Omalla (Suing as the administrator ad litem of the Estates of William Opondo Omalla, Augustino Omwanda, Henry Mutula and Dismas Othwilla) v Oriwo & another (Environment & Land Case 36 of 2021) [2023] KEELC 392 (KLR) (2 February 2023) (Judgment)

Neutral citation: [2023] KEELC 392 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ENVIRONMENT & LAND CASE 36 OF 2021

AY KOROSS, J

FEBRUARY 2, 2023

BETWEEN

PAUL OMALLA ..... PLAINTIFF

SUING AS THE ADMINISTRATOR AD LITEM OF THE ESTATES OF WILLIAM OPONDO OMALLA, AUGUSTINO OMWANDA, HENRY MUTULA AND DISMAS OTHWILLA

AND

GABRIEL OCHONG ORIWO ..... 1ST DEFENDANT

PHILISTER ACHAPA OBUOR ..... 2ND DEFENDANT

JUDGMENT

1. The plaintiff is a son of Henry Mutula Omalla (deceased). On 4/05/2021, he obtained limited grant of letters of administration on the estates of William Opondo Omalla, Augustino Omwanda, Henry Mutula and Dismas Othwilla who were brothers and owned land parcel no. North Ugenya/Sega/12 ('suit property') as tenants in common.

2. The plaintiff sued the defendants who were the respective owners of adjacent parcels of land known as North Ugenya/Sega/1216 and North Ugenya/Sega/5181.

3. In a further amended plaint dated 2/11/2021, the plaintiff contended that the defendants had trespassed on the suit property by putting up structures on it, planting trees and cultivating it.

4. Prior to instituting suit, the relevant authorities had determined and fixed the boundaries of the suit property and those of adjacent parcels including those belonging to the defendants; trespass was established. A challenge of the decision of these bodies by the defendants in Kisumu ELC Petition No.13 of 2015 was disallowed by the court.

5. The orders sought by the plaintiff were inter alia, a declaration of trespass against the 1st defendant; permanent injunction; eviction; special damages of ksh. 200,000/=; general damages; mesne profits and costs of the suit.

6. The claim against the 2nd defendant was withdrawn on 5/7/2022 when it emerged pleadings had not been served upon her/him. Despite the 1st defendant's counsel Otieno, Yogo, Ojuro & Co. Advocates entering appearance and filing a preliminary objection which was dismissed by the court on 20/06/2019, a defence was not filed.

Plaintiffs' evidence

7. The plaintiff testified as PW1. His testimony was contained in his oral evidence, adopted witness statement and documents contained in his list of documents.

8. It was his testimony, the registry index map established the boundaries and acreages of each parcel of land. Over the years, the suit property had been encroached upon which necessitated him to seek the assistance of the district surveyor. After following due process, the surveyor and land registrar actioned on it by determining and fixing its boundaries which established the defendants had encroached on the suit property and attempts to resolve the issue amicably had hit a snag. The 1st defendant had destroyed his fence and continued to cultivate a portion of the suit property.

9. During cross examination, he testified the destroyed fence had cost him kshs.200,000. However, he did not have the receipts. He did not know when the 1st defendant built his house partly on the suit property.

10. Boniface Onyango Ongele; a government surveyor testified as PW2. It was his testimony his office sought to reestablish the boundaries of parcels of land including the suit property in order to ensure they tallied with the registry index map. They established the owner of North Ugenya/Sega/5181 had encroached on the suit property by about half an acre with a house on it. He produced his report together with a sketch map which showed the extent of encroachment.

11. During cross examination he testified that not all the owners of adjacent parcels of land were present during the re-establishment exercise.

12. PW3, Thaddeus Odhiambo Okello, a former assistant chief produced minutes in support of his case. It was his case that his attempts of conciliation between the parties were fruitless.

13. The land registrar George Ogondo testified as PW4.He produced a report which emanated from his office in support of his case.

Parties' written submissions

14. Mr. Morara Omoke, counsel for the plaintiff filed his written submissions dated 24/10/2022 while Ms. Anyango, counsel for the 1st defendant filed her written submissions dated 8/11/2022.

15. Counsel identified 4 issues for determination; (i)whether the suit property was legally co-owned by the estates of William Opondo Omalla, Augustino Omwanda, Henry Mutula and Dismas Othwilla, (ii)whether the 1st defendant had unlawfully trespassed or encroached onto the suit property (iii)whether the 1st defendant's failure to file a defence amounted to admission of the allegations against him and (iv) whether the plaintiff was entitled to the reliefs sought.

16. On the 1st issue, counsel submitted the plaintiff had proved that the estates of William Opondo Omalla, Augustino Omwanda, Henry Mutula and Dismas Othwilla were the owners of the suit property and they were protected by Sections 24 and 26 of the *Land Registration Act*.

17. On the 2nd issue, it was counsel's submission that the area Land Registrar and District Surveyor visited the site and and re-established the boundaries involving land parcels number 12, 1216, 1217, 1513, 2235, 2237, 2238, 2239 and 1573 which affirmed the 1st defendant had encroached onto the suit property.

18. Counsel highlighted Clerk & Lindsell on Torts, Sweet & Maxwell, 18th edition on the definition of trespass and the case of Rhoda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited [2019] eKLR which also defined trespass in accordance with Section 3 (1) of the *Trespass Act*. In view of the forgoing definitions it was counsel's claim the 1st defendant had trespassed onto the suit property.

19. On the 3rd issue counsel argued that failure by the 1st defendant to file any pleadings was an admission of the allegations against him. In that regard, counsel cited the case of Daniel Kenga Katana & 4 others v Dzitu Toto Bokole & 3 others [2022] eKLR where the judge stated that:

> 'it is trite that uncontroverted evidence is weighty and courts will rely on it to prove facts in dispute. The evidence cannot be controverted by allegations in the statement of defence if the Defendants fail to call a witness to adduce evidence and be cross examined to test the evidence.'

20. It was counsel's position that since the plaintiff's case was uncontroverted by the 1st defendant, then the plaintiff ought to be awarded the prayers sought.

21. On the final issue, counsel submitted that from the foregoing, the plaintiff had established a case to warrant grant of reliefs sought. Counsel cited the case of Duncan Ndegwa v Kenya Pipeline HCC Number 2577 of 1990 (Nairobi) which was cited with approval in the case of Ochako Obinchu v Zachary Oyoti Nyamongo [2018] eKLR where the court expressed itself thus on the principle of damages: -

> 'the general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land. The overriding principle is to put the claimant in the position he was prior to the infliction of the harm.'

22. The defence submissions argued that special damages must be both pleaded and proved before they can be awarded by the court; which the plaintiff had not discharged. Counsel cited the Court of Appeal case of Hahn v Singh, Civil Appeal Number 42 of 1983 [1985] KLR 716 at pages 717 and 721 where the court expressed itself thus;

> 'special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.'

23. On general damages, it was counsel's submission that the plaintiff had failed to lead evidence on loss arising from the alleged trespass. In that regard, counsel relied on several authorities including the case of Philip Ayaya Aluchio v Crispinus Ngayo [2014] eKLR.

24. Counsel submitted that where a party claimed both mesne profits and damages for trespass, the court can only grant one and not both. Counsel relied on the persuasive decision of Inverugie Investment v Hackett (Lord Lloyds) [1995] 3 ALL ER 842 where it was held that:

'our understanding of the above persuasive authority is that once the learned judge made the award under the subhead "mesne profits" there was no justification for him awarding a further Ksh 10,000,000/- under the subhead "trespass" since both mean one and the same thing.'

25. Counsel submitted that the plaintiff had not led any evidence on the difference of the value before and after the alleged trespass and hence should not be awarded any damages. On injunction, counsel submitted that there was no evidence the defendant had trespassed on the suit property in the recent past and consequently, the prayer for injunction should be disallowed.

Analysis and determination

26. I have considered the plaintiff's evidence including documents produced in support of his case as well as counsels rival submissions. Being guided by the provisions of law and judicial precedents, I shall now proceed to consider the merits or otherwise of the plaintiff's claim to the suit properties and plausibly the issues for determination are;

    I. Whether the 1st defendant had trespassed on the suit property.

    II. Whether the plaintiff is entitled to the reliefs sought.

I. Whether the defendant had trespassed on the suit property.

27. The meaning of trespass is found within our statutory provisions. Section 152A of the *Land Act* 2016 states:-

    'A person shall not unlawfully occupy Private, Community or Public Land.'

    While Section 3 (1) of the *Trespass Act* defines trespass as,

    'any person who without unreasonable 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.'

28. The case of John K Koech v Peter Chepkwony [2019] eKLR cited with approval Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 which defined trespass as follows:

    'Any unjustifiable intrusion by one person upon land in possession of another"...Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession.'

29. The undisputed facts of the case were that, William Opondo Omalla, Augustino Omwanda, Henry Mutula and Dismas Othwilla were the registered proprietors of the suit property, Kisumu ELC Petition No.13 of 2015 was dismissed on merits, the land registrar and surveyor had established, determined and fixed the boundaries of the suit property and they had established encroachment.

30. Notwithstanding the 1st defendant failed to respond to the plaintiff's claim by filing a defence which had the effect of rendering the suit unopposed, the plaintiff still had the onus of proving his case.

31. It was the plaintiff's testimony that from the reports and sketch map of PW3 and PW4, it was evident the 1st and 2nd defendants had encroached on the suit property. The plaintiff was uncertain when the

1st defendant constructed a house on the suit property but he testified that when the boundaries had been determined and fixed by the land registrar, the 1st defendant trespassed onto the suit property and destroyed a fence and continued to plough the land. From the evidence adduced it is clear the 1st defendant's actions constituted a continuing trespass which was defined in Eliud Njoroge Gachiri v Stephen Kamau Ng'ang'a [2018] eKLR as follows;

> '23. A continuing trespass is defined in JOWITT's DICTIONARY OF ENGLISH LAW 2ND EDITION as follows:-
>
> "A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbor's land".
>
> In BLACK's LAW DICTIONARY 8TH EDITION, 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".
>
> Finally, in CLERK & LINDSEL ON TORTS 16th EDITION, paragraph 23 - 01, it is stated that:-
>
> "Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues".

32. Prior to instituting suit, there was full compliance with the provisions Sections 18(2) and 19 of the Registration of *Land Act* by determining and fixing the boundaries of the suit property. PW3 and PW4 produced evidence in support of this. PW3's report showed that North Ugenya/Sega/5181 which belonged to the 2nd defendant had encroached on the suit property and the owner of North Ugenya/Sega/5181 had partly built on the suit property. The report did not make any reference to North Ugenya/Sega/1216 that belonged to the 1st defendant. In light of the report by PW3, I am satisfied that it was the 2nd defendant who had constructed a house on the suit property and not the 1st defendant.

33. However, the sketch map that was attached to the report clearly outlined the boundary features between the suit property and North Ugenya/Sega/5181 and North Ugenya/Sega/1216. It showed the extent of encroachment. From the shaded portions on the sketch map, it was evident that though North Ugenya/Sega/5181 and North Ugenya/Sega/1216 had encroached on the suit property, the main culprit was the 2nd defendant. Be that as it may, the 1st defendant who is the registered owner of North Ugenya/Sega/1216 had trespassed on the suit property. It is my finding that the 1st defendant has trespassed on the suit property.

II. Whether the plaintiff is entitled to the reliefs sought.

34. The plaintiff sought for several orders including special and general damages, and mesne profits. The 1st defendant's counsel strenuously attacked these prayers in her submissions.

35. I fully concur with the decision of Hahn v Singh (Supra). It is trite law that special damages must not only be specifically pleaded but strictly proved. In the instant case, the plaintiff despite pleading ksh. 200,000/- under the head of special damages, did not produce any receipts to show the loss he incurred. In absence of such evidence, this court is not in a position to assess it or allow it. The plaintiff's claim of special damages fails.

36. I disagree with the defence counsel that the plaintiff was not entitled to general damages. It is trite law that trespass is actionable per se. The plaintiff's counsel did not submit on the amount of general damages the plaintiff was seeking. The trespass was and still is a continuing one.

37. Although the plaintiff testified that the 1st defendant had destroyed his fence and continued to plough the land. From PW3's evidence, it is the 2nd defendant who had partly built a house on the suit property. The plaintiff did not lead any evidence on the amount of diminution in value of the suit property or the costs of reinstatement and for that, I will assess general damages at ksh. 300,000/-. See Ochako Obinchu v Zachary Oyoti Nyamongo (Supra) and Park Towers Ltd v John Mithamo Njika and 7 Others 2014 eKLR where Mutungi J expressed himself as follows:

> '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 general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case'

38. On mesne profits, the defence counsel cited the persuasive case of Inverugie Investment v Hackett (Supra) that held that once mesne profits had been awarded, an award of general damages for trespass could not follow. It is unfortunate that counsel did not tender her quoted authorities to this court. This court had an opportunity to access this particular decision and such a paragraph was non-existent. The paragraph that counsel cited was a direct quotation from the Court of Appeal decision of Kenya Hotel Properties Limited v Willesden Investments Limited [2009] eKLR. I urge counsel to be meticulous her submissions.

39. Be that as it may, I am fully in agreement with the said decision of Kenya Hotel Properties Limited v Willesden Investments Limited (Ibid) that having assessed general damages, an award of mesne profits could not ensue.

26. Having found the 1st defendant a trespasser, the plaintiff is entitled to the reliefs of permanent injunction and eviction against the 1st defendant.

40. It is my ultimate finding the plaintiff proved his case against the 1st defendant. It is trite law costs follow the event and in the absence of special circumstances, I award him costs of the suit which shall be borne by the 1st defendant. I issue the following disposal orders;

    a. The 1st defendant is hereby granted 90 days from the date of service of the orders of this court to remove himself and his developments from land parcel no. North Ugenya/Sega/12 and give the plaintiff vacant possession and in default, the plaintiff shall forcefully evict the 1st defendant together with his servants or agents.

    b. A permanent injunction be and is hereby issued restraining the 1st defendant, his servants and agents from entering or occupying, constructing, destroying, damaging or dealing whatsoever with land parcel no. North Ugenya/Sega/12.

    c. General damages for trespass are ordered in the sum of Kshs 300,000/- payable by the 1st defendant to the plaintiff.

    d. The cost of the suit is payable by the 1st defendant to the plaintiff.

41. For the avoidance of doubt herein, eviction of the 1st defendant from the suit property shall be undertaken in accordance with Sections 152 B, 152E, 152F, 152G, 152H, and 152 I of the *Land Act*.

42. Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 2ND DAY OF FEBRUARY 2023.

HON. A. Y. KOROSS

JUDGE

2/02/2023

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Mr. Morara for the plaintiff

M/s Anyango for 1st defendant

Court assistant: Ishmael Orwa