaintiff referred to as his tenants were indeed his tenants and that they occupied Plot No. 236 until 2010 when they were evicted therefrom.
 21. I am not satisfied from the evidence on record that Plaintiff proved that the Defendant in his capacity as the administrator of the estate of Dr. Shabir extended any building I believe from Plot No. 236 to the suit property. I am in agreement with the Defendant that to determine whether or not the Defendant's alleged building the existence of which was not proved had been extended from Plot No. 236 to the suit property, the physical boundaries of the suit property and Plot No. 236 had to be established first. It was upon such establishment that the extent of the extension of the said building could be determined. It was also upon the establishment of the said boundaries that a determination could be made whether the Defendant's tenants were occupying the suit property or Plot No. 236. The Plaintiff relied entirely on the report and evidence of PW2 to prove the alleged encroachment on the suit property.
 22. On cross-examination, PW2 told the court that his instructions were to determine the boundaries of the suit property and to show the developments thereon. As correctly observed by the Defendant in his submission, PW2 was not concerned with the boundaries of Plot No. 236. Without establishing the boundaries of Plot No. 236, there was no way PW2 could authoritatively say that any building from Plot No. 236 had extended to the suit property or that any structure which was said to be on Plot No. 236 was indeed on the suit property. It was upon having the surveys of the two parcels of land side by side and the developments thereon plotted on each that any encroachment could be laid bare. It is my finding that the report that was tendered by PW2 was inconclusive as to the boundaries of the suit property and Plot No. 236 and as such the same cannot be relied on for the determination of encroachment of the suit property from Plot No. 236 and the extent thereof.
 23. I did not also find the report dated 28th October 2005 that was produced by PW3 of any assistance to the Plaintiff in proving that the tenants of the Defendant were occupying the suit property and not Plot No. 236 as claimed by the Defendant. In the paragraph dealing with "Findings", there is no doubt that the investigators were investigating the businesses on Plot No. 236 which they stated belonged to Dr. Shabir and measured 0.1862 Ha. This fact is further supported by the statement on the second page of the report where the investigators stated as follows in paragraph 3:

"On 24th October 2005, the premises which Block 8/236 situated along Jomo Kenyatta Highway-Kisumu was visited and the proprietor of Copy bird Computer services was interviewed and told the officer that she pays a monthly rent to Mr. Shakeel".
 24. According to this report the Defendant's tenants were on Plot No. 236 and were paying rent to the Defendant. This is inconsistent with the Plaintiff's contention that the said tenants were on the



suit property. The other things that do not add up in my view with respect to the Plaintiff's claim particularly that relating to the alleged encroachment by the Defendant's tenants are first, why the Plaintiff chose not to add the said tenants who were in actual occupation of the suit property according to the Plaintiff as parties to the suit and secondly, if it was the Defendant who invited people to occupy the suit property, why did the Plaintiff choose to sue the estate of Dr. Shabir? How was the estate involved in such kind of trespass which in any event has not been proved?

25. Due to the foregoing, it is my finding that the Plaintiff has failed to prove that the Defendant trespassed on the suit property by extending his building on Plot No. 236 to the suit property and by inviting third parties to come and occupy the suit property. On whether the Plaintiff is entitled to the reliefs sought, the answer is negative. The Plaintiff has failed to establish trespass against the Defendant. The Plaintiff is therefore not entitled to the reliefs sought in the plaint.

Conclusion

26. It is my finding that the Plaintiff has not proved its case against the Defendant to the required standard. The suit is accordingly dismissed with costs to the Defendant.

DELIVERED AND DATED AT KISUMU ON THIS 19TH DAY OF OCTOBER 2023

S. OKONG'O

JUDGE

