



Mayfair Holdings Limited v Omumbo & another (Environment and Land Case Civil Suit 874 of 2015) [2023] KEELC 20607 (KLR) (12 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20607 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 874 OF 2015
SO OKONG'O, J
OCTOBER 12, 2023**

BETWEEN

MAYFAIR HOLDINGS LIMITED PLAINTIFF

AND

WILSON AKWACHA OMUMBO 1ST DEFENDANT

PAULINE MAUWA AKWACHA T/A HANG OVER HOTEL 2ND DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit by way of a plaint dated 29th June 2011. The suit was filed in the High Court where it was assigned High Court Civil Suit No. 100 of 2011. Upon transfer to this court in 2015, the suit was given its current case number. The Plaintiff averred that at all material times, the Plaintiff was the registered proprietor of all that parcel of land known as Kisumu Municipality/Block 8/297 (hereinafter referred to as “the suit property”).
2. The Plaintiff averred that sometime in March 2011, the Defendants unlawfully and without any reasonable cause or justification encroached onto the Plaintiff’s said parcel of land by piling bricks and constructing a structure thereon using the said bricks without the authority of the Plaintiff. The Plaintiff averred that by reason of the said unlawful acts by the Defendants, the Plaintiff had been barred from developing the suit property in spite of the fact that the plans for such development had been approved by the relevant local authority. The Plaintiff averred that it had lost the use of and prospective income from the premises for which it held the Defendants liable. The Plaintiff averred that the suit property had a fixed boundary and that it had carried out a survey that confirmed that the Defendants had indeed encroached upon the property.
3. The Plaintiff prayed for judgment against the Defendants for:
 - a. A declaration that the Plaintiff(sic) had trespassed upon the suit property and ought to be evicted.



- b. An order of permanent injunction restraining the Defendants either by themselves, their agents, servants or invitees from continuing to trespass on the suit property.
 - c. Loss of user at the rate of Kshs. 20,000/- per month from the date of trespass until vacant possession.
 - d. General and exemplary damages for trespass until the date of vacant possession.
 - e. Costs of this suit.
 - f. Interest on (c), (d) and (e) above at court rates.
 - g. Any other or further remedy this court may deem just and expedient to grant.
4. The Defendants filed a joint statement of defence on 5th December 2011. The Defendants denied the Plaintiff's claim in its entirety. The Defendants denied that the Plaintiff was the registered owner of the suit property and that the Defendants had trespassed thereon. The Defendants averred that they were in possession of the suit property as of right having acquired the same lawfully.

The evidence tendered by the parties

5. The Plaintiff called one witness, Amin Mohamed Sadrudin Gilani (PW1). PW1 adopted his witness statement dated 29th June 2011 as part of his evidence in chief and produced the Plaintiff's bundle of documents of the same date as Plaintiff's exhibits 1,2,3,4 and 5. In his witness statement, PW1 stated that the Plaintiff was the registered owner of the suit property which was a leasehold from the Government of Kenya for a term of 99 years from 1989. PW1 stated that in March 2011, the Defendants assembled building materials on the suit property and commenced construction of structures thereon. PW1 stated that the Defendants refused to vacate the property even after they were asked to do so. PW1 stated that the Plaintiff had no alternative but to come to court to protect its interest in the property. PW1 was recalled and produced the certificate of lease for the suit property as Plaintiff's exhibit 6.
6. On cross-examination, PW1 stated that the Plaintiff had a pending suit with Shakeel Shabbir who owned a parcel of land adjacent to the suit property namely, Kisumu Municipality/Block 8/234. PW1 stated that in the certificate of lease, the lessor was the Government of Kenya and the lessees were George Adika and Grace Chepkori. PW1 confirmed that the register for the suit property was opened on 30th August 1993. He stated that the Plaintiff purchased the suit property from the said lessees. PW1 denied that the suit property was on a road reserve.
7. The suit against the 1st Defendant was withdrawn on 30th August 2021. The 2nd Defendant, Pauline Mauwa Akwacha (DW1) produced the documents attached to the Defendants' list of documents dated 2nd December 2011 as exhibits save for the letter dated 17th March 2005. She stated that the 1st Defendant who was her deceased husband entered into a lease with Shakeel Ahmed in respect of the premises which she was occupying. She stated that the land she was occupying was a road reserve between land parcel number 235 and land parcel number 237. DW1 stated that she had operated from the premises for over 11 years. She stated that the land was allocated to her by the Municipal Council of Kisumu through a letter dated 28th September 2007.
8. On cross-examination, DW1 stated that the suit property was a road reserve. She stated that she applied to the Municipal Council of Kisumu to be allocated the land. She stated that her application was accepted and she was allocated the road reserve. She stated that her hotel was on a road reserve which



was being claimed by the Plaintiff. DW1 stated that she did not have a title for the land that she was occupying. On re-examination, DW1 reiterated that her business premises were not on the suit property. She stated that she was operating on the land between the suit property and land parcel No. 235.

9. After the close of evidence, the parties made closing submissions in writing. The Plaintiff filed its submissions on 14th December 2022 while the 2nd Defendant filed her submissions on 19th January 2023.

The Plaintiff's submission

10. The Plaintiff submitted that it had proved that it was the owner of the suit property and that the 2nd Defendant had trespassed on the property. The Plaintiff submitted that the issue of ownership of the suit property between the Plaintiff and the Municipal Council of Kisumu was the subject of litigation in Kisumu ELC No. 386 of 2015. The Plaintiff submitted that in that suit, the court ordered the Municipal Council of Kisumu to remove all the structures on the suit property which included the 2nd Defendant's structures. The Plaintiff submitted that the 2nd Defendant admitted trespassing on the suit property which she claimed was a road reserve. The Plaintiff submitted that the survey report that it produced in evidence showed the 2nd Defendant's encroachment on the suit property. On the issue of costs, the Plaintiff submitted that costs follow the event. The Plaintiff urged the court to award it the costs of the suit. The Plaintiff submitted that it had proved its case against the 2nd Defendant on a balance of probabilities and urged the court to grant the reliefs sought as prayed in the plaint.

Defendant's submission

11. The 2nd Defendant submitted that her occupation of the suit property was an overriding interest in the property and entitled her to the protection of the law under Section 28 (h) of the [Land Registration Act](#), 2012. The 2nd Defendant submitted that the Plaintiff acquired the suit property while she was in possession thereof. The 2nd Defendant submitted that the previous owner of the suit property acquired the property illegally since the title was created from a road reserve. The 2nd Defendant submitted that the Plaintiff was not an innocent purchaser of the suit property for value. The 2nd Defendant submitted that the Plaintiff was not entitled to compensation for the 2nd Defendant's alleged acts of trespass since it acquired the property illegally. The 2nd Defendant submitted that the Plaintiff had failed to prove its claim against the 2nd Defendant to the required standard and urged the court to dismiss the suit with costs.

Analysis and Determination

12. I have considered the pleadings, the evidence on record and the submissions filed by the parties. I am of the view that the following are the issues arising for determination by the court in this suit;
 - i. Whether the Plaintiff is the owner of the suit property.
 - ii. Whether the 2nd Defendant trespassed into the suit property.
 - iii. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
13. I will consider these issues together. The suit property was registered under the Registered [Land Act](#), Chapter 300 Laws of Kenya (now repealed). The Registered [Land Act](#) was repealed by the [Land](#)



Registration Act, 2012. Sections 27 and 28 of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) provide as follows:

“27. 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
- b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease

28. The rights of a proprietor, whether acquired on first registration or whether acquired 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. unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

14. The two sections have been reproduced in Sections 24 and 25 of the Land Registration Act, 2012 as follows:

“24. 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. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or



expressed agreements, liabilities or incidents of the lease.

25.

- (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) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

15. Section 26 of the [Land Registration Act](#), 2012 provides as follows:

26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts 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 that 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, unprocedurally or through a corrupt scheme.

16. I am satisfied from the evidence on record that the Plaintiff is the registered proprietor of the suit property. The Plaintiff produced in evidence a certificate of lease dated 1st November 1993 showing that the Plaintiff was registered as the owner of the suit property on 1st November 1993. The Plaintiff's title was not challenged in any material respect by the Defendants. The Defendants who claimed that the suit property was created from a road reserve produced no evidence to support the allegation. The Defendants also claimed that the suit property was created from a parcel of land that was allocated to



them by the Municipal Council of Kisumu. Again this claim was not proved. The Defendants placed no evidence before the court showing that the Municipal Council of Kisumu owned the suit property at any time. In any event, I have noted that there was a previous suit between the Municipal Council of Kisumu and the Plaintiff herein namely, *Mayfair Holding Ltd v. Municipal Council of Kisumu* [2018] eKLR in which the court found that the Plaintiff was the lawful owner of the suit property and ordered the Municipal Council of Kisumu to cancel the licences that had been issued to the businesses that were illegally operating from the suit property. The court has noted that the 2nd Defendant's business was one of the businesses that was mentioned in that case as being on the suit property. The court having made a finding in that suit in which the Municipal Council of Kisumu was a party that the Plaintiff was the lawful owner of the suit property and the Municipal Council of Kisumu having not contested the Plaintiff's title, the Defendants' claim that the property was owned by the Municipal Council of Kisumu which allocated the same to them is untenable. The Defendants had also contended that the land they were occupying was let to them by Shakeel Ahmed. I have looked at the lease dated 16th May 2002 between the 1st Defendant and Shakeel Ahmed. The lease is in respect of a portion of an office suite/unit 4 "A" situated on Plot No. 8/236. This property known as Plot No. 8/236 is not the suit property herein, Kisumu Municipality/Block 8/297. The Defendants' claim to the suit property based on the said lease also fails. Due to the foregoing, it is my finding that the Plaintiff is the lawful registered owner of the suit property.

17. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph 18-01. In *Gitwany Investments Limited v. Tajmal Limited & 3 others* [2006] eKLR, it was held that title to land carries with it legal possession. I have already made a finding that the Plaintiff is the lawful registered owner of the suit property. As the owner of the suit property, the Plaintiff was entitled to quiet possession and enjoyment of the property. I have held earlier that the Defendants have no valid interest in the suit property. It follows therefore that the 2nd Defendant has no reasonable excuse or justifiable cause for being on the suit property. The 2nd Defendant is in the circumstances, a trespasser on the suit property.
18. The Plaintiff has established that the 2nd Defendant is a trespasser on the suit property. The Plaintiff is entitled to a declaration to that effect and an order for the eviction of the 2nd Defendant from the property. The Plaintiff is also entitled to an order of a permanent injunction restraining the 2nd Defendant from trespassing on the suit property. The Plaintiff also sought general and exemplary damages for trespass to land. In *Park Towers Ltd. v. John Mithamo Njika and 7 Others 2014* eKLR, the court stated as follows:

"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 general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case."

19. In *Halsbury's Laws of England 4th Edition Volume 45* para. 26 1503 the authors have stated as follows on assessment of damages for trespass:
 - a) If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.
 - b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss



- c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use
 - d) Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded
 - e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased.
20. The Plaintiff having proved trespass is entitled to general damages. The Plaintiff did not lead evidence or cite authorities in its submissions to guide the court in the assessment of appropriate damages. In the circumstances, I will award the Plaintiff nominal damages in the sum of Kshs. 100,000/-.
21. In Godfrey *Julius Ndumba Mbogori & another v. Nairobi City County* [2018] eKLR the court stated as follows:

Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are;

- i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,
 - ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and
 - iii) where exemplary damages are expressly authorized by statute"
22. From the evidence on record, I am not persuaded that a case has been made for an award of exemplary damages. The Plaintiff also prayed for loss of use at the rate of Kshs. 20,000/= per month from the date of trespass until vacant possession is handed over to it. I am of the view that a claim for loss of use of land is the same as damages for trespass. It should not be claimed under a separate head of damages unless the claim is for special damages in which case it has to be specifically pleaded with the necessary particulars and strictly proved. In *Fredrick Mukiri Kingatia v. John Njiru & 2 others* [2019] eKLR the court stated that:

"The court has noted that the Plaintiff sought general damages for "loss of user" of the suit property. The court is of the opinion that damages for loss of user are in the nature of special damages. The claimant must plead specific particulars of such loss, including the rate at which the damages are sought and period of time for which they are sought. The Plaintiff did not plead the claim with particularity and no evidence was led at the trial to justify an award for loss of user."

I am fully in agreement with the decision. The Plaintiff did not provide evidence in support of this claim. The Plaintiff did not establish any specific loss that he incurred that would entitle it to this award. The court was also not told how the Plaintiff arrived at the figure of Kshs. 20,000/- per month. I find the claim not proved.



Conclusion

23. Save as aforesaid, I find the Plaintiff's case against the 2nd Defendant proved on a balance of probabilities. I therefore enter judgment for the Plaintiff against the 2nd Defendant for:
- a. A declaration that the 2nd Defendant has trespassed upon the parcel of land known as Kisumu Municipality/Block8/297 owned by the Plaintiff.
 - b. An order that the 2nd Defendant vacates the parcel of land known as Kisumu Municipality/Block8/297 within 60 days from the date hereof in default of which the Plaintiff shall be at liberty to apply for a warrant for her forceful eviction from the property.
 - c. An order of a permanent injunction restraining the 2nd Defendant either by herself, her agents, servants, employees or assigns from trespassing upon the parcel of land known as Kisumu Municipality/Block8/297 after vacating the same or being evicted therefrom pursuant to order (b) above.
 - d. Kshs. 100,000/- being general damages for trespass.
 - e. Costs of the suit.
 - f. Interest on (d) at court rate from the date hereof until payment in full.

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

S. OKONG'O

JUDGE

