



REPUBLIC OF KENYA



KENYA LAW
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**Jiwa v Olemuteke & another (Environment & Land Case 31 of 2018)
[2023] KEELC 21951 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21951 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 31 OF 2018
EC CHERONO, J
NOVEMBER 30, 2023**

BETWEEN

SHAIWAZ SADRUDIN JIWA PLAINTIFF

AND

RAJAB BARASA OLEMUTEKE 1ST DEFENDANT

LUCY OPURU 2ND DEFENDANT

JUDGMENT

1. By way of a plaint dated 19th June, 2018 the Plaintiff sought for the following orders against the Defendants jointly and severally;
 - a. A permanent order restraining the Defendants by themselves, their agents, servants and or workers from ploughing, scooping soil and or interfering in any manner with land parcel no. Malakisi/Township/375, 413 and 419.
 - b. Eviction of the Defendants from land parcel no. Malakisi/Township/375, 413 and 419.
 - c. Damages.
 - d. Costs.
 - e. Interest.
 - f. Any other relief.
2. In the plaint the Plaintiff contends that he is the sole registered owner of land parcel no. Malakisi/Township/375, 413 and 419 (“the suit properties”) and that the Defendant’s unlawfully invaded the suit land in the year 2011 and have since refused to vacate. It is averred that the Defendants have been utilizing the land to their advantage and for commercial purposes despite various demands to vacate forcing the Plaintiff to institute the current suit.



3. The suit is contested and the Defendants have filed a statement of defence dated 25th June,2018 where they have denied all the allegations in the plaint. It is averred that the 1st defendant is the caretaker of the suit land on behalf of the family of the Plaintiff that fled the country and relocated since the year 1999 when he was employed as such. The Defendants contends that the current suit is an attempt by the Plaintiff to defeat a suit instituted against him in the ELRC Court i.e. ELRC Case No. 35 of 2018 Rajab Barasa Olemukete vs. Shaiwaz Sadrudin Jiwa.
4. The defendants therefore contend that this suit is sub judice and an abuse of the court process as it does not disclose any cause of action in law as against them.
5. After the close of pleadings, directions were taken that the matter proceed by way of viva voce evidence. The case was thereafter set down for hearing wherein both parties called two witnesses each and closed their respective cases.
6. PW1, Shaiwaz Sadrudin Jiwa adopted his two witness statements dated 19th July,2018 and 8th September,2021 as his evidence in chief. He equally produced into evidence his list of documents dated 19th June,2018 showing the certificates of titles to the three parcels of land. In cross-examination, he stated that he currently resides in the USA having relocated in the year 2001. He stated that he knew the family of Jetha Jiwa and sons who are his uncles and that his father's name is Sadrudin Jetha Jiwa. It was his testimony that he purchased the suit properties himself and obtained titles in 2016 while the Defendants invaded the suit properties in 2011. He testified that between 2011 and 2016, he issued various demand notices through his brother Shanif Sadrudin Jiwa and his lawyer to the defendants to vacate and issued verbal warnings but the Defendants declined to vacate forcing him to file the current suit.
7. The witness testified that he appointed Shukkur Mohamed Omar as his caretaker through his brother Shanif Sadrudin Jiwa to whom he had appointed as his attorney. It was his evidence that the 1st defendant was his father's employee and that he (1st defendant) had sued the Plaintiff and his brother in Bungoma ELRC Case no. 35 of 2018 which is still pending in Court. PW1 testified that his brother was in the process of selling the suit properties to one Fredrick Wafula Musee and that the Defendants vacated the suit properties in 2020. In re-examination he confirmed that his prayers were as per his plaint.
8. PW2 Shanif Sadrudin Jiwa adopted his witness statement dated 8th September,2021 as his evidence in chief. In cross examination he stated that he was the appointed attorney of the Plaintiff who is his brother. He reiterated PW1'S evidence and added that the suit properties were purchased by their family and not Jetha Jiwa & Sons. It was his evidence that the Defendants had not put up ant structures over the suit properties but were only using it to plough.
9. In his submissions, the plaintiff submitted that he had demonstrated that he was the registered owner of the suit properties and that he has proved his case on a balance of probabilities as required under the law. He submitted that the defendants failed to prove that they were in occupation of the suit land with consent of the plaintiff therefore they fell short of the requirement that he who alleges must prove. In support of his case, he cited the case of Paul Ngashema Kamu vs. Halima Said (2020) eKLR.
10. DW1 Rajab Barasa Olemuteke adopted his witness statement dated 25th June,2018 as his evidence in chief and a list of documents of even date was produced into evidence as DExhibit 1 and 2. He testified that he was not in occupation of the suit properties and sought to have the Plaintiff's case dismissed with no orders as to costs. It was further his evidence that he has never been served with any notice to vacate.



11. In cross-examination, he stated that he vacated the suit properties in the year 2020 while this case was filed in the year 2018. It was his testimony that his occupation of the suit properties was with license from the owners Jertha Jiwa where he worked as a baker for the Plaintiff's father who was its owner while the Plaintiff was the Managing Director. DW1 testified that he has instituted a suit against the Plaintiff in the ELRC Court for his dues. It was further his testimony that the 2nd Defendant who is his wife has never lived in the suit properties.
12. The witness further testified that he vacated the suit properties after he was attacked by goons sent by the Plaintiff. It was further his testimony that he was ploughing maize in the suit properties.
13. In re-examination, he testified that he was excavating and selling marram in the suit land. It is further his testimony that he appealed against the decision of the court wherein he lost.
14. DW2 Lucy Oporu adopted her witness statement dated 25th June, 2018 as her evidence in chief. In cross-examination, it was her testimony that she did not live in the suit properties and that the 1st Defendant vacated the suit properties in the year 2020 after being asked by the area OCS to leave. In re-examination, she testified that the 1st defendant was not selling marram from the suit properties.
15. Upon consideration of the materials placed before me particularly the pleadings, Witness statements, Exhibits and Submissions, the following issues in my view commend for determination:
 - a. Whether an order of eviction should issue against the Defendants.
 - b. Whether the Defendants should be permanently restrained from interfering with the suit properties.
 - c. Whether the Plaintiff is entitled to damages.
 - d. Who should bear the costs of the suit.
16. For purposes of this disposition, I will discuss the first two issues together i.e. whether an order of eviction should issue against the Defendants and whether the Defendants should be permanently restrained from interfering with the suit properties.
17. From the pleadings and evidence, it is clear the Plaintiff claims that the Defendants are trespassers and wishes to have them vacate from the suit properties while the Defendants claim the Plaintiff gave them permission and/or license to occupy the suit properties. Trespass has been defined as any unjustifiable intrusion by one person upon the land in the possession of another. See Clerk & Lindsell on Torts, 18th Edition at page 923. The onus is on the plaintiff to prove that he is the owner of the suit property and that the defendant has invaded and occupied the same without any permission or justifiable cause.
18. The *Land Registration Act* is very clear on issues of ownership of land and in Section 26(1) provides as follows;

"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. '

Section 24 (a) of the *Land Registration Act* states that:

' subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....'

19. In the case of *Willy Kipsongok Morogo v Albert K. Morogo* (2017) eKLR the Court held as follows: ' the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the *Land Registration Act*.'
20. The Plaintiff (PW1) tendered evidence to prove he is the registered proprietor of land parcel no. Malakisi/Township/375, 413 and 419. I note that throughout the evidence from both parties, the plaintiff's ownership of the suit properties has not been contested. Therefore, this court shall proceed on the premises that the Plaintiff is the lawful owner of the suit properties.
21. On the other hand, the 1st Defendant case is that he had been employed as a caretaker of the property and was therefore in occupation of the suit property with permission. The witness produced a statement of claim for the ELRC case which I need not emphasize since it has no bearing on this particular case and I shall therefore not belabor on that issue. However, no material has been placed before this court to prove that indeed the 1st defendant was on the property with consent/permission. He failed to produce any evidence in form of a contract of employment, proof of payment of wages or any other document to support his case. I am therefore not persuaded that the defendants have satisfactorily explained their presence in the suit properties.
22. From the foregoing, it is my considered view that the Defendants, having unlawfully entered the suit property without the permission of the Plaintiff are trespassers on the suit property and the Plaintiff is entitled to orders for eviction and for a permanent injunction to restrain any further acts of trespass. From the evidence as presented by both parties, it is not in contention that the Defendants vacated the suit properties in the year 2020. As such, the prayer for eviction at this point is untenable as the court cannot issue orders in vain. The prayer for an order restraining the Defendants from interfering with the suit properties is however tenable and I proceed to grant it as prayed.
23. As to whether the Plaintiff is entitled to damages, the answer is in the affirmative. I say so because I have found that the Plaintiff is the absolute, rightful and indefeasible owner of the suit properties. The defendant's entry and occupation of the suit property without authority, consent and/or permission by the plaintiff who is the lawful owner of the property constitute trespass and in those circumstances, the Plaintiff would be entitled to damages.
24. In the case of *Duncan Nderitu Ndegwa v. KP& LC Limited & Another* (2013) eKLR where P. Nyamweya J. held that: -
- “...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 Defendants trespass”
25. In Halsbury Laws of England 4th Edition, Vol 45 at para 26, 1503, it is provided as follows:-



- (a) If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
 - (b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
 - (c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.
 - (d) --
 - (e) --
26. . In the case of *Phillip Aluchio -vs- Crispinus Ngayo* [2014] eKLR Obaga, J. held:-
- “... The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less.....”
- The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass.....”
27. In the cited hereinabove, the court proceeded to award a nominal figure of Kshs. 100,000/= as damages for trespass. In the present case and considering that the Plaintiff did not lead any evidence nor attach any documentation to prove the extent of the damages suffered, I find that an award of Kshs.100,000/= would be reasonable compensation for the period he was deprived the use of his land.
28. Lastly on the issue of costs, it is trite that costs generally follow the event and since the Plaintiff is the successful party in this case, I find that he is entitled to costs of the suit.
29. In view of the matters aforesaid, I find that the Plaintiff has proved his case on a balance of probabilities and do hereby enter judgement for the Plaintiff against the Defendants in the following terms: -
- a. A permanent order restraining the Defendants by themselves, their agents, servants and or workers from ploughing, scooping soil and or interfering in any manner with land parcel no. Malakisi/Township/375, 413 and 419.
 - b. Kshs. 100,000/= being General Damages for Trespass.
 - c. Costs.
 - d. Interest on (c) at court rates until full payment.
30. Orders accordingly.

DATED, DELIVERED AND SIGNED AT BUNGOMA THIS 30TH DAY OF NOVEMBER, 2023.

HON.E.C CHERONO

JUDGE

In the presence of;

Bwonchiri for plaintiff.

Wamalwa R H/B for Wanjala for defendant.

