



Fresco Bushlands (K) Limited v Isaak & 4 others (Environment & Land Case 5 of 2015) [2022] KEELC 4842 (KLR) (20 September 2022) (Judgment)

Neutral citation: [2022] KEELC 4842 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 5 OF 2015
MAO ODENY, J
SEPTEMBER 20, 2022**

BETWEEN

FRESCO BUSHLANDS (K) LIMITED PLAINTIFF

AND

WARSAME MUHAMED ISAAK 1ST DEFENDANT

MUHAMED YUSUF HORAR 2ND DEFENDANT

MOHAMED ALI MAHAT 3RD DEFENDANT

NASTE DAUD 4TH DEFENDANT

AGRICULTURAL DEVELOPMENT CORPORATION 5TH DEFENDANT

JUDGMENT

1. By a plaint dated January 12, 2015 the plaintiff herein sued the defendants jointly and severally seeking the following orders;
 1. A declaration that the defendants are trespassers on the suit property
 2. An order of permanent injunction do issue against the defendants by themselves and /or their hirelings, servants, employees and or agents or any persons claiming and acting on their behalf from entering, trespassing and/or continuing with the impugned intended developments on the suit property.
 3. Costs of the suit.



Plaintiff's Case

2. The Plaintiff gave evidence through Bare Muhumed the administrator of the plaintiff's projects in Kilifi County and currently the Manager of Kulalu farm and adopted his witness statement dated March 11, 2022.
3. PW1 stated that the plaintiff is the lessee of ninety five thousand acres of LR No 14248 situate within Kilifi County also known as Kulalu Ranch leased from the Agricultural Development Corporation of Kenya which lease is still in force.
4. It was PW1's evidence that the Plaintiff in 2013 filed Malindi ELC No 123 of 2013 *Fresco Bushlands (K) Ltd Versus The Agricultural Development Corporation* in which the honourable court issued orders barring the said Agricultural Development Corporation from interfering with the plaintiff's rights and interests in the said parcel of land. He further averred that the 1st to 4th defendants have neither sub lease from the plaintiff nor authorization from the 5th defendant to interfere with the Plaintiff's rights contained in the lease agreement yet the 1st to 4th defendants have been grazing on the suit property in defiance to demands and requests from the plaintiff that they stop trespassing.
5. PW1 also stated that the 1st to 4th defendants have become hostile and violent to the plaintiff's agents and their actions have occasioned losses and/or damages to the plaintiff's and urged the court to grant the orders as prayed.
6. The defendants neither filed a defence nor gave evidence during the trial hence the matter proceeded undefended.

Plaintiff's Submissions

7. Counsel for the Plaintiff submitted that the plaintiff leased the suit property from the 5th defendant of which they took possession and enjoyed all rights flowing from the said lease until 2013 when they sued the 5th defendant in Civil Case No 123 of 2013 *Fresco Bushlands (K) v Agricultural Development Corporation* where the court restrained the 5th defendant from interfering with the plaintiff's rights. Further, that having established its rights over the suit property the 1st to 4th defendants have entered the suit property without its permission thus are guilty of trespass.
8. Counsel relied on the case of *Agricultural Development Corporation Lands Limited v Raphael Mlewa Mkare & 515 others* [2022] eKLR which cited the case of *Telkom Kenya Limited v County Government of Muranga* [2019] eKLR on the issue of trespass.
9. Counsel therefore urged the court to find that the 1st to 4th defendants are trespassers and grant the orders as prayed as the plaintiff has proved its case to the required standard.

Analysis and Determination

10. The plaintiff filed this suit against the defendants who were served with summons to enter appearance and plead but they neither filed memorandum of appearance nor defence. This matter therefore proceeded undefended.
11. The issue for determination is whether the plaintiff has proved that the defendants are trespassers and whether the plaintiff has met the threshold for the grant of a permanent injunction.



12. According to *Black's Law Dictionary* 8th Edition, trespass is defined, in the strictest sense, as:
An entry on another's ground, without a lawful authority, and doing some damage, however inconsiderable, to his real property"
13. A continuing trespass is defined as: -
A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property"
14. The plaintiff gave evidence and produced a lease agreement dated May 26, 2010 which agreement indicated the coordinates and boundaries were communicated by the 5th defendant. Further the plaintiff produced a letter from the 5th defendant dated August 11, 2010 which attached a map of the area.
15. This evidence was uncontroverted as the defendants did not filed any defence. It follows that the 1st to 4th defendants' action amounted to trespass.
16. It is strange that counsel for the 1st to 4th defendants filed submissions attaching documents yet the defendants neither filed a defence nor gave evidence. The submissions are therefore of no value as they are not anchored on any defence.
17. Further the court had also restrained the 5th defendant from interfering with the plaintiff's rights to the suit land. There is no evidence to the contrary that the defendants are not trespassers. I therefore find that the plaintiff has proved its case against the defendants and consequently I enter judgment as prayed in the plaint as follows: -
1. A declaration is hereby issued that the defendants are trespassers on the suit property
 2. An order of permanent injunction is hereby issued against the defendants by themselves and /or their hirelings, servants, employees and or agents or any persons claiming and acting on their behalf from entering, trespassing and/or continuing with the impugned intended developments on the suit property.
 3. Costs of the suit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF SEPTEMBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

