



**Orago v Adede (Environment & Land Case 52 of 2017)
[2022] KEELC 14679 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14679 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 52 OF 2017
MN KULLOW, J
OCTOBER 31, 2022
(FORMERLY KISII ELC CASE NO. 162 OF 2016)**

BETWEEN

GEORGE ORANGO ORAGO PLAINTIFF

AND

JOHN WARINGA ADEDE DEFENDANT

JUDGMENT

a. Introduction

1. The Plaintiff commenced this suit by way of a Plaint dated May 30, 2016; seeking the following Orders:
 - i. Declaration that the Plaintiff is the lawful, bonafide and registered owner of LR No Kanyamkago/ Kajulu/2002.
 - ii. An Order of Eviction against the Defendant, his agents and/or servants from the portion of LR No Kanyamkago/ Kajulu/2002, lying adjacent to the Road access on which the Defendant has unlawfully and illegally encroached and/or overlapped onto, to the detriment and/or prejudice of the Plaintiff.
 - iii. Permanent Injunction restraining the Defendant either by himself, agents, servants and/or anyone claiming under the Defendant, from re-entering, trespassing onto, laying a claim to, cultivating, leasing, building onto, interfering with and/or in any other manner whatsoever, dealing with the portion of the suit property, that is, LR No Kanyamkago/ Kajulu/2002.
 - iv. General damages for trespass.
 - v. Costs of this suit be borne by the Defendant.



- vi. Such further and/or other relief as the Honourable court may deem fit and expedient so to grant.

Plaintiff's Case

2. The Plaintiff avers that he was registered as the absolute proprietor of the suit parcel on November 26, 2012. That the said suit parcel of land lies adjacent to parcel No LR No Kanyamkago/ Kajulu/ 51 registered in the name of the Defendant's father, Hosea Adede; and the 2 parcels of land have been separated by a road access measuring 8 meters. The demarcation of the said road access was settled by the Land Registrar on February 2, 2016.
3. It is his claim on May 12, 2016; the Defendant removed the boundary beacons which were placed to show the extent of the road access and overlapped into the suit property by excising a portion of the suit property adjacent to the road access. It is his contention that the said actions by the Defendant were undertaken without any lawful cause, excuse and/or color of right and further that the same were carried out in contempt of the determination/ decision of the Land Registrar of demarcating the extent of the road access and the boundary beacons.
4. He now contends that as a result of the said acts of trespass by the Defendant, he has been dispossessed and deprived of a substantial portion of the suit property and has been blocked from accessing, getting to and using the Road Access. He urged the court to issue an order of eviction and permanent injunction against the Defendant from re-entering and trespassing onto the suit property.
5. During trial, he testified as PW1 and called 2 witnesses in support of his case. It was his testimony that he is the registered owner of the suit parcel No 2002 and produced a copy of the Green Card, the Title Deed and the Certificate of Official Search as PExhibit 1, 2 & 3 in support of his case while the Defendant owns the adjacent land No 51. It was his contention that the access road between the two parcels of land was fully blocked and produced Pexh 4 – Map to show the blocked the access road and reiterated the same during cross-examination.
6. He further stated that he reported the dispute between him and the Defendant to the area Chief who advised him to go to the Land Registrar or Surveyor for assistance and produced a copy of the Letter by the Chief to the Land Registrar as Pexh 5. He also produced Summons by the Registrar as Pexh 6 &7, a Report dated February 2, 2016 by the County Surveyor as Pexh 8, Report dated May 4, 2016 by the County Land Registrar as Pexh 9, letter dated April 4, 2016 by the Assistant Chief as Pexh 10, OB extract of May 12, 2016 from Uriri Police Station as Pexh 11, Demand Letter from the firm of Oguttu Mboya & Co Advocates dated May 13, 2016 as Pexh 12, Report dated June 7, 2016 from Geomatic Surveyors as Pexh 13.
7. Philip Makini Onyiego, Land Registrar Migori County testified as PW2; he relied on the report dated May 4, 2016 Pexh 9 prepared by his predecessor one Nelson Otieno. The said report was prepared upon hearing of both parties whereupon they were advised to respect the access road. Ray Aloo, the Deputy County Land Surveyor testified as PW3, he stated that he attended a boundary dispute in respect of the parcels of land No 2002 and 51 in the year 2016 accompanied by the Land Registrar Nelson Otieno; following a complaint by PW1 that the access road had been encroached. After the site visit, he prepared a report dated February 20, 2016 – Pexh 8. He visited the site again on January 22, 2019 pursuant to a court order of November 5, 2018, accompanied by the then Land Registrar George Oguta to re-establish and fix the boundaries thereof. they discerned that the demarcation on the ground as fixed on the February 2, 2016 were intact, except the defaced features on LR No 51 which had eucalyptus trees planted on the side of the land hence causing encroachment thereof. He then prepared a Report dated January 22, 2019 and attached its map, the Report was produced as Pexh 14.



8. On cross-examination, PW3 reiterated that they demarcated the road access to enable parties gain access and the same was exhibited by Pexh 8. That as per Pexh 14, the road was in existence and relied on his findings thereon. The Plaintiff thereafter closed his case.

Defendant's Case

9. The Defendant filed a Statement of Defence dated July 12, 2016, denying all the allegations made by the Plaintiff. He further stated that the Plaintiff's claim is statutorily barred in law and is an abuse of court process.
10. After several adjournments of the Defence Case hearing; on February 28, 2022, the Defence Counsel informed the court that he would be closing the Defence case without calling any witness and sought to rely on the Defendant's witness statement filed. The Defence case was therefore marked closed.
11. Vide an Order dated November 8, 2018; Ong'ondo J. directed the Land Registrar and Surveyor Migori County to re-visit land parcels No 2002 & 51 to establish and fix the boundary and thereafter file a Report to that effect.
12. The County Surveyor filed a Report dated January 22, 2019 whereupon it has his finding that; there was an existing boundary on parcel No 2002 while there was no existing boundary on the side of parcel No 51. Further, it was their determination that that the proprietors' of parcel No 51 had blocked the road usage by planting eucalyptus trees on the road on a portion measuring 3 meters into the road. The road position was re-established as per the map and the sisal planted to denote the road extension on the ground.

b. Analysis and Determination

13. It is this court's considered view that the following issues arise for determination: -
 - a. Whether there was trespass by the Defendant onto the Plaintiff's parcel No 2002.
 - b. Whether the Plaintiff is entitled to the reliefs sought on account of permanent injunction and General damages.

a. Whether there was trespass by the Defendant onto the Plaintiff's parcel No 2002.

14. The ownership of the parcels of land herein; LR No Kanyamkago/ Kajulu/2002 and 51 is not in dispute. The Plaintiff is the owner of parcel No 2002 while the Defendant is the owner of parcel No 51. It is however the Plaintiff's claim that on May 12, 2016; the Defendant removed the boundary beacon of the road access and encroached onto his suit property by excising a portion of the suit property adjacent to the road access.
15. The Land Registrar and Surveyor, did a site visit on the 2 suit parcels No 2002 & 51 on the January 22, 2019 and made a determination with regards to the boundary and the extent of the encroachment/ trespass which I seek to reproduce. The said Report which was evenly dated and produced as Pexh. 14, stated in part as follows;

“The 8M road exists on the ground at a distance of 127M from point A to B as well as from point C to D thus there is an existing boundary of parcel number 51 from point A to B. The boundaries of parcel number 2002 are intact all round and specifically from point C to E (boundary of parcel number 2002 on the road side) whereas from Point B to F there was no existing Boundary (boundary of parcel number 51 on the road side). Proprietors’



of parcel number 51 had blocked the road usage by planting eucalyptus trees on the road (3m into the road)

Conclusion and Recommendations

The 8M road in dispute was located and demarcated on the side of parcel number 51 since on the side of parcel number 2002 there was an existing boundary. All the concerned parties were requested to maintain and respect the boundaries as planted unless another court order is issued to the contrary.”

16. The Plaintiff adopted the said Report as PExhibit 14 in support of his case. There was no comment whatsoever by the Defendant as to the correctness of the said report and the same therefore stands unchallenged and/or uncontroverted.
17. I wish to associate myself with the findings and conclusions arrived at by the Land Registrar and the Surveyor Migori County in their Report dated January 22, 2019 and produced as Pexh. 14. However, from the said report it is clear that even though there was encroachment on the part of the Defendant, the same was on the access road, on a portion measuring 3 meters from the 8meter Road Access. The road access boundary on the Plaintiff's side was intact which means that there was no encroachment onto the Plaintiff's land parcel LR No Kanyamkago/ Kajulu/2002 as claimed.
18. In view of the foregoing, I find that even though there was encroachment on the access road, there was no demonstration and/or evidence that the Defendant had actually encroached onto the Plaintiff's land parcel as alleged.

b. Whether the Plaintiff is entitled to the Reliefs sought on account of Permanent Injunction and General damages as sought

19. The Plaintiff seeks against the Defendant an order of permanent injunction, restraining the Defendant from claiming, re-entering, trespassing onto, laying claim to, cultivating, leasing, building onto, interfering with or in any other manner dealing with a portion of the suit parcel No 2002.
20. The Principles on Injunction were established in the celebrated case of *Giella v Cassman Brown & Co Ltd (1973) EA 358*. Looking at the Report by the County Surveyor dated January 22, 2019 which confirmed that there was encroachment and/or trespass on the part of the Defendant onto the Road Access for a portion measuring 3meters; I hold that the Plaintiff has indeed established a prima facie case and proved its case to the required threshold to warrant the grant of permanent injunctive orders sought.
21. Consequently, I will proceed to find that the Defendant either by himself, agents, servants and /or anyone claiming under the him should be permanently restrained from entering, trespassing onto, cultivating, building structures thereon, interfering with the Road Access measuring 8meters.
22. E. Obaga J in the case of [*Philip Ayaya Aluchio v Crispinus Ngayo \[2014\] eKLR*](#) 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).
23. From the evidence on record, it is clear that there was trespass by the Defendant. However, the said trespass and/or encroachment was not onto the plaintiff's suit parcel No 2002 as alleged. To this



end, I find no basis and sufficient justification for the award of general damages as sought. The said trespass was on a portion measuring 3meters from the 8meters Road Access. Thus the allegations by the Plaintiff that he was unable to access the grazing fields are unfounded

Costs

24. Costs generally follow the event, and in this instant case, since the Plaintiff has proved that there was trespass onto the Road Access, I find that it is entitled to costs of the suit.

Conclusion

25. The upshot of the above is that the Plaintiff has proved his case to the required threshold and I partially enter judgement for the Plaintiff against the Defendant in the following terms: -

- a. An Order of Permanent Injunction be and is hereby issued, restraining the Defendant either by himself, agents, servants and/or anyone claiming under the Defendant, from re-entering, trespassing onto, laying a claim to, cultivating, leasing, building onto, interfering with and/or in any other manner whatsoever, dealing with the Road Access measuring 8Meters.
- b. Costs of the suit to be borne by the Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 31ST DAY OF OCTOBER, 2022.

MOHAMMED KULLOW

JUDGE

In presence of; -

..... Plaintiffs

.....Defendants

Tom Maurice – Court Assistant

