



Bos Shipping (East Africa) Limited v Rehman & another (Environment & Land Case 121 of 2019) [2023] KEELC 21691 (KLR) (22 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21691 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 121 OF 2019
SM KIBUNJA, J
NOVEMBER 22, 2023**

BETWEEN

BOS SHIPPING (EAST AFRICA) LIMITED PLAINTIFF

AND

ABDALLAH ABDUL REHMAN 1ST DEFENDANT

TEXAS ALARMS (K) LIMITED 2ND DEFENDANT

JUDGMENT

1. The plaintiff commenced this proceeding through the plaint dated the 26th June 2019 and filed on the 1st July 2019 seeking for:
 - a. A declaration that plot No. MN/1/890, CR No. 9291/1, Mombasa Municipality, delineated on Survey Plan No. 39643 stands on a different ground position with plot No. MN/1/9779.
 - b. A declaration that plaintiff's plot No. MN/1/890 and the premises the plaintiff occupies therein stand on the correct and lawful position.
 - c. A mandatory injunction compelling the removal and or eviction of the defendants from the plaintiff's property.
 - d. A mandatory and permanent injunction restraining the defendants whether by themselves, their servants and or agents whatsoever howsoever from interfering with the plaintiff's property and or access to the suit property.
 - e. Special and general damages.
 - f. Costs of this suit.
 - g. Any other relief the court may deem just and fit to grant.



The plaintiff averred that it was the registered proprietor of MN/1/890, CR. No. 9291/1, the suit property. That on or about 25th March 2019, at about 6.30pm the 2nd defendant, acting on instructions of the 1st defendant posted security guards on the suit property, claiming it was the 1st defendant's plot No. MN/1/9779, who forcefully took possession. The defendants evicted the plaintiff's employees and prevented them from accessing the property. That despite the plaintiff's frequent requests for the defendants to vacate and yield up possession, they have refused to do so thereby depriving the plaintiff of full use and enjoyment of the property. That the plaintiff has suffered loss and damage which continues as long as the defendants persists in their wrongful trespass. The plaintiff has particularised the loss and damage at paragraph 6 of the plaint including the Kshs.50,000 paid to a consultant to compile a report on the property.

2. The plaintiff's claim is opposed by the defendants' joint statement of defence dated the 28th October 2019 and filed on the 4th November 2019 in which they inter alia averred that the 1st defendant acquired plot No. MN/1/890, the suit property, through adverse possession. That the 1st defendant is in lawful possession of the suit property and that the 2nd defendant is providing security thereon on instruction of the 1st defendant. They prayed for the plaintiff's suit to be dismissed with costs.
3. In the Reply to the Defence dated the 30th October 2020, the plaintiff termed the defendants' defence a sham, adding that it has not set out the particulars constituting the alleged adverse possession in favour of the 1st defendant. The plaintiff averred that the 1st defendant does not own the said property or have any rights to possess it or to instruct the 2nd defendant to provide security over it.
4. During the hearing, the plaintiff called Ayoob Mohamed Bashir, the finance director, and Bhanderi Dinesh Devji, the Mombasa branch manager, who testified as PW1 and PW2 respectively. PW1 adopted the contents of his statement dated the 26th June 2019 as his evidence in chief. He also produced the seven documents on the plaintiff's list of documents dated the 26th June 2019 as exhibits. He denied that the 1st defendant had been in adverse possession of the suit land and pointed out that the plaintiff's request for particulars dated 30th June 2020 on the adverse possession averment at paragraph 3 of the defence has never been responded to. During cross examination, PW1 told the court that after the defendants' trespassed onto the plot on the 25th March 2019, the plaintiff had reported the incident to the police on the same date and were issued with an OB reference that they have filed with the court. That they then asked the 2nd defendant to vacate and upon failing to do so, filed this suit. That the 2nd defendant had claimed to have acted on instructions of the 1st defendant but did not present the plaintiff with documents on the ownership of the suit property. That the 2nd defendant only vacated from the suit property after being served with the court orders issued in this case, and after the filing of a contempt of court application dated 4th February 2020. PW2 also adopted his statement dated the 26th June 2019 as his evidence in chief. During cross examination, PW2 stated that the 2nd defendant broke the padlocks to gain entrance onto the suit property and then installed guards and declined to allow the plaintiff's employees who resided on the plot entry. That when he was notified of the incident, he called their headquarters at Nairobi and reported, and then reported to the police. That the police visited the suit property and allowed the plaintiff's employees to continue residing there and the 2nd defendant's guards to go on with their security duties. That the 2nd defendant left the suit property after the court order to that effect was issued.
5. The 2nd defendant called Bernard Odhiambo Aduda who testified as DW1. He adopted the contents of his statement dated the 15th February 2022 as his evidence in chief. He also produced a copy of the authority to act on behalf of the 2nd defendant, contract under which the 2nd defendant provided a day and night guard to a residential property under 1st defendant's instructions and guards deployment



form as exhibits. It was his evidence that one Mr. Rana, a director of Autocars Limited and their client for long, called the 2nd defendant's offices asking for a day and night guard to be provided at the suit property. DW1 detailed Amos, the operations officer, to go to the property and deploy a guard as it was already 6.00pm. At about 7.00pm, the guard reported that the OCS Nyali had come to the property. DW1 sent Amos to go there with the documents the client had signed. The witness testified that the OCS allowed them to go on with the guard duties without interfering with the properties therein as investigations continued. That the 2nd defendant continued guarding the property until and this suit was then filed. During cross examination, DW1 stated that though Mr. Rana who gave the 2nd defendant instructions to deploy guards on the suit property did not show him documents of ownership, they agreed to do so as he had been their client for over 20 years. That the contract dated 30th March 2019 with 1st defendant that the 2nd defendant got had been signed and stamped by Mr. Rana. That DW1 testified that when he called Mr. Rana about it, he was told the 1st defendant was in Nairobi and that is why he had signed for him. That the 2nd defendant guarded the suit property up to the 25th February 2020. That the 2nd defendant's fees for the guarding services for the period were paid by Mr. Rana. That he did not know the relationship between the 1st defendant and Mr. Rana. That by the time Munyao J, issued the order in this suit, the 2nd defendant had already taken possession of the suit property. He denied knowledge of the contempt application dated 4th February 2020 against the 2nd defendant. He also denied that it was the application that made them remove the guards from the property on advice of their counsel. He added that the 2nd defendant did not know that there was a dispute over the suit property.

6. The learned counsel for the plaintiff and 2nd defendant filed their submissions dated the 30th July 2022 [sic] and 25th August 2023 respectively which the court has considered.
7. The issues for the determinations by the court are as follows:
 - a. Whether the plaintiff has proved that the suit property belongs to it.
 - b. Whether the plaintiff has proved entrance onto the suit property by guards deployed by the 2nd defendant, and if so whether their acts amounted to trespass.
 - c. Whether the 1st defendant was an adverse possessor of the suit property.
 - d. Whether the declaratory and injunctive orders sought should be issued.
 - e. Whether the plaintiff suffered loss and damages and if so, the amount to be awarded and against which party.
 - f. Who should pay the costs of the suit?
8. The court has carefully considered the pleadings, evidence presented by both parties, submissions by the learned counsel, superior courts decisions cited and come to the following conclusions:
 - a. The evidence tendered by PW1, including the title document for plot No. MN/1/890, Grant No. CR 9291, the suit property, that is not contested by any of the defendants, has confirmed that the plaintiff is the registered proprietor of the said land. Section 26 (1) of the [Land Registration Act](#) No. 3 of 2012, provides that:

“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.”

The document of title produced by the plaintiff is indefeasible evidence of the plaintiff’s ownership of land, and the plaintiff is conferred with all the rights and privileges accruing from being so registered with the suit property as provided in Sections 24 and 25 of the [Land Registration Act](#), including the right to possession, to a quiet and peaceful occupation and right to use of their property.

- b. The defendants herein filed a joint statement of defence dated the 28th October 2019 through Ms. Marende Necheza & Company Advocates. At paragraph 3 of that defence, the 1st defendant averred that he “is the registered owner of the suit property Plot Number MN/1/890 having acquired the same by way of adverse possession.” The record confirms that Ms. Marende Necheza & Company Advocates later filed an application to cease acting for 1st defendant. The 2nd defendant changed counsel and when the hearing date was fixed, the 1st defendant was served with the hearing notice through advertisement in the Daily Nation of the 17th January 2023 and an affidavit of service was filed. The 1st defendant did not attend court either in person or through counsel to participate in the hearing. That as no evidence has been adduced by the 1st defendant in support of his averment that he is the registered proprietor of the suit property by way of adverse possession, that claim remains an allegation that has not been proved. The testimony adduced by DW1 on behalf of the 2nd defendant did not contain any evidence that could go to proving the 1st defendant’s claim of being a registered adverse possessor of the suit land. The 1st defendant’s allegation of entitlement to the suit land is incapable of challenging the plaintiff’s title to the property as he has failed to discharge the duty placed on a party who alleges a fact under section 107 of the [Evidence Act](#) Chapter 80 of Laws of Kenya.
- c. The claim by DW1 in his testimony that the 2nd defendant did not know of the dispute over the suit property cannot be true as he at the same time admitted knowledge of the institution of this suit in which the 2nd defendant was a party. The witness further confirmed knowing of the order issued by Munyao J. The court is left wondering if the 2nd defendant was as blameless as DW1 claimed it was, why did it not obey the court order issued on the 7th September 2019 directing the defendants to stop interfering with the plaintiff’s possession of the suit property, if it was merely acting in accordance with the contract to provide guards without knowledge of a dispute over the suit property? The record confirms that on 18th February 2020 the learned counsel for the defendants got to know of the contempt application dated 4th February 2020 that had been fixed for hearing on 3rd March 2020. Then on the 3rd March 2020, the counsel for the plaintiff and 2nd defendant informed the court that the parties were in negotiations over the application and needed more time. The contempt application was on the 30th September 2020 marked by consent as settled with costs to be paid by the 1st defendant. The foregoing shows that contrary to the claim by DW1 of the 2nd defendant’s innocence in the matter, the suggestion by the plaintiff’s counsel to DW1 during cross examination that the 2nd defendant only withdrew its guards from the suit property on the 25th February 2020 after the filing and



service of the contempt application dated 4th February 2020 against its directors looks more probable.

- d. It is important to note that the 1st defendant has not disowned the contract of 30th March 2019 with the 2nd defendant, even though the evidence by DW1 confirmed that it was signed and stamped by Mr. Rana of Auto Cats International Limited, who is not a party in this suit and whose relationship with the 1st defendant is unclear. As the 1st defendant in person or through Mr. Rana had no demonstrable legal or beneficial rights over the suit property, then he had no authority without the plaintiff's consent or permission to instruct the 2nd defendant to place guards on the suit property, and doing so, as he did constituted trespass. Likewise, the act of the 2nd defendant to place guards on the suit property from the 25th March 2019 to the 25th February 2020 without permission of the plaintiff and thereby interfering with the plaintiff's rights to use, possess and enjoy the property amounted to trespass.
- e. Having established that the suit property indeed belongs to the plaintiff, and that no evidence has been tendered in support of the 1st defendant's claim of being an adverse possessor, the next issue to be determined is whether the 2nd defendant's act of placing day and night guards on the suit property from 25th March 2019 to the 25th February 2020, on instructions of the 1st defendant was lawful or amounted to trespass. As the 1st defendant's claim to the title of the suit property has failed as in (b) above, it follows that he had no legal authority to instruct the 2nd defendant to place guards over the suit property without the specific consent of the registered and legal proprietor, the plaintiff. Trespass is defined in Section 3 (1) of the [Trespass Act](#), Chapter 294 of Laws of Kenya, which 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.”
- The evidence tendered by the plaintiff and the confirmation by DW1 that indeed the 2nd defendant was deploying day and night guards on the suit property on instructions of the 1st defendant through Mr. Rana, from the 25th March 2019 to 25th February 2020 is sufficient proof that the defendant not only entered onto the suit property, but also remained there for that period without the permission or consent of the plaintiff. That is also evidence of the plaintiff's rights over the suit property having been curtailed by the acts of trespass of the defendant. The plaintiff is entitled to general damages for trespass, against both defendants. That even though no materials have been presented to the court to guide on quantum I am of the view an award of Kshs.1,000,000 is fair and just. If indeed the 2nd defendant was innocent as it submitted that its acts were covered under clauses 9 and 13 of the contract they had with the 1st defendant dated the 30th March 2019, then that is a matter it will have to pursue with the 1st defendant as it did not raise any claim of indemnity against the 1st defendant in this proceeding.
- f. The claim of Kshs.50,000 for the costs of the report on the suit property by a consultant, is in the nature of special damages and though pleaded at paragraph 6 (d) of the plaint, no documentary evidence to back the expenditure was availed by the plaintiff through its only witness, PW1. That claim therefore fails.
- g. The testimony availed by DW1 that was not contested by the plaintiff show clearly that the defendant removed the guards from the suit property on or about the 25th February 2020. This must have been one of the considerations taken into account by the plaintiff when it agreed to have its contempt application against the 1st defendant and directors of the 2nd



defendant marked settled through the consent recorded and adopted by the court on the 30th September 2020. It follows that as court orders are not issued in vain, prayer (c) on the plaint for mandatory injunction cannot be issued as it has been overtaken by events. However, in view of the sudden and blatant way the defendants moved onto the suit land on the 25th March 2019 deploying guards and keeping the plaintiff out of the suit property for about an year, and declined to yield possession despite the injunction orders of 7th October 2019, I find there is still need to issue permanent injunction restraining the defendants in terms of prayer (d) on the plaint.

- h. Considering the unexplainable action of the 1st defendant directly and or as reported by DW1, through Mr. Rana, of procuring guards to be deployed and retained on the suit property from the 25th March 2019 to 25th February 2020 without the authority, permission or consent of the registered proprietor, while apparently holding no legal or beneficial interests over the said land, the court finds there is still need to issue the two declaratory orders as sought under prayers (a) and (b) on the plaint.
 - i. That in terms of section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya that costs shall follow the events unless where otherwise ordered by the court on good cause, the defendants shall pay the plaintiff's costs.
9. That in conclusion, the court finds the plaintiff has proved its claim against the defendants on a balance of probabilities. The court enters judgement for the plaintiff against the defendants and issues the following orders:
- a. That declaratory orders in terms of prayers (a) and (b) of the plaint dated the 26th June 2019 are hereby granted.
 - b. That permanent injunction in terms of prayer (d) of the said plaint is also granted.
 - c. General damages for trespass of Kshs.1,000,000 [one million] is awarded.
 - d. The plaintiff is also awarded costs of the suit.
 - e. Under prayer (g) of any other relief, the plaintiff is awarded interests at court rates on (c) and (d) above until payment in full.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 22ND DAY OF NOVEMBER 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiff: M/s Ogejoh for Oluga.

Defendants: N/s Okeyo for 2nd Defendant.

Wilson – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

