



**Mbaabu v Anampiu (Environment and Land Appeal E111 of 2021)
[2023] KEELC 21757 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21757 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E111 OF 2021
CK NZILI, J
NOVEMBER 22, 2023**

BETWEEN

CHARLES MBAABU APPELLANT

AND

DANIEL M'MWIRABUA ANAMPIU RESPONDENT

*(Being an appeal from a judgment by P.M Wechuli SRM
delivered on 28/9/2021 in Tigania ELC No. 57 of 2019)*

JUDGMENT

1. The suit at the lower court was commenced through a plaint dated 5.9.2019, in which the respondent had sued the appellant for trespass to LR No. Tigania/Antuamburi/4720, alleged to have occurred in August 2019, with the respondent depositing building materials on it. The respondents sought eviction and damages for trespass. The plaint was accompanied by witness statements and a list of documents, further list of witnesses, and documents dated 16.2.2020.
2. By a defense dated 27.9.2019, the appellant denied the claim, stating he was the absolute owner of LR No. Tigania/Antuamburi/3776 had never unlawfully or wrongfully occupied or trespassed into the respondent's land or occasioned any loss or damage to it. He termed the suit as raising no triable issue and amounting to abusing the court process. The defense was accompanied by witness statements, a list of documents dated 27.9.2019, and a further list of witnesses and documents dated 1.3.2021.
3. At the trial, Charles Daniel M'Mwirabua Anampiu testified as PW 1 and adopted his witness statement dated 1.2.2021 as his evidence in chief. He told the court that he bought his land from M'Ikendo Ikendo in 1975, became a registered owner, and acquired a title deed dated 20.8.2019. The respondent told the court that in July, he received a report that the appellant had trespassed onto his land and deposited some building materials therein. PW 1 said he visited the land offices that directed him to file



- a suit, for they had no authority to evict the appellant forcefully. He produced a copy of the title deed and a sketch map as P. Exh No. (1) & (2). He said his land had been moved from Sheet No. 12 to No. 17.
4. PW 1 told the court the appellant had not constructed anything on his plot when he filed the suit or by 1.7.2019. He denied the alleged encroachment onto the appellant's land. PW 1 said he fenced his land in 1991, started using the land, and that land surveyors had visited the land.
 5. Charles Kimencu testified as PW 2. As a neighbor to PW 1, he told the court he bought his LR No. 1691 in 2001 from M'Ringerera and that the title deeds for the area came out in 2018/2019. He said his parcel number was in Sheet No. 12 instead of Sheet No. 17. PW 2 said the appellant had constructed a building near his storey house, which borders the respondent's land.
 6. Aglika Kaibuthu testified as PW 3. He told the court that the respondent bought the land from her father in 1975. She described the land as adjacent to LR No. Tigania/Antuamburi/3799. Her testimony was that the land was bought during the adjudication process, after which the respondent took vacant and quiet possession until the appellant came to his land. She could not tell who among her siblings had sold plots to third parties. She could not confirm if her brother Zacharia sold the land or caused the dispute.
 7. Charles Mbaabu, the appellant, testified as D.W. 1 and adopted his witness statement dated 2.9.2019 as his evidence in chief. He told the court he was the owner of LR No. Tigania/Antuamburi/3776 situated in the outskirts of Mikinduri Township, which he converted into a commercial property due to its size and proximity to the town. D.W. 1 said that while putting up a storey building on the first floor, he was served with court papers and had to suspend it. Further, D.W. 1 said he had never dwelt with the respondent over his plot nor had any interest in his land. D.W. 1 also said the respondent was attempting to evict him from his land, yet he had not occupied it before and was a stranger to him. He said the respondent was passing off his Parcel LR No. 4720 as if it were Parcel LR No. 3776. He termed the claim baseless since he had never trespassed into the alleged land.
 8. D.W. 1 produced a copy of the original adjudication record as D. Exh No. (1), copy of survey sheet maps No. 108/4/12/7/12/7 as P. Exh No. (2), photographs as D. Exh No. (3), an approved development plan for his plot as D. Exh No. (5), a letter dated 6.6.2019 by the sub-county surveyor as D. Exh No. (6) and a letter dated 4.6.2019 from the area chief as D. Exh No. (7), the area map as D. Exh No. (8) and a scene visit report as D. Exh No. (9). D.W. 1 said he had a booklet but not a title deed.
 9. In cross-examination, D.W. 1 told the court he bought his land from Peter Mukura DW 2 in 2004 through the land office. He said he had a booklet to show ownership, though he had no sale agreement. D.W. 1 said his neighbors were present during the sale but could not remember the parcel numbers as his neighbors were off head. Shown the survey report, D.W. 1 told the court he had his map showing parcel No. 3776 and those of his neighbor as Parcel No. 3199 and 1691.
 10. D.W. 1 said that after he bought his land, he never sought the remarking of the boundaries as per D. Exh No. 10; he said it was a different map where his plot was replaced with Parcel No. 4720. D.W. 1 told the court he bought his plot from Peter Mukura, who had acquired it from one Zachary. He said his developments were approved before construction, and between 2004/2019, he was planting nappier grass on the suit land.
 11. Peter Mukura Mugambi testified as DW 2. He adopted his witness statement dated 1.3.2021 as his evidence in chief. He told the court he bought LR No. 3776 from Nataline Muteria, who had acquired it from Zachary M'Mwirabua M'Ikindu as an inheritance from his deceased father, M'Ikindu Ikindu. He said he eventually sold the land to D.W. 1, who took vacant possession and began cultivating it.



- D.W. 2 told the court that a land surveyor was present when he handed over vacant possession to the appellant and showed him the beacons. He denied that the respondent had ever utilized the land.
12. DW 3 was Naftally Muteria Imanyara. He adopted his witness statement dated 1.3.2021 as his evidence in chief. He confirmed that the appellant bought land from D.W. 2 because he was a witness during the sale; he was the one who had initially bought the land from Zachary in 1970 and resold it to D.W. 2.
 13. Raphael Muthomi Riungu was DW 4. As a land surveyor based in Maua Town, he told the court he prepared D. Exh No. (9) following a scene visit. According to the area survey map, D.W. 4 told the court that LR No. 3776 was on the map and the ground. He said LR No.4720 was in the locality of LR No.3776 as per the new maps from the Director of Survey map dated 9.3.2021. DW4 told the court that LR No.3776 was missing in the new maps as opposed to the maps of 2019. He could not give any explanation since Parcel No.3776 was initially appearing in the earlier maps.
 14. Further, D.W. 4 said a survey map is generated from a base map, which is taken using aerial photographs. He said Parcel No. had been moved to a new sheet map in 121/7 since it was at the disputed area in 2019. DW4 said he could not establish where Parcel No.3776 was in the current survey map unless the owner had a title deed.
 15. D.W. 4 said a title could be moved during the amendment of a title with the owner's involvement as the land was being changed from its location.
 16. D.W. 4 said LR No. LR No.4720 was currently in sheet map No.1217 instead of sheet map No.1714. He could not state when the alternation was made. Otherwise, it could not have occurred without the involvement of the land registrar and land surveyors. He said the two parcels of land were interchanged unless the court was to direct the survey map to be amended.
 17. Aggrieved, the appellant, by a memorandum of appeal dated 15.10.2021, faults the lower court judgment on nine grounds of appeal summarized as the trial court failed to find Section 79 of the [Land Registration Act](#) on the translocation of the location of the suit land was not followed; the appellant was to involved in the translocations the court did not consider appellants written submissions. It disregarded the appellant's evidence and defense, including the area map.
 18. In support of his grounds of appeal, the appellant, by written submissions dated 18.10.2023, submitted the appeal was merited since the suit land was legally registered under his name during the adjudication process. The process under Sections 22 & 79 of the [Land Registration Act](#) of rectification of the register was not followed before changes could occur on the area map which inevitably affected him.
 19. The appellant submitted that neither the land registrar nor the survey director notified him of the impending boundary alteration or adjustment and or allowed him to be heard. Further, the appellant submitted that the respondent availed no evidence to show he bought the resultant land from their late father.
 20. The respondent, by written subdivisions dated 17.10.2023, relied on Section 26 (1) of the [Land Registration Act](#) and [Simon Njagi Njoka v Simon Gatimu Kanyi](#) (2007) eKLR, to submit that the appellant did not dispute ownership of the suit land or provide evidence to show that he owned the suit land, otherwise in his statement of defense he had pleaded that he had no interest in LR No. Tigania/ Antuamburi/4720.
 21. The respondent submitted PW 2, 3, and 4 were consistent and corroborated his evidence on ownership of the suit land from 1975 until July 2019 when the appellant, contrary to Section 3 (1) of the Tresspass Act, interfered with the land.



22. Regarding the location of the suit land, the respondent submitted that he produced a title deed and a map as P. Exh No. 1 & 2, showing the position of his land, which evidence was not challenged through rival documents by the appellant. Further, the respondent submitted the D. Exh No. (9) & (10) and the evidence produced by D.W. 4 located his land.
23. The respondent submitted D.W. 2 and 3 but did not know the parcel numbers they sold to the appellant. Additionally, the respondent submitted that D.W. 4 could not explain how and when the alleged discrepancies or alterations on the sheet maps came about. Reliance was placed on *Mathew Ndau Kiambati v James Gichuki Magundu & another* (2018) eKLR, which cited with approval *Gitwany Investments Ltd v Tajmal Ltd and others* (2006) 2 EA 76, that in the case of plots' physical location, the critical question and the burden of proof was on the claimant to prove ownership, possession, fencing, and the alleged trespass to his land. The respondent urged the court to find the trial court's judgment well-reasoned, correct, and sound.
24. The court has carefully examined the pleadings, evidence, tendered grounds of appeal and written submissions. The issues for the court's determination are:
- i. If the respondent pleaded and proved trespass to LR No. Tigania/Antuamburi/4720 by the appellant in August 2019.
 - ii. If the appellant pleaded and proved any justification for the alleged trespass.
 - iii. If LR No. Tigania/Antuamburi/4720 and 3716 are located on the same land.
 - iv. If the respondent was entitled to the reliefs of eviction and damages for trespass.
 - v. If the appeal has merits.
25. The respondent's claim at the lower court was that in August 2019, the appellant entered onto his land without any color of right or justification, deposited building materials and commenced illegal construction, causing him loss and damage. He sought eviction orders and damages for trespass.
26. By defense dated 21.9.2019, the appellant denied the alleged trespass, stating that he was the absolute owner of LR No. Tigania/Antuamburi/3776, which he was occupying or developing; hence, the respondent's allegations of trespass or illegal occupation were an abuse of the court process.
27. Trespass is defined under Section 3 (1) of the *Trespass Act* as entry into private land of another remaining there, erecting structures, or undertaking other activities without the consent of the occupier. In *Kenya Power & Lighting Company v Ringera* (2022) KECA (104) KLR 4th February (2022) (judgment), the court cited with approval *Municipal Council of Eldoret v. Titus Gatitu Njau* (2020) eKLR that trespass was a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership.
28. In the case of *Justin Gatumuta v Kenya Power & Lighting Company & Co.* (2018) eKLR, the court said that under Sections 107 – 112 of the *Evidence Act*, the burden of proof was on the appellant to prove the tort of trespass. Further, the court cited with approval *Duncan Nderitu Ndegwa v. KPLC and another* (2013) eKLR, that once the tort of trespass was established, it was actionable per se, and no proof of damage was required to award damages.
29. In this appeal, the respondent produced a copy of his title deed as proof of land ownership. Under Section 26 (1) of the *Land Registration Act*, the appellant did not impeach the title deed on any of the legal grounds set out under the Act. Further, PW 1 produced a survey map and called PW 2 and 3 to support his claim on acquisition, ownership, and possession. D.W. 4, was also called and produced D.



- Exh No's (9) and (10), which located the title deed held by the respondent on the survey maps and on the ground.
30. On the other hand, the appellant pleaded that he was the owner of LR No. Tigania/Antuamburi/3776. He denied the alleged trespass by erecting buildings on the respondent's land. In the scene visit report dated 9.11.2020 following a court order, the sub-county land surveyor Meru North indicated he visited the disputed parcels of land on 13.6.2019 to determine the boundaries of LR No. 3776. He said that under the new survey maps, LR No. 4720 was on the ground alleged to belong to the appellant.
 31. Other than a booklet, the appellant failed to avail or produce as an exhibit, any title deed for LR No.3776 or a record of existing rights to show that his parcel of land was recorded or demarcated and subsequently registered under his name or to that of any of the predecessor to the title.
 32. D.W. 4 was emphatic in his evidence that under the survey maps, LR No.4720 was where the appellant was alleging it to be his land. D.W. 4 said LR No. 3776 was not on the survey map, unlike LR No. 4720, which was on map sheet No. 12/7 dated 9.3.2021. The appellant failed to call for and produce any other map to challenge the survey map produced by D.W. 4.
 33. In *Stephen Konga v. Symon Kipruto Rop* (2020) eKLR, the court said the survey map sheet was the official map in terms of Section 30 (1) of the *Survey Act* and that land registrar and land surveyor under Sections 7, 15, and 19 of the *Land Registration Act* have the mandate to establish boundaries as per the survey map, registry index map or cadastral map under Section 41 of the *Survey Act*.
 34. D.W. 4 testified before the trial court that land adjudication officers would produce a base map as an interim map pending the Director of Surveys issuing a final map.
 35. The appellant relied on a base map dated 4.6.2019. He did not dispute the existence of the Survey Map developed by the Director of Surveys dated 9.3.2021. The appellant has submitted before this court that the translocation of his parcel LR No. 3776 was done contrary to the law and without being accorded an opportunity to be heard.
 36. It is trite law that parties are bound by their pleadings, and the court determines issues that flow those pleadings (*Raila Amolo Odinga v IEBC* (2017) eKLR. The appellant did not raise in his defence any issues of translocation or superimposition of his parcel LR No. 3776 by LR No.4720. The issue of who and when the translocation occurred and who did it was never pleaded at the lower court. The appellant did not tender any evidence that he applied for the placement or an ascertainment of his boundaries with the Director of Surveys, relying on survey maps, since the land was titled. The appellant failed to produce a title deed or any record of ownership of LR No. 3776. If his title had been availed, there would have been an indication on which map sheet it fell under, and perhaps it would have been established if it was overlapping with that issued to the respondent.
 37. The onus was on the appellant to show a paper trail on how he acquired his LR No. 3776 and, by extension, trace its ownership to the adjudication records, demarcation maps, and later in the survey maps.
 38. In *Stephen Onyango Oloo v Nelson Mukhokha Kaburu & others* (2015) eKLR, the court held that in the absence of an objection during the stipulated period following the land adjudication exercise, the appellant was estopped from seeking to adjust the acreage on the land register on the basis that the acreage on the ground differed from the acreage specified on the land register. Regarding the procedure to alter the map to reflect the altered boundaries, the court said that Section 22 of the repealed *Registered Land Act* (Cap 300) required the land registrar gives notices to the affected person(s). In the



- absence of the notice, the court found the survey map unilateral and unlawful. The court confirmed nullification by the trial court of the title deed issued according to such an unlawful map alteration.
39. In this appeal, the appellant has raised new grounds which were never pleaded or determined before the trial court. It would be against the law for the appellant to raise such issues as held in *Central Kenya Coffee Mills Ltd v Commissioner of Domestic Taxes* (2017) eKLR. There was no pleading on illegal translocation of LR No.3776 and interposing the same on the ground with LR No.4720.
 40. In *George Hopf v Director of Survey & 2 others* (2020) eKLR, the court cited with approval *Mumo Matemba v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR, that cases cannot be dealt with justly unless parties and the court know the issue in controversy and that pleadings assist to give a fair notice to the other party.
 41. In *Jimrise Ltd & 2 others v. Kenya Revenue Authority* (2017) eKLR, the court cited Section 9 (2) (3) & (4) of the *Fair Administrative Action Act* that gives parties remedies on matters of fair administrative action. The court cited with approval *Republic v National Environment and Management Act Civil Appeal No. 84 of 2010*, which stated that where there was an alternative remedy, parties must exhaust those remedies before coming to court. The issue of whether the land registrar failed to give notice under Section 79 of the *Land Registration Act* was not before the trial court. There was no evidence tendered that the appellant had complained to the land registrar for rectification of the register for LR No.3776.
 42. In the absence of any evidence or proof of encroachment on LR No. 3776 by the respondent LR No. 4720, I find the respondent had proved his claim for trespass to the required standards.
 43. On damage for trespass in *Willesden Investments Ltd v. Kenya Hotels Properties Ltd* (2006) eKLR, the court cited with approval *M'Mukangu v M'Mbijiwe* HCCA No. 13 of 1980, that where a party has the right to possess, and another intentionally enters his plot even though they honestly believed the land was their own, and they had a right of entry on it or they did so under an inevitable mistake of law or fact, that would be no defense for trespass.
 44. The court cited with approval *Kamau Macharia v Mwangi Kigundu & others* HCC 4067 of 1986 that even without evidence of loss, the court is obliged to assess damages for deprivation of the use of the land in dispute, the profits measure such damage being as the court may consider reasonable considering the size of the land and the length of the time.
 45. In this appeal, the appellant could not prove ownership of LR No. 3776. None of his witnesses who sold the land produced documentary evidence that they were genuine owners before selling it to the appellant. The relevant government agencies did not authenticate the evidence produced by the appellant. Even after the respondent showed the appellant a title deed, he still erected structures on the suit land. The appellant took no measures or due diligence before entering and embarking on developing the suit land.
 46. In *Municipal Council of Eldoret v Gatitu Njau* (supra), the court cited with approval *County Government of Meru v Isaiab Mugambi M'Muketha* (2017) eKLR and *Obongo & another v Municipal Council of Kisumu* (1971) E A 91, that in awarding damages at large, a court looks into factors such as malice or arrogance on the part of the defendant, which is regarded as increasing the injury suffered by the plaintiff, for example, by causing him humiliation or distress.
 47. In *Godfrey Julius Ndumba Mbogori, another v Nairobi City Council* (2018) eKLR, the court said exemplary damages serve the object to compensate, punish, and deter. In *Duncan Ndegwa* (supra), the court awarded general damages of Kshs.100,000/= for infringement of the right to use and enjoy the land. In *Philip Ayaya Aluchio v Chrsipinus Ngayo* (2014) eKLR, the court said a plaintiff was entitled



to general damages, the difference in the value of his property immediately after the trespass as costs of restoration, whichever was less.

48. The appellant put up a storey building on the plot per the approved building plans. The respondent was denied use and access of his land. I believe Kshs.2,000,000/= general damages would be appropriate compensation.
49. The upshot is that the appeal is dismissed. Other than the prayer for general damages, the lower court judgment is confirmed. The appellant shall hand over vacant possession after three months from the date hereof.
50. Costs of the appeal to the respondent.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 22ND DAY OF NOVEMBER 2023

**In presence of

C.A Kananu/Mukami

Gichunge for appellant

HON. CK NZILI

ELC JUDGE

