



**Kamau v Bunjo (Environment & Land Case 497 of 2017)  
[2023] KEELC 21551 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21551 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 497 OF 2017**

**JG KEMEI, J**

**NOVEMBER 15, 2023**

**BETWEEN**

**CHARLES KAHUMBURU KAMAU ..... PLAINTIFF**

**AND**

**DANIEL BUNJO ..... DEFENDANT**

**JUDGMENT**

1. On the May 2, 2017 the plaintiff filed suit against the defendant seeking the following orders;
  - a. A permanent injunction restraining the defendant by himself, his servants or any person claiming title through the respondent/defendant be restrained from trespassing on, constructing on, wasting or in any manner interfering with the parcel of land known as Kiambu/Mun Block 5 (Kiamumbi) 1508.
  - b. An eviction order against the defendant and/or in the alternative an order that the defendant render vacant possession.
  - c. Mesne profits and interest from the date of illegal occupation by the defendant to the date of filing, hearing and determination of this suit.
  - d. Costs and interest of this suit.
  - e. Any other relief this honourable court deems fit to grant.
2. The defendant resisted the plaintiff's claim through the Statement of Defence filed on the April 1, 2018. The defendant avers that he has not encroached on the plaintiff's land and that the area he operates a car wash and eco garden as duly licensed by the County Government of Kiambu where he has held a license since 2010. That the plaintiff has no proprietary interest in the portion where he is carrying out his activities and urged the Court to dismiss the case of the plaintiff.



## The hearing

3. At the hearing the plaintiff led evidence in support of his case and relied on his witness statement dated the May 13, 2019 and produced the list of documents marked as PEX 1 - 10 in support of his case.
4. The witness stated that the defendant has encroached onto his property as well as dumped soil on this land thereby causing flooding and rendering it marshy thus damaging the land. That arising from the said encroachment, the land is now smaller in size. Further that the soil dumped on the land has blocked the river reversing the flow of water backwards into his land and that the access to the land has been hindered. He added that the receipts, the defendant has produced before Court have nothing to do with the impugned land. That the defendant is occupying a road reserve which is public land in nature. That the defendant has occupied some parts of his land and a portion of the road reserve. That he acquired his land from the cooperative society that owned the land before it sold to its members.
5. The defendant led evidence and relied on his witness statement dated the March 28, 2019 and produced documents marked as DEX 1-7.
6. The witness stated that he occupies the road reserve and denied dumping any soil on the plaintiff's land or blocking the flow of water. That he reclaimed the open space next to the road reserve for purposes of carrying out a car wash business which he runs with the license of the county government. That the road reserve fronts Kamiti Road and that he has no other car wash in the area except the one he runs on the road reserve. That the plaintiff's land is marshy and cannot accommodate a car wash.
7. DW2 – Bernard Gitonga stated that he is a qualified surveyor working at the Land Survey Office at Kiambu. He explained that the boundaries are general in nature and not fixed. That there is an open space next to the road reserve fronting Kamiti road. That the suit land is smaller by 0.019 hectares arising from the loss of land on the side of the river and not the riparian side. That the dimensions of the river are not marked.
8. In his further evidence he explained that the soil dumping is on the vacant space between the road reserve and the plaintiff's land. That the river flows towards Kamiti road and not backwards hence the river course is not blocked. That he is unaware who owns the open space adjacent to the road. He stated that the flow of the river may have shifted as a result of the river changing course. The witness stated that the car wash is on the open space and not the suit land.
9. The parties filed Written Submissions which I have read and considered in the judgement
10. The key issue for determination is whether or not the Plaintiff has proven a case for trespass.
11. Section 3 (1) of the *Trespass Act*, cap 294 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.”
12. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. It is trite that trespass is actionable per se.
13. It is not in dispute that the Plaintiff is the registered owner of the suit land. It is the law that as a registered owner, he is entitled to the rights under the law especially rights flowing from section 24 and 25 of the *Land Registration Act* which states as follows;

“ 24. Interest conferred by registration 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. Rights of a proprietor

- (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.”

- 14. The plaintiff’s case is that his land has been encroached by the defendant who has carried out certain activities on the nearby road reserve which activities have impeded the enjoyment of his property rights to wit; encroached on the suit land; blocked the free flow of water in Kiu river forcing a reversal flow into his land; turned his land into a marshy plot incapable of any meaningful land use; blocked access to his land.
- 15. The defendant has denied the claims of the plaintiff and reiterated that he runs a car wash licensed by the county on the open space between the Plaintiff’s land and the road reserve.
- 16. DW2- the Surveyor led evidence on site as well in Court and stated that there was no encroachment of the plaintiffs land. The surveyor agreed with the plaintiff that his land is smaller on the ground. He attributed that to the loss of the land across the Kiu River and not on the part of the road reserve. He opined that there is a possibility that the fence across the river was moved into the Plaintiffs land long before the fencing. He was also categorical that the river flows underneath the Kamiti Road and not backwards into the Plaintiffs land. According to the maps the witness demonstrated that the original river course was along the blue line (as per the Registry Index Map) but with the river changing course it is now on the white line (as per the current ground positioning) hence the high probability that the loss of the plaintiffs land lies on the area between the blue and the white line. The maps also demonstrate that the riparian or the road reserve does not in any way encroach on the suit land.



17. From the maps and evidence led on trial it is not in dispute that the Defendant operates a car wash on the open space and partly on the road reserve, none of which have encroached the suit land. The soil dumping is on the open space and on the suit land.
18. The court notes that the cause of action of the plaintiff is trespass and not the size of the land. The latter is a matter that the plaintiff may want to pursue with the office of the land registrar under the relevant provisions of the law for purposes of ascertaining the area in the title vis-à-vis the Registry Index Map (ground area).
19. On eviction and mesne profits, having found that trespass is not proved, these prayers are untenable and fall for dismissal.
20. The plaintiff therefore failed to prove his case and on the balance of probabilities and the court finds the suit unmerited.
21. It is dismissed.
22. Each party to meet their own costs.
23. Orders accordingly

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

G. Kamau for the Plaintiff

Defendant - Absent

Court Assistants – Phyllis/Lilian

