



Mwendwa & another v China Road and Bridge Corporation (Kenya (Environment & Land Case 146 of 2017) [2022] KEELC 141 (KLR) (16 June 2022) (Judgment)

Neutral citation: [2022] KEELC 141 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 146 OF 2017
CG MBOGO, J
JUNE 16, 2022**

BETWEEN

CAROLINE WANYUA MWENDWA 1ST PLAINTIFF

ALPHONCE MWENDWA NYALITA 2ND PLAINTIFF

AND

CHINA ROAD AND BRIDGE CORPORATION (KENYA DEFENDANT

JUDGMENT

1. The Plaintiffs filed this suit on the 11th of February, 2019 vide the Amended Complaint dated 6th February, 2019. They pray for judgment to be entered against the Defendant for:
 - a) Permanent injunction against the Defendant, its servants, agents, employees and all those claiming through or under the Defendant restraining them from trespassing on the Plaintiffs' land.
 - b) Permanent injunction against the Defendant, its servants, agents, employees and all those claiming through the Defendant restraining them from harvesting soil from the Plaintiffs' land.
 - c) Damages for trespass to land.
 - d) Special damages of Kshs. 24,503,376 which was to go towards restoring the suit to its original state.
 - e) Special damages of Kshs. 257,000,000 which are the projected profits from the year 2014 to the year 2019.
 - f) Damages for trespass to land.
 - g) Costs of this suit; and



- h) Interest on all monetary sums awarded at prevailing commercial rates.
2. The Defendant filed an Amended Statement of Defence on 12th November, 2019 in which it prays that the suit herein be dismissed with costs.
 3. This matter was set down for hearing on 8th December, 2020. The 2nd plaintiff, Alphonce Mwendwa Nyalita, adopted his statement dated 6th February, 2019 as his evidence in his examination in chief. Next, he produced a list of documents dated 6th February, 2019. Lastly, he produced a further list of documents dated 6th July, 2020 in support of his evidence. All the documents produced were marked as PEX Nos. 1-12 respectively.
 4. In brief, the Plaintiffs aver that on 4th December, 2014 they entered into a sale agreement for the purchase of Plot No. 63 which is within LR. No. 9731/1 and situate in Sultan Hamud, Makueni County from Dennis Kilonzo. That soon thereafter, the Defendant trespassed from a neighbouring parcel of land, which had been leased to them, and began excavating from the Plaintiffs' land. That despite opposition from the Plaintiffs, the excavation from their land went ahead unabated.
 5. the 2nd plaintiff averred that the mitigation measures proposed by NEMA were ignored by the Defendant. He proceeded to state that as a result of the Defendant's illegal excavation, he has been unable to use his land for agribusiness and thus, he prays for judgment as per the amended plaint.
 6. In cross-examination, the 2nd plaintiff stated that he did not have an approved scheme of subdivision for his land which was to be subdivided from the parent title. That he did not have transfer documents for the suit property which is now known as Parcel No. 266. That the total encroachment in the suit property is about a quarter of an acre. That he intended to utilize the suit property for agribusiness. That Dennis Kilonzo signed a 12-month lease agreement for LR. No. 9731/1 with the Defendant on 6th September, 2014 for about 20 acres of the land. That the Defendant's lease agreement with Dennis Kilonzo was signed before the Plaintiffs' sale agreement with Dennis Kilonzo. That he did not know where the 20 acres leased out to the Defendant were located. That he did not have a letter asking the Defendant to rehabilitate the suit property.
 7. In re-examination, the 2nd plaintiff stated that he made the last payment on the purchase price in October, 2020 and that the Title deed for the Parcel No. 266 was issued in September, 2020.
 8. PW1, Francis Kariuki Kiiru, a Quantity Surveyor, adopted his statement dated 6th February, 2019 as his sworn evidence in his examination in chief. He adopted his report marked as PEX No. 3. He stated he was contracted by the 1st Plaintiff to do an assessment of the damage that had been done in suit property. He added that on the basis of the Environmental Impact Assessment Report appearing at pages 68 – 84 of the Plaintiffs' bundle of documents, he was able to calculate costs for the restoration work which he recommended to the Plaintiffs. He came up with a total cost of Kshs. 24,503,376/=.
 9. In cross-examination, PW1 stated that as a quantity surveyor, he picked what he got from the environmental impact assessment report and adopted it. That he was able to specify some of the material to be used in his report. That he did not know how many trees could fit in a quarter acre of the suit property.
 10. PW2 was David Gor Owilah, a practicing accountant. He adopted his statement dated 5th February, 2019 as his sworn evidence. He confirmed that he had prepared the business plan marked as PEX No. 1. In cross-examination PW2 stated that his report was based on assumptions. That it was a projection based on information and data presented by the Plaintiffs. That while preparing the business plan, he did not see a report confirming the viability of the suit property for agribusiness. That he also did not see approvals from the County Government of Makueni indicating that the Plaintiffs were to build a



4-star hotel. That he did not see a CR12 document confirming the Plaintiffs as the directors of Emasun Farm Limited. That he also did not see a document showing that the directors of Emasun Farm Limited were trained in agribusiness.

11. PW3, Thomas Mutinda Kavivya, adopted his statement dated 22nd June, 2020 as his sworn evidence. He stated that he is a licensed land surveyor. That he received instructions from the Plaintiffs to carry out a boundary verification exercise for land parcel number Mbitini/Nzai Block 1(Nzai Farm)/266. That he was required to verify the extent of excavation thereof. That he visited the land and prepared his report marked as PEX No. 11. That excavations had been done in the abutting land parcel number Mbitini/Nzai Block 1(Nzai Farm)9 and had extended to parcel number 266 belonging to the Plaintiffs.
12. PW3 added that the length of excavation along the boundary line separating the two parcels of land was 200 metres. That there was continuous soil erosion from parcel number 266 to fill the void that was left on parcel number 9 after excavation. That apart from excavation, the Defendant did not do any backfilling. That page 12 of his report disclosed the findings and recommendations.
13. In cross-examination, PW3 stated that his report did not indicate the date when he visited the site. He added that the objective of his report was to verify the boundary and encroachment. That to determine the extent of encroachment, he had to determine where the boundary was. Again, PW3 stated that he did not have an extract from the Registrar of Lands to show that the fixed boundary had been fixed.
14. In re-examination, PW3 stated that his report was done in May, 2020. That a licensed surveyor does not need permission from the Land Registrar before going to the land. That initially, the suit property was plot number 63 and 64 before it became Parcel number 266 and 9 after survey was done. That marked the close of the Plaintiffs' case.
15. The Defence called DW1, Gachagua Ngunjiri, a quantity surveyor. In his sworn evidence, he stated that the affected area being a quarter of an acre, required about 5,000 cubic metres of red soil to back fill. That the purchasing and transportation costs per cubic metre is Kshs. 400/= putting the total costs at Kshs. 2,000,000/=. He added that the total cost of grass on the affected area was Kshs. 100,000/=. In support of his cost estimation, DW1 produced the cost handbook (DEX No. 1) prepared by the Institute of Quantity Surveyors of Kenya while clarifying that the cost of red soil per cubic metre was Kshs. 480/=.
16. In cross-examination, DW1 stated that he had based his report on Mr. Kavivya's assessment. That the drawings he was shown were not done by an engineer or architect. That neither did he visit the site nor have the drawings from an architect or engineer. That DEX No. 1 was for guiding purposes and not binding. That the figures shown could go higher and that he had not included the cost of building gabions.
17. In re-examination, DW1 stated that backfilling did not require the report of a structural engineer or an architect. He added that the average cost of red soil in Emali would have to be lower than that within Nairobi region because the soil was readily available there. With that, the Defence closed its case.
18. The Plaintiffs filed submissions on 27th August, 2021. Among the issues identified for determination was whether the Defendant, its servants, agents and or employees trespassed on the Plaintiffs' land. It was argued that excavation on parcel number 266 began after the Plaintiffs purchased the land. That there was a fixed boundary separating parcel Nos. 9 and 266. That excavation happened after the Plaintiffs purchased parcel No. 266. That the Defendant's agents did not stop when asked to do so by the 2nd Plaintiff. That the Plaintiffs' demand letter dated 12th June, 2015 and marked as PEX No. 7 was ignored by the Defendant.



19. It was further submitted that because they had established that the Defendant trespassed on the suit property, the Plaintiffs were entitled to general damages. That the Defendant had benefitted from the act of trespass. A figure of Kshs. 10,000,000/= was proposed. That the Plaintiffs had suffered actual loss that was quantified in the sum of Kshs. 24,503,376/= as costs of restoration of land. That the said costs account for special damages which had been specifically pleaded and proved. That the Plaintiffs were also entitled to Kshs. 257,000,000/= as loss of future earnings for the agribusiness they had intended to undertake on the suit property. Lastly, it was submitted that costs of the suit were due to the Plaintiffs having proved their case in the requisite standard.
20. The Plaintiffs cited the following authorities in support of their case: -
- i) [*Rhoda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited*](#) [2019] eKLR;
 - ii) *Ajit Bhogal v Kenya Power And Lighting Co. Ltd* [2020] eKLR;
 - iii) [*Union Technology Kenya Limited v County Government of Nakuru*](#) [2019] eKLR;
 - iv) *Kenya Power and Lighting Company Limited v Philip A.M. Kimondiu* [2018] eKLR; and
 - v) [*New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd*](#) [1988] eKLR
21. The Defendant filed its submissions on 29th September, 2021. It began by submitting that the Plaintiffs lack the locus to maintain the claim for the alleged events of 15th May, 2015 took place when the Plaintiffs were not the registered or beneficial owners of the suit property. That the boundary between the suit property and the property that was leased to the Defendant had not been fixed in accordance with Sections 18 and 19 of the Land Registration Act.
22. Regarding the Plaintiffs' claim for Kshs. 257,000,000/=, the Defendant submitted that the claim was not backed by evidence. That the said claim being based on the business plans of Emasun Farm Ltd, which is a separate legal entity distinct from the Plaintiffs, was untenable. Further, since the said farming business was yet to start, the report was based on assumptions. On the claim for Kshs. 24,503,376/= as costs for restoration of the land, it was submitted that the figure was based on hearsay because PW2 relied on environmental specialists who specified the material to be used.
23. Again, the Defendant argued that the physical location and boundaries of the suit property was not capable of being ascertained because LR. No. 9731/1 is 8.3 acres while the suit property, which was to be subdivided therefrom, is approximately 10 acres. It was also submitted that the boundaries allegedly verified by PW3 were mere approximations because the Plaintiffs did not produce an extract of the land register showing that the Land Registrar had noted that boundaries had been fixed as per Section 18(1) of the [*Land Registration Act*](#).
24. Additionally, the Defendant contended that the suit property had not been surveyed in accordance with Sections 24 and 32 of the Survey Act for purposes of being subdivided from LR. No. 9731/1. To the Defendant, the fact that the 10 acres of the suit property had not been surveyed and defined as at 15th May, 2015 when the alleged trespass occurred, the Plaintiffs do not have any legal or equitable title and neither can they claim to have been in possession thereof. The Defendant insisted that the 2nd Plaintiff admitted to not having an approved sub-division scheme from the Director of Survey during cross-examination.
25. Submitting that the Plaintiffs had not taken possession of the suit property, it was argued that the Plaintiffs did not plead the same. That the time of entitlement to possession is fundamental to any sale agreement and since the Plaintiffs' agreement with the seller, Dennis Kilonzo, was incomplete then their evidence of possession must be prejudicial to their case. That since a transfer was registered in



- favour of the Plaintiffs in September, 2020 and the full purchase price paid in October, 2020, the Plaintiffs were not entitled to possession of the suit property as at 15th May, 2015.
26. Concluding its submissions with the argument that the Plaintiffs' claim was not based on admissible evidence of legal or equitable interest in the suit property, the Defendant placed reliance on the bundle of authorities dated 29th September, 2021 urging this Court to dismiss the claim.
27. To begin with, I have identified the following as the undisputed facts in my disposition: -
- i) The Defendant signed a lease agreement with Dennis Kilonzo Mutui for LR. No. 9731/1 on 6th September, 2014 to use the land for excavation of murram/red soil;
 - ii) The Plaintiffs entered into a sale agreement with Samuel Kyama Mutui and Dennis Kilonzo Mutui for the sale of approximately 10 acres of land that was to be subdivided from LR. No. 9731/1 and more particularly known as Plot No. 63;
 - iii) That Samuel Kyama Mutui and Dennis Kilonzo Mutui were the legal administrators of the estate of Josphat Mutui Mboko over several parcels of land in LR. No. 9731/1 situate within Emali;
 - iv) That the last payment of the purchase price for Plot No. 63 was made in October, 2020;
 - v) That the Title deed of the suit property (Plot No. 63) was issued in September, 2020 and is currently known as Mbitini/Nzai Block 1(Nzai Farm)/266.
28. The apparent issues for determination are as follows: -
- i) Whether the Plaintiffs can maintain a cause of action based on trespass to land?
 - ii) Whether the Plaintiffs are entitled to the prayers sought in the amended Plaintiff?
 - iii) Which party bears costs of the suit?
29. Black's Law Dictionary (9th Edn) page 1643 defines trespass to land (trespass quare clausum fregit) as follows: -
1. A person's unlawful entry on another's land that is visibly enclosed. • This tort consists of doing any of the following without lawful justification: (1) entering upon land in the possession of another, (2) remaining on the land, or (3) placing or projecting any object upon it. 2. At common law, an action to recover damages resulting from another's unlawful entry on one's land that is visibly enclosed.
30. From the above exposition, it was disclosed in evidence that both Parcel Nos. 266 and 9 are neighbouring plots. That previously, before issuance of title deeds, the said plots were known as Plot Nos. 57 and 58 respectively. It is also not disputed that prior to the issuance of a title deed in favour of the Plaintiffs for Parcel No. 266, in or about September 2020, the previous proprietors of the two neighbouring properties were Dennis Kilonzo Mutui and Samuel Kyama Mutui.
31. It is noteworthy that there are two competing interests herein. The first is the Defendant's, claiming that it had been granted a lease from the previous proprietors of the suit property to excavate parcel LR. No. 9731/1. Of importance is that the Defendant's lease to the suit property does not identify a specific plot on the entire parcel LR. No. 9731/1 that restricted the Defendant from crossing to another plot for excavation purposes.



32. On the other hand, the Plaintiffs claim to have a purchaser's interest in Plot No. 266. Again, on perusal of the agreement for sale, it shows that Plot No. 266 was known as Plot No. 63 in the year 2014 and was to be subdivided from parcel LR. No. 9731/1. Surprisingly, both the lease agreement and the agreement for sale are ambiguous as to whether the two neighbouring plots were very clearly demarcated by a fence.
33. From the pleadings and the evidence, I am doubtful that Plot No. 266 was enclosed by a perimeter fence as has been alleged under paragraph 16 of the amended Plaint. The evidence of a perimeter fence would easily have thwarted an intrusion by the Defendant to the suit property which was being bought by the Plaintiffs. Ten acres of the suit property is unarguably expansive land and it has not been shown in evidence how prominent the alleged beacons separating the two neighbouring parcels were.
34. I have also noticed from the amended Plaint that despite alleging demolition of a perimeter fence, the Plaintiffs have not made a claim for compensation in special damages. Apart from that, no photographs of the said fence were annexed in evidence and above all, the seller of the suit property was not called as a witness to corroborate evidence of the suit property being visibly enclosed. Most importantly, the Plaintiffs did not have a certificate of title to the suit property at the time of trespass.
35. Section 25(1) of the Land Registration Act, 2012 perfectly sums up the fate of this matter. The said provision of statute outlines as follows: -

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

36. I have grappled with the basis upon which the Plaintiffs founded their claim against the Defendant without any proof of title to the suit property at the material time. I have also pondered as to why the Plaintiffs did not opt to sue the vendors for breach of contract for not being able to deliver the subject matter in the nature and form it was agreed when the parties executed a sale agreement.
37. In my reflection of the Plaintiffs' incentive to file this suit, I thought of a situation where hypothetically, suppose that the Plaintiffs had been unable to pay the balance of the purchase price after successful registration of the transfer in their favour as per the provisions of Clause 3.2 of their sale agreement with Dennis and Samuel, would they still have held legal rights over the suit property? Could they be sued as proprietors of the suit property in 2015? Could they sue for an injunction or for eviction? Could they even use the suit property as collateral for a borrowing?
38. I do not think that the Plaintiffs' contractual claim in the suit property can trump a legal title that would be vested upon the holder of a certificate of title. Only registration of a person as proprietor of land confers on that person absolute and indefeasible ownership that allows him/her the latitude to take any lawful steps to protect the said land. In this instance, I do not think it possible for the Plaintiffs to maintain a suit for trespass in the absence of a certificate of title when the alleged trespass occurred in 2015.



39. In *Moya Drift Farm Ltd v Theuri* [1973] 1 EA 114 at page 115 Spry VP, JA. aptly observed as follows in the Court of Appeal's unanimous decision: -

“Mr. Hewitt conceded that it was formerly the law in England that a person had to have taken possession of land before he could take proceedings in trespass, but he submitted that this cannot be the law of Kenya, as it would make nonsense of s. 23. I find this argument irresistible and I do not think it necessary to examine the law of England. I cannot see how a person could possibly be described as “the absolute and indefeasible owner” of land if he could not cause a trespasser on it to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has taken physical possession.”

40. In the same judgment at page 117, Sir William Duffus P. JA., endorsed the judgment of Spry VP. while giving the following rendition: -

“The evidence also showed that several other demands for possession had been made and in my opinion this evidence in view of the appellant's absolute and indefeasible title to the land and also the fact that the respondent was a trespasser with no right or title to be on the land, was sufficient to establish the appellant's legal possession. In any event I agree with the Vice-President that the fact that the appellant was the registered proprietor as owner in fee simple under the Registration of Titles Act, and as such vested with the absolute and indefeasible ownership of the land, was sufficient to vest the legal possession of the land in the appellant, and that this possession would be sufficient to support the action of trespass against a trespasser wrongly on the land.”

41. A similar view was taken by the Court of Appeal in *Joseph N.K. Arap Ng'ok v Moiyo Ole Keiwua & 4 others* [1997] eKLR where it was held as follows: -

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

42. The Court of Appeal in *Charles Ogejo Ochieng v Geoffrey Okumu* [1995] eKLR held as follows: -

“Trespass is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. See Halsbury's Laws of England 3rd edition Volume 38 at pg 744. In the instant case the appellant has no right to sue in trespass since the respondent was lawfully in possession of the title to the suit land at the time of the alleged trespass.

Moreover, under section 23 (1) of the *Registration of Titles Act* the certificate of title in respect of LR 8530/130 and in possession of the respondent shall be taken by all Courts as conclusive evidence that the respondent is the proprietor of the said land as the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title shall not be subject to



challenge except on the ground of fraud or misrepresentation to which he is proved to be a party.”

43. Keeping with the above dicta, in the case of *Ochako Obinchi v Zachary Oyoti Nyamongo* [2018] eKLR, J.M. Mutungi J. held as follows: -

“The plaintiff’s title over the suit property is therefore not challenged on any of the grounds mentioned above or at all. In the absence of such challenge, I am enjoined by law to take the plaintiff on the basis of the title deed that he holds in his name to be the absolute and indefeasible owner of the suit property. As the absolute proprietor of the suit property, the plaintiff is entitled to enjoy rights and privileges associated with such ownership which includes exclusive use, possession and enjoyment thereof without interference by any third party.”

44. On the basis of the foregoing, I can hardly condemn the Defendant for unwittingly entering the suit property that was in no way enclosed and neither registered in the names of the Plaintiffs as lawful proprietors. In the premises, the Plaintiffs cannot maintain a cause of action based on trespass to land against the Defendant.

45. It goes without saying that the prayers sought in the amended plaint must fail. Neither can the Plaintiffs seek to rely on the judgment delivered on 22nd June, 2018 after the matter had proceeded ex-parte due non-appearance on the part of the Defendant. That judgment was eventually set aside and the matter proceeded for hearing afresh culminating in this judgment.

46. I am only left to determine the issue of costs. In *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR, Mativo J. observed as follows: -

“To my mind, in determining the issue of costs, the court is entitled to look at inter alia (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination, (v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relationship between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution.^[11] In other wards the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.^[12]”

47. I have taken note of the conduct of this suit since the time it was filed in Machakos ELC in 2016. I have noted the depth of the evidence produced by either party in prosecuting and defending the claim. I am of the view that an order for costs would only prolong a long-standing tussle. To obviate the same, the reasonable order would be that each party bears its own costs.

48. For the avoidance of doubt, the final orders are as follows: -

- i) The Plaintiffs’ suit is hereby dismissed;
- ii) Each party shall bear their own costs.

49. It is so ordered.

SIGNED, DATED AND DELIVERED AT NAROK VIRTUALLY THIS 16TH DAY OF JUNE, 2022.
MBOGO C.G.



JUDGE

16/6/2022

Court Assistant: T.Chuma

