



**Ndegwa v Ol'Kalou Water & Sanitation Company Limited & another (Environment & Land Case 85 of 2017) [2022] KEELC 2456 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2456 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE 85 OF 2017**

**YM ANGIMA, J  
JULY 14, 2022**

**BETWEEN**

**NJOROGE NDEGWA ..... PLAINTIFF**

**AND**

**OL'KALOU WATER & SANITATION COMPANY LIMITED ... 1<sup>ST</sup> DEFENDANT**

**RIFT VALLEY WATER SERVICES BOARD ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**A. The Plaintiff's Claim**

1. By a plaint dated July 12, 2010 and amended on September 2, 2010 the Plaintiff sought the following reliefs against the Defendants:
  - a. A declaration that Title No. I.R. 42314 and L.R. No.3777/279/66 belongs exclusively to the Plaintiff pursuant to the certificate of lease dated 12/6/1987 and issued to him on the 16/6/1987.
  - b. An order of permanent injunction do issue restraining the Defendants either by themselves, their agents, servants, employees, contractors or anybody else whether claiming in or under their names from in anyway whatsoever trespassing into, developing, interfering or in any other manner dealing with Title I.R. No. 42314 and L.R. No. 3777/279/66 within Ol'Kalou Township in Nyandarua Central District.
  - c. General damages for trespass and for the illegal dealings on the suit plot.
  - d. Costs of this suit and interest.
  - e. Any other relief or further relief that this Honorable Court may deem fit and just to grant.



2. The Plaintiff pleaded that he was the registered proprietor of L.R. 3777/279/66 (I.R.No.42314) the suit property located in Ol'Kalou Township in Nyandarua County which was a leasehold interest from the Government of Kenya for a period of 99 years with effect from October 1, 1986. The Plaintiff further pleaded that the Defendants had without any lawful justification or excuse entered the suit property and caused permanent developments thereon without his consent in violation of his property rights hence the suit.

## **B. The Defendants' Response**

3. The Defendants filed a statement of defence dated July 24, 2010 and amended on September 16, 2010. The Defendants denied the Plaintiff's claim in its entirety and pleaded that the suit property was allocated to the Ministry of Water much earlier hence the same was not available for allocation to the Plaintiff at any given time. The 1<sup>st</sup> Defendant pleaded that it was merely a water service provider and that the 2<sup>nd</sup> Defendant was the custodian of all the developments and assets the Plaintiff was complaining about and that the same were put up with the consent of the Ministry of Water.
4. The Defendants further pleaded that the developments on the suit land were for public good since they were meant to improve water supply to the residents of Ol'Kalou Township. It was the Defendants' plea that the Plaintiff had acquired the suit property fraudulently and irregularly. It was further contended that the Plaintiff had never been in possession of the suit property and that *the Constitution* of Kenya did not protect illegally acquired property.
5. By their counterclaim, the Defendants reiterated the contents of their amended defence and pleaded that the Plaintiff had fraudulently and illegally acquired the suit property which was reserved for a public purpose. The Defendants enumerated 8 particulars of the alleged fraud and illegality in paragraph 16 of the amended counterclaim and sought the following reliefs:
  - a. A declaration that L.R. No. 3777/279/666 was not available for allocation to the Plaintiff.
  - b. That the said title be cancelled.
  - c. That the Defendants be awarded costs of the suit.

## **C. Summary Of Evidence At The Trial**

### **a. The Plaintiff's evidence:**

6. The Plaintiff called 2 witnesses at the trial and closed his case. The Plaintiff adopted his witness statement dated July 3, 2018 as his evidence in-chief. He also produced the documents in his list of documents and further list of documents as exhibits. The gist of the Plaintiff's case was that he was given the suit property as a gift by its previous owner the late Morgan Grenville and that all formalities for its transfer to him were finalized in the 1980s. He produced a copy of the grant dated 12.06.1987 as evidence of ownership. The evidence of PW2 was similar to that of the Plaintiff and it essentially supported the Plaintiff's evidence that the suit property was a donation from Morgan Grenville.

### **b. The Defendants' evidence:**

7. Despite being accorded an opportunity to tender their evidence, the Defendants did not call any evidence at the trial despite being represented by an advocate. The Defendants' application for an adjournment was rejected for reasons which were recorded and for the reason that they were granted a last adjournment on 01.11.2021.



#### **D. The Issues For Determination**

8. The court has considered the pleadings, documents and evidence on record and is of the opinion that the following issues arise for determination herein:
  - a. Whether the Plaintiff is the registered proprietor of the suit property.
  - b. Whether the Plaintiff obtained such registration through fraudulent or illegal means.
  - c. Whether the Plaintiff is entitled to the reliefs sought in the suit.
  - d. Whether the Defendants are entitled to the reliefs sought in the counter-claim.
  - e. Who shall bear costs of the suit and counter-claim.

#### **E. Analysis And Determination**

##### **a. Whether the Plaintiff is the registered proprietor of the suit property**

9. The court has considered the submissions and material on record on this issue. There is no doubt from the Plaintiff's exhibits that the suit property was originally the property of one, Morgan Grenville who donated the same to the Plaintiff. There is evidence on record to demonstrate that even the defunct County Council of Nyandarua acknowledged Morgan Grenville as the owner of the suit property way back in 1981 and demanded payment of rates from his lawyer.
10. The material on record further reveals as at October 11, 1985 the said County Council was billing the Plaintiff for rates with respect to the suit property. The record also shows that the Plaintiff obtained a grant to the suit property on 12.06.1987. There is no evidence on record to demonstrate that the said grant has ever been recalled or cancelled. The court is thus satisfied that on the basis of the material on record, the Plaintiff has proved on a balance of probabilities that he is the registered proprietor of the suit property.

##### **b. Whether the Plaintiff obtained such registration through fraudulent or illegal means**

11. The issue of fraud and illegality in the Plaintiff's acquisition of the suit property was pleaded by the Defendants in their amended defence and counter-claim. The Defendants contended that the suit property was not available for allocation to the Plaintiff in the first place because it had already been allocated to the Ministry of Water for public purposes. The Defendants consequently listed 8 particulars of alleged fraud and illegality in the counter-claim against the Plaintiff.
12. It is trite law that in civil law, he who alleges must prove the allegation to the required standard. Section 107 of the [Evidence Act](#) (Cap.80) stipulates as follows:
  - “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
13. It is evident from the record that the Defendants did not tender any evidence at the trial in support of their defence or counter-claim. The Defendants' advocate simply informed the court that the Defendants' witnesses were not available because they were attending to other official duties. The nature of those duties were not disclosed to the court. The court consequently finds no evidence to



demonstrate that the suit property was ever reserved for or allocated to the Ministry of Water at any given time. There is equally no evidence on record to demonstrate that the Plaintiff acquired the suit property fraudulently or illegally as no evidence was tendered at the trial in support of the particulars of fraud and illegality. Accordingly, the court finds no evidence to demonstrate that the Plaintiff's acquisition of the suit property is impeachable.

**(c) Whether the Plaintiff is entitled to the reliefs sought in the suit**

14. The court has already found that the Plaintiff has proved his ownership of the suit property. The court has also found that there is no evidence on record to demonstrate that the Plaintiff acquired the suit property through fraudulent or unlawful means. The court is thus of the opinion that the Plaintiff is entitled to the declaration and injunction sought as prayers (a) and (b) of the amended plaint.
15. The court has considered the prayer for general damages for trespass. The court agrees with the Plaintiff's submission that trespass is actionable per se and that a claimant need not prove to have suffered particular damage. The Plaintiff cited the case of *Rhoda Kiilu –vs- Jiangxi water and Hydro-power Construction Kenya Ltd* [2019] eKLR in which the court awarded Kshs.10 million as general damages for trespass. The Plaintiff, however, urged the court to award him Kshs.40 million as general damages for trespass. In the *Rhoda Kiilu Case* (supra) the trial court considered the assessment of general damages in paragraph 14 as follows:

“On the issue of general damages for trespass, the issue that arises is what is the measure of it? This question was answered by E. Obaga J in the case of Philip Ayaya –vs- Chrispinus Ngayo [2014] eKLR where it was held as follows:

The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damages. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less. See *Hostler –vs- Green Park Development Co.* 986 S.W. 2d 500 No. App.1999.”
16. The court has noted that there are two valuation reports in this matter. One was filed by the Plaintiff in 2012 whereas the other was filed by the District Land Registrar in 2010 on the basis of a court order. The Land Registrar valued the suit property at Kshs.2,900,000/= whereas the Plaintiff's valuer indicated the value at Kshs.8,150,000/= inclusive of the developments thereon. There was no recent valuation tendered by any of the parties at the trial. There was no evidence of degradation of the suit property other than the fact that the Defendants were making use of the borehole thereon and constructing a water tank.
17. In the case of *John Koech v Peter Chepkwony* [2019] eKLR which was cited by the Defendants, the trial court considered the guiding principles in *Halsbury's Laws of England* as follows:

“Halsbury's Laws of England, 4<sup>th</sup> Edition, volume 45 paragraph 26 at 1503 provides as follows on computation of damages in an action 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."

18. In the case of *Nakuru Industries Limited –vs- S.S. Mehta & Sons Ltd* [2016] eKLR which was cited by the trial court in Rhoda Kiilu case (supra) the court had awarded Kshs.500,000/= as general damages for trespass to land. The court is of the opinion that an award of Kshs.1,000,000/= would adequately vindicate the violation of the Plaintiff's proprietary rights. If the Plaintiff was minded in obtaining compensation for the actual loss suffered, he should have sought mesne profits and pleaded particulars thereof.

**(d) Whether the Defendants are entitled to the reliefs sought in the counterclaim**

19. The court has already found that the Defendants have failed to prove their counterclaim to the required standard. In fact, they did not tender any evidence at the trial hence they did not even attempt to prove the counter-claim. In the premises, it is obvious that the Defendants are not entitled to the prayers sought in the counter-claim.

**(e) Who shall bear costs of the suit and counter-claim**

20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful litigant should not be awarded costs of the action. Accordingly, the Plaintiff shall be awarded costs of the suit and the counter-claim.

**F. CONCLUSION AND DISPOSAL**

21. The upshot of the foregoing is that the court finds and holds that the Plaintiff has proved his case against the Defendants to the required standard. The court further finds and holds that the Defendants have failed to prove their counter-claim against the Plaintiff. Accordingly, the court makes the following orders for disposal of the suit and counter-claim:

- (a) Judgment be and is hereby entered for the Plaintiff against the Defendants jointly and severally in the following terms.
  - (i) A declaration be and is hereby made that the Plaintiff is the legitimate proprietor of L.R. No.3777/279/66 (I.R. No. 42314).
  - (ii) An order of permanent injunction do issue restraining the Defendants either by themselves, their agents or servants, employees, contractors or anybody else claiming under them from trespassing upon, developing or interfering with the suit property.
  - (iii) The Plaintiff is hereby awarded Kshs.1,000,000/= as general damages for trespass.



- (b) The Defendants' counter-claim is hereby dismissal in its entirety.
  - (c) The Plaintiff is hereby awarded costs of the suit and counter-claim.
- It is so decided.

**JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 14<sup>TH</sup> DAY OF JULY, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Mrs. Mwaniki for M/s Ndegwa Wahome & Co. Advocates for the Plaintiff

N/A by M/s Odhiambo & Odhiambo Advocates for the Defendants

C/A - Carol

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**Y. M. ANGIMA**

**JUDGE**

