



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mwinyi v Kumbi & 2 others (Environment & Land Case 113 of 2021)
[2023] KEELC 22309 (KLR) (13 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22309 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 113 OF 2021
NA MATHEKA, J
DECEMBER 13, 2023**

BETWEEN

ZUENA MWINYI PLAINTIFF

AND

JUMA SHEIHI KUMBI 1ST DEFENDANT

JOSEPH NYANGE 2ND DEFENDANT

MAXEL MAASAI 3RD DEFENDANT

JUDGMENT

1. The plaintiff avers that at all material times to this suit, she is the owner of the suit property that is Matrimonial Property "Vikwatani/Kajiweni" measuring approximately 110 by 80 ft. situated at Vikwatani. The Plaintiff avers that her husband, vide a written agreement, bought the said Matrimonial Property "Vikwatani/Kajiweni" measuring approximately 110 by 80 ft. situated at Vikwatani from the 1st defendant on 19th February 2006 through the Title has never been transferred and/or issued. The plaintiff avers that she and her husband then built their two-room matrimonial home on the said land where they lived with their children even after the demise of her husband sometime in 2010. The plaintiff avers that sometime after her husband's death, she got into a written agreement with the 1st defendant where they agreed that the 1st defendant was to extend the said property for a consideration of Kshs 20,000/= which the plaintiff paid the 1st defendant in full and the property was initially measuring approximately 50 by 50 ft. but was later extended vide the agreement to 110 by 80 ft. The Plaintiff avers that sometime in 2014, she learnt that the 1st defendant had sold the said Matrimonial Property "Vikwatani/Kajiweni" to the 2nd defendant when the 2nd defendant in company of the 3rd defendant trespassed into the suit property and demolished her matrimonial house; the said demolition was witnessed by the area 'village' elder.



2. It is the plaintiff's case that she owns a plot of land in Vikwatani/Kajiweni measuring approximately 110 by 80 ft situated in Vikwatani. The suit property was purchased in two folds, the first portion of the suit property measuring 50 by 50 ft, was purchased by her late husband Daudi Sulubu Ndegwa from Juma Shehi Kumbi on 19th February 2006 (PEX-2). After the demise of her husband on 16th December 2010 (PEX-10), the plaintiff extended the initial portion for consideration of Kshs 20,000/= from the 1st defendant to bring the whole parcel of land to approximately 110 by 80 ft (PEX-4).
3. This court has considered the evidence and the submissions therein. It is the plaintiff's case that sometime in 2014, 1st defendant sold the same parcel of land to Joseph Nyange and in the company of Maxel Maasai trespassed into her suit property and demolished her matrimonial house as witnessed by a village elder (PEX-5). The plaintiff averred that she reported the matter to the area chief (PEX-6), who advised her to report to the police, which she did and was issued with an OB No 10/17/7/2019 (PEX-7). Since title to the suit property had not been transferred by the 1st defendant, the plaintiff was advised by the police to resort to the area chief and village elders to determine ownership of the suit property. When the area chief summoned the defendants, they failed to obey the summons and did not show up for the hearings, it was then concluded that as a successor of her late husband, the plaintiff owned the suit property and the defendants were trespassers (PEX-9).
4. The plaintiff further averred that the chief wrote to the 2nd and 3rd defendants informing them of the decision but they have since refused to receive the said letters. The 2nd and 3rd defendants proceeded to invade the suit property, and on reporting the issue to the police the 1st defendant was arrested. In solving the issue, the 1st defendant's father proposed to give the 2nd defendant another portion of the land of equal measurement in order for the 2nd defendant to vacate the suit property. It is the plaintiff's case that initially the 2nd defendant had agreed to the proposal but has since refused to vacate the suit property and continues to build structures on it. The plaintiff prays for judgment against the defendants for;
 - a. An order directing the defendants to deconstruct any structures constructed on the suit property.
 - b. An order evicting the defendants from the matrimonial property permanently.
 - c. An order directing the defendants to allow the plaintiff access to the matrimonial property.
 - d. A restraining order against the defendants from trespassing into the matrimonial property.
 - e. An enforcement order be issued to the Kiembeni police station to ensure compliance.
5. The defendants were duly served with the summons to enter an appearance, none of the three a memorandum of appearance or defence filed within the stipulated time or at all. They also did not participate in the trial and hence the plaintiff's case was undefended.
6. The suit property herein is unregistered, the plaintiff did not adduce evidence of registration of the suit property. Nevertheless, it is not necessary to prove ownership of land in a claim for trespass. Trespass to land is an entry upon, or any direct and immediate act of interference with, the possession of the land. What the plaintiff needed to prove was actual possession of the suit property, which is a question of fact consisting of an intention to possess the land in question and exercise control over the land. The plaintiff has averred that she lived on the suit property and built her home which she has lived with her late husband and children until the 2nd and 3rd defendants trespassed thereto. The actions taken by the plaintiff of reporting the 2nd and 3rd defendants' actions of trespass to the area chief and making a report to the police are sufficient acts to prove that she has been in possession of land and entitled to



make a claim for trespass. The Court of Appeal was of this opinion in *Jamal Salim v Yusuf Abdulabi Abdi & another* (2018) eKLR and stated that;

“In the text *Clerk & Lindsell on Torts, Sweet & Maxwell*, 18th Edition, at page 923, trespass to land is defined as follows :- “Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another.

At page 927 of the same text discusses who may sue for trespass and it states as follows:-

“Trespass is actionable at the suit of the person in possession of land, who can claim damages or injunction, or both... Similarly, a person in possession can sue although he is neither owner nor derives title from the owner, and indeed may be in possession adverse to the owner.”

It is therefore not necessary for one to establish ownership of land to sustain a claim for trespass. It is enough that the person suing is in possession.”

7. It has not been disputed that the plaintiff’s late husband Daudi Sulubu bought a portion of the suit property from the 1st defendant on 19th February 2006 and later the plaintiff extended the said portion from the same vendor, who was the 2nd defendant. The plaintiff’s claim of being in possession has not been challenged and the fact that her interest in the suit property has not been effected through registration and issuance of title documents does not derogate her possession of the suit property. The defendants have not given any justification for entering and taking possession of the suit property, and since the plaintiff’s evidence remains unchallenged, it is the finding of this court that the 2nd and 3rd defendants’ actions amount to trespass, which are actionable at the instance of the person in possession.
8. The plaintiff averred that the 2nd and 3rd defendants demolished her house and started to build structures on it and even produced pictures in a bid to prove the same. In *Philip Ayaya Aluchio v Crispinus Ngayo* (2014) eKLR the court held that;

“The defendant has constructed on the plaintiff’s land. This in itself is damage and wastage of the plaintiff’s land. 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 the plaintiff’s property immediately before and immediately after the trespass or the cost of restoration, whichever is less. See *Hostler v GreenPark Development Co* 986 S. W 2d 500 (No ct App 1999).

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. There was no evidence adduced on the nature of house which the defendant has constructed on the suit land. The court is at a disadvantaged position in reaching at a cost which might be reasonable for restoration of the property to its former state. However as I have found that the plaintiff is entitled to general damages for trespass, I will award a nominal sum of Kshs 100,000/= as general damages for trespass. This cost will go towards restoration of the suit land to its former state.”

9. Similarly, in this case, the plaintiff has not adduced evidence as to the status of her suit land before and after the trespass, she is entitled to general damages for trespass but the same has not been sought in her prayers. Nonetheless, the court will award a nominal sum of Kshs 150,000/= as damages for trespass to help her restore the suit property and possibly get back on her feet by constructing a decent house for



her family. Having proved her case on a balance of probabilities, she is entitled to the prayers sought in the plaint and I make the following orders:

1. A permanent injunction against the defendants either by themselves, their servants, agents, employees or anyone authorized by them from continuing to occupy the suit property.
2. The 2nd and 3rd defendants are hereby ordered to vacate the suit property and remove all the buildings structures within 60 days from the date of this judgement.
3. In the event of default (2) above the plaintiff be at liberty to so evict or cause to be evicted from the suit land in strict adherence to the law and to remove all the 2nd and 3rd defendants' buildings and structures at their costs.
4. General damages for trespass are provided in the sum of Kshs 150,000/=.
5. Costs of the suit are awarded to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 13TH DAY OF DECEMBER 2023.

N.A. MATHEKA

JUDGE

