



**Akinyi v Orwa (Environment & Land Case 4 of 2016)
[2022] KEELC 3282 (KLR) (5 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 3282 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 4 OF 2016**

**A OMBWAYO, J
AUGUST 5, 2022**

BETWEEN

ROSE VIOLET AKINYI PLAINTIFF

AND

JAMES OUMA ORWA DEFENDANT

JUDGMENT

Brief Facts

1. On January 13, 2016, Rose Violet Akinyi (hereinafter referred to as the Plaintiff) filed a Plaint dated January 12, 2016 against James Ouma Orwa (hereinafter referred to as the Defendant) wherein she averred that she is the registered proprietor of all that piece of land known as Title Number Kisumu/Kogony/1965 measuring approximately 0.13 Ha, situated in Kogony Sub-Location, Kadongo location within Kisumu County since 3/12/2002. It is the Plaintiff's case that she purchased the suit property around 1987 from Andrea Obonyo for a consideration of KShs. 15,000/=after subdivision of the piece of land that the said Andrea Obonyo had exchanged with one John Wasiema.
2. The plaintiff averred that the defendant is the registered proprietor or has beneficial interest of all that land known as Title Number Kisumu/Kogony/1966 situated in Kogony Sub=Location within Kisumu County. That in 2007, the Plaintiff lawfully sought the assistance of the offices of Kisumu District Land Registrar and Kisumu District Surveyor to establish an access road to the plaintiff's land since the plaintiff was planning to develop her land.
3. It was the plaintiff's case that in January 2013, the plaintiff learnt that the defendant had personally and/or through his servants or agents or relatives or lessees, entered into the plaintiff's land and/or fenced, and/or cultivated the plaintiff's land, and/or remained on the plaintiff's land, and/or deprived profits from the plaintiff's land without any colour of right and/or without the consent of the plaintiff. In June 2013, the plaintiff learnt that the office of the Kisumu District Surveyor established that there



is a common boundary between the plaintiff's land and the defendant's adjoining land since there is a road that separates the plaintiff's land from the defendant's land.

4. The plaintiff therefore prayed for Judgment against the defendant for an order of vacant possession of the property known as Kisumu/Kogony/1965 and General damages for trespass on the property known as Kisumu/Kogony/1965. Lastly, an order of temporary injunction restraining the defendant personally and/or his relatives and/or any other person claiming under him from trespassing and/or whatsoever interfering with the plaintiff's proprietary rights over the Property known as Kisumu/Kogony/1965. Costs of this suit and interest thereon at court rates.
5. The defendant herein entered appearance and filed a Statement of Defence wherein he denied the allegations in the Plaint and averred that he had no knowledge of what the plaintiff did with her parcel of land in the year 2007 since he acquired his parcel of land that is Kisumu/Kogony/1966 in the year 2012 and was issued with a title on 21st September 2012.
6. The defendant reaffirmed that there is a road separating the two parcels of land and that he is in occupation of his rightful parcel of land. The defendant denied the alleged threats as the claims are false hence Kisumu C.M.C Criminal Case No. 625 of 2013 failed to proceed. The Defendant stated that he will put the plaintiff to strict proof.

Plaintiff's Evidence

7. The plaintiff herein testified on oath as PW1 that land parcel Kisumu/Kogony/1965 is her land and produced a title deed as Exhibit 1. She confirmed that land parcel number Kisumu/Kogony/1966 belonged to the defendant. She stated that in the year 2007 when she wanted to use the land, she discovered that there was no road leading to her parcel of land.
8. PW1 testified that she visited the Lands Office and requested the Land Registrar to visit the suit parcel and identify the access road and that the Land Registrar issued a summons indicating that the surveyor would visit the suit property and settle the dispute. She further testified that after numerous rescheduling of the dates issued requiring the surveyor to visit the suit property, the surveyors visited the suit property and marked the road to the Plaintiff's land.
9. She stated that after the access road was marked in 2007, she returned to her rural home but requested her neighbor to watch over it. That in January 2013, her neighbor called her and told her that someone was fencing her land and she informed the Assistant Chief who requested her to show the title document. The plaintiff further testified that when she went to the Assistant Chief, she found him with the defendant and the Assistant Chief referred them to a surveyor who made a report dated June 10, 2013 but the defendant was not satisfied with the surveyor's work. PW1 stated that she later found out that defendant had trespassed onto her land and she reported the matter to Chief who informed him to stop but he did not comply. She further stated that she reported the matter to the Police and Chief together with the defendant were arrested and charged in a Criminal case Kisumu for trespass and threatening her. That the court ordered for another site visit and a report was prepared and filed.
10. Mica Odhiambo Ogola, PW2 upon being sworn stated that the plaintiff used to come and check her land and he came to know the title of the suit property when the plaintiff went with a surveyor to point out the road. That the defendant fenced off the plaintiff's land and notified the plaintiff and the plaintiff went with a surveyor who prepared a report. He testified that the surveyor confirmed the boundaries of the public land and the parcels in the neighborhood and that the Defendant is still using the Plaintiff's land.



11. On Cross examination, he stated that his land is parcel number Kisumu/Kogony /1961 and she knows where parcels number Kisumu/Kogony/1965 and Kisumu/Kogony/1966 are located. He stated that he does not know how the plaintiff acquired the suit property but knows the defendant acquired his parcel from Wilson Amolo. He confirmed that the plaintiff was present when the surveyors came and established the boundaries between the two parcels.
12. PW3 who is Godfrey Mbok a surveyor at Kisumu informed the court that he made a survey report in 2013 where he established that plot number 1965 and 1966 are distinct both on the map and on the ground and are separated by a public road and do not share a boundary. He testified that he reestablished the boundaries and the owners of the two parcels were shown the boundary. On Cross examination he confirmed that parcel number 1965 was under cultivation and that the public road between parcel 1965 and 1966 was visible on the ground but as a foot path.

Defendant's Evidence

13. James Ouma Orwa DW1 upon being sworn in, adopted his statement as evidence in chief. He stated that his land is Kisumu/Kogony/1966 while the plaintiff's land is Kisumu/Kogony/1965. He testified that a surveyor came on the ground and prepared a report and the District Surveyor and the Registrar did not go on the ground.
14. After close of the Defence case, this court gave orders that the Regional surveyor Kisumu to visits the two parcels of land and place the road and re-establish the boundaries of the suit parcels of land within 60 days and the parties to share the survey costs. I also ordered that parties were at liberty to engage their private surveyors and the O.C.S Central Police Station Kisumu to provide security and a report to be filed in court. The surveyor's report was filed and I directed parties to file submissions based on the report.

Plaintiff's Submissions

15. The plaintiff herein filed his submissions on February 21, 2022 where it was stated that the main issue for determination was whether the Plaintiff has proved her case against the Defendant to the requisite standard. It was submitted that as per the Nyanza Regional Surveyor's report dated January 13, 2022, the two parcels were separated by road and the report also indicated that the position of the road on the ground was wrong.
16. It was further submitted that the Kisumu District Land Adjudication and Settlement demarcation sketches for parcels 1963 to 1967 is different in relation to the exact position of the said road as it shows that the road lies within the plaintiff's parcel as opposed to separating the plaintiff's parcel from the defendant's parcel. It was stated that as per the report of PW3, the same indicated that the plaintiff's parcel was re-established in 2013 in the presence of the plaintiff, the defendant and the adjacent parcel owners.
17. It was submitted that the defendant had trespassed into the Plaintiff's land as the plaintiff's witnesses confirmed the same to the court as they stated that the plaintiff was cultivating the plaintiff's parcel of land. It was stated that with respect to the measure of damages, the court should consider the case of *Ochako Obinchu v Zachary Oyoti Nyamongo* (2018) eKLR where it was stated that "if the Plaintiff proves trespass, he is entitled to recover nominal damages, even if he has not suffered actual loss." The plaintiff therefore prayed for general damages of Kshs. 100,000/=.
18. The plaintiff further submitted that she had adduced evidence to the required standard of balance of probabilities and the plaintiff should allow the suit as prayed for.



Defendant's Submissions

19. I have perused the file and do confirm that the Defendant failed to file his submissions as directed by the court.

Analysis and Determination

20. Pursuant to the Regional Surveyor's Report dated January 13, 2022, it was found out that on the road of access between Kisumu/Kogony/1965 and Kisumu/Kogony 1966; foot path of about 2 meters existed between the suit parcels of land, that this was confirmed to be a 6-meter public road as indicated on Preliminary Index Diagram No. 9 for Kisumu/Kogony Registration Section and it was expanded to 6 meters' and marked on the ground.
21. On the order of re-establishment of the suit parcels of land Kisumu/Kogony/1965 and Kisumu/Kogony1966; it was found out that the suit parcels of land are separated by the 6-meter road. That Kisumu/Kogony/1965 is defined by a 1-meter trench with Kisumu/Kogony/1962, a natural fence with Kisumu/Kogony/1964 and a road access with Kisumu/Kogony/3176. It was further found out that Kisumu/Kogony /1966 has a natural fence with Kisumu/Kogony/3239 and an access road with Kisumu/Kogony/3175 and 3176. It was also found out that there was no need for re-establishment of boundaries of the suit parcels.
22. It is not in dispute that the plaintiff is the registered owner of land parcel number Kisumu/Kogony/1965 while the defendant is the registered owner of land parcel number Kisumu/Kogony/1966. It is the plaintiff's case that there is no access road to her parcel of land.
23. This court has considered the report of the Regional Surveyor and has established that there is a 6-meter public road and I have looked at the map and do confirm that there is access road between the two parcels of land. This court has also found out that the boundaries of the two parcels of land are well established.
24. The plaintiff herein averred that the defendant had trespassed into her parcel of land that is Kisumu/Kogony/1965 and was cultivating maize. During hearing, PW3 testified that there was maize plantation on the plaintiff's parcel of land. PW1 also testified that when she found out that the defendant had planted maize on her parcel of land, she reported the matter to the Chief and the police. Based on the evidence on record, it has been clearly established that the defendant herein had trespassed on the Plaintiff's land.

Section 3 (1) of the [Trespass Act](#), defines trespass as follows;

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

25. *Clark & Lindsell on Torts*, 18th Edition on page 923 defines trespass “as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason”.
26. In the case of [Park Towers v Moses Chege & others](#) (2014) eKLR the court held as hereunder;

“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 damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts



and circumstances of each case. As observed in the cases referred to there is no mathematical or scientific formula in such cases for assessment of general damages. However, in the case before me I consider that the suit properties are sizeable parcels sitting on nearly three quarters of an acre of land located in the Central Business District (CBD). This is a prime property in the City Centre and any unlawful act of aggression and/or intrusion that prevents the rightful owner of the property from enjoyment of his ownership rights of possession and use is to be frowned at and is punishable by way of an award of damages.”

27. In the case of *Philip Ayaya Aluchio v Crispinus 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 damage? 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 v Green Park Development Co* 986 S W 2d 500 (No App. 1999).

28. The Plaintiff herein prayed for general damages of Kshs. 100,000 however this court has to be reasonable while awarding general damages for trespass. I therefore award Kshs. 50,000/= as general damages for trespass.

29. This court therefore enters Judgment in favour of the Plaintiff as against the Defendant for:

- a. An order of vacant possession of the property known as Kisumu/Kogony/1965. The defendant to vacate the premises within 90 days.
- b. General damages of Kshs. 50,000/= for trespass on the property known as Kisumu/Kogony/1965.
- c. An order of a permanent injunction restraining the defendant personally and/or his relatives and/or any other person claiming under him from trespassing and/or whatsoever interfering with the plaintiff’s proprietary rights over the Property known as Kisumu/Kogony/1965.
- d. Costs of this suit.

DATED AT KISUMU THIS 5th DAY OF AUGUST, 2022.

ANTONY OMBWAYO

JUDGE

