



**Awandu v Odindo & another (Environment & Land Case E003 of 2022)
[2023] KEELC 20692 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20692 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E003 OF 2022
AY KOROSS, J
OCTOBER 12, 2023**

BETWEEN

JAMES ERICK OUMA AWANDU PLAINTIFF

AND

ELISHA OTIENO ODINDO 1ST DEFENDANT

CHRISTINE AWINO OMAMO 2ND DEFENDANT

JUDGMENT

1. The plaintiff is the registered owner of land parcel no. North Gem/Malunga/1151 ('the suit property') while the defendants are respectively husband and wife and allegedly neighbours to the plaintiff.
2. By a plaint dated 4/02/2022 and amended on 11/10/2022, the plaintiff contended the defendants had on diverse dates and without permission trespassed onto the suit property and caused wastage to it by cutting trees, making bricks and destroying crops. This was despite the plaintiff lodging complaints against them including to the area chief. The plaintiff asserted the defendants' actions had caused him loss of kshs. 120, 000/-.
3. The plaintiff prayed for the following reliefs; permanent injunction, general damages, special damages of kshs. 120,000/-, interest and costs of the suit.
4. The defendants' counsel, M. Korongo & Co. Advocates filed their defence dated 4/03/2022 in which they denied the statements made in the plaint and put the plaintiff to strict proof. They asserted that if at all they entered the suit property, which was allegedly adjacent to theirs, it was with express or implied permission of the plaintiff.



The Plaintiff's case and evidence

5. The plaintiff testified as PW1. His evidence was composed of his written and oral testimony and documents he produced in support of his case. His evidence was led by Alfred Awandu Ong'ongo, Charles Nondi Ong'ongo and Caleb Ondik Owuor who respectively testified as PW2, PW3 and PW4. In a similar fashion as the plaintiff, their evidence was contained in their written and oral testimonies.
6. It was his testimony over the past few years, the defendants had trespassed onto the suit property, felled trees and had removed soil from it for purposes of brick making. The area chief's heed for them to desist had been ignored.
7. In particular, on 26/11/2021, the defendants in the company of 4 others commenced cutting down trees on the suit property. He confronted them together with PW2 in the presence of PW3. They had caused damage to the suit property. The defendants' property was land parcel no. 1159 which was separated from the suit property by a 6-metre road.
8. On cross examination, PW1 admitted that land parcel no. 1169 did not border the suit property and was adamant that the defendants' property was 1159. Jackton Odindo ('Jackton') who was the defendants' father owned 1169. The instant suit was not a boundary dispute.
9. In 2009, the defendants attempted to encroach and plant trees on the suit property but he repulsed them. In 2019, another trespass was attempted whereby the defendants wanted to make bricks but upon reporting them, the 2nd defendant stopped her actions. In these previous attempts, the defendants had not been successful in their intentions. The last straw that broke the camel's back was on 26/11/2021 when they felled trees that he had planted.
10. PW2 who is PW1's father corroborated PW2's testimony. On 26/11/2021, he witnessed the defendants together 4 other people who were armed with a panga, jembe and power saw felling trees on the suit property. 1169 never bordered the suit property.
11. On cross examination, PW2 stated that 1169 was owned by Jackton who was the 1st defendant's father. A road separated 1151 and 1169. The suit property had never been surveyed.
12. PW3 was a village elder, a brother to PW2 and an uncle to PW1. It was his testimony on 26/11/2021, he and PW4 were on official duty and were heading to PW1's homestead when they stumbled upon the defendants' acts of trespass.
13. On cross examination, PW3 admitted that it was the 1st time he had witnessed trespass on the suit property. Abongo Otieno ('Abongo') owned 1169 and was a neighbour. Only two trees were cut on the fateful day.
14. PW4 corroborated PW3's evidence in chief. On cross examination, he testified a road traversed the suit property and 1169 and it acted as a physical boundary between the two properties.

Defendants' case and evidence

15. James Mrera Ocholla a neighbour to the parties and a relative to the defendants testified as DW1. His evidence was composed of his written and oral testimonies.
16. He testified Jackton inherited several parcels of land including 1169 from his deceased brother Abongo. He was familiar with the portion of the suit property the defendants had encroached upon since he had grazed on it prior to Abongo's demise.



17. When Jackton was giving an access road in 1169 to one of his brother's one Zedekia Ong'an'ga, a portion of 1169 remained on the suit property; Jackton and his family had been tilling this trespassed portion since 1974 and had even planted trees. Jackton and PW2 had co-existed peacefully and trespass had not been committed.
18. On cross examination, he testified there was an error in his statement; he meant 1159 rather than 1169. There was no survey report showing part of 1159 was on the suit property but a road demarcated and traversed these two properties. Ruth Odindo ('Ruth') who was the 1st defendant's mother, had been tilling the trespassed portion of 1151 since 1974 and had even planted trees on it.
19. Peter Otieno Onyuka testified as DW2. He corroborated DW1's evidence in chief. On cross examination, he testified 1169 was unknown to him and there was no error on it. He admitted that the defendants told him what to record as his statement and that was what was recorded. Although he was privy the defendants' family planted trees on the suit property since 1970's, he had no evidence to prove so.
20. On re-examination, DW2 testified the defendants were his relatives and he knew the history of the suit property however he did not know the parcel no. of the land in dispute.
21. The 2nd defendant testified as DW3 and her testimony was composed of her written and oral evidence. It was her testimony Abongo's land parcel no. North Gem/Malunga/1169 was inherited by Jackton.
22. Upon her marriage to the 1st defendant, they utilised the trespassed portion as a couple. Jackton planted trees on this portion. In 2009, the defendants also planted trees which did not survive, they had been utilising the portion peacefully.
23. However, at the plaintiff's instigation the area chief stopped them in April 2020; which they complied with. On 26/11/2021, the area chief gave them permission to ingress the suit property.
24. On cross examination, she testified by adverse possession, she was claiming the trespassed portion to the tune of 0.08 Ha. Albeit not having documents to prove ownership of this trespassed portion, she had used it since 2004 to 2020. However, she did not have any prove she tilled the trespassed portion during this intervening period.
25. The trees on the trespassed portion were planted by Jackton, her mother in law or Abongo but similarly she did not have any prove. In 2009, she did not enter the suit property but sometimes again in 2009, she entered the disputed portion to plant trees.
26. In 2020, the area chief, interrogated her on her brick making activities on the suit property and he prohibited her from interfering with the suit property. Later, after hearing all the parties, the chief did not render a decision.
27. However, on 20/11/2021, the area chief privately had a meeting with her and told her to vacate the suit property and directed her to share the trees on the trespassed portion with the plaintiff and that was how she entered the suit property on 26/11/2021 with other people who had pangas and an axe.
28. Albeit not having a power saw on the fateful date, the photographs produced by the plaintiff demonstrated indeed a power saw had been used to cut power trees. She denied trees were cut on that day.
29. Abongo was the registered owner of the suit property but he died in February 2020 and he had never laid a claim on the trespassed portion and neither did Jackton nor the defendants. There was no evidence a part of 1159 was on the suit property and a road separated them.



30. Albert Walton Ombogo who testified as DW4 corroborated DW1 and DW2's testimonies.

Plaintiff's submissions

31. His counsel, Mr. Charles O. Onyango, filed written submissions dated 12/06/2023. Counsel identified the following issues for determination: (a) whether the plaintiff had made a claim for injunctive relief; (b) whether the plaintiff had made a case for the grant of special and general damages and what ought to be the quantum; and (c) who ought to cater for costs of the suit.
32. On the 1st issue, counsel submitted Article 40 of *the Constitution* affirmed the right of a party to acquire and own property and this legal position was statutorily recognised by Sections 24 and 25 of the *Land Registration Act*.
33. Counsel submitted the plaintiff having proved to be the registered owner of the suit property and the defendants having trespassed on it, he was entitled to the injunctive relief. Counsel cited the case of Hassan Mohammed Haji vs. Mohammed Kenyan & another [2019] eKLR on indefeasibility of title to land.
34. On the 2nd and 3rd issues, counsel submitted the prayer for Ksh 120,000/- as special damages was not opposed. On general damages, counsel urged the court to consider Section 3 of the *Trespass Act* and because the act of trespass was repetitive, the plaintiff's general damages should be assessed at ksh 500,000/-. Counsel sought costs of the suit.

Defendants' submissions

35. Their counsel, M. Korongo & Co. Advocates filed written submissions on 11/07/2023. Counsel adopted the plaintiff's issues.
36. On the 1st issue, counsel submitted from the evidence, it emerged the plaintiff's family had given the defendants express permission for them to utilise the trespassed portion and accordingly, the issue of trespass could not suffice. To buttress his position, counsel relied on decision of Peter N Migwi Kang'ethe vs. John Githua Wahome [2008] eKLR which stated:-
- “ There cannot therefore be trespass where the alleged offending party enters the suit premises with the permission of the registered owner as it happened in this case.”
37. It was counsel's submission that the claim for general damages ought to fail as trespass was not proved.
38. On the 2nd issue, counsel submitted having failed to prove trespass, the claim of general damages could not arise and the defendants were not claiming land and but trees. As for special damages, counsel submitted it was settled law it must not only be specifically pleaded but strictly proved; which the plaintiff had failed to discharge in accordance with Section 107 of the *Evidence Act*. Counsel relied on Douglas Odhiambo Apel & Anor vs. Telkom Kenya Ltd Civil Appeal No. 115 of 2006 where the Court of Appeal held that:
- “...a Plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court...unless a consent is entered into for a specific sum, then it behooves the claiming party to produce evidence to prove the special damages claimed...”
39. On the last issue, counsel submitted in the circumstances of this case, the defendants should be awarded costs.



Analysis and Determination

40. I have considered the pleadings, evidence adduced by the parties, as well as counsels rival submissions. Being guided by the provisions of law and judicial precedents that have been well cited, I shall now proceed to consider the merits or otherwise of the plaintiff's claim and conceivably the issues for determination are;

- I. Whether the defendants trespassed onto the suit property.
- II. Whether the plaintiff is entitled to the reliefs sought.
- I. Whether the defendants trespassed onto the suit property.

41. Article 40 of *the Constitution* recognises every person has the right to acquire and own property of any description and in any part of Kenya. Protections and limitations to such rights over land are protected by the Sections 24, 25 and 26 of the *Land Registration Act* which sets out land's rights, privileges, appurtenances, liabilities and interests.

42. Since the plaintiff's title to the suit property is not being challenged and the suit property is not a lease, the most significant provisions are Sections 24 (a) and 25 (1) of the said Act which state as follows: -

24. Interest conferred by registration

Subject to this Act—

- (a) 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; and
- (b).....

25. Rights of a proprietor

- (1) 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, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2)"

43. The plaintiff pleaded trespass which is provided for by Section 152A of the *Land Act* 2016 as follows: -

“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.’



44. 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.”
45. It was undisputed the plaintiff was registered as the proprietor of the suit property. He produced the suit property’s title document and green card which proved this. The Registry Index Map (RIM) showed the suit property and North Gem/Malunga/1159 were not adjacent to each other but were separated by a road.
46. From the RIM, the two properties’ positions had never been amended. I was unable to trace North Gem/Malunga/1169 on the RIM which affirmed the 2nd defendant’s evidence that she meant 1159 and not 1169.
47. The defendants’ evidence that a portion of North Gem/Malunga 1159 was adjacent to the suit property was not proved. This was lent credence by the 1st defendant’s evidence that her family had never laid claim on the trespassed portion.
48. The plaintiff’s evidence that the defendants trespassed on the suit property in 2009 and 26/11/2021 was not contradicted. The 2nd defendant’s evidence was evasive and full of contradictions. On the one hand she testified the trees she planted in 2009 on the suit property did not survive because of bad luck while on the other hand, she testified they were either uprooted or she never entered the suit property.
49. In addition, DW2 testified the defendants directed him on what to record as his evidence and he appeared clueless as to whether the defendants parcel of land, if at all, was 1159 or 1169.
50. As for the date of 26/11/2021, the 2nd defendant admitted she entered the suit property with permission of the area chief. Even if the chief had given her permission, as earlier highlighted in this judgment, the suit property was protected by law. The defendants were prohibited from interfering with the plaintiff’s rights over it except by his permission.
51. Although the 1st defendant was evasive on the equipment she used to fell trees, it is no doubt on 26/11/2021, the defendants cut some trees existing on the suit property. She also contradicted herself as to who planted the trees; whether it was the Abongo, Jackton or Ruth.
52. Regardless of whether any of them planted the trees on the suit property, for as long as they planted them without permission, their acts amounted to trespass.
53. There was no evidence led that the plaintiff or his predecessors in title ever granted permission to the defendants or their relatives to use the suit property.
54. If at all the defendants’ relatives ever planted trees on the suit property, their acts were in vain. The plaintiff being the proprietor owned the trees and was protected by the legal maxim of *cujus est solum ejus usque ad coelum* which means he who owns the soil owns everything above and below from heaven to hell. I do find the defendants were trespassers.

II _Whether the plaintiff is entitled to the reliefs sought.

55. As rightfully submitted by the defendants’ counsel, it is trite law special damages must be specifically pleaded and proved. See Douglas Odhiambo Apel & Anor Vs Telkom Kenya Ltd (Supra) and Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR.



56. Notwithstanding the plaintiff pleaded special damages of kshs. 120,000/-, he did not tender an assessment report from a reputable assessor to demonstrate the nature of the species of the cut trees, their number, maturity and value to enable this court assess special damages. It is my finding this claim fails.

57. As for general damages, in Nakuru Industries Limited v S S Mehta & Sons [2016] eKLR, Odero J stated that: -

“in tort, damages are awarded as a way to compensate a plaintiff for the loss he had incurred due to a wrongful action on the part of the defendant... In cases where trespass to land results in damage then the computation of damages is on the basis of restitution of land. The cost of restoration of the land to the position it was in before the wrongful act was committed are factored in.”

58. According to J M Mutungi J in Park Towers Limited vs. John Mithamo Njika & 7 others [2014] eKLR:
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“...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 the duty to assess the damages awardable depending on the unique facts and circumstances of each case.’

59. It is trite law that trespass is actionable per se. Having proved trespass, the plaintiff was entitled to general damages. In the plaintiff’s submissions, he assessed general damages at ksh 500,000/- However, the plaintiff did not lead any evidence on the amount of diminution in value of the suit property or the costs of its reinstatement. I hereby assess general damages at kshs. 200,000/-.

60. Having proved his claim, the plaintiff is entitled to the reliefs sought except special damages which he failed to discharge.

61. Finally, it is my ultimate finding that the plaintiff proved his case against the defendants. I award the plaintiff costs of the suit and hereby I issue the following disposal orders;

- a. A permanent injunction be and is hereby issued against the defendants restraining them, their servants, agents and workers from entering, occupying, constructing, destroying, damaging or dealing whatsoever with land parcel no. North Gem/Malunga/1151.
- b. General damages for trespass are ordered in the sum of Kshs 200,000/- payable jointly by the defendants to the plaintiff.
- c. The costs of the suit are awarded to the plaintiff.

62. Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 12TH DAY OF OCTOBER 2023.

HON. A. Y. KOROSS

JUDGE

12/10/2023

Judgment delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Mr. Onyango C. for the plaintiff



N/A for the defendants

Court assistant: Mr. Ishmael Orwa.

