



REPUBLIC OF KENYA



China Wu Yi Construction Company Ltd v Wambua (Environment and Land Appeal 12 of 2019) [2023] KEELC 20457 (KLR) (4 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20457 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 12 OF 2019
A NYUKURI, J
OCTOBER 4, 2023**

BETWEEN

CHINA WU YI CONSTRUCTION COMPANY LTD APPELLANT

AND

ANTHONY MWAU WAMBUA RESPONDENT

(Being an Appeal from the Judgment of Chief Magistrate's Court at Machakos in ELC Case No. 2 of 2018 delivered on 27th March 2019 by Hon. A.G. Kibiru, Chief Magistrate)

JUDGMENT

Introduction

1. The Appellant in this matter filed appeal against the judgment of Honourable A. G. Kibiru, Chief Magistrate delivered on 27th March 2019. In the impugned judgment, the learned magistrate awarded the Respondent exemplary damages in the sum of Kshs. 2,000,000/= as compensation for trespass in regard to the Respondent's property known as Muputi/Kiima-Kimwe/635 (suit property). He also ordered the Appellant to pay costs and interest.

Background

2. Antony Mwau Wambua, the Plaintiff in Machakos CMCC No. 2 of 2018, filed suit vide Plaint dated 9th March 2018, against China Wu Yi Construction Company Ltd alleging that the Defendant had trespassed on his land parcel Muputi/Kiima-Kimwe/635. He sought a permanent injunction and compensation for general, special and aggravated damages to the tune of Kshs. 19,600,000/= on averments that the Appellant had by trespassing on the suit property, led to loss of value and income from the suit property, having trespassed thereon on two instances and continuously for a period of four months.



3. In a defence dated 14th May 2018, the Defendant denied trespassing on the suit property and stated that the Plaintiff was actuated by greed on the basis that the Defendant was a foreigner. They averred that the Plaintiff had instituted criminal proceedings against the Defendant in regard to the same cause of action vide Machakos Criminal Case No. 433 of 2017 which he withdrew for lack of evidence. They stated that the allegations in the criminal proceedings were different from the allegations made in the civil suit, although they related to the same cause of action. They maintained that they had designated and leased places, but that the Plaintiff was not one of them.
4. The matter proceeded for a full hearing. Consequently, upon considering the pleadings and evidence, the trial court found that the Defendant had trespassed on the Plaintiff's land. The trial court therefore awarded the Plaintiff exemplary damages of Kshs. 2,000,000/= together with costs and interest.
5. Aggrieved with the findings of the trial court, the Appellant filed a Memorandum of Appeal dated 15th April 2019 against the judgment on the following grounds;
 - a. That the learned Magistrate misdirected himself when he arrived at a decision not based on evidence.
 - b. That the learned Magistrate relied on contradictory evidence to make a finding in favour of the Respondent.
 - c. That the learned Magistrate erred when he awarded the Respondent an excessive and unreasonable figure without proof of damage.
 - d. That the learned Magistrate erred when he relied on the value of the land to assess the damage without evidence that the Applicant used the entire land.
 - e. That the learned Magistrate erred when he made a finding that there was damage without evidence of the position of the land before the alleged trespass.
6. Consequently, the Appellant sought that the judgment by the lower court be set aside with costs. The court ordered that the appeal be canvassed by way of written submissions. On record are the Appellant's submissions filed on 27th June 2022 and the Respondent's submissions filed on 20th July 2022.

Appellant's submissions

7. Counsel for the Appellant submitted that although it was alleged that the Appellant parked their trucks on two occasions on the Respondent's land, no survey or valuation report to demonstrate the extent of the actual damage on the land was produced.
8. On quantum for damages, reliance was placed on the cases of *Philip Ayaya Aluchio v. Chrispinus Ngayo* [2014] eKLR, and *Nakuru Industries Limited v. S.S Mehta & Sons* (2016) eKLR for the proposition that to prove damages for trespass, the claimant must prove the value of the land before and after trespass.
9. Counsel argued that the Respondent only provided the court with a valuation report prepared on 27th July 2018, at the tail end of the trial when both parties had testified and closed their respective cases and that the same could not be used as evidence. Counsel submitted that the Respondent did not adduce any evidence to show the state or value of his property before and after the alleged trespass making it difficult to assess damages.
10. As regards exemplary damages, counsel relied on the cases of *Mikidadi v Khaggan & Another* (2004) eKLR 496 and *Rhoda S. Kiilu v Jiangxi Water Hydropower Construction Kenya Ltd* (2019) eKLR to contend that exemplary damages are awarded in instances of oppressive, arbitrary or unconstitutional



action by Government servants, conduct by the defendant calculated to make him profit which may exceed the compensation payable to the Plaintiff or where exemplary damages are authorized by statute.

11. It was submitted that the purpose of exemplary damages is to punish the defendant and not to enrich the Plaintiff, yet they were simply constructing Konza-Komarock road, an exercise that was meant to benefit the community including the Respondents.
12. On trespass, counsel relied on Section 3 (1) of the *Trespass Act* and argued that the Respondent's evidence on trespass was contradictory and did not prove when the appellant trespassed on the suit property, if any or how the trespass occurred. Counsel submitted that in the pleadings, the Respondent alleged that the Appellant had only parked the vehicles on two occasions but at the hearing, he testified of a longer period. Counsel argued that the Respondent did not state the exact occasions and how many vehicles were there and that the dates and allegations made in the criminal case are different from allegations given in this matter.
13. Counsel argued that trespass having not been proved, the Respondent's claim ought to have been dismissed and that the award of Kshs. 2,000,000/= was exorbitant and without basis. They prayed that the lower court judgement be set aside.

Respondent's submissions

14. The Respondent submitted that the Appellant trespassed on the suit property by occupying and using the land, dumping construction materials thereon, excavating, destroying the environment by removing trees and vegetation, removing survey beacons, and by parking trucks, and heavy construction equipment. That this was done when there was no lease agreement between the Appellant and the Respondent. The Respondent argued that taking into account the value of the land, loss of value, trespassing on the land twice and occupying the suit property, the award of Kshs. 2,000,000/= was justified and that it was in fact on the lower side, in view of the malicious, aggravated, arrogant and reckless actions of the Appellant.
15. On exemplary damages, he argued that the conduct of the Appellant in trespassing upon the suit property twice and ignoring the rights of the owner was oppressive, malicious, arbitrary, unconstitutional and that of making profit through unlawful acts. He contended that there was a valuation report dated 25th July 2022, which had photographs to prove presence of heavy construction materials on the suit property and the extent of damage. He further contended that general damages had not been awarded hence the same was not an issue. He prayed that the appeal be dismissed.

Analysis and Determination

16. Having considered the appeal, parties' rival submissions and the entire trial record, two issues arise for determination, namely;
 - a. Whether the Respondent proved trespass against the Appellant; and
 - b. Whether the trial court properly exercised its discretion in awarding the sum of Kshs. 2,000,000/= for exemplary damages.
17. The duty of this court as a first appellate court is to re-evaluate, reconsider and re-analyse the evidence before the trial court and make its own independent conclusions bearing in mind that it had no opportunity to see or hear witnesses and give due allowance for that. (See *Selle v Associated Motor Boat Company Limited & others* (1968) EA 123).



18. Trespass has been defined in the *Black's Law Dictionary* 11th Edition to mean an unlawful act committed against the person or property of another; especially wrongful entry on another's real property.
19. Section 107 of the *Evidence Act* places the burden of proof in a case on the Plaintiff. Therefore, the issue that ought to be addressed is whether the evidence presented before the trial court proved that the Appellant trespassed on the parcel of land known as Muputi/Kiima-Kimwe/635.
20. To demonstrate trespass, the Respondent pleaded and testified that the Appellant trespassed on the suit property on 28th April 2017 which trespass was reported at Machakos Police Station vide OB No. 30/28/04/2017. He further stated that the Appellant vacated after several weeks without the Plaintiff's knowledge leaving behind environmental destruction. Further that between April and September 2017 the Appellant on different days and nights also trespassed on the suit property; and lastly that on 24th September 2017 the Appellant further trespassed on the suit property which was reported to Machakos police station vide OB No. 24/21/9/2017. That on all occasions, trespass by the Appellant was by dumping material and parking trucks and other construction equipment and material on the suit property, without the Respondent's consent and without paying rent.
21. On the other hand, in both their pleadings and testimony, the Appellant denied having trespassed on the suit property and stated that the Appellant always leased the places they operate from. That even the criminal proceedings brought against their employee were withdrawn and that this suit is actuated by greed. In regard to the photographs filed by the Respondent, the defence witness testified that he did not know if they were on the Appellant's land. He stated that he could not tell whether the property that his employees were photographed on was on leased land because they leased land which they operated from and did not take other people's land. He maintained that he could not tell where the photographs produced by the Plaintiff were taken.
22. In view of the above evidence, did the Respondent prove trespass as against the Defendant? My answer is in the negative. While the Respondent produced a land certificate demonstrating that parcel No. Muputi/Kiima-kimwe/635 was registered in his name, which copy of title had no particulars on size of the land, and also produced photographs showing the Defendant's trucks and employees, the Defendant pleaded and testified that they only parked the Defendant's trucks on leased property. My view is that the Appellant having denied trespass in their pleadings and evidence and having stated that, they could not tell where and when the Respondent's photographs were taken, it was not enough for the Respondent to rely on the title and the photographs as proof of trespass. It was upon the Respondent to establish the nexus between his title for parcel No. Muputi/Kiima-Kimwe/635 and the photographs presented; by availing expert evidence to show that the suit property was the same land as that shown in the photographs and that what he said happened to his land indeed did happen. This was necessary in view of the fact that the Appellant stated that there was nothing to show that the photographs were in respect of the suit property and the fact that the Respondent conceded to have withdrawn criminal trespass charges against the Appellant's employees. I therefore find and hold that the Respondent having failed to produce expert evidence to demonstrate that the land which he states was trespassed upon by the Appellant is one and the same as the suit property, failed to prove trespass against the Appellant. In short, there was no nexus between the title and the photographs produced by the Respondent.
23. In the premises, the Respondent having failed to prove trespass, the trial court erred in finding that trespass had been proved. As trespass was not proved, the question of quantum of damages becomes moot.



24. For the above reasons this appeal succeeds, the same is allowed, the judgment of the lower court set aside, and substituted with an order dismissing the Plaintiff's suit with costs.
25. The Appellant shall have the costs of the appeal.
26. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 4TH DAY OF OCTOBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Antony Wambua the Respondent in person

No appearance for Appellant

Mr. Abdisalam - Court Assistant

