



Ojiambo & 2 others (All being Trustees of Regiechristies Church Ministry) v General & 2 others (Environment & Land Case 190 of 2010) [2023] KEELC 17890 (KLR) (8 June 2023) (Judgment)

Neutral citation: [2023] KEELC 17890 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 190 OF 2010
EK WABWOTO, J
JUNE 8, 2023**

BETWEEN

**PETER XAVIER INDINDI OJIAMBO 1ST PLAINTIFF
CONCILIA AKUKU ODUNDO 2ND PLAINTIFF
REGINA OCHAMI ODUORI 3RD PLAINTIFF
ALL BEING TRUSTEES OF REGIECHRISTIES CHURCH MINISTRY**

AND

**ATTORNEY GENERAL 1ST DEFENDANT
KENYA POWER & LIGHTING COMPANY LIMITED 2ND DEFENDANT
ATHI WATER SERVICES BOARD 3RD DEFENDANT**

JUDGMENT

1. The Plaintiffs filed a plaint dated April 20, 2010 which they sought the following orders.
 - a. A declaration that the Defendants have trespassed upon LR No 209/14854 Nairobi.
 - b. An order that the Defendants be evicted from LR No 209/14854 Nairobi.
 - c. A mandatory injunction directing that the Defendants remove or cause to be removed all those chattels, machinery and equipment from LR No 209/14854 in Nairobi in default of whereof the Plaintiff be at liberty to do so at the Defendant costs.
 - d. In the alternative to prayer (C) above, An order that the Defendants remove or cause to be removed all those chattels, machinery and equipment placed upon LR No 209/14854 Nairobi.
 - e. Damage for trespass.



- f. Costs of the suit.
 - g. Interests on damages at court rates from the date of judgment till payment in full.
2. The Defendants filed defence objecting to the suit. The 2nd Defendant filed a Defence dated October 25, 2011. The 3rd Defendant filed a Notice pursuant to order 1 rule 24 of the *Civil Procedure Rules* seeking to be indemnified against all the claims made by the Plaintiff against them by the 2nd Defendant, the reasons being that the 3rd Defendant was acting on representations made to her by the 2nd Defendant and that the 2nd Defendant had failed to disclose to the 3rd Defendant that it lacked capacity to execute the wayleave agreement and or had proper capacity to sink a borehole in the suit premises.
 3. The suit against the 1st Defendant was withdrawn leaving the 2nd and 3rd Defendants as the only Defendants in the matter.

The Plaintiff's case.

4. It was the Plaintiff's case that they are the registered proprietors or lessees of that parcel of land known as L R No 209/14854 (Grant No I R 91427) situated in Villa France Estate in the City of Nairobi. It was pleaded that in May 2009, the 1st and 2nd Defendants without any colour of right caused their respective employees or agents to trespass onto their land and without consent drilled and sunk a borehole, installed water extractor equipment and in company with the 3rd Defendant laid electricity poles, transmission lines and other electrical works.
5. It was also the Plaintiffs case that owing to the Defendants actions they have been deprived the use and quiet enjoyment of the suit premises.
6. During hearing Peter Ojiambo testified as PW1 and the sole Plaintiffs witness. He relied on his witness statement and bundle of documents on record dated May 4, 2017 as his evidence in chief. He urged the court to grant the Plaintiffs the prayers sought.
7. On cross-examination, he stated that the suit property has some residential structures which are incomplete. He also stated that the electricity in the suit property is for the borehole which belongs to Athi Water Services Board.
8. On further cross examination, he also stated that their allotment letter was issued on October 23, 2001. He also stated that the allotment letter that was issued had conditions which they accepted.
9. When asked about the role of the 3rd Defendant in the matter, he stated that he did not know if the 3rd Defendant had drilled any borehole and neither does he know if they installed any water equipment and neither could he remember when Kenya Power entered into his property and also he could not remember when power was installed. He further stated that he does not know who made the request and neither does he know who paid for the same. He also stated that he doesn't know the value of the property. He also conceded that condition No. 14 of this title had a provision on wayleave.
10. On re-examination, he stated that he has never made any application to have electricity. He also stated that the suit property belongs to him and that the title is valid. He further stated that he did not apply for any borehole and neither did he apply for any electricity.

The Defendants case.

11. As earlier stated, the case against the 1st Defendant, the Attorney General was withdrawn leaving the suit to proceed only as against the 2nd Defendant, Athi Water Services Board and 3rd Defendant, Kenya Power and Lighting Company Limited.



12. The 2nd Defendant filed its statement of Defence dated October 25, 2011. In its defence, it denied the averments raised in the Plaint and further stated that the land in question does not belong to the Plaintiffs.
13. It was further averred that even if the land in question belongs to the Plaintiffs then the same was obtained fraudulently and in bad faith since the same is public land which ought to be used for supply of utilities to the general public and not for use by Plaintiffs. The 2nd Defendant also pleaded the following particulars of fraud on the part of the Plaintiff;
 - a. Being issued with a title for a property belonging to the public.
 - b. No public consent was obtained before allocation was done.
 - c. The property was not gazetted as being converted from public land to private land.
14. The 3rd Defendant filed a notice for indemnity dated April 20, 2015 against the 2nd Defendant for indemnity against all claims made against them by the Plaintiff and the costs incurred therein for the reasons that:-
 1. The 3rd Defendant was acting on representations made to her by the 2nd Defendant.
 2. The 2nd Defendant failed to disclose to the 3rd Defendant that she lacked the capacity to execute the way leave agreement and or had property capacity to sink a borehole in the suit.
15. During the hearing the 2nd and 3rd Defendant never called any witnesses to testify on their behalf and this prompted the court to close their cases without them calling any witnesses.

The Plaintiffs submissions.

16. The Plaintiffs filed submissions dated February 24, 2023 through A I Onyango Advocates. It was submitted that there was trespass by the 2nd and 3rd Defendants who have respectively drilled a borehole and placed power pylons in L R No 209/14854 Nairobi without the Plaintiffs permission, the Defendants did not prove that LR No 209/14854 Nairobi is public land at all or that LR No 209/14854 Nairobi had been cancelled, the Plaintiffs produced documentary evidence from the Government of Kenya and that there was no evidence that those documents were false or forgeries or not from the Government and that the Defendants did not show that they sought for and obtained the Plaintiffs permission before the above trespass engagement.
17. It was also submitted that pursuant to Section 26 of the *Land Registration Act*, the certificate of title as produced by the Plaintiffs is conclusive proof of ownership unless invalidated on the grounds of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, procedurally or through a corrupt scheme.
18. The Plaintiffs submitted that their title L R No 209/14854 Nairobi being valid cannot be impugned at all without evidence and so long as it has not been impugned it remains as such private property that third parties such as the Defendants cannot trespass into without permission being expressly granted. It was also submitted that the Plaintiffs having acquired proprietary interests in the lease of the plot, they are protected by didn't of Article 40 of the *Constitution* and cannot be arbitrarily deprived of the same. Reliance was placed in the case of *Rutongot Farm Ltd vs Kenya Forest Service & 3 others* (2018) eKLR.
19. On the issue of damages Counsel for the Plaintiffs relied on the case of *Kenya Power & Lighting Company Ltd -Vs- Ringera & 2 others* (Civil Appeal E247 & E 248 of 2020 (Consolidated) (2022)



KECA 104(KLR) 4 February 2022 (Judgment) Neutral Citation (2022) KECA 104 (KLR) and urged the court to award the sum of Kshs 10,000,000/- as damages for trespass.

The 2nd Defendant's submissions.

20. The 2nd Defendant filed its written submissions dated April 14, 2023. It was submitted that the borehole was intended to be a public property managed and operated by Nairobi City Water and Sewerage Company Ltd for the benefit of the surrounding community. It was also submitted that the parcel of land was a Chief's Camp and the Plaintiff can never have a legal right on property acquired wrongfully. The property was not gazetted as being converted from public land to private land yet the Plaintiffs had alleged that they were lessees on the parcel of the land.
21. It was also submitted that due diligence was undertaken prior to the drilling of the borehole and the Plaintiffs actions towards 2nd Defendant is just an afterthought. The court was also informed that the then Principal Administration was instrumental in assisting in the identification of the public utility plots for the boreholes at that time.
22. The second Defendant also contended that for a borehole to be drilled there ought to have been permission from City County of Nairobi, Water Resources Authority, National Environment Management Authority and a no objection letter from Nairobi Water and Sewerage Company. Reliance was made to the case of *Jones Muthami t/a Muthami Enterprises vs John Mwaniki* (2018) eKLR.
23. It was further submitted that having not joined City County of Nairobi considering the role they played herein, rendered the suit null ab initio and the court was urged to dismiss the suit with costs.

The submissions of the 3rd Defendant.

24. The 3rd Defendant filed written submissions dated March 23, 2023. In the said submissions, reference was made to condition No 14 of the letter of allotment issued to the Plaintiffs which stated as follows; -

“The President or such person or authority as may be appropriate for the purposes shall have the right to enter the land and lay and have access to water mains, services pipes and brains, telephone or telegraph lines and electric mains of all descriptions whether over head or underground and the grantee shall not erect any building in such way as to cover or interfere with any existing alignments of mains or service pipes of telephone or telegraph wires and electric mains.”
25. In light of the foregoing, the 3rd Defendant submitted that there must have been an invitation and application made as it is the norm before the 3rd Defendant provided power to the 2nd Defendant. Reference was then made to the notice of indemnity filed pursuant to Order 1 Rule 24 of the Civil Procedure Rules. It was also submitted that the Plaintiffs witness was unable to prove whether any demand was made to 3rd Defendant to remove the poles and he was also unable to establish whether there was any machinery/equipment belonging to the 2nd Defendant as alleged.
26. It was further submitted that the Plaintiffs had failed to prove their case against the 3rd Defendant on a balance of probability. On the issue of damages sought, it was submitted that no evidence had been adduced to warrant the court to grant the same. The 3rd Defendant submitted that if indeed the 3rd Defendant is found liable then she ought to be indemnified by the 2nd Defendant herein an issue which was not contested.



Analysis and Determination.

27. The court has considered the pleadings filed, written submissions of the parties and oral evidence adduced by Peter Ojiambo who testified as PW1 and is of the humble opinion that the following are the main issues for consideration herein.
- i. Whether the Plaintiffs have proved their case to the required standard.
 - ii. Whether the Plaintiffs are entitled to the orders sought in their plaint.
 - iii. Whether the 3rd Defendant is entitled to be indemnified by the 2nd Defendant.
 - iv. What orders should issue as to costs.

Issue No 1

Whether the Plaintiffs have proved their case to the required standard.

28. During trial the Plaintiffs led evidence that they are the registered proprietors as lessees of that parcel of land known as L R No 209/14854 (Grant No I.R. 91427) situated in Villa France Estate in the City of Nairobi. It was pleaded that in May 2009, the 1st and 2nd Defendants without any colour of right caused their respective employees or agents to trespass onto their land and without consent drilled and sunk a borehole, installed water extractor equipment and in company with the 3rd Defendant laid electricity poles, transmission lines and other electrical works. It was also there testimony that owing to the Defendants actions they have been deprived the use and quiet enjoyment of the suit premises
29. It is worth noting that the 2nd and 3rd Defendants never called any witness to testify on their behalf. However, they both filed written submissions. No witness was called on their behalf to controvert the allegations made against them by the Plaintiffs. Therefore, the Defendants defence remains mere allegations as the Plaintiffs testimony was not rebutted. See the case of *Bilsah Matiangi vs Kissi Bottlers Limited & Another* (2021) eKLR;
- “Where a Plaintiff gives evidence in support of her case, but the Defendant fails to call any witness in support of its allegations, then the Plaintiff’s evidence is uncontroverted and the statement of defence remains mere allegations.”
30. However uncontroverted evidence is not automatic evidence and the Plaintiffs still had an obligation to prove their case to the required standard. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the *Evidence Act*, which provides as follows:
- “ 1 Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - 2 When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
31. In the instant suit, the evidence adduced confirmed that indeed the Plaintiffs are the registered owners of LR No 209/14854, Grant I R 9147 and as such ownership of the suit property to the Plaintiffs has been proved.
32. During trial, no explanation and or evidence was adduced to support the Defendants case, no explanation was also offered by way of evidence adduced in court as to why the Defendants sunk the



borehole onto the Plaintiffs property without the consent of the Plaintiffs and in the circumstances, the court finds that the Plaintiffs have proved their case to the required standard.

Issue No. 2.

Whether the Plaintiffs are entitled to the prayers sought.

33. The Plaintiffs prayed for several orders in their plaint. These included eviction orders, mandatory injunction orders, damages for trespass and costs of the suit.

34. In respect to damages for trespass 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.”

Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership.

35. In *Clerk and Lindsell on Torts*, 17th Edition page 1354 paragraph 24. It is stated;

“Nuisance” is defined as an act or omission which is an interference with, disturbance of or annoyance to, a person’s rights used or enjoyed in connection with land. It is caused usually when the consequences of a person’s actions on his land are not confined to the land, but escape to his neighbours land causing an encroachment and causing physical damage or unduly interfering with the neighbour’s use and enjoyment of his land”.

36. It is trite law that trespass to land is actionable per se (without proof of any damage). See the case of *Park Towers Ltd v John Mithamo Njika & 7 others* (2014) eKLR where J M Mutungi J, stated:

“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 damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case...”

37. From the evidence adduced it is clear that the 2nd Defendant’s action of drilling a borehole in the Plaintiffs property without their consent amounted to trespass and as such the Plaintiffs are entitled to the orders of general damages for trespass.

38. Granted that trespass is actionable perse, the Plaintiffs submitted that the court should award them the sum of Kshs 10,000,000/-. In the case of *Nakuru Industries Limited vs S S Mehta & Sons* (2016) eKLR where the court faced such a similar situation, it was held as follows; -

“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not provided. However, I have found the Defendant’s did trespass onto the Plaintiff’s lanes and conduct some excavation. For this reason, I award the damages in the amount of Kshs 500,000/- plus interest and costs of this suit from the date of this judgment until payment in full.”



Similarly, in the case of *John Chuma Nganga –Vs- Attorney General and Another* (2019) eKLR, the court held as follows; -

“In terms of prayer No (d) the court awards the Plaintiff general and exemplary damages for trespass and conversion of property and nuisance to the tune of Kshs 1,000,000/-.”

39. Taking into consideration and noting the duration of the trespass, the court is inclined to award a figure of Kshs 2,000,000/- as damages for trespass considering the length of time that the trespass has occurred.
40. In respect to the order of mandatory injunction sought for the removal machinery and equipment from LR No 209/14854 Nairobi upon considering the evidence that was tendered, it will not serve any meaningful purpose by this court ordering the removal of the said machinery and equipment since the same belong to public entities and public funds were incurred in procuring the same. In the circumstances the said prayer is declined.

Issue No III

Whether the 3rd Defendant is entitled to be indemnified by the 2nd Defendant.

41. The 3rd Defendant filed a notice dated April 20, 2015 seeking to be indemnified by the 2nd Defendant against any damages to be suffered by them pursuant to Order 1 Rule 24 of the Civil Procedure Rules. During trial the Plaintiffs witness was unable to prove any demand to the 3rd Defendant to remove the electric poles, he was also unable to establish whether there was any machinery/equipment belonging to the 3rd Defendant. The witness in cross –examination also conceded that the borehole was not drilled by the 2nd Defendant and in essence the Plaintiffs claim against the 3rd defendant was not proved to the required standard. In view of the foregoing, no liability can be attributed towards the 3rd defendant herein.
42. This court is also mindful of the special conditions attaching to the Plaintiffs title to the suit property which in essence provided that the Plaintiffs title may be subjected to any wayleaves as and when applicable. In the circumstances, I do not find any liability as against the 3rd Defendant to warrant this court to make any order in respect for them to be indemnified.

Issue No IV

What orders should issue as to costs.

43. As to costs, Section 27 of the *Civil Procedure Act* the same is a discretion of the court and considering that the Plaintiffs have partially succeeded in some of their reliefs, I will direct each party to bear own costs of the suit.

Final orders

44. In conclusion, I hereby make the following orders. I enter Judgment for the Plaintiffs against the 2nd Defendant for;
 - a. General damages for trespass for Kshs 2,000,000/- to be paid by 2nd Defendant.
 - b. Each party to bear own costs of the suit.
 - c. Any reliefs not expressly granted are deemed as declined.



Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF JUNE 2023.

E.K. WABWOTO

JUDGE

In the presence of:

Mr Onyango for Plaintiffs.

Mr Mulekyo for 3rd defendant.

No appearance for 2nd Defendant.

Court Assistant – Caroline Nafuna.

E K WABWOTO

JUDGE

