



**Mwangi v China Road and Bridge Corporation (Environment & Land Case E409 of 2021) [2022] KEELC 15096 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15096 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E409 OF 2021  
EK WABWOTO, J  
NOVEMBER 24, 2022**

**BETWEEN**

**CATHERINE WANJIRU MWANGI ..... PLAINTIFF**

**AND**

**CHINA ROAD AND BRIDGE CORPORATION ..... DEFENDANT**

**JUDGMENT**

1. This suit was instituted by the plaintiff vide a plaint dated November 9, 2021 wherein the plaintiff sought for the following orders against the defendant: -
  - a. An order of permanent injunction restraining the defendant by themselves or their agents from trespassing and causing damage to the plaintiff's property by diverting the flow of sewage into the land parcel Nairobi Block 117/254.
  - b. An order directing the defendant to remove the culverts that are placed in a manner to direct the flow of sewage into the suit land being Nairobi Block 117/254.
  - c. Special damages of Ksh 200,000/- or in the alternative an order of the court for the defendant to repair the stone and live fencing on the Plaintiff's parcel of lands, namely Nairobi Block 117/254.
  - d. General damages for trespass and nuisance.
  - e. Costs and interest.
  - f. Any such other relief as this honourable court may deem appropriate to grant.
2. The defendant despite being served with all the court process did not enter appearance. Neither did they file a defence. In consequence and pursuant to Order 10 Rule 9 of the [Civil Procedure Rules](#), the case was set down for formal proof hearing on July 27, 2022.



3. In a nutshell, the plaintiff's case from the pleadings is that she is the registered proprietor of property known as Nairobi Block 117/254 since September 1, 1995 of which the defendant has caused destruction to the fence surrounding the plaintiff's property on the side touching the road being developed by the defendant.
4. It was averred that due to the said destruction, she has suffered damages particulars of which were pleaded at her Plaint.
5. The case proceeded as an undefended case under Order 10 Rule 9 of the *Civil Procedure Rules*. Only the plaintiff testified as PW1. She adopted her witness statement dated November 9, 2021 and produced the following documents as her evidence in chief. The documents were produced in the following order: -
  - i. Subdivision scheme approval of Nairobi/Block 117/254 as plaintiff Exhibit 1.
  - ii. Copy of map showing the location of Nairobi/Block 117/254 as Plaintiff Exhibit 2.
  - iii. Copies of Photographs showing the destruction of the fence as plaintiff Exhibit 3.
  - iv. Copies of Photographs showing the flowing sewage as plaintiff Exhibit 4.
  - v. Demand letter dated November 1, 2021 as plaintiff Exhibit 5.
6. The plaintiff stated that the defendant in the course of constructing the road adjacent to her property had destroyed her property which included her wall of about 18 metres and they had also diverted the flow of sewerage through her property as the same had been done to pass through the middle of her property.
7. It was also the plaintiff's testimony that she has confronted the defendant several times but has declined to remedy the situation and hence she seeks this court's intervention in granting her the necessary prayers as sought in her Plaint.
8. The plaintiff filed her written submissions dated August 16, 2022 through her counsel M/S Wakio Mugo & Co. Advocates. The plaintiff submitted that she had proved her case to the required standard and was entitled to the orders sought.
9. The plaintiffs' counsel also submitted that the defendant despite being requested to remedy the situation had failed to do so and hence ought to be condemned to pay the costs of the suit.
10. The main issue for determination is whether the plaintiff has proved her case against the defendant to the required standard warrants the grant of the reliefs sought.
11. Although the suit was undefended, the plaintiff had a duty to formally prove her case on a balance of probabilities as is required by law.
12. In the case of *Kirugi and another v Kabiya & 3 others* (1987) KLR 347 the Court of Appeal held that;

“The burden was always on the plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”



13. Similarly, in the case of *Gichinga Kibutha v Caroline Nduku* (2018) eKLR the court held that;
 

“It is not automatic that instances where the evidence is not controverted the claimants shall have his way in court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”
14. PW1 stated that she was the registered owner of the suit land as was evidenced from the documentary evidence that was produced as plaintiff’s Exhibit 1 and 2. The plaintiff also produced photos of the destruction done to her wall and the photos of the diverted sewer that had been done by the Defendant while constructing the road.
15. As already stated the defendant never filed a defence, it did not adduce any evidence during trial. In the case of *Shaneebal Limited v County Government of Machakos* (2018) eKLR, the court cited the case of *Janet Kaphiphe Ouma & anor –v- Marie Stopes International (Kenya)* Kisumu HCCC No. 68 of 2007, and held that:
 

“In this matter apart from filing its statement of defence, the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> Plaintiff and that of the witness remain uncontroverted.”
16. In essence the evidence tendered by the plaintiff remained unchallenged and this court is satisfied that the plaintiff has proved her case to the required standard.
17. In respect to the reliefs sought, the plaintiff stated that the defendant had refused to remedy the situation and had trespassed onto the suit land to the extent of causing the destruction of the wall and diversion of the sewer to her property.
18. Section 3 (1) of the *Trespass Act*, cap 294 provides that:
 

“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”.
19. In the case of *Entick v Carrington* (1765) as quoted in the case of *Maina Kabuchwa v Gachuma Gacheru* [2018] eKLR, Lord Camden CJ had this to say:-
 

“Our law holds the property of every man so sacred, that no man can set his foot upon his neighbour’s close without his leave”.
20. In the case of *Maina Kabuchwa v Gachuma Gacheru* (*supra*), the Learned Judge defined trespass “as the act of unauthorized and unjustifiable entry upon the land in another’s possession. The wrong of trespass is actionable regardless of the extent of the incursion and without any necessary showing of injury or damage to the claimant.”
21. Even though trespass is actionable per se, it is clear from the evidence adduced by the plaintiff that they suffered loss and damage as a result of the defendant’s actions. The Plaintiff is therefore entitled to general damages for trespass. Having found that the plaintiff has proved her ownership to the property and that she never authorized the defendant to enter into the said property, it is obvious that the defendant has trespassed onto the plaintiff’s property and ought to be held liable for the destruction committed therein.



22. Further, the plaintiff is entitled to protection from further acts of trespass and destruction by the defendant. Accordingly, the order of a permanent injunction against the defendant is appropriate. I find that the plaintiff is entitled to the prayers sought save for the claim of special damages which was pleaded at Ksh 200,000/- but not proved by any evidence that was adduced.
23. In respect to general damages, the plaintiff did not indicate any amount to guide the court in assessing general damages for trespass and nuisance. The court would have expected the Plaintiff to do so in her submissions but none was provided. That notwithstanding this court is still obligated to consider the same as general damages are awarded as recognition of an infringement of a legal right or duty. In the case of *Simeon Nyachae & another v County Government of Mombasa* [2020] eKLR which had similar issues in respect to the instant case, the Learned Judge awarded Kshs.1,500,000/= for general damages. Considering all the circumstances of this case I am of the opinion that an award of general damages in the sum of Kshs. 1,000,000/= would be adequate compensation to the Plaintiff for the loss suffered as a result of the defendant's act of trespass and nuisance.
24. In conclusion, this court makes the following final orders;
- a. A permanent injunction be and is hereby issued restraining the defendant from trespassing, encroaching, entering into damaging or in any other manner interfering with the plaintiff's property by diverting the flow of the sewerage into parcel of land known as Nairobi Block 117/254.
  - b. An order directing the defendant to take corrective action and ensure that the culverts directing the flow of sewage into the plaintiff's property being Nairobi Block 117/254 are removed within the next thirty days (30) from the date of delivery of this judgment.
  - c. General damages are awarded to the plaintiff in the sum of Kshs. 1,000,000/= for trespass and nuisance plus interest from the date of this judgment until payment in full.
  - d. The plaintiff shall have the costs of the suit and interest thereon from the date of this judgement until payment in full.
25. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.**

**E. K. WABWOTO**

**JUDGE**

In the presence of: -

Ms. Mugo for the Plaintiff.

N/A for the Defendant.

