



**Mursi v Chepkwony & 3 others (Environment & Land Case
65 of 2014) [2023] KEELC 15880 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 15880 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 65 OF 2014**

**MC OUNDO, J
MARCH 2, 2023**

BETWEEN

BENARD CHERUIYOT MURSI PLAINTIFF

AND

MUSA CHEPKWONY 1ST DEFENDANT

JEREMIAH RUTO 2ND DEFENDANT

JOSEPH RUTO 3RD DEFENDANT

DAVID RUTO 4TH DEFENDANT

JUDGMENT

1. Vide a Plaint dated December 17, 2014, the plaintiff herein sought for the following orders;
 - i. A permanent order of injunction restraining the defendants by themselves their agents, employees, servants or otherwise from trespassing onto, interfering with and or doing any other act which is prejudicial to the plaintiffs quiet possession and or enjoyment of ownership rights over LR nos Kericho/Kapsuser 1767 & 1204.
 - ii. Costs of the suit and interest.
 - iii. Any other relief the court may deem fit and just to grant.
2. The defendants neither entered their appearance nor filed their defence and on October 27, 2016 after several adjournments, the matter proceeded for hearing *ex-parte* wherein the plaintiff, Benard Cheruiyot Mursi testified to the effect that he lived in Kammandet village in Kericho county. That he was a farmer and had filed suit against the defendants because he was the proprietor of land parcels number Kericho/Kapsuser/1204 and Kericho/Kapsuser/1767 as per the copy is of the official searches which he produced as Pf exh 1 and 2.



3. That although the defendants herein, who were his neighbors and lived on land parcel no Kericho/Kapsuser/1100 which had a road of access as per the map, they persistently trespassed on his land. That he had now come to court seeking that they be restrained. He also sought for costs.
4. The witness was stepped down so as to avail some photographs, photographs which were not produced after the matter resumed as he was not recalled to testify.
5. On November 4, 2019, there was another application by the plaintiff's counsel for the surveyor to visit the suit land and make a report to present in court wherein the court directed the district land surveyor Kericho to visit land parcels no Kericho/Kapsuser/1767, Kericho/Kapsuser/1204 and Kericho/Kapsuser /1100 to determine whether there was a road of access passing through parcel no Kericho/Kapsuser/1767 and Kericho/Kapsuser/1204 and thereafter filed his report.
6. The matter did not take off for hearing up to May 11, 2022, when the plaintiff closed its case but sought to call the surveyor who testified on June 27, 2022 as PW2 to the effect that he was Christopher Kirui the district surveyor land officer Kericho county. That he had visited parcel of land no Kericho/Kapsuser/1767 and 1204 on March 24, 2019 at 2:00 pm in the presence of the plaintiff and defendants wherein they had conducted their survey and thereafter filed their report.
7. That the issues that had emerged therein was that the plaintiff claimed ownership of both parcels no 1767 and 1204. That the section in dispute was the road marked in red (on the sketch map) which was an access road.
8. That initially the road was supposed to serve parcel no 1204 after there having been a subdivision that had yielded parcel no 1203 and 1204. That the plaintiff's parcel of land no 1767, was a remainder of parcel no 1203 and part of the road that used to serve parcel no 1204.
9. That for the plaintiff's convenient, he had changed the old road to serve the new road which was marked in blue (on the sketch map) That the road serving 1204 was not meant to serve parcel no 1100 in any way because it had been created to serve parcel no 1204 from a different parcel and not parcel no 1100 whose owner had access to the main road.
10. That since the road in dispute on parcel no 1204 was not registered as a public road, the owner of parcel no 1100 could not claim the right of access to the road serving parcel no 1204 unless they could reach an agreement to each excise some land from their respective parcels of land.
11. His evidence was that the road that had been created in parcel no 1204 was only meant to help the people living there to access the public road. He produced his report dated April 10, 2019 as Pf exh 4 after which the plaintiff closed its case.
12. Pursuant to the closure of the plaintiff's case, the court declared the defence case closed and directed that written submissions be filed in court.

Plaintiff's submissions

13. The plaintiff's submissions was to the effect that at all material times relevant to this suit he was and is the registered proprietor of L R no Kericho/Kapsuser/1767 & 1204 which were adjacent to L R no Kericho/Kapsuser/1100 registered in the name of Kipruto Kaptich (deceased).
14. That the defendants herein had without any color of right illegally trespassed onto his aforesaid parcels of land and were in the process of creating a road of access thus interfering with his quiet possession and enjoyment of the ownership rights of the subject parcel of land which action had in turn occasioned him loss and damages. That there was no road of access in the map and hence the defendants' acts were



- acts of lawlessness and anarchy to which themselves, their agents, employees and or assigns should be permanently restrained from doing anything prejudicial to his quiet enjoyment and possession of the subject parcels of land.
15. The plaintiff framed his issues for determination as follows;
 - i. Whether the defendants should be permanently restrained from trespassing into the plaintiff's property?
 - ii. Whether the plaintiff is entitled to damages for trespass, costs and interest of the suit?
 16. On the first issue for determination, the plaintiff submitted that he had produced mutation forms and copies of certificates of official search showing that he was the registered proprietor of the subject parcels of land.
 17. That a letter to the district land registrar dated November 11, 2013 and the land maps therein had actually confirmed that the alleged access road the defendants were bent on creating so as to access the adjacent parcel of land being L R no Kericho/Kapsuser/1100, did not exist on the ground and in the Registry Index Map (RIM) and mutation forms. That further, the land surveyor had produced his report as exhibit 4 in which it had been noted that the access road on the map was only meant to serve L R no Kericho/Kapsuser/1204 which belonged to the plaintiff, and it was the only access road which existed on the ground. There had been recommendation that the ground position be maintained. Therefore, clearly from the foregoing, the defendants' acts of trying to create an access road where it did not exist amounted to trespass.
 18. The plaintiff relied on the provisions of section 24(a) and 25 (1) of the *Land Registration Act* to submit that he was the legal owner of the subject parcels of land and thus enjoyed absolute ownership of the land plus all rights and privileges to it.
 19. Reference was also made to the definition of trespass as per *Clerk and Lindsel on Torts*, 18th edition at pg 23 and section 3 (1) of the *Trespass Act*, cap 294 to submit that trespass was an intrusion by a person into the land of another who was in possession and ownership. That the plaintiff never authorized nor gave consent to the defendants to create an access road through his parcels of land.
 20. That pursuant to the holding in case of *Kenya Power & Lighting Co Limited vs Sheriff Molana Habib* [2018] eKLR, the defendants be perpetually restrained from continuing trespassing and damaging the plaintiff's property so as to protect his rights.
 21. On the second issue as to whether the plaintiff was entitled to damages for trespass costs and interest of the suit, the plaintiff relied on the decided case in *Park Towers Limited versus John Mithamo Njika & 7 others* [2014] eKLR and a host of other authorities to submit that from the extent of damage, the special circumstances of the case and the precedents that have been set by superior courts, the court should award him a sum of kshs 10,000,000/= as general damages.
 22. That on costs and interests, it was trite law that the cause followed the event and having proved that the defendants had trespassed on his parcel of land that he ought to be awarded costs and interests of the suit.

Determination.

23. I have duly considered the evidence adduced before court by the plaintiff and find that the same was believable as it was backed by genuine documents which were not contested by the defendants who decided not to enter appearance or file any pleadings indeed they decided to keep away from the suit despite service.



24. The plaintiff's case against the defendants is that being his neighbors on land parcel no Kericho/Kapsuser/1100 which had a road of access as per the RIM, they had persistently trespassed on his land with the aim of creating an access road. His evidence was supported by the evidence of the district land surveyor who had testified that the road serving parcel no 1204 was not meant to serve parcel no 1100 in any way because it had been created to serve parcel no 1204 from a different parcel of land and not parcel no 1100 which had access to the main road.
25. In so filing the suit the plaintiff was seeking, that being the registered proprietor of L R no Kericho/Kapsuser/1767 & 1204 which parcels of land were adjacent to LR no Kericho/Kapsuser/1100, the defendants herein, their agents, employees and or assigns should thus be permanently restrained from interfering with his quiet possession and enjoyment of the ownership rights of the subject parcel of lands upon which they had embarked on creating a road of access where in fact no such road existed on the RIM (Registry Index Map).
26. The plaintiff further sought for kshs 10,000,000/= as general damages for trespass, Mesne profits, costs of the suit and interest therein at court rates, as well as any other relief that the court may deem fit to grant.
27. In support of his case, the plaintiff had produced copies of the official searches to land parcels no Kericho/Kapsuser/1204 and Kericho/Kapsuser/1767 as Pf exh 1 and 2 as well as a surveyor's report dated April 10, 2019 which comprised a sketch map on the situation on the ground annexed to it, and which report had been mistakenly produced as Pf exh 4 instead of Pf exh 3.
28. I have reviewed and considered the evidence of the plaintiff. I find the issues that arise for determination therein as follows;
 - i. Whether the defendants herein are trespassers on land no Kericho/Kapsuser/1204 and Kericho/Kapsuser/1767
 - ii. Whether the plaintiff is entitled to damages.
29. The provision of section 24(a) of the [Land Registration Act](#) no 3 of 2012 outlines the interests and rights of a registered proprietor of land as follows;

the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....'
30. Section 25(1) of the [Land Registration Act](#) also stipulates that ;

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...
31. The law is very clear on the position of a holder of a title deed in respect of land. Indeed section 26(1) of the [Land Registration Act](#) provides as follows:

“ the certificate of title issued by the registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all counts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –



- a. On the ground of fraud or misrepresentation to which the person is proved to be a party
 - b. Where the certificate of title has been acquired illegally un-procedurally or through a corrupt scheme
32. It will be seen from the above, that title to land is protected, but the protection can be removed and title impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme.
 33. The defendants did not adduce any evidence to the effect that the plaintiff had acquired the suit lands through fraud or misrepresentation or that his certificates of title had been acquired illegally, un-procedurally or through a corrupt scheme.
 34. Indeed based on the evidence adduced herein above, and while relying on section 26(1) of the [Land Registration Act](#), we cannot run away from the fact that the plaintiff has indeed satisfied the legal provision that he is the proprietor of the suit lands and hence has absolute ownership including all rights and privileges appurtenant to it. The plaintiff was therefore entitled to quiet, peaceful possession and enjoyment of the ownership rights of the subject parcels of land.
 35. By forcefully creating an access road through the plaintiff's suit parcels of land herein without the plaintiff's authorization and/or consent, so as to create an access road through his parcels of land, it goes without saying that the defendants were trespassers on the said parcels of land.
 36. Trespass has been defined by the 10th Edition of [Black's Law Dictionary](#) as;

“an unlawful act committed against the person or property of another; especially wrongful entry on another's real property.”
 37. Section 3 (1) of the [Trespass Act](#), also defines trespass as follows;

“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.”
 38. The court in [John Kiragu Kimani vs Rural Electrification Authority](#) [2018] eKLR also in defining trespass relied on Clark & Lindsell on Torts, 18th Edition on page 923 which defines trespass as;

‘any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the plaintiff to prove that the defendant invaded his land without any justifiable reason’.
 39. From the holding herein above and the definition of trespass, the court finds that indeed the defendants' action of creating an access road through the plaintiff's suit parcels of land constituted trespass. It is trite law that an act of trespass is actionable per se by an award of general damages once it is established.
 40. In [Philip Ayaya Aluchio vs Crispinus Ngayo](#) [2014] eKLR the court 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 – VS – Green Park Development Co* 986 S. W 2d 500 (no App 1999).

41. In the case of *Willesden Investments Limited vs Kenya Hotel Properties Limited* NBI H C C no 367 of 2000, it had been held thus:

“There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case.”

42. In this case the plaintiff has not adduced any evidence as to the state or the value of his property before and after the trespass. This makes it difficult to assess the general damages.

43. The summation of my finding is that having found that the plaintiff had proved his case against the defendants on a balance of probabilities, judgment is herein entered against the defendants as prayed to wit;

- i. A permanent order of injunction is herein issued restraining the defendants by themselves their agents, employees, servants or otherwise from trespassing onto, interfering with and/or doing any other act which is prejudicial to the plaintiffs quiet possession and or enjoyment of ownership rights over LR Nos Kericho/Kapsuser 1767 & 1204.
- ii. The plaintiff is herein awarded general damages of ksh 2,000,000/= (Two million shillings only)
- iii. Costs of the suit at a lower scale since the same was undefended,
- iv. Interest on clause (ii) above to be computed after 30 days from the date of delivery of this judgment.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 2ND DAY OF MARCH 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

