



Gitege v Board of Governors of Magomano Primary School & 4 others (Environment & Land Case 272 of 2017) [2023] KEELC 16242 (KLR) (9 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16242 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 272 OF 2017**

**YM ANGIMA, J
MARCH 9, 2023**

BETWEEN

JOHN MAINA GITEGE PLAINTIFF

AND

**BOARD OF GOVERNORS OF MAGOMANO PRIMARY
SCHOOL 1ST DEFENDANT
JOSPHAT KIBE 2ND DEFENDANT
PAUL KANGETHE 3RD DEFENDANT
SAMWEL KAMAU KARANJA 4TH DEFENDANT
DANIEL KAMAU 5TH DEFENDANT**

JUDGMENT

A. The Plaintiff's Claim

1. By a plaint dated September 27, 2010 the Plaintiff sought the following reliefs against the Defendant:
 - a. A declaration that the Plaintiff is the owner and is entitled to exclusive and unimpeded right of possession and occupation of all that land parcels known as Nyandarua/Ndemi/5864, 5865 and 5867 (“suit properties”);
 - b. A permanent and temporary injunction restraining the Defendants by themselves, their agents, hooligans, goons, hoodlums, servants, hirelings, employees and proxies from further trespassing unto, entering, encroaching, damaging, destroying, alienating or in any way dealing with the suit properties;
 - c. General damages for trespass and malicious damage; and



- d. The costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.
2. The Plaintiff pleaded that he was the registered proprietor of Title Nos Nyandarua/Ndemi/5864, 5865 & 5867 (the suit properties). It was pleaded that sometime in 2016 the Defendants illegally and forcibly trespassed onto the suit properties by entering thereon and destroying the perimeter fence and the Plaintiff's property without any lawful justification. The Plaintiff further pleaded that as a result of the Defendants' said action he had suffered loss and damage for which they were liable.
3. It was the Plaintiff's contention that the Defendants were wrongfully claiming that the suit properties formed part of the school land and that when the dispute was referred to the District Land Registrar for resolution, it was determined that the official boundaries as they existed before the Defendants' invasion be maintained and respected.

B. The Defendants' Defence

4. The Attorney General filed a defence dated February 03, 2017 on behalf of the 1st – 4th Defendants in which the Defendants made a general denial of the Plaintiff's claim. They denied knowledge of all the allegations contained in the plaint including the allegations of trespass and damage to property.
5. The 4th Defendant later on applied to file a separate defence and engage separate legal representation. The 4th Defendant's application was allowed on September 28, 2021 whereupon he was granted 7 days to file a statement of defence. There is, however, no indication on record of such defence having been filed.
6. There is also no indication on record of the 5th Defendant having entered appearance or filed a defence to the suit. He did not also participate in the proceedings.

C. The Plaintiff's Evidence

a. The Plaintiff's Evidence

7. The Plaintiff called two witnesses at the trial and closed his case. He adopted the contents of his witness statement dated September 27, 2016 as his evidence in-chief and produced the documents in his list of documents as exhibits. The gist of his case was that he was the registered proprietor of the suit properties but the Defendants had wrongfully trespassed thereon, annexed the suit properties into the school compound and erected a new fence.
8. The Plaintiff then called the District Land Surveyor - Nyandarua North Sub-County who testified on his behalf as PW2. The surveyor produced a report dated July 16, 2019 which was prepared pursuant to a court order made on May 14, 2019. The surveyor testified that upon visiting the suit properties he found that the school had erected a new boundary which was not in the Registry Index Map (RIM).

b. The Defendant's Case

9. The Defendants called the Land Adjudication and Settlement Officer – Nyandarua (DW1) and the Land Registrar – Nyandarua County (DW2) as the only witnesses. According to DW1, the school was allocated 11.0 ha as plot No 1366 during land demarcation in Ndemi Settlement Scheme. He could not, however, tell why there was a deficit in the school's acreage. On the other hand, DW2 visited the disputed properties and prepared a report dated January 20, 2022. He was of the opinion that the deficit in the acreage of the school land was not attributable to the Plaintiff since there were many plots in the area which had similar problems.



D. Directions on Submissions

10. Upon conclusion of the hearing, the parties were directed to file and exchange their respective written submissions within certain timelines. The record shows that the Plaintiff's submissions were filed on November 30, 2022 whereas the Attorney General filed his submissions on behalf of the 1st – 3rd Defendants on December 08, 2022. However, the 4th Defendant's submissions were not on record by the time of preparation of the judgment.

E. The Issues for Determination

11. The court has noted that the parties did not file any agreed statement of issues in this matter. The court shall consequently frame the issues for determination as provided for under Order 15 rule 2 of [*Civil Procedure Rules*](#). Under the said rule, the court may frame issues from any of the following:
 - a. The allegations contained in the pleadings.
 - b. The allegations made on oath by or on behalf of the parties.
 - c. The contents of documents produced by the parties.
12. The court has perused the pleadings, evidence and documents on record in this matter and is of the opinion that the following issues arise for determination:
 - a. Whether the Plaintiff is the registered proprietor of the suit properties.
 - b. Whether the Defendants trespassed into the suit properties in 2016 as alleged by the Plaintiff.
 - c. Whether the Plaintiff is entitled to the reliefs sought in the suit.
 - d. Who shall bear costs of the suit.

F. Analysis and Determination

a. Whether the Plaintiff is the registered proprietor of the suit properties

13. The court considered the material and submissions on record. Although the 1st – 4th Defendants denied in their defence that the Plaintiff was the registered proprietor of the suit properties there is adequate evidence on record of the Plaintiff's ownership. The Plaintiff not only produced copies of his title deeds to the suit properties but he also produced certified copies of the relevant land registers to demonstrate his ownership. The court is thus satisfied that the Plaintiff has proved his ownership of the suit properties.

b. Whether the Defendants trespassed into the suit properties in 2016 as alleged by the Plaintiff

14. The court has considered the evidence and submissions on this issue. Although the Plaintiff was questioned on his acquisition of the suit properties from the previous owner, the Plaintiff's evidence on trespass upon, and annexation of, the suit properties was not challenged by the Attorney General during cross-examination. There was no challenge to the Plaintiff's evidence that the school was the one which destroyed the fence and altered the original boundaries because it was claiming the suit properties were part and parcel of the school land.
15. The material on record further shows that the school used a surveyor from the County Government to alter the original boundaries as shown in the RIM in a bid to recover the deficit in the school's land from the Plaintiff and his neighbours. The material on record further shows that the dispute between the



Plaintiff and the school was reported to the National Land Commission for resolution and ultimately the Land Registrar who made a determination that the parties were to maintain the existing boundaries as per the RIM.

16. The evidence by DLASO (DW1) and the Land Registrar (DW2) indicate that whereas the school was allocated 11.0 ha in its letter of offer dated January 30, 2006, the actual acreage on the ground was only 5.3 ha. The deficit could not be explained by any of the government officers who testified at the trial. According to DW2, the Plaintiff was not responsible for the deficit. During his evidence in chief he testified that:

“We could not apportion any blame to any of the parcel owners. We found that most plots in the neighbourhood had a deficit in their acreage. We found that there was a disconnect between the registered area and the ground acreage. In my view the parties are not to blame for the discrepancies. The discrepancies are historical and date back to the period of original allocation of the scheme...”

17. The court is thus of the opinion that the Defendants were wrong in attempting to recover the deficit in their land from the Plaintiff and his neighbours. The Plaintiff was not responsible for the deficit. The Defendants were supposed to look up to the Settlement Fund Trustees or the allocating authority for an explanation on the deficit but not to invade and annex the neighbouring plots. The court is satisfied on the basis of the evidence on record that the Defendants actually trespassed upon the suit properties and that they did so without any lawful justification.

c. Whether the Plaintiff is entitled to the reliefs sought in the suit

18. The court has already found that the Plaintiff has demonstrated his ownership of the suit properties. The court has also found that the Defendants did trespass upon the suit properties without lawful justification. The court is thus of the opinion that the Plaintiff is entitled to most but not all of the prayers sought in the suit.
19. The court agrees with the Plaintiff's submission that trespass is a tort which is actionable per se hence the Plaintiff does not have to prove any specific damage in order to be entitled to general damages. The court is, however, inclined to award the Plaintiff nominal damages of Kshs 5,000/= only in recognition of the violation of his property rights bearing in mind the circumstances of the case. The court is not inclined to award the Plaintiff damages for destruction of the fence, farm house and other properties on the suit properties because the Plaintiff ought to have pleaded the claim as special damages and claim a specific amount for the alleged loss. The court shall not allow the Plaintiff to irregularly convert a claim for special damages into one of general damages.

d. Who shall bear costs of the suit

20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the [Civil Procedure Act](#) (Cap 21). The court has taken note of the peculiar circumstances of this suit and the fact that the deficit in acreage of the school land was occasioned by the Settlement Fund Trustees. The 1st Defendant is a public school which went looking for its missing land in the wrong direction hence it should not be penalized in costs. The court is, therefore, of the opinion that each party should bear its own costs.



G. Conclusion and Disposal Order

21. The upshot of the foregoing is that the court finds and holds that the Plaintiff has proved his case against the Defendants to the required standard. Consequently, judgment be and is hereby entered for the Plaintiff against the Defendants in the following terms:
- a. A declaration be and is hereby made that the Plaintiff is the owner of the suit properties and is entitled to exclusive right of possession and use of Title Nos Nyandarua/Ndemi/5864, 5865 and 5867.
 - b. A permanent injunction be and is hereby granted restraining the Defendants by themselves, their agents, servants or employees from further trespassing upon the suit properties or in any manner dealing with the suit properties.
 - c. For the avoidance of doubt, the Defendants shall restore the original boundaries between Parcel 1366 and the suit properties as per the RIM and restore any portion of the suit properties in possession of the school to the Plaintiff at their expense in default of which the Plaintiff shall do so at the Defendants' expense.
 - d. The Plaintiff is hereby awarded nominal damages of Kshs 5,000/= as general damages for trespass.
 - e. The prayer for general damages for malicious damage to property is hereby declined.
 - f. Each party shall bear its own costs.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 9TH OF MARCH, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

N/A for the Plaintiff

Ms. Wanjeri for the Attorney General for the 1 – 3 Defendants

N/A for the 4th Defendant

C/A - Carol

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Y. M. ANGIMA

JUDGE

