



REPUBLIC OF KENYA



**KENYA LAW**  
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**Okach v Owuor (Environment and Land Appeal 1 of 2022)  
[2022] KEELC 3950 (KLR) (26 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3950 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL 1 OF 2022  
GMA ONGONDO, J  
JULY 26, 2022**

**BETWEEN**

**HENRY OKACH ..... APPELLANT**

**AND**

**ERICK OUMA OWUOR ..... RESPONDENT**

**JUDGMENT**

1. The instant appeal arose from the judgment of the learned trial magistrate delivered on 17<sup>th</sup> March 2021 where the trial court entered judgment for the respondent who was the plaintiff against the appellant who was the defendant in the suit for orders that;
  - a. An order of injunction directed to the defendant to cease trespassing on the plaintiff's parcel of land no. Kasgunga/Kamreri/770.
  - b. An order directed to the defendant to compensate the plaintiff an amount of Kshs. 109,000/- for the loss suffered by the plaintiff as a result of the destruction of the plaintiff's house by the defendant.
  - c. The respondent shall have costs and interest of this suit.
2. The appellant was aggrieved thereby. As a result, it generated this appeal mounted by way of a memorandum of appeal dated 14<sup>th</sup> April 2021 based on grounds 1 to 6 set out on the face of it. The grounds include;
  - a. The learned trial magistrate erred in law and in fact by failing to take into consideration the evidence adduced by the appellant thus arrived at a wrong/ unfair conclusion.
  - b. That the learned trial magistrate erred in law and in fact in awarding the respondent nominal damages despite making a finding that the respondent had failed to prove his claim as to damages.



- c. The learned trial magistrate erred in law and in fact by failing to appreciate the fact that the appellant had good and noble intentions to try and preserve a neighbour's property that was being damaged and stolen by unknown people.
3. Wherefore, the appellant has sought the following orders;
  - a. Set aside the judgment and decree in Mbita Environment and Land Case No. 21 of 2018 and in its place enter a judgment dismissing the respondent's prayers in Mbita Environment and Land Case No. 21 of 2018 with costs to the appellant.
  - b. Award costs of this appeal and the subordinate/trial court's case to the appellant.
4. The property in dispute in the present appeal is land reference number Kasgunga/Kamreri/770 measuring approximately zero decimal nine zero hectares (0.90) Ha in area (The suit land herein). It is captured in Registry Map Sheet Number 8 and located within Homa Bay County.
5. The appellant, Henry Okachis represented by the firm of Geoffrey O. Okoth and Company Advocates.
6. The firm of Nyauke and Company Advocates is on record for respondent, Erick Ouma Owuor.
7. Initially, this appeal was lodged at Migori Environment and Land Court. On 3<sup>rd</sup> February 2022, the same was transferred to this court, upon its establishment, for hearing and determination. 3<sup>rd</sup> February 2022; see Articles 6 (3) and 48 of *the Constitution* of Kenya, 2010.
8. This being the first appeal, this court is bound to revisit the evidence on record, evaluate the same and reach its own conclusion. The court however, must appreciate that the appellate court will not ordinarily interfere with findings of fact by the trial court unless they are founded on no evidence at all, or on a misapprehension of it, or the court is shown demonstrably to have acted on wrong principles in reaching the findings; see *Mwanasokoni-vs-Kenya Bus Services Ltd* (1982-88) 1 KAR 278 and *Kamau-vs-Mungai and another* (2006) 1 KAR 150.
9. The respondent originated the suit by way of a plaint (Fast Track) dated 22<sup>nd</sup> February 2018 seeking twin orders; an injunction against the appellant to cease trespassing on the suit land belonging to the respondent and compensation of the respondent by the appellant in terms of an amount of Kshs. 109,000/= as a result of the destruction of the respondent's house by the appellant.
10. The respondent (PW1) told the court that he found the appellant having pulled down a mabati structure valued at Kshs. 109,000/= on the suit land. He identified and produced in evidence, a certificate of official search, valuation report and title deed (PExhibits 1, 2 and 3 respectively).
11. During cross examination, PW1 maintained that the suit land belongs to him and that the appellant trespassed thereunto and destroyed the mabati structure. In reference to PExhibit 2, he further stated-

“...Willis did the valuation....”
12. PW2 was Wills Onyango, a registered contractor. He stated that he carried out valuation in regard to the vandalized structure of PW1. He stated that he prepared PExhibit 2 which shows the value of the damaged structure to be Kshs. 109,000/=.
13. By an amended statement of defence and counter claim dated 30<sup>th</sup> July 2019 and filed in court on 31<sup>st</sup> July 2019, the appellant denied the respondent's claim. That the respondent had obtained title deed (PExhibit-3) fraudulently.



14. It must be noted that by consent order made on 22<sup>nd</sup> August 2019 in this matter, the counter claim was marked as settled.
15. The appellant (DW1) testified that he trespassed into the suit land. That the claim of Kshs 109,000/= was unfounded, He relied on DExhibits 1 to 3 which include a medical report dated 21<sup>st</sup> January 2019 (DExhibit 1).
16. During cross examination, DW1 stated, inter alia;  

“...I took materials from the land to my home for safe custody....”
17. Mashack Okach (DW2), testified that he removed iron sheets from the suit land under the instructions of his father (DW1). That it was wrong to do so.
18. In reaching the findings, the learned trial magistrate made reference to the parties’ respective pleadings, the testimonies of PW1, PW2, DW1 and DW2 as well as relied on Section 3 (1) of the *Trespass Act* Chapter 294 of the Laws of Kenya and the case of *Park Towers Ltd-vs-John Muthama Njika and 7 others* (2014) eKLR. He observed that that PW1 established on a balance of probabilities that DW1 trespassed into the suit land and demolished a structure of PW1 who suffered loss.
19. The appeal was heard way of written submissions pursuant to this court’s directions given on 2<sup>nd</sup> March 2022.
20. So, learned counsel for the appellant filed submissions dated 28<sup>th</sup> April 2022 and urged the court to allow the appeal with costs to the appellant. Counsel relied on pages 1, 2, 24,25,4838, 57-61 78 and 80-87 of the record of appeal herein alongside Clerk and Lindsell on Torts 18<sup>th</sup> Edition paragraph 18-01, Section107 of the *Evidence Act* Chapter 80 Laws of Kenya , *Michael Kinyua Njue-vs-APA Insurance Company Ltd* (2022 KLR and Section 3 (1) of the *Trespass Act* (supra), to fortify the submissions.
21. By the submissions dated 14<sup>th</sup> June 2022 and filed herein on 17<sup>th</sup> June 2022, learned counsel for the respondent urged this court to find that the appeal in its entirety must fail. That the respondent’s evidence was sufficient that he did not permit the appellant to enter the suit land to do anything thereon. That thus, the appellant was a trespasser thereon.
22. In the foregone, it is the duty of this court to determine whether;
  - a. The respondent proved to the requisite standard that the appellant trespassed into the suit land.
  - b. Depending on the outcome in issue (a) hereinabove, did the respondent suffer loss as a result of the trespass?
  - c. The appeal is tenable.
23. The respondent succinctly pleaded particulars of trespass at paragraph 6 of the plaint. The same are noted accordingly.
24. It was the assertion of the respondent that he suffered loss due to the acts of the appellant on the suit land. Therefore, he prayed that an order of injunction and compensation as sought in the memorandum of appeal be granted in his favour.
25. Plainly, DW1 stated that he entered the the suit land and took away materials from the land. This was confirmed by his son (DW2)



26. The said evidence of DW1 and DW2 affirmed the testimonies of PW1 and PW2 that the structure of PW1 had been demolished on the suit land.
27. I take into account Section 3 (1) of the Trespass Act and Clerk and Lindsell on Torts (supra) regarding trespass.
28. The tort of trespass is one which is actionable without proof of any damage; see also Nakuru Industries Ltd-vs-S.S Mehta and sons (2016) eKLR.
29. It must be remembered that removing any part of the soil also constitutes trespass; see Clerk and Lindsell (supra).
30. Indeed, soil is part of land. Under Article 260 of the Constitution of Kenya, 2010, the term “Land” includes;
- “ The surface of the earth and the subsurface rock”
31. In Philip Aluchio-vs-Crispinus Ngayo 2014 KLR, the court awarded a nominal figure of Kshs. 100,000/ = as damages for trespass and reasoned that the measure of general damages depends on;
- “ .....the state of the property before and after the trespass...”
32. In the impugned judgment, the trial court observed-
- “....the defendant instructed his son to move into the plaintiff’s land without permission.....the defendant and his son trespassed into the plaintiff’s land
33. The learned trial magistrate also relied on Park Towers case (supra) and held-
- “ .....I hereby award a nominal figure of Kshs 100,000 as general damages for trespass....”
34. In arriving at its decision, it is clear that the trial court took into account the nature of the tort of trespass, evidence on record, relevant authorities thereof and the circumstances of the case. He also bore in mind the very foundation of the jurisdiction to issue injunctive orders as held in Nguruman Ltd-vs-Jan Bonde Nielsen and 2 others (2014) eKLR.
35. To that end, it is the finding of this court that the judgment of the learned trial magistrate is founded on evidence on record and correct principles of law. There is no iota of reason to disturb the said decision and I hereby uphold the same.
36. It is trite that an injunction is an equitable and discretionary remedy and depends on the circumstances of each case; see National Bank of Kenya Ltd-vs-Shimmers Plaza Ltd (2009) KLR 278 at 283.
37. For clarity, the order of injunction granted by the trial court is deemed to be permanent in nature to preserve the suit land as envisioned under Section 13 (7) (a) of the Environment and Land Court Act, 2015 (2011).
38. A fortiori, this appeal generated by way of a memorandum of appeal dated 14<sup>th</sup> of April 2021 and filed herein on 15<sup>th</sup> April 2021, is devoid of merit. The same be and is hereby dismissed with costs to the respondent.
39. It so ordered.

**DATED AND DELIVERED AT HOMA BAY THIS 26<sup>TH</sup> DAY OF JULY, 2022.**



**G M A ONGONDO**

**JUDGE**

PRESENT;

a) Ms Oriche holding brief for Mr Nyauke, learned counsel for the respondent

b Angela and Fiona, Court Assistants

