



**Ogolla v Agwedo (Environment & Land Case 32 of 2016)
[2023] KEELC 22068 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22068 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 32 OF 2016**

E ASATI, J

DECEMBER 7, 2023

BETWEEN

WILSON DANIEL OGOLLA PLAINTIFF

AND

MOURICE OUMA AGWEDO DEFENDANT

JUDGMENT

Introduction

1. This suit was commenced vide the plaint dated 28th December 2016. The plaint was later amended and vide the amended plaint dated 1st October 2020, the plaintiff Wilson Daniel Ogola claiming to be the sole registered owner of land parcel known as Kisumu/Kogony/5656 measuring 0.11Ha. (the suit land herein) sued Mourice Ouma Ogwendo, the Defendant, for: -
 - a. A permanent injunction restraining the Defendant from remaining on or continuing being in occupation of the suit land;
 - b. General damages for trespass and destruction of property;
 - c. Costs of the suit and
 - d. Any other relief the court may deem fit to grant
2. Vide his Statement of Defence to amended plaint, the defendant denied the plaintiff's claim as contained in the amended plaint and put the plaintiff to strict proof thereof.

The Evidence

3. The Plaintiff testified as PW1. He adopted the contents of his witness statement dated 1/10/2020 as his evidence in chief. In the witness statement, he had stated that the suit land was family land as he inherited it from his father who had also inherited it from the plaintiff's grandfather. That his



family had been cultivating the land ever since he was a child and that upon the demise of his father he inherited the land and continued cultivating it. That the Defendant trespassed onto a portion of the land and started building structures on it. That because the Defendant was hostile, the plaintiff reported the matter to the area Chief and a meeting was held but the defendant was hostile in the meeting. That he also reported the matter to the Land Registrar and Land surveyor who came to the ground but the Defendant refused to cooperate hence no resolution was arrived at. That the Defendant has continued being in illegal possession of his (Plaintiff's) land to the Plaintiff's detriment.

4. The Plaintiff produced title deed and certificate of official search for the suit land as exhibits. He stated in court that he does not stay on the land.
5. On cross-examination the Plaintiff stated that the Defendant owns land in the neighborhood and that the Land Registrar and Surveyor visited the land but the Defendant was uncooperative.
6. On behalf of the defence the Defendant testified as DW1. He also adopted the contents of his witness statement recorded on 4/11/2019 as his evidence in chief. He had stated in the witness statement that he has never done any activity on the suit land. That his land is No. Kisumu/Kogony/6916 which he purchased and that the same is totally different and distinct from the suit land. That it is not true that he has trespassed onto the suit land as alleged by the Plaintiff.
7. He produced title deed and certificate of official search to land parcel No. Kisumu/Kogony/6916 as exhibits in the case. He stated that the house he has built is on his land which is on map sheet No. 6. He also produced a map as exhibit to show the position of his land on the ground. He testified further that the title deed produced by the Plaintiff shows that the suit land is on map sheet No. 9. That the suit land does not share any boundary with his land. That map sheet 6 is far away from map sheet 9. That the two lands are unrelated. That the Plaintiff has never brought a Surveyor to the land.

Submissions

8. Written submissions dated 14th June 2023 were filed on behalf of the Plaintiff by the firm of Aoko, Ondieki & Company Advocates. Counsel relied on *Black's Law Dictionary 8th Edition* where trespass is defined as "an entry on another's ground without a lawful authority, and doing some damage however, inconsiderable, to his real property. Counsel similarly relied on Clek & Lindsell on Torts 18th Edition at Paragraph 18-11 where the definition of trespass is given as "any unjustifiable intrusion by one person upon land in possession of another... trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession." Reliance was also placed on Section 391 of the *Trespass Act* cap 294 Laws of Kenya.
9. Counsel relied on section 24 of the *Land Registration Act*, 2012 to submit that registration of a person as the proprietor of land vests in that person the absolute ownership of the land. That the Plaintiff in this case produced a copy of title deed to the suit land to prove ownership and that he testified to the effect that the Defendant had trespassed onto the land. That to establish the tort of trespass, a party has to prove his ownership of the property and that the Defendant's occupation of the property is unjustified.
10. On whether or not a permanent injunction should issue, Counsel relied on the provisions of sections 24, 25 and 26 of the *Land Registration Act* and the case of *Willy Kipsongok Moroga Vs Albert K. Morogo* (2017) eKLR to submit that the plaintiff is entitled to protection of the law. That failure to issue the order of permanent injunction and eviction would be tantamount to negating the title of plaintiff contrary to law.



11. On whether or not the plaintiff is entitled to damages, Counsel relied on the cases of *Park Towers Ltd Vs John Mithamo Njika & 7 another* (2014) eKLR and *Dancan Nderitu Ndegwa Vs KP & LC Limited & Another* (2003) eKLR to submit that trespass to land is actionable per se (without proof of damages) That in this case the plaintiff has suffered immeasurable loss as he has not been able to enjoy his land. Counsel relied on *Halbury's Laws of England 4th Edition* volume 45 paragraph 26 1503 on computation of damages in an action for trespass. Counsel further submitted that the plaintiff has proved his case and urged the court to grant the prayers sought.
12. Written submissions dated 21st August 2023 were filed by the firm of Omondi Abande & Co. Advocates on behalf of the Defendant. Counsel submitted that the plaintiff is bound by his pleadings and to adequately claim trespass he should have provided proof of the location of the boundary separating the two parcels of land. That the matter before the court is a boundary dispute as the plaintiff is not sure as to where the boundary between his land and the Defendant's is located.
13. Counsel submitted further that the Plaintiff has failed to prove that the defendant trespassed onto the suit land. Counsel relied on Section 3(1) of the *Trespass Act* Cap 294 of the Laws of Kenya, Section 107 and 108 of the *Evidence Act* and the cases of *Dave -vs- Business Machines Ltd* (1974) EA 68 and Susan Grebedhin, HCC No. 3321 of 1993 to support the submission that he who alleges has to prove. That it is for the Plaintiff to prove his case on a balance of probabilities.
14. On whether or not the Plaintiff is entitled to damages, Counsel submitted that for the Plaintiff to be entitled to damages, he must prove that the Defendant indeed trespassed onto the Plaintiff's land without reasonable excuse or permission. That the Defendant denied ever trespassing onto the suit land. That the Plaintiff did not adduce evidence to prove the trespass and that the Plaintiff did not refute the existence of the defendant's land neither the claim that the parcels are not in the same vicinity. That therefore the Plaintiff is not entitled to damages as he failed to prove that the Defendant is the person who trespassed onto his land.
15. On whether the court should issue a permanent injunction restraining the defendant from remaining on or continuing being in occupation of the suit land, Counsel submitted that in order for an order or permanent injunction to issue, the conditions set in the case of *Giella Vs Cassman Brown* (1973) EA 348 need to be satisfied. That the Plaintiff has failed to satisfy these conditions. Counsel prayed that the Plaintiff's case be dismissed with costs.

Issues for determination

16. From the pleadings filed, evidence adduced and submission made by the parties it is clear that the issue for determination in this matter are: -
 - a. Whether or not the defendant trespassed onto the suit land
 - b. Whether or not the plaintiff is entitled to damages for trespass
 - c. Whether or not an order of permanent injunction should issue as prayed.
 - d. What order to make on costs.

Although the defendant raised and argued the issue of whether or not the dispute was a boundary dispute, this issue had been the subject of a preliminary objection raised by the Defendant on which the court delivered its ruling on 24/3/2021 hence the same is res judicata.



Analysis and determination

17. The first issue for determination is whether or not the defendant trespassed onto the suit land. In paragraph 5 of the amended plaint, the Plaintiff pleaded that the Defendant trespassed and illegally took possession and entered onto the Plaintiff's parcel of land known as Kisumu/Kogony/5656 and illegally started to plough, that the plaintiff reported the matter to the police and the Defendant was arrested with his workers but later released. That the Defendant together with his workers brought sand and marram onto the suit land ready to illegally put a structure thereon.
 18. The Defendant denied ever trespassing onto the suit land and put the plaintiff to strict proof thereof. In his evidence, he stated that he had never entered or carried out any activities on the suit land. He produced documents to show that he owns a separate and distinct parcel of land which is situate in a different sheet map from the suit land. He testified that the two parcels of land do not share a common boundary.
 19. From the definition of trespass as given by both parties in their submissions trespass to land is an unjustified intrusion onto someone's land. In this case, while the Plaintiff pleaded that he reported the trespass to the police and the Defendant and his workers were arrested, there was no evidence produced to that effect. In his evidence the plaintiff stated that he actually reported the matter to the area Chief and later to the Land Registrar. There are no photographs to show the alleged illegal activities of the Defendant on the suit land. No Surveyors report was produced to show that the illegal activities, if any, are actually being done on the suit land. No evidence of the extent of the trespass; whether it covers the entire suit land or only a portion thereof. Under Sections 107 to 109 of the *Evidence Act* Cap 80 Laws of Kenya, the burden of proof was on the Plaintiff to prove the alleged trespass. There is no evidence that the suit land and the Defendant's land share a common boundary. I find that it has not been proved that the Defendant trespassed onto the suit land as claimed or at all.
 20. Whether the plaintiff is entitled to damages for trespass and whether an order of permanent injunction should issue, is dependent on whether trespass is proved. Having found that the tort of trespass has not been proved, there is no basis for awarding damages or an order of permanent injunction.
 21. I find that the plaintiff has not proved his case on a balance of probabilities to warrant grant of the relief sought. The suit is therefore hereby dismissed. Costs to the Defendant.
- Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 7TH DAY OF DECEMBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

No Appearance for the Plaintiff.

Raburu for the Defendant.

