



REPUBLIC OF KENYA



**Siele v Juma & 25 others (Environment & Land Case E13 of 2021)
[2023] KEELC 20485 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20485 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E13 OF 2021
LA OMOLLO, J
OCTOBER 5, 2023**

BETWEEN

ELIZABETH CHEPNGETICH SIELE PLAINTIFF

AND

JAMES JUMA 1ST DEFENDANT
REBECCA ASIKO 2ND DEFENDANT
EUNICE ODHIAMBO 3RD DEFENDANT
MUSA HUSSEIN 4TH DEFENDANT
ROBERT AYANGA 5TH DEFENDANT
SELPHINE MBONE 6TH DEFENDANT
JOSEPH NYANDORO 7TH DEFENDANT
PETER OTIATO 8TH DEFENDANT
ROBERT CHEBONO 9TH DEFENDANT
EMMA NYANCHAMA 10TH DEFENDANT
JACKSON ODHIAMBO 11TH DEFENDANT
RAMOTHEN CHEPKEMEI 12TH DEFENDANT
MAURICE ODHIAMBO 13TH DEFENDANT
ANAITAL NYALENDO 14TH DEFENDANT
BENJAMIN TAI 15TH DEFENDANT
JULIUS KIRAYO 16TH DEFENDANT
ESTHER OBONGI 17TH DEFENDANT



SOLOMON NG'ANG'A	18 TH DEFENDANT
JACKSON MORANGA	19 TH DEFENDANT
JOSEPH MADIVO	20 TH DEFENDANT
MARK MICHEKA	21 ST DEFENDANT
EMMA NYAKUNDI	22 ND DEFENDANT
PAUL MUTISO	23 RD DEFENDANT
ROBERT MOEK	24 TH DEFENDANT
EDWIN OTIATO	25 TH DEFENDANT
ALEX OSOGO	26 TH DEFENDANT

JUDGMENT

Introduction.

1. The Plaintiff commenced this suit vide a Plaint dated 12th February, 2021. The said plaint was amended on 16th November, 2021.
2. The Plaintiff avers that she is the registered owner of land parcel No. Nakuru Municipality Block 29/337.
3. The Plaintiff also avers that sometime in the year 2016, the Defendants trespassed onto the suit property and erected permanent and semi-permanent structures.
4. The Plaintiff further avers that the Defendants have prevented her from taking possession of the suit property.
5. The Plaintiff sets out the particulars of illegalities on the part of the Defendants and the particulars of loss and damage she has suffered.
6. The Plaintiff also avers that she has severally urged the Defendants to vacate the suit property but the Defendants have refused and/or neglected to move out.
7. The Plaintiff prays for judgement against the defendants for;
 - a. A declaration that the Defendants are jointly and severally trespassers in the Plaintiff's land title number Nakuru Municipality 29/337.
 - b. An eviction order be and is hereby issued removing the Defendants, their servants, agents, heirs, dependents, transferees, lessees, licensees and/or any other person occupying the suit property with the authority of the Defendants from land title No. Nakuru Municipality 29/337.
 - c. A permanent injunction restraining the Defendants whether by themselves or their servants or agents, transferees, lessees and/or licensees and/or otherwise howsoever from remaining on or continuing in occupation of Land Reference Nakuru Municipality 29/337.
 - d. That the OCS Nakuru Central Police Station be and is hereby directed to provide security during eviction.



- e. General damages for;
 - i. Trespass.
 - ii. Loss of future earning capacity; and
 - iii. Loss of user
 - f. Costs of the suit; and
 - g. Any other relief this court deems fit and just to grant.
8. The Plaintiff, in her plaint dated 12th February, 2021, had instituted this suit against the 1st to 10th Defendants.
 9. An affidavit of service was filed on 8th June, 2021 sworn by George Isogol on 10th May, 2021 which shows that the 1st to 10th Defendants were served with summons to enter appearance and the plaint dated 12th February, 2021 on 18th March, 2021.
 10. The 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 10th Defendants entered appearance on 26th October, 2021.
 11. The Plaintiff amended her plaint on 16th November, 2021 as a result of which the 11th to 26th Defendants were joined to the suit.
 12. An affidavit of service was filed on 6th December, 2021. It is sworn by Vincent Lelgo on 3rd December, 2021 and is evidence that the 11th to 26th Defendants were served with summons to enter appearance and the amended pleadings on 1st December, 2021.
 13. The 1st to 26th Defendants entered appearance on 15th February, 2022 through the firm of Mongeri & Company Advocates. Subsequently, the said firm filed an application dated 7th March, 2022 to cease acting for the Defendants. The said application was allowed on 29th June, 2022.
 14. An affidavit of service sworn by Chelule Vincent Yego on 12th February, 2023 and filed on 24th January, 2023 shows that the Defendants were served with hearing notices on 16th, 17th and 18th November 2022.
 15. On 13th March, 2023 the matter proceeded to hearing.

Plaintiff's Evidence.

16. Elizabeth Chepngetich Suele testified as PW1. She prayed that her amended witness statement dated 16th November, 2021 be adopted as part of her evidence which prayer the court acceded to.
17. The documents in her list of documents dated 12th February, 2021 and filed on 17th February, 2021 were marked and produced as follows:
 - a. Copy of the title of land parcel No. Nakuru Municipality Block 29/337 issued on 24th August, 2015 as Exhibit P1.
 - b. A demand letter to the Defendants dated 3rd April, 2018 by the firm of Kirui as Exhibit P2.
 - c. A demand letter dated 6th January, 2021 by the firm of Odhiambo Paul Xistus & Co as Exhibit P3.
18. In her witness statement, the Plaintiff states that she is a joint owner of the suit property together with Anna Chepketer Siele.



19. The Plaintiff also states that sometime in the year 2016, the Defendants unlawfully entered the suit property and apportioned it to themselves.
20. The Plaintiff further states that immediately after entering the suit property, the defendants begun building permanent and semi-permanent structures.
21. The Plaintiff states that the defendants entered the suit property without her consent and despite trying get them to vacate the suit property, they declined to do so.
22. The Plaintiff also states that unless the court intervenes and orders their eviction, she risks losing the suit property.
23. The Plaintiff's case was then closed.
24. The Defendants case was also closed after the court satisfied itself that service was properly effected upon them but they failed to attend court.

Issues For Determination.

25. The Plaintiff filed her submissions dated 31st March, 2023 while the Defendants did not file any submissions.
26. The Plaintiff identifies the following issues for determination;
 - a. Whether the Plaintiff has beneficial, or registered proprietary rights over the subject property.
 - b. Whether the Plaintiff is entitled to the orders sought.
27. On the first issue, the Plaintiff relies on the cases of *Embakasi Properties Limited v Commissioner of Lands & Another* [2019], *Gateway Insurance Co. Ltd v Jamila Suleiman & another* [2018] eKLR and submits that she has produced a copy of the title deed to the suit property which shows that she is a co-owner.
28. On the second issue, the Plaintiff relies on Section 3(1) of the *Trespass Act*, the cases of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited Nairobi* (Milimani) HCC No. 834 of 2002, *Trust Bank Limited v Paramount Universal Bank Limited & 2 Others Nairobi* (Milimani) HCCS No. 1243 of 2001 and submits that the Defendants entered appearance but did not file their statement of defence.
29. The Plaintiff also submits that the Defendant's advocates made an application to cease acting which was allowed and the Defendants opted not to file any documents.
30. On her prayer for eviction, the Plaintiff relies on Sections 152A, 152B and 152F of the *Land Act* and submits that she served the Defendants with notices to vacate through the letters dated 3rd April, 2018 and 6th January, 2021 and since they are yet to vacate the suit property, she seeks that an eviction order be issued.
31. The Plaintiff relies on the cases of *Philip Aluchio v Crispinus Ngayo* [2014] eKLR, *Willesden Investment Limited v Kenya Hotel Properties Limited* HCC No. 367 of 2000, *Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited* [2017] eKLR among other cases in support of her arguments.
32. The Plaintiff also relies on the case of *Rhoda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited* [2019] eKLR and submits that in that case, the court awarded Kshs. 10,000,000 as general damages in circumstances similar to the present case.



Analysis And Determination.

33. After considering the pleadings, evidence and submissions, the two issues that arise for determination are whether the Plaintiff is entitled to the orders sought in the Plaintiff and who should bear the costs of the suit.

A. Whether the Plaintiff is entitled to the orders sought in the Plaintiff.

34. The orders sought have been set out in the preceding paragraphs but I will nonetheless reproduce them as hereunder;

- a. A declaration that the Defendants are jointly and severally trespassers in the Plaintiff's land title number Nakuru Municipality 29/337.
- b. An eviction order be and is hereby issued removing the Defendants, their servants, agents, heirs, dependents, transferees, lessees, licensees and/or any other person occupying the suit property with the authority of the Defendants from land title No. Nakuru Municipality 29/337.
- c. A permanent injunction restraining the Defendants whether by themselves or their servants or agents, transferees, lessees and/or licensees and/or otherwise howsoever from remaining on or continuing in occupation of Land Reference Nakuru Municipality 29/337.
- d. That the OCS Nakuru Central Police Station be and is hereby directed to provide security during eviction.
- e. General damages for;
 - i. Trespass
 - ii. Loss of future earning capacity; and
 - iii. Loss of user
- f. Costs of the suit; and
- g. Any other relief this court deems fit and just to grant.

35. The Plaintiff's case is that she is a joint owner of the suit property together with Anna Chepketer Siele.

36. It is also the Plaintiff's case that sometime in the year 2016 the Defendants trespassed onto her property and refused to vacate it.

37. The Plaintiff therefore seeks that the court issues an order of eviction against the Defendants together with a permanent injunction.

38. In support of her case, the Plaintiff produced a copy of the title deed (Exhibit P1) for land parcel No. Nakuru Municipality Block 29/337. The title shows that the registered owners of the suit property are Annah Chepketer Siele and Elizabeth Chepngetich Siele. The said title deed was issued on 24th August, 2015.

39. The Plaintiff also produced a letter dated 3rd April, 2018 (Exhibit P2) written by J.K Kirui & Co. Advocates addressed to 'to whom it may concern'. The said letter asks the people it is addressed to, to vacate land parcel No. Nakuru Municipality Block 29/337 as they are trespassers. The letter bears a stamp of the Chief of Kaptembwo Location.



40. A copy of the letter dated 6th January, 2021 (Exhibit P3) was produced. The said letter is written by Odhiambo Paul Xistus & Co. Limited addressed to ‘to whom it may concern’ through Chief Kaptembwo Location. The said letter makes reference to the letter dated 3rd April 2018 (Exhibit P2) and seeks vacant possession of land parcel No. Nakuru Municipality Block 29/337.
41. As noted before, the Defendants did not participate in the hearing of this suit. Therefore, the Plaintiff’s evidence remains uncontroverted.
42. Even though the Plaintiff’s evidence is uncontroverted, the burden of proof is on her and she must discharge it. The Court in the case of *Kenya Power & Lighting Company Limited v Nathan Karanja Gachoka & Another* [2016] eKLR held as follows;
- “I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”
43. The Plaintiff in her evidence testified that she is a co-owner of the suit property with one Elizabeth Chepngetich Siele. To prove ownership, she produced a copy of the title deed issued on 24th August, 2015.
44. The legal position is that the registration of a person as a proprietor of land and the issuance of a certificate of title to such a person is prima facie evidence of ownership. The said registration can only be challenged on the ground that it was obtained through fraud or misrepresentation or where the title has been acquired illegally unprocedurally or through a corrupt scheme. This is as provided for by Section 26(1) of the *Land Registration Act*. It is 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; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.



45. The copy of the title deed produced by the Plaintiff confirms that she is one of the registered owners of the suit property. As one of the legal owners of the suit property, she has all the rights and privileges that appertain to it as provided for by Section 24(a) of the [Land Registration Act](#). It provides as follows;

“(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...”

46. The right of such a proprietor shall not be defeated except as provided for by Section 25 of the [Land Registration Act](#). Section 25 is as follows;

“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.”

47. The court in the decision of *Willy Kipsongok Morogo v. Albert K. Morogo* (2017) eKLR held as follows;

“the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under Sections 24, 25 and 26 of the [Land Registration Act](#).”

48. Since the Plaintiff has demonstrated that she is an absolute and indefeasible joint owner of the suit property, she is entitled to enjoy quiet and peaceful occupation of the same.

49. 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.”

50. As stated before, the evidence of the Plaintiff is uncontroverted and therefore the issue of whether or not the Defendants are trespassers on the suit property is not contested.



51. Section 152A of the *Land Act* prohibits a person from unlawfully occupying private, community or public land. Section 152B provides that an unlawful occupant of private community or public land shall be evicted in accordance with the Act

52. This court has no reason to refuse the grant of orders sought in prayers (a), (b) and (c) of the Plaint.

53. On the award of general damages for trespass, the court in the case of *Philip Ayaya Aluchio v Crispinus Ngayo* [2014]eKLR 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 – v – Green Park Development Co.* 986 S. W 2d 500 (No. App. 1999).”

54. This is to say that damages for trespass are in the realm of special damages and must be specifically proved. In the present case, the value of the land before and after the trespass was not availed. The court in the case of *Nakuru Industries Limited v S S Mehta & Sons* [2016] eKLR while dealing with similar circumstances held as follows;

“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the Defendants did trespass onto the Plaintiff’s land and conduct some excavation. For this reason I award the defendant damages in the amount of Ksh 500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.”

55. The fact of trespass has been proved by the Plaintiff whose evidence is that the Defendants entered the suit parcel, subdivided it and built permanent and semi-permanent structures. This is a clear violation of the Plaintiff’s proprietary rights and she is therefore deserving of compensation both as a matter of law and equity.

56. The Plaintiff also seeks general damages for loss of future earning capacity. The Court of Appeal in the case of *SJ v Francesco Di Nello & Another* [2015] eKLR held as follows;

“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in *Fairley V John Thomson Ltd* [1973] 2 Llyod’s Law Reports 40 at pg. 14 wherein Lord Denning M.R. said as follows:

“It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence Compensation for diminution in earning capacity is awarded as part of general damages.”

Learned counsel for the respondent was therefore wrong in stating that loss of earning capacity was not pleaded and that it must be proved as though it was a claim under loss of income or future earnings. The correct position as in the



Fairley case (supra) was restated by this court in the case of Cecilia Mwangi & Another V Ruth W. Mwangi CA No. 251 of 1996 as hereunder;

“Loss of earning is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as proved on a balance of probability.”(Emphasis mine)

57. A perusal of the Plaintiff’s pleadings shows that the Plaintiff did not specifically plead loss of future earning capacity and did not also prove them. I find that the Plaintiff’s claim for loss of future earning capacity fails.

58. The Plaintiff also seeks general damages for loss of user. The Court of Appeal in the case of *Kenya Power and Lighting Company Limited v Phillip A M Kimondiu* [2018] eKLR held as follows;

“At this juncture that it will be observed that the case of U.Y B. Ltd v British Railways Board (2001) 81 P. and C.R. DG19 CA, confirmed that loss of user profits can also be claimed. There, the claim involved the tort of nuisance where water had seeped from the lessor’s property into the lessee’s premises making it impossible for use for the latter’s projected business. They were awarded lost profits for a limited period, as they did not seek to relocate their business to alternative premises.

The respondent’s claim is for loss of user profits for an intended irrigation project which he was precluded from undertaking by reason of the trespass of the appellant’s extant overhead power lines. Support for this was to be found in the valuation report of Mwaka Musau Consultants undertaken immediately after the appellant’s intrusion that indicated that, “There is an excavated foundation for a further extension of the main house a project which has been stalled together with irrigation project for the last four years.” It therefore follows that the inability to undertake the project was as a direct and natural consequence of interference in the Plot, which was attributed to the appellant, and would as a consequence entitle the respondent to damages for loss of use of the Plot.”

59. In the present matter, other than seeking for general damages for loss of user, the Plaintiff did not specifically plead or adduce any evidence in support of the said claim and has not therefore establish a basis for the award of them.

B. Who should bear costs of this suit?

60. The general rule is that costs follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act*. (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition.

61. Now, therefore, the Plaintiff’s suit succeeds. Consequently, I enter judgment, against the Defendants jointly and severally, in the following terms:

- a. A declaration is hereby issued that the Defendants are trespassers on the Parcel of Land known as Nakuru Municipality 29/337.



- b. An eviction order is hereby issued against the Defendants, their servants, agents, heirs, dependents, transferees, lessees, licensees and/or any other person occupying the Parcel of Land known as Nakuru Municipality 29/337 with the authority of the Defendants.
- c. The eviction order in (b) above shall take effect 90 days after service of this judgment and decree upon the Defendants.
- d. The Officer Commanding Station, Nakuru Central Police Station, is hereby directed to provide security during eviction.
- e. A permanent injunction restraining the Defendants by themselves, their servants or agents, transferees, lessees and/or licensees from remaining on or continuing in occupation of the Parcel of Land known as Nakuru Municipality 29/337 is hereby issued.
- f. The Plaintiff is hereby awarded Kshs. 700,000 as General Damages for trespass.
- g. The Plaintiff shall have costs of the suit from the date of Judgment until payment in full.

62. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 5TH DAY OF OCTOBER, 2023.

L. A. OMOLLO

JUDGE

In the presence of:

Mr. Lorot for the Plaintiff

No appearance for the Defendants

Court Assistant; Ms. Monica Wanjohi.

