



**Nyamao v Nyamira County Government (Environment & Land Case
86 of 2021) [2022] KEELC 4783 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4783 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 86 OF 2021**

**JM KAMAU, J
SEPTEMBER 21, 2022**

BETWEEN

SAMWEL W M NYAMAO PLAINTIFF

AND

NYAMIRA COUNTY GOVERNMENT DEFENDANT

((Formerly Kisii ELC No E07 of 2020))

JUDGMENT

1. The plaintiff has sued the defendant, the County Government of Nyamira for:
 - i. Declaration that the plaintiff is the lawful, Bona-fide and registered owner of LR No West Mugirango/Siamani/2137 and thus entitled to exclusive and absolute occupation, possession and usage thereof, without interference by the defendant herein, whatsoever and/or howsoever.
 - ii) Permanent injunction restraining the defendant by either herself, agents, servants and/or anyone claiming under the defendant from further entering onto, re-entering, excavation, constructing and/or continuing with the construction of the road of access, interfering with and/or in any other manner dealing with the suit Property, that is, LR No West Mugirango/Siamani/2137.
 - iii) An order of mandatory injunction, to compel the defendant and/or her agents, servants and/or employees, to remove the various machineries, equipment and/or bulldozers, from the suit property herein and/or otherwise compel same to restore LR No West Mugirango/Siamani/2137 to the status in which same was prior to and/or before the offensive activities.



- iv) Compensation for the nature and/or extent of destruction caused to the buildings standing on LR No West Mugirango/Siamani/2137 and in particular, payments of the sum of Kshs. 11,475,355/= only, (details in terms of paragraph 12 hereof).
 - v) General and aggravated damages for trespass.
 - vi) Interest on (v) above at court rates.
 - vii) Costs of this suit be borne by the defendant.
 - viii) Such further and/or other relief as the honourable court may deem fit and expedient so to grant.
2. The circumstances leading to the case are that the Plaintiff is the registered proprietor of LR No West Mugirango/Siamani/2137 with exclusive and absolute rights over the same. On May 23, 2020 the defendant, through its agents/servants and/or employees unlawfully and illegally trespassed onto the suit property destroying and/or pulling down a house erected thereon. Further, on May 26, 2020 the defendant again pulled down the perimeter wall and gate mounted on the suit property and curved out a portion measuring 10 by 6 metres and started excavating it in order to establish a road of access. As a result, the plaintiff has suffered extensive damage amounting to Kshs 11,393,355/= in respect to the destruction of the buildings and Kshs 3,600,000/= as the value of the land which will require a further Kshs 11,400,000/= for its improvement and the plaintiff also incurred a further Kshs 90,000/= as professional fees for the Land surveyor, valuer and on account of bill of quantities. He was also denied his source of livelihood and earnings. The plaintiff's claim for special damages alone amounts to Kshs 11,475,355/=. These averments were fortified in the plaintiff's written statement dated December 16, 2020.
 3. On March 4, 2021 a request for judgement was filed and although we cannot trace a copy of the defence in the court file there is a reply to the defendant's statement of defence filed on May 24, 2021 reiterating what is contained in the plaint.
 4. When the case came up for hearing, the plaintiff adopted his written statement of December 16, 2020. He also produced in court the following documents:-
 1. Green card
 2. Copy of certificate of title 2 (a) official search 2 (b)
 3. Copy of OB
 4. Revenue receipt of Kshs 25,000/=.
 5. Revenue receipt of Kshs 50,000/=.
 6. Revenue receipt of Kshs 15,000/=.
 5. He testified that he lawfully bought the property LR No West Mugirango/ Siamani/2137 on November 12, 1987 from one Arama Mogaka and Mogaka Maangi after identifying the boundaries which were shown to him by the vendors and the Government Surveyor from Nyamira Lands Office and the mutations were signed at Kisii. He then immediately moved onto the suit property, fenced it with a barbed wire, put up a 4-bedroom bungalow, a 3 story building and a concrete water tank. He said that he never received a notice to vacate nor that he had encroached the road reserve. On May 23, 2020 at 7:30 a m when the family was asleep and his wife was preparing breakfast, he heard a loud bang from the water tank which had been hit and water was now flowing into the house through the doors that



had been broken by the force of the water. The county minister for works and other officials were there imposing the demolition exercise. His blood pressure rose up uncontrollably. No reasons were given for the demolition. On May 26, 2020 his gate and the perimeter wall were equally demolished by the same defendant. The Surveyor found that he had not encroached onto the defendant's property but on the contrary it is the defendant that had encroached onto his property. On cross-examination by Mr Nyachiro for the defendant, the plaintiff said that he never reported the destruction to the police and only complained to the defendant about 5 months later on November 26, 2020 and that his building plans had not been approved by the Physical Planning Department of the defendant nor was there any certificate of occupation. The provision for a road reserve is next to the plaintiff's property. On re-examination, the defendant explained the reason for not reporting the destruction to the Police was because he had to seek medical attention first. The building is no longer habitable and has cracks all over.

6. PW2 Prescott Nyakango, a Land Surveyor produced his report dated June 26, 2020 which shows that the demolished buildings are not on a road reserve. Michael Samora, a quantity surveyor, gave a report showing the cost of constructing the demolished buildings as approximately Kshs 11.3 million and the same are no longer habitable. On re-examination, Mr Samora said he would not advise repair of the 2 buildings but a new construction. A valuation report allegedly compiled and filed by one Wallace Mbugua was disowned by the said valuer and a new one had to be done by Dennis Auma dated April 4, 2020 which shows the value of the land encroached by the defendant, 160 meters square as Kshs 1.5 million. He heavily relied on the surveyor's report compiled by Prescott Nyakango.
7. After the close of the plaintiff's case, The defendant never availed any witnesses and the case had to be closed.
8. The plaintiff's evidence was never countered with any contrary evidence and I condense it as follows: -
9. It is not in doubt that the plaintiff's buildings were destroyed by the defendant. The same are situate on the Plaintiff's property LR No West Mugirango/ Siamani/2137. The defendant did not give any notice of demolition nor was due diligence applied to confirm the ownership of the property. Of course, the ownership of the suit property is not in dispute. The property belongs to the plaintiff. This has been confirmed by all the witnesses who appeared in court. It beats logic why the plaintiff's staff would be highheaded to the extent of demolishing houses belonging her own residents and leasees who are no doubt rate payers to her. The defendant unlawfully and illegally trespassed onto the plaintiff's suit land on May 23, 2020 where her employees destroyed and pulled down a house erected thereon. On May 26, 2020 the defendant pulled down the plaintiff's perimeter wall and a gate mounted on the suit property, excavated a portion measuring 10 by 6 metres in order to create a road of access thereon. The plaintiff's claim is for Kshs 11,475,355/= as special damages. PW2 Prescott Nyakango, a Land surveyor produced a survey report which shows that the demolished buildings were not on a road reserve. The quantity surveyor, Mr Michael Samora gave evidence that the demolished buildings are no longer habitable and he could not advise on the buildings being repaired but a new construction. What remains for the court to determine now is the cost of destruction or the cost of restoring the Plaintiff to where he was before the destruction of his buildings. He has put it at Kshs 11,475,355/= particularized as follows:
 - (a) Destruction of the story building – Kshs 4,260,390/=
 - (b) Destruction of the bungalow on the property –Kshs 7,122,965/=Total: Kshs 11,383,355/=
10. And the value of the excavated land at Kshs 3,600,000/=. From the quantity surveyor's report and the photographs produced in court, these figures are a gross exaggeration and unfortunately there are



no proper comparables from the neighborhood. There are also no clear photos to guide the court in assessing the damage. I would therefore award the special damages as follows:

- a. Destruction of the story building – Kshs 2,500,000/=
 - b. Destruction of the so-called bungalow – Kshs 800,000/=.
11. As to the excavated land, I agree that the soil will have to be improved but no agricultural officer or soil expert was called upon to testify as to how much it will cost. Nor was a witness called to say how much soil was carted away. No clear photographs were also exhibited. I will therefore give a figure of Kshs 350,000/= under the 2 heads of value of the land and improvement of the same. The professional fees of Kshs 90,000/= are also awarded as special damages.
12. Under the heading of trespass, in the case of *Duncan Nderitu Ndegwa v KP& LC Limited & Another* (2013) eKLR P Nyamweya J as she then was held: -
- ...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd defendants' trespass”
13. I will award Kshs 150,000/= because of the cruel manner in which the trespass was executed in this case.
14. Also, the first 2 prayers in the suit are hereby awarded as prayed for in the plaint. This sums up the Judgment of the court as follows:
- (a) A permanent injunction do and is hereby issued restraining the defendant either by herself, agent, servants and/or anyone claiming under the defendant from further entering onto, re-entering, trespassing onto, demolishing further buildings and/or structure thereon, undertaking excavation, constructing and/or continuing with the construction of the road of access, interfering with and/or in any other manner dealing with the suit property, that is, LR No West Mugirango/Siamani/2137.
 - (b) Compensation for the destruction caused by the defendant on the plaintiff's property on LR No West Mugirango/Siamani/2137 in the sum of Kshs 3,740,000/=.
 - (c) General and aggravated damages for trespass – Kshs 150,000/=.
 - (d) Costs of the suit at court rates.
 - (e) Interest on (c) above at court rates from the date of filing this suit i.e. December 22, 2020 and interest on interest (d) and (e) above at court rates from the date of this judgment till payment in full.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 21ST DAY OF SEPTEMBER 2022.

MUGO KAMAU

JUDGE

