



**Mwarania v Gakii (Environment and Land Appeal 6 of 2022)
[2023] KEELC 20758 (KLR) (16 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20758 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT AND LAND APPEAL 6 OF 2022
PM NJOROGE, J
OCTOBER 16, 2023**

BETWEEN

DAVID MWITI MWARANIA APPELLANT

AND

LILIAN GAKII RESPONDENT

(Being an appeal from the Judgment/Decree of the Honourable E. Ngigi, Principal Magistrate, Isiolo dated and delivered on 6th day of September, 2022 in Isiolo ELC E005 of 2020)

JUDGMENT

1. The memorandum in this appeal is presented in the following format;

Memorandum of Appeal

(Being an appeal from the Judgment/Decree of the Honourable E. Ngigi, Principal Magistrate, Isiolo dated and delivered on 6th day of September, 2022 in Isiolo ELC E005 of 2020)

The appellant being greatly aggrieved by the Judgment of the Honourable E. Ngigi, Principal Magistrate in Isiolo ELC E005 Of 2020 (lilian Gakii Versus David Mwiti Mwarania) appeals to this Honourable Court and sets here below his grounds of Appeal.

1. The Learned trial Magistrate erred in Law and in facts in entertaining and proceeding to declare the appellant herein as illegal trespasser and terming his occupation on Plot No. 15 Kulamawe as forcible occupation since



2013 and failed to find That the appellant herein was born and brought up on the said plot and continues to live in the said plot to date and That the determination of ownership of Plot No. 15 Kulamawe was confirmed on 12th February, 2019 in the Meru Succession Cause No. 463 of 2011 (Estate of Naaman M' Mwarania – Deceased).

2. The Learned trial Magistrate erred in law and fact in finding and holding That the Respondent herein be awarded general damages for trespass and loss of user of Kshs. 400,000/= for forceful trespass from the year 2013 which amount is unjust enrichment on the part of the Respondent herein.
3. The Learned trial Magistrate erred in fact and Law in ascribing the evidences of Lilian Gakii and completely refusing and ignoring and failing to consider the evidence of David Mwiti Mwarania by ignoring and or failing to factor into consideration the Appellant's heavy and extensive development of the suit land which includes residential house/home.
4. The Learned Magistrate Judgment was biased in favour of the Respondent against the Appellant, is full of errors, does not contain reasons for his decision, and is against the provisions of law and a travesty of justice.

Reasons Wherefore the appellant prays That:

- a. That this appeal be allowed and the judgment in Isiolo ELC E005 Of 2020 (lilian Gakii Versus David Mwiti Mwarania) delivered on 6th September, 2022 be set aside in its entire.
- b. That this Honourable court to supersede the Trial Court and dismiss the Respondent suit in the Trial court being Isiolo ELC E005 Of 2020 (Lilian Gakii Versus David Mwiti Mwarania).
- c. Award costs of this Appeal and the lower court to the Appellant.

Dated At Meru This 23rd Day of October, 2023

For: Kiauthia Arithi & Company

Advocate For The Appellant

2. The appeal was canvassed by way of written submissions.
3. A perusal of the proceedings in the Lower Court, to wit Isiolo ELC Case No. 5 of 2020, shows That in Meru Succession Cause No. 463 of 2011, the Honourable Justice Francis Gikonyo, Judge held That



the suit property in this matter belonged to the Respondent Lilian Gakii and did not form part of the estate of the common father of the Appellant and the respondent. This finding was not contested by the appellant.

4. The plaint in the Lower Court seeks Judgment against the appellant as follows;
 - a. A declaration That the defendant is an illegal trespasser on Plot No. 15 Kulamawe and his forcible occupation thereon since the year 2013 has been illegal and unlawful.
 - b. An order directing the defendant to vacate and surrender vacant possession of the plot to the plaintiff within 30 days of the Judgment date, failure to which a forcible eviction be issued upon the defendant.
 - c. General damages for trespass and illegal occupation and damages for loss of user from the year 2013 to the time of surrender of vacant possession.
 - d. A permanent order of injunction restraining the defendant, his agents, servants, relatives or whosoever else acting on the defendant's behalf or instructions from further trespassing, entering into, invading, occupying, constructing or in any other manner whatsoever or howsoever dealing or interfering with the plaintiff's ownership, possession and use of Plot No. 15 Kulamawe.
5. The Honourable the Principal Magistrate in the Lower Court made the following orders:
 - i. A declaration is hereby issued That Plot No. 15 situated at Kambi Bulle within Isiolo is the property of the Plaintiff.
 - ii. A further declaration That the plaintiff is the bona fide legal owner of That plot known and or described as Plot No. 15 at Kambi Bulle within Isiolo Township.
 - iii. A permanent injunction is hereby issued restraining the 1st and 2nd defendant whether by themselves, their agents, servants and/or employees or whomsoever else acting on their behalf, disposing off, or in any other manner whatsoever dealing with or interfering with the plaintiff's ownership possession, occupation and use of Plot No.15 Kambi Bulle in Isiolo Township.
 - iv. General damages for non-user of the plot and destruction of the plaintiff's plot assessed at 400,000/=.
 - v. Costs of this suit and interest thereon at court rates to the plaintiff.
6. The prayers in the plaint and the orders issued by the lower court shall be juxtaposed against the pleadings filed by the parties, including their submissions.
7. In his submissions, the appellants advocate only submitted on the sum of Kshs. 400,000/= awarded as General Damages to the Respondent. He made no submissions whatsoever regarding the other orders issued by the trial court.
8. His submission was That the Quantum of General Damages was awarded erroneously and said That the respondent had not brought to the court the magnitude of the loss he had incurred out of the alleged trespass. He further submitted That both the appellant and the respondent had stayed on the



suit land but admits That the appellant and his wife were tenants of the respondent. He seems to suggest That because of this occupancy of the suit land, the issue of trespass could not arise. He also seems to suggest That as he has already moved out of the suit property, the award of damages should be set aside.

9. In support of his submissions with regard to the award of damages for trespass, the appellant referred to the following cases;

- a. *Kemero Africa Limited t/a Meru Express Service Gathogo Kanini Versus A. M.M Lubia and Another* [1982-88] I KARTIT.
- b. *Arrow Car Limited Versus Bimomo & 2 others* (2004) eKLR 101.
- c. [*Ochako Obincha Versus Zachary Oyoti Nyamongo*](#) [2018] eKLR.
- d. [*Nakuru Industries Limited Versus S.S Mehta & Sons*](#) [2016] eKLR.
- e. *Catholic Diocese of Kisumu Versus Sophin Achieng Tele*, Civil Appeal No. 284 of 2001 [2004] 2KLR 55.
- f. [*Phillip Aluchio Versus Crispinus Ngiyo*](#) [2004] eKLR.

All these cases deal with issues concerning entitlement of damages for trespass and the factors to be taken into account, including when courts may interfere with the Quantum of damages awarded by trial courts.

10. In his submissions, the respondents advocate explained That ownership of the suit property was finally and indubitably established in Meru HCC Succession Case No. 463 of 2011 where the Honourable Justice Francis Gikonyo found That the suit property belongs to the respondent to the exclusion of other family members. He explains That it is after the appellant refused to vacate the suit property That the respondent initiated this suit seeking inter alia orders of eviction, permanent injunction, general damages for trespass and costs of the suit.

11. The respondents advocate submits That in its Judgment the trial court laid foundation for the award of Kshs. 400,00/= as damages for trespass. In his view, the trial court had a wide discretion in assessment of general damages and had made relevant considerations including;

- a. The fact That the suit property had rental buildings which could have generated income.
- b. The fact That the appellant admitted That he had been in occupation of the said house on the suit land since 2013 and;
- c. The rigours of litigation which the Respondent had been put through regarding the suit property in both Meru Hc Succession Cause No 463 of 2011 as well as the trial court matter.

12. The respondents advocate averred That the award of Kshs. 400,000/= as general damages in the circumstances of this case was merited. In urging the court not to interfere with the Quantum of damages awarded by the trial court, the advocate proffered the court of Appeal Case of Catholic



Diocese of Kisumu Versus Sophia Achieng Tele, Civil Appeal No. 284 of 2001 [2004] 2KLR 55 where the court opined as follows;

“It is trite Law That the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for That awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the Quantum of damages awarded by the trial court only if it is satisfied That the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account relevant ones) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate”

13. The respondents also beseeched the court to be guided by Section 27 of the Civil Procedure Act and allow costs to follow the event.
14. I have considered the pleadings and the submissions proffered by the parties to buttress their incongruently diametrical assertions.
15. As I have already noted, the Appellant has only challenged the Quantum of damages in his submissions. IPSO facto, the other orders issued by the trial court remain unchallenged and are therefore clearly legally extant. This being the case, I find it untenable That in the Memorandum of Appeal, the appellant prays That the entire Judgment of the Lower Court be set aside. I also disagree with the appellant’s assertion That since he has ceased trespassing upon the suit land, damages for trespass upon the suit land, damage awarded for trespass should not be upheld.
16. I do find That the Hon. Principal Magistrate who conducted the lower court trial was erudite in bringing out all apposite issues in the trial including his declaration, That as the suit property belonged to the respondent, the appellant was an illegal trespasser on Plot No.15 Kulamawe, and his forcible occupation therein since the year 2013 had been illegal and unlawful. I find That the trial court did not consider irrelevant issues in its decision to award Kshs. 400,000/= as damages for trespass. The court was pellucid That it considered the longevity of the period the respondent had been denied use of her property by her brother, the appellant.
17. In the circumstances, I uphold the Judgment of the Lower Court. I hereby issue the following order;
 - a. This appeal is hereby dismissed.
 - b. Costs in the lower court as awarded by the trial Hon. Principal Magistrate are hereby upheld.
 - c. For avoidance of doubt, costs in this appeal shall follow the event and are awarded to the respondent.

DELIVERED IN OPEN COURT AT ISIOLO THIS 16TH DAY OF OCTOBER, 2023.

Court assistant: Balozi/Rahma

Miss Nyasani holding brief for Kitheka for the Respondent.

Kiautha Arithi for the Appellant - Absent

HON. JUSTICE P.M NJOROGE

JUDGE

