



**Reli Savings and Credit Co-operative Society Limited v Sinohydro Corporation Limited
(Environment & Land Case 90 of 2015) [2025] KEELC 280 (KLR) (28 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 280 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 90 OF 2015
SO OKONG'O, J
JANUARY 28, 2025**

BETWEEN

**RELI SAVINGS AND CREDIT CO-OPERATIVE SOCIETY
LIMITED PLAINTIFF**

AND

SINOHYDRO CORPORATION LIMITED DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit on 14th April 2015 through a plaint dated 10th April 2015 seeking among other reliefs; a permanent injunction restraining the Defendant, its agents, representatives, assigns or any other persons acting through its direction from trespassing upon, continuing to trespass upon, excavating murram or in any other way interfering with the Plaintiff's possession and use of all that parcel of land known as Kanyakwar Residential Plots/Kisumu Block 17 (hereinafter referred to as "the suit property"), repair and restoration of the suit property to its condition prior to the Defendant's trespass, compensation for violation of the Plaintiff's right to property, degradation of the suit property and trespass.
3. The Plaintiff averred that it was the lawful owner of the suit property. The Plaintiff averred that the Defendant entered the suit property without its permission and engaged in mining and excavating murram therefrom in violation of the Plaintiff's constitutional right to own property. The Plaintiff averred that in the process of excavating and mining the murram, the Defendant degraded and destroyed the suit property. The Plaintiff averred that the damage caused by the Defendant's activities on the suit property was severe and would require a substantial amount of money to remedy.
4. The Defendant entered an appearance and filed a defence on 24th June 2015 in which it denied that the Plaintiff was the lawful owner of the suit property. The Defendant denied that it had trespassed on the suit property as claimed by the Plaintiff. The Defendant admitted that it was excavating murram but contended that its operations were being undertaken on a different parcel of land that the Plaintiff



did not own. The Defendant averred that the Plaintiff's suit disclosed no cause of action against it and urged the court to strike it out.

The evidence given by the Plaintiff

5. The hearing of the suit commenced before Ombwayo J. on 26th September 2019 when the Plaintiff's first witness, Bob Charles Auchu (PW1) gave evidence. PW1 relied entirely on his witness statement filed in court on 14th April 2015 which was adopted as his evidence in chief. PW1 stated that the suit property was allocated to the Plaintiff by the Ministry of Lands. He produced the letter of allotment dated 22nd February 1994 as P.EXH.1. The Plaintiff's second witness was Patrick Opiyo Adero (PW2). PW2 told the court that he was a licensed surveyor. PW2 told the court that he was instructed in September 2015 to carry out ground survey on the suit property, Kisumu Municipality Block 17/1-277. He stated that he was instructed to measure the extent to which the property had been excavated. He stated that he found that the area of the property measuring 240 meters by 250 meters (6 Ha.) had been excavated to a depth of between 1.5 meters and 1.8 meters. He produced a report that he prepared following the assignment as P.EXH.2.
6. The Plaintiff's next witness was Sween Nyongesa (PW3). PW3 told the court that he was an environment planner by profession and a NEMA lead expert. He stated that he held a Master's Degree from Maseno University in Environmental Sciences. He stated that he did an environmental impact assessment on the suit property and prepared a report which he produced as P.EXH.3. He stated that among the impacts of the land degradation activities on the suit property were; loss of nutrients and land productivity, surface runoff and floods, and soil erosion.
7. The Plaintiff's next witness was Luke Okeyo Madunda (PW4). PW4 told the court that he was a registered and practising valuer by profession. He stated that he was also an estate agent. He stated that he was instructed by Envirochek Ltd. to carry out a valuation exercise. He produced his valuation report dated 1st October 2015 P.EXH.3(b).
8. PW1 was recalled and gave further evidence on 6th October 2021. PW1 told the court that the suit property belonged to the Plaintiff. He produced a letter of allotment dated 22nd February 1994 as P.EXH.4, development plans as P.EXH.5 and another letter dated 20th January 2014 as P.EXH.6. PW1 told the court that the Plaintiff's claim against the Defendant was for a sum of Kshs. 317,000,000/- for excavating murrum on the suit property without the Plaintiff's permission.
9. After the close of the Plaintiff's case, the Defendant did not tender evidence. Ombwayo J. considered the Plaintiff's claim based on the evidence on record and entered judgment for the Plaintiff against the Defendant in the sum of Kshs. 317,000/- on 18th March 2022. On application by the Defendant, the said judgment was set aside on 12th June 2023, the Plaintiff's case was re-opened and the Defendant was allowed to defend the suit.
10. When the hearing resumed before me on 12th February 2024, PW1 was recalled for the second time and gave further evidence. PW1 adopted his further witness statement dated 18th September 2023 as his further evidence in chief. PW1 also produced the documents in the Plaintiff's further list of documents dated 18th September 2023 as P.EXHS. 7 to 14 (b) respectively. On cross-examination, PW1 stated that he was the chairman of the Plaintiff. He stated that the suit property was allocated to the Plaintiff in 1994 by the Commissioner of Lands. He stated that the land owned by the Plaintiff was Kisumu Municipality/Block 17. He stated that the land was allocated to the Plaintiff as Un-surveyed Residential Plot-Kisumu Municipality. He stated that it was after the land was surveyed that it was given land reference Block 17. He stated that the land was initially given land reference Block 16 which was changed to Block 17. He stated that the land remained the same and it was only the



reference number that was changed. He stated that the Plaintiff had not been issued with a title. He stated that there was a delay on the part of the Government to issue the title but the Plaintiff was pursuing the same. He stated that the suit property was undergoing subdivision when the Defendant trespassed on the same. He stated that the suit property was not occupied as it had been turned into a quarry. He stated that the claim by KIKAKO over the suit property was resolved by the National Land Commission in a determination that was published in the Kenya Gazette Notice No. 11714 of 9th November 2018. He stated that the suit property was compulsorily acquired by the Government in 1976 which subsequently allocated the same to the Plaintiff. He stated that the suit property was approximately 6 hectares (18 acres) and that the whole land was excavated by the Defendant. He stated that the Plaintiff learnt of the Defendant's activities on the land in 2014.

11. PW1 stated that the Plaintiff made a report to the Police and those engaged in quarrying were arrested. He stated that the land was not restored. He stated that almost the whole land was excavated. He stated that the Defendant was using the murrum from the suit property for road construction. He stated that the Plaintiff planned to sell the land to its members after the subdivision. He stated that the members had paid Kshs. 100,000/- for a plot in 1994 and had paid a total of Kshs. 27,000,000/-. He stated that the amount they were claiming had been assessed by an expert. On re-examination, PW1 stated that the Plaintiff was not claiming the value of the suit property but damages for the destruction of the land. PW1 stated further that the Plaintiff was asked by the Ministry of Lands to surrender the letter of allotment for the suit property so that the Ministry of Lands could process letters of allotment for individual plots for the 277 plots that resulted from the subdivision of the suit property. PW1 stated further that when they went to the suit property, they found the Defendant's staff and the Defendant's machinery on the land. PW1 stated that they made a report at Kondele Police Station and the said staff who were on site were arrested.

The evidence given by the Defendant

12. The Defendant called Li Yingtao (DW1) as its first witness. DW1 told the court that he was the Defendant's project engineer. He adopted his witness statement dated 24th July 2023 as part of his evidence in chief and produced the documents attached to the Defendant's list of documents dated 24th July 2023 as D.EXH. 1 to 10 respectively. On cross-examination, DW1 stated that the Defendant had road construction contracts in Kisumu and was getting murrum from land near the project site. He stated that he had produced the lease agreements that the Defendant entered into with Grace Achieng Otiende, Vitalis Onyango Akech, and KIKAKO. He stated that these persons were the owners of the land from which they were extracting the murrum at Kanyakwar next to Uzima University. He stated that the lease agreements were for land totaling 3 acres. He stated that the Defendant assumed that the lessors had titles for the land that they leased to the Defendant.
13. DW1 stated that the Defendant excavated murrum weighing 32,780.7 tonnes from the land that was leased to it. He denied that the Defendant's employees were arrested. DW1 stated that if the court ruled against the Defendant, the Defendant would be willing to pay only for the murrum that it excavated from the suit property. On re-examination, DW1 reiterated that the Defendant excavated murrum from land measuring 3 acres only. On examination by the court, DW1 stated that the people who leased land to the Defendant had some documents which showed that their titles to the land were being processed at the land office.
14. The Defendant's next witness was Robert Ochieng' Osure (DW2). DW2 adopted his witness statement dated 24th July 2023 as his evidence in chief. On cross-examination, DW2 stated that he was one of the persons who entered into a lease with the Defendant which allowed it to excavate murrum from the suit property. DW2 stated that they were paid by the Defendant for the murrum



harvested from the suit property. He stated that his Association did not have a title to the suit property but the same was their ancestral land. He stated that the land had not been adjudicated and that explained why they did not have a title. He stated that there was an intention by the Government to compulsorily acquire the suit property but the process was not completed. He stated that after the extraction of the murrum, the suit property remained as a big hole and nobody was staying on the same. He stated that the dispute between his Association and the Plaintiff over the suit property was taken to the National Land Commission(NLC) which determined that the land was lawfully acquired by the Government compulsorily. He stated that his Association was advised to pursue its claim as a historical land injustice. On re-examination, DW2 stated that the Defendant excavated murrum from land measuring 3 acres only that was leased to it and that other persons had also been extracting murrum from the suit property.

The submissions

15. After the close of evidence, the parties made closing submissions in writing.

The Plaintiff's submissions

16. The Plaintiff filed submissions dated 2nd April 2024. The Plaintiff submitted that earlier in the proceedings, the court noted that the ownership of the suit property was not in dispute. The Plaintiff submitted that on 26th September 2019, the court ordered by consent of the parties that the County Land Surveyor visit the suit property and establish the extent of murrum mining and whether the mining was on the suit property. The Plaintiff submitted that a report that was prepared by the County Land Surveyor filed in court on 28th February 2020 pursuant to the said order confirmed that the murrum was excavated from the whole of the suit property. The Plaintiff submitted that this fact was also confirmed by the surveyor Patrick Opiyo (PW2) in his report that was produced in evidence. The Plaintiff submitted that according to PW2, the excavation covered 240 meters by 250 meters and had a depth of 1.8 meters. The Plaintiff submitted that PW4 gave evidence on the degradation of the suit property following the excavation while PW5, Luke Madende valued the murrum that was excavated from the suit property at Kshs. 317,000,000/-. The Plaintiff submitted that the ownership of the suit property was not in dispute and the Plaintiff proved that the Defendant had excavated murrum from the suit property owned by the Plaintiff. The Plaintiff submitted that since the ownership of the land was not disputed and the excavation of murrum had been established what remained for the court was to determine the damages payable for the trespass. On damages, the Plaintiff submitted that it was proved that there was a great environmental degradation of the suit property. The Plaintiff submitted that the land required reclamation to restore. The Plaintiff submitted that this would entail backfilling of the land to its original state for it to be of any use.
17. The Plaintiff submitted that the amount of murrum excavated was estimated to be approximately 90,000 cubic meters or 158,450 tons which was valued at Kshs. 317,000,000/-. The Plaintiff submitted that although the Defendant expressed willingness to pay for murrum weighing 32,787 tons, the Defendant did not state how that quantity was arrived at and how the value was assessed. The Plaintiff submitted that the Defendant did not place before the court any expert evidence to challenge the evidence of the experts who gave evidence in support of the Plaintiff's case.
18. The Plaintiff urged the court to grant the reliefs sought in the plaint. The Plaintiff submitted that the Defendant be ordered to restore the suit property to its original state prior to the excavation. The Plaintiff submitted that since it would be difficult if not impossible for the court to determine the exact state of the suit property before the excavation by the Defendant, the court should consider awarding the Plaintiff as damages the value of the murrum that was excavated from the suit property by the



Defendant which had been assessed at Kshs. 317,000,000/-. The Plaintiff submitted that it was also entitled to general damages for trespass having been prevented from developing the land due to the illegal acts of the Defendant. The Plaintiff also prayed for costs and interest.

The Defendant's submissions

19. The Defendant on its part filed submissions dated 4th May 2024. The Defendant framed three issues for determination namely; whether the Plaintiff was the lawful owner of the suit property, whether the Defendant rightfully believed that KIKAKO was the genuine and rightful owner of the suit property and what was the extent of the area from which the Defendant excavated the murrum and the extent of damages suffered by the Plaintiff if any?
20. On the first issue, the Defendant submitted that the Plaintiff did not prove ownership of the suit property and as such could not maintain a valid claim against the Defendant for trespass. The Defendant submitted that the land was leased to them by KIKAKO which claimed ownership of the same through ancestry and were also in occupation of the same at the time of the lease. The Defendant submitted that none of the documents produced in evidence by the Plaintiff in proof of its title to the suit property such as the letter of allotment dated 22nd February 1994, the Gazette Notice and various correspondence between the Plaintiff and the National Land Commission related to the suit property. The Defendant submitted that the documents had land reference numbers different from that of the suit property. The Defendant submitted that the chairman of the Plaintiff admitted in cross-examination that the Plaintiff did not have a title to the suit property. The Defendant submitted that there was substantial doubt on the validity of the Plaintiff's ownership claim over the suit property. The Defendant submitted that the only evidence of title of land ownership that was produced by the Plaintiff that related to the suit property was the letter of allotment for Kisumu/Municipality/Block 17/89 measuring 0.0272 of a hectare. The Defendant submitted that if there was compensation to be paid, it should only be in respect of this particular parcel of land.
21. The Defendant submitted that in the absence of proof of ownership of the suit property, the Plaintiff's trespass claim was not maintainable. The Defendant submitted that it rightfully believed that the suit property was owned by KIKAKO and that KIKAKO had the right to deal with the same. The Defendant submitted that its activities on the suit property were lawful in that the same were undertaken pursuant to the lawful leases that it entered into with KIKAKO.
22. On the second issue, the Defendant submitted that it entered the suit property upon executing leases dated 23rd April 2014 and 9th August 2014 in respect to the land on which it was to excavate the murrum. The Defendant submitted that for the entire duration when it was excavating the murrum, the members of KIKAKO were on the ground supervising the exercise. The Defendant submitted that the members of KIKAKO were the ones in possession of the land and a part from the Defendant, there were other groups undertaking the same activity of murrum excavation. The Defendant submitted that it innocently believed that KIKAKO was the rightful owner of the suit property. The Defendant submitted that at no time during the initial excavation of the murrum was the Defendant made aware that there were other parties claiming the suit property. The Defendant submitted that it innocently believed that KIKAKO was the rightful owner of the suit property and dealt with it as such. The Defendant submitted that it was entitled to protection of the law under the doctrine of innocent purchaser for value without notice.
23. On the issue of damages, the Defendant submitted that the scope of its excavation activities was limited to 3 acres as agreed between it and KIKAKO. The Defendant denied that its excavation of murrum activities covered an area measuring 240 meters by 250 meters (approximately 15 acres). The Defendant submitted that this position was supported by its project engineer's report dated 25th July 2023 in



which he stated that the area from which it excavated murram measured 21, 853 cubic meters and that the murram excavated was approximately 32,780.7 tons. The Defendant submitted that it did not extract murram weighing 158,450 tons as claimed by the Plaintiff's valuer in his report dated 1st October 2015. The Defendant submitted that the claim by the Plaintiff of Kshs. 317,000,000/- for the murram excavated was exaggerated. The Defendant submitted that according to the report by ADD Property Consultants, the value that was attributed to the murram was the same as the value of the land. The Defendant wondered as to who would own the land after the Plaintiff had received full compensation for the value thereof. The Defendant submitted that the Plaintiff would be unjustly enriched if it was to be awarded the sum of Kshs. 317,000,000/- claimed by it. The Defendant cited two decisions in support of this submission.

24. In conclusion, the Defendant submitted that the Plaintiff had failed to prove that it was the owner of the suit property. The Defendant submitted further that the valuation reports tendered in evidence by the Plaintiff and the methodology used in arriving at the compensation claimed were flawed. The Defendant urged the court to dismiss the Plaintiff's suit with costs to the Defendant.

Analysis and determination

25. I have considered the pleadings, the evidence tendered and the submissions by the parties. In my view the following are the issues arising for determination in this suit;
1. Whether the Plaintiff is the owner of the suit property;
 2. Whether the Defendant trespassed on the suit property;
 3. If number 2 is in the affirmative, what was the extent of the trespass?
 4. Whether the Plaintiff is entitled to the reliefs sought in the plaint.

Whether the Plaintiff is the owner of the suit property;

26. Although the Defendant contested it, I find the evidence on record in proof of the Plaintiff's ownership of the suit property overwhelming. The Defendant did not claim to own the suit property. The Defendant claimed that the suit property was owned by an entity known as KIKAKO Welfare Association (KIKAKO). KIKAKO was not a party to the suit and no evidence was placed before the court in proof of its alleged ancestral claim to the suit property. The dispute between the Plaintiff and KIKAKO over the ownership of the suit property was lodged with the National Land Commission (NLC) for determination in exercise of its powers under Article 68(c) (v) of *the Constitution* and Section 14 of the *National Land Commission Act* 2012. In a determination that was contained in Gazette Notice No. 11714 published in the Kenya Gazette of 9th November 2018, NLC made a finding that the Plaintiff was the owner of the suit property(P.EXH.8). The Plaintiff proved that the suit property was among the parcels of land that were compulsorily acquired by the Government of Kenya in 1976 through Gazette Notice No. 3400 dated 6th November 1976 published on 19th November 1976 (P.EXH.7). The Plaintiff proved that the suit property was allocated to the Plaintiff by the Commissioner of Lands through a letter of allotment dated 22nd February 1994 as un-surveyed residential plot measuring approximately 7.2 hectares (See P.EXH.4). The Plaintiff proved that it accepted the allotment through a letter dated 22nd March 1994 and paid all the requisite charges(P.EXH.9). Before the suit property was surveyed, the Plaintiff sought the approval of the Commissioner of Lands to subdivide the same into 277 portions for sale to its members on the understanding that the Plaintiff would surrender the letter of allotment dated 22nd February 1994 in exchange for new letters of allotment for each of the 277 plots. The subdivision scheme for the suit property was approved by the Commissioner of Lands and the property was surveyed and subdivided



into 277 plots through Survey Plan F/R No. 253/51 of 1994 (P.EXH.13). Following this survey, the suit property was assigned land reference Kisumu Municipality Block No. 16 and a Registry Index Map (RIM) for Kisumu Municipality Block 16/1-277 was prepared for the purposes of processing of titles. The titles are yet to be issued for the said subdivisions of the suit property. Block No. 16 was given to the Plaintiff's parcel of land in error as the same had already been given by the Director of Surveys to a parcel of land that was allocated to Mava Women Group. The Director of Surveys changed the Block number for the Plaintiff's land to Kisumu Municipality Block 17(See P.EXH.6). From the foregoing evidence, it is my finding that the Plaintiff is the lawful owner of all that parcel of land known as Kisumu Municipality Block 17/1-277 (formerly Known as Kisumu Municipality Block 16/1-277) (also known as Block 17). I have found the explanation given by the Plaintiff for the various land reference numbers given to the suit property at different times convincing.

Whether the Defendant trespassed on the suit property

27. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph, 18-01. In *Gitwany Investments Limited v. Tajmal Limited & 3 others* [2006] eKLR, it was held that title to land carries with it legal possession. I have made a finding that the Plaintiff is the lawful owner of the suit property. From the evidence on record, I am convinced that the Defendant entered the suit property and excavated murram therefrom. The Defendant's excuse for entering the suit property without the Plaintiff's permission was that the land belonged to KIKAKO and KIKAKO had granted it a lease authorising it to enter the land and excavate murram therefrom. I have also made a finding that KIKAKO from which the Defendant purported to have leased the suit property had no proprietary interest in the suit property. Due to the foregoing, it is my finding that the Defendant had no reasonable excuse or justifiable cause for entering the suit property. The Defendant was therefore a trespasser on the suit property.

What was the extent of the Defendant's trespass?

28. From the evidence on record, the suit property measured 7.2 Hectares (approximately 18 acres). The Plaintiff filed this suit on 14th April 2015. On 15th April 2015, the court issued an injunction stopping excavation of murram from the suit property. According to the report dated September 2015 produced as P.EXH. 2 by PW2, the portion of the suit property that was excavated measured 240 meters by 250 meters (approximately 6 Hectares) and the excavation was between 1.5 and 1.8 meters in depth. The Kisumu County Surveyor visited the suit property with the District Land Registrar on 24th February 2020 pursuant to an order made by the court and filed a report dated 27th February 2020 on 28th February 2020. The report confirmed that there was excavation of murram on the suit property. With regard to the extent of the excavation, the report stated that the excavation which was described as "massive excavation of murram" was spread all over the surface of the suit property.
29. According to the Defendant, the portion of the suit property from which it excavated murram measured only 3 acres (approximately 1.214 Ha.). In support of this contention, the Defendant relied on two lease agreements. The first was Land Lease Agreement dated 23rd April 2014 between the Defendant, and Grace Achieng Otiende, Vitalis Onyango Akech and KIKAKO for land measuring 2 acres. The other agreement was Agreement for Lease dated 9th August 2014 between the Defendant, and Michael Owino Abwao and KIKAKO for land measuring 1 acre. The Defendant contended that it did not extract murram from any other portion of the suit property.
30. From the material before me, the first survey that was done by the Plaintiff when the Plaintiff learnt of the excavation of murram on the suit property was carried out by Geostate Development Services



who prepared a report dated 29th May 2014. According to the report, as at the time of the inspection of the property, excavation of murram had already taken place in 42 out of the 277 plots excluding roads of access. According to the Area Lists attached to the letter dated 19th January 2011(See the Plaintiff's bundle of documents dated 5th August 2019 filed on the same date), the 42 parcels of land measured approximately 1 Ha. This means that as of 29th May 2014 a portion of the suit property measuring 1 Ha. had already been excavated and murram carried away. As mentioned earlier, these activities continued unabated for nearly one more year until it was stopped by the court on 15th April 2015. If it is assumed that the Defendant commenced its activities on the suit property on 23rd April 2014 and by 29th May 2014 it had excavated murram from an area measuring 1 Ha., it is unbelievable that for the next one year, it would have excavated murram from an area measuring 0.214 Ha. only. The Defendant's claim that it excavated murram from a portion of the suit property measuring 3 acres only is betrayed by the minutes of a meeting of KIKAKO that was held to discuss the extraction of murram from what was referred to as KIKAKO land. According to the said minutes which are attached to the agreement dated 23rd April 2014(D.EXH.8), before the lease agreements for land measuring a total of 3 acres to which KIKAKO was a party, the Defendant had entered into another lease agreement that allowed it to extract murram from the suit property with persons referred to in the minutes as "KONDENGE FAMILY". This lease agreement which was not produced in evidence by the Defendant was for land measuring 5 ½ acres. According to the said minutes, as of the date of the said meeting when the agreement was nullified by KIKAKO, the Defendant had already excavated murram from land measuring 3 acres of the agreed 5 ½ acres. It follows therefore that in addition to the land measuring 3 acres that that the Defendant admitted to have excavated, there was additional 3 acres which the Defendant did not disclose. It follows therefore that from the evidence presented to court by the Defendant, the Defendant extracted murram from land measuring a total of 6 acres (approximately 2.43 Ha.). Looking at the evidence before the court in totality, I agree with the Defendant that it was not only the Defendant who was engaged in the excavation of murram on the suit property. Muriithi Mugo, a licensed surveyor of Geostate who was the first to carry out survey on the suit property after the extraction of murram had started stated as follows in part in his report, "... In course of time, illegal murram diggers invaded the land to dig murram and vehicles to carry away murram." This surveyor did not refer to one murram digger. In the report that was produced as P.EXH.3(a) Sween Nyongesa of Envirocheck Ltd. stated in the executive summary as follows in part, "Kanyakwar area next to Uzima University has been hard hit by both locals and chines(sic) Synohydro Company that have been harvesting marram for commercial purposes thus resulting in deep pits that have degraded the parcel of land...". While proposing rehabilitation measures that can be taken to restore the land to its previous state, she stated in part that, "...The valuer on the other hand had to quantify the amount of marram scooped by the synohydro company and the locals from the pits...". These statements leave no doubt that apart from the Defendant, there were also other murram miners on the suit property whom the Plaintiff did not mention. Due to the foregoing, I will hold the Defendant liable for trespass only on a portion of the suit property measuring a total of 6 acres (2.43 Ha.).

Whether the Plaintiff is entitled to the reliefs sought in the plaint.

31. I had set out earlier in the judgment the reliefs sought by the Plaintiff. The Plaintiff having established that it is the lawful proprietor of the suit property and that the Defendant had trespassed thereon is entitled to an injunction to restrain any further acts of trespass. The Defendant had also claimed an order for repair and restoration of the land to its state prior to the illegal excavation of murram and



what I would call damages for trespass. In *Park Towers Ltd. v. John Mithamo Njika and 7 Others* 2014 eKLR, the court stated as follows:

“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case.”

32. In *Halsbury’s Laws of England* 4th Edition Volume 45 para. 26 1503 the authors have stated as follows on assessment of damages for trespass:

- “ a) If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.
- b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- c) Where the Defendant has made use of the Plaintiff’s land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.
- d) Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
- e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased.”

33. The Plaintiff has proved trespass on its land. The Plaintiff has also proved that the trespass had caused damage to its land. The Plaintiff is entitled in the circumstances to receive compensation for its loss. The court while assessing reasonable compensation would consider the costs of rehabilitating/reclaiming the degraded land and the fact that the Plaintiff has for several years been unable to put the land into any use. *Envirocheck Ltd.* in its report(P.EXH.3(a) recommended filling up (backfilling) the pits left after murram extraction and planting of trees in the affected area. Based on the excavated area of 6 Ha.(14.82 acres), Add Property Consultants in their valuation dated 1st October 2015(P.EXH. 3(b) assessed the murram excavated from the suit property to be 158,450 tons with a value of Kshs. 317,000,000/-. I believe this is the quantity of murram that would be required to rehabilitate the affected portion of the suit property. This valuation only factored in the costs of the murram and the costs of transportation. The cost of planting trees as part of the reclamation of the land was not considered.

34. As I mentioned earlier in the judgment, in my view, the Defendant can only be held liable for the destruction and degradation of a portion of the suit property measuring 6 acres(2.43Ha.) That being the case, the murram excavated from the area would be approximately 36,450 cubic meters which is equivalent to 64,152 tons using the measurements and rates adopted by the Plaintiff’s valuer which I find reasonable. At the price of about Kshs. 2000/- per ton of murram used by the Plaintiff’s valuer, Add Property Consultants, the value of the murram required to backfill the portion of the suit property from which the Defendant excavated murram would come to about Kshs. 128,304,000/-. The calculation that I have adopted here is not far off from that adopted by the Defendant in its D.EXH.10. The only difference is that the Defendant has taken the excavated area to be 3 acres while I have used 6 acres in my calculation for reasons I have given earlier. The Defendant has also not suggested



or given the price of the murrum per ton. I will award the Plaintiff a sum of Kshs. 130,000,000/- all-inclusive as damages for trespass on its land by the Defendant.

Conclusion

35. In conclusion, I hereby enter judgment for the Plaintiff against the Defendant for;
1. A permanent injunction restraining the Defendant, its agents, representatives, assigns or any other persons acting through its direction from trespassing upon continuing to trespass upon, excavating murrum on or in any other way interfering with the Plaintiff's possession and use of all that parcel of land known as Kanyakwar Residential Plots/Kisumu Block 17.
 2. Kshs. 130,000,000/- as general damages for trespass together with interest at court rates from the date hereof until payment in full.
 3. The costs of the suit.

DELIVERED AND DATED AT KISUMU ON THIS 28TH DAY OF JANUARY 2025.

S. OKONG'O

JUDGE

Judgment read through Microsoft Teams Video Conferencing platform in the presence of;

Mr. Odhiambo h/b for Mr. Yogo for the Plaintiff

Mr. Ooko for the Defendant

Ms. J. Omondi-Court Assistant

