



**Batholomeo Nyakundi Samarere T/A Bokibarori Trading Company
& 8 others v Kisii County Government (Environment & Land Case
134 of 2016) [2022] KEELC 4748 (KLR) (25 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 4748 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 134 OF 2016
JM ONYANGO, J
AUGUST 25, 2022**

BETWEEN

**BATHOLOMEO NYAKUNDI SAMARERE 1ST PLAINTIFF
LAWRENCE SAGWE MOKORO 2ND PLAINTIFF
FRANCIS NYAGAKA SAMARERE 3RD PLAINTIFF
GESAGE GEKONGE 4TH PLAINTIFF
MAKORI SAMARERE 5TH PLAINTIFF
AMIMA MUKORA 6TH PLAINTIFF
WILSON ONGOA GEKONGE 7TH PLAINTIFF
ONESMUS MONGEI GEKONGE 8TH PLAINTIFF
NYANGAI GEKONGE 9TH PLAINTIFF**

AND

KISII COUNTY GOVERNMENT DEFENDANT

JUDGMENT

PARAGRAPHS

Introduction

1. The plaintiffs filed this suit vide a Plaint dated May 12, 2016 seeking the following orders against the defendants;



- i. A declaration that the actions and/or omissions of the defendant, relating to the entry upon and/or construction of the road on the parcel of land known as LR no Nyaribari Masaba/Bomobea/1277, measuring approximately 0.09 Ha (hereinafter referred to as the suit property) was unlawful, illegal and hence a violation of the plaintiff's legitimate right over the property;
 - ii. An order of permanent injunction restraining the defendant either by herself, agents, and/or any one claiming under the defendant from further reverting to the suit property for purposes of constructing, digging trenches, gravelling, grading and/or (sic) operationalizing the road of access for purposes of human and vehicular traffic or in any other manner using the suit property to the detriment of the plaintiff herein whatsoever.
 - iii. An order for the vacant possession of the suit property;
 - iv. General damages for trespass and mesne profit.
 - v. Costs of the suit
2. In support of his case against the defendants, the plaintiffs averred that at all times the plaintiffs were and still are the registered proprietors of the suit property situated within Keroka town. They claimed that in May 2016, the defendant through her agents and/or employees, without any lawful cause, trespassed into the suit property and commenced construction of an access road cutting across the suit property and thereby interfering with its usage by the plaintiffs.
3. They averred that the defendant was keen on opening the access road with a view to operationalizing it for human and vehicular traffic use. It was their contention that this was an illegal action that was likely to further degrade the plaintiffs' rights and interests over the suit property. They contended that the said actions were illegal and amounted to an abuse of due process of law. It was their further contention that the said actions amounted to a violation of their right to property provided for under article 40 of the *Constitution* of Kenya, 2010.
4. They claimed that the defendant proceeded with its actions without any notice to them and hence it was impractical for them to issue a demand letter or a notice of intention to commence legal proceedings against them.
5. Upon being served with the Plaint and Summons to enter appearance, the defendants filed a Memorandum of Appearance and Statement of Defence dated March 27, 2019. The defendant denied all the allegations by the plaintiff and stated that the said allegations were mere gimmicks and fabrications calculated to defeat the defendant's ownership of the suit property. She further stated that the said allegations were a conspiracy born out of a manipulation of records.
6. The matter was set down for hearing on various dates but neither the defendants nor their advocates showed up despite being served with hearing notices.
7. On March 1, 2022, the plaintiffs and their counsel attended court and after confirming that the defendant had been served, the court proceeded to hear the case ex parte. The plaintiffs only relied on the evidence of one witness; Mr Gesage Gekonge who testified in support of their case.
8. Mr Gesage in his testimony stated that he and his co-plaintiffs some of whom had since died, formed a land buying company known as Bokibarori Trading Company. He testified that upon forming and registering the said company, they purchased the suit property and registered it in the name of their company. He produced a copy of the title deed, copy of the search certificate and a copy of the green card to prove their claim. He contended that the reason they resorted to filing this suit was because the



defendant had constructed an access road across the suit property without their consent and without any notice to them. He further testified that they were compelled to engage a land surveyor who prepared a report which clearly showed the extent of encroachment. He produced the said report as evidence in support of their case. He urged the court to grant them the prayers outlined in their Plaint.

9. Upon the closure of the plaintiffs' case, the court directed the parties to file their submissions within 14 days. On March 22, 2022, counsel for the plaintiff confirmed that the plaintiffs had complied with the directions of the court. The court granted the defendants 14 more days to file their submissions and fixed the matter for mention on May 9, 2022. On May 9, 2022 the learned counsel for the defendant who appeared in court for the first time stated that in as much the case had proceeded *ex parte*, the defendants had filed a statement of Defence and thus he urged the court to grant him 14 more days to file his submissions.
10. From the record, it is clear that the defendant's counsel sought several adjournments to file his written submissions but at the time of writing this judgment, he had not yet to filed his submissions.

Issues for determination

11. Having considered the pleadings filed by the parties, the plaintiff's oral testimony and exhibits as well as the plaintiffs' written submissions, I deduce the following as the issues for determination:
 - a. Whether the plaintiffs are the registered owners of the suit property.
 - b. Whether the defendant trespassed into the suit property.
 - c. Whether the plaintiff is entitled to the reliefs sought.

Analysis and determination

Whether the plaintiffs are the registered owners of the suit property.

12. The plaintiffs have by way of evidence produced a copy of the search certificate and copy of the title. The defendant in her Defence claimed that she was the owner of the suit property and that the plaintiff's ownership of the property was a mere conspiracy born out of a manipulation of records. However, the defendant did not call any witnesses to support her case.
13. Section 26 of the [Land Registration Act](#) is extremely protective of title documents and provides limited circumstances under which a title document may be impeached. The said section provides that;

S.26 "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.
14. It is clear from above the provision that for this court to cancel a title document, the conditions set out in section 26 of the [Land Registration Act](#) highlighted above must be met.



15. The plaintiffs have presented documentary evidence to prove that the suit property is registered in their land purchasing company. It is quite unfortunate that the defendant who claimed that the plaintiffs' ownership of the suit property was a mere manipulation and fabrication of records, never showed up in court to prove its allegation so as to warrant the impeachment of the title held by the Plaintiff. Without a doubt therefore it is clear that the plaintiffs are the lawful owners of the suit property.

Whether the defendant trespassed into the suit property

16. According to *Clerk & Lindell on Torts* (17th Edition) para 17-01 trespass is defined as:

“An unjustifiable entry by one person upon the land in possession of another. Removing any part of the soil of land also constitutes trespass”

17. The plaintiffs whom I have since established to be the legal owners of the suit property have provided uncontroverted evidence that the Defendant through its agents and/or employees entered into the suit property and commenced construction of an access road cutting across the suit property and thereby interfering with its usage by the plaintiffs.
18. In so far as the defendant's entry into the suit property was done without the plaintiff's permission or consent, the same amounts to trespass to land and it is therefore my finding that the defendant is a trespasser.

Whether the plaintiff is entitled to general damages for trespass

19. It is trite law that trespass to land is actionable per se. That means that one need not prove any damage in order to be entitled to general damages for trespass. In the case of *Nakuru Industries Limited vs SS Mehta & Sons* [2016] eKLR the court observed thus:-

“In tort, damages are awarded as a way to compensate a plaintiff for loss he had incurred due to a wrongful action on the part of the defendant. The damages so awarded are intended to return the plaintiff back to the position he was before the wrongful act was committed. In cases where trespass to land results in damage then the computation of damages is on the basis of restitution of land. The value of the soil (or trees or fruits) which have been removed from that land are all factored as well as the cost of restoration of the land to the position it was in before the wrongful act was committed.”

20. *Halsbury* 4th edition, Vol 45 at para 26, 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 plaintiffs land, the plaintiff is entitled to receive by way of damages such sum 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 or 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, the general damages may be increased.
21. In *Nakuru Industries Limited (supra)* the court cited the case of *Duncan Ndegwa V Kenya Pipeline* HCC No. 2577 of 1990 (Nairobi) the court held that:-
- “The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land. The overriding principle is to put the claimant in the position he was prior to the infliction of the harm.”
22. In the case of *Phillip Aluchio vs Crispinus Ngayo* [2014] eKLR Obaga, J held:-
- “...The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less.....”
- The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass.....”
23. In that case the court went ahead to award nominal damages amounting to kshs 100,000/=.
24. Similarly in this case the plaintiffs have not led any evidence nor attached any documentation to establish the exact value of the suit property before and after the trespass and/or how much damage was occasioned on the suit property by the actions of the defendant. As it was determined in the aforementioned case, the plaintiffs will still be entitled to receive by way of nominal damages such sum as would reasonably compensate them for being denied and deprived of the use of the suit property for now a period of over 6 years. For this reason, I award the plaintiff damages in the amount of kshs 300,000/= on account of nominal general damages for trespass together with interest at court rates from the date of this judgment until payment in full.
25. In the final result, I enter judgment for the plaintiff against the defendant in the following terms: -
- a. A declaration be and is hereby issued that actions and/or omissions of the defendant, relating to the entry upon and/or construction of the road of access on parcel of land known as L R no Nyaribari Nasaba /Bomobebe/1277 was unlawful, illegal, hence a violation of the plaintiff’s legitimate rights over and in respect of the suit property.
 - b. A permanent injunction be and is hereby issued restraining the defendant either by herself, agents, and/or anyone claiming under the defendant from further reverting to the suit property for purposes of constructing, digging trenches, gravelling, grading and/or operationalizing the road of access for purposes of human and vehicular traffic or in any other manner using the suit property to the detriment of the plaintiff herein whatsoever.
 - c. The plaintiff is awarded kshs 300,000/= general damages for trespass together with interest at court rates from the date of judgment until payment in full.
 - d. The costs of the suit shall be borne by the defendant.

DATED, SIGNED AND DELIVERED AT KISII THIS 25TH DAY OF AUGUST, 2022.

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J M ONYANGO
JUDGE

