



**Waitiki v Opiyo & another (Environment & Land Case 129 of 2018)
[2023] KEELC 21534 (KLR) (14 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21534 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 129 OF 2018
MN GICHERU, J
NOVEMBER 14, 2023**

BETWEEN

EVANSON KAMAU WAITIKI PLAINTIFF

AND

MICHAEL ODHIAMBO OPIYO 1ST DEFENDANT

COUNTY GOVERNMENT OF KAJIADO 2ND DEFENDANT

JUDGMENT

1. The Plaintiff seeks the following reliefs against the two Defendants both jointly and severally.
 - a. An order of mandatory injunction compelling the 1st Defendant to forthwith restore the property by filling in and compacting the pit excavated on L.R Kajiado/Kaputiei North/4371 adjacent to L.R. No. Kajiado/Kaputiei/North/4370 and restoring the ground to the condition the same existed as before.
 - b. An order against the 2nd Defendant directing it to ensure full and proper compliance by ensuring that the pit excavated on L.R. Kajiado/Kaputiei North/4371 extending to L.R. 4370 is properly filled and compacted and restored to the condition that the ground was before.
 - c. Judgment for the sum of Kshs. 556,684.00 on account of repaid costs.
 - (cc) Kshs. 348,942 being professional fees paid to the surveyor, civil engineer and quality surveyor.
 - d. Damages for malicious damage to property and for trespass to the Plaintiff's property.
 - e. An order of permanent injunction restraining the 1st Defendant either by himself, employees, servants and or agents from excavating, digging, blocking access or in any other manner whatsoever undertaking such activities on L.R. 4371 that interfere with the Applicant's use, occupation and enjoyment of L.R. 4370.



f. Costs of the suit and interest at court rates.

This is as per the further amended plaint dated 25/2/2022.

2. The Plaintiff's case is as follows. He is the registered owner of L.R. Kajiado/Kaputiei-North/ 4370. He has developed the land by building a one storey residential house. He bought the land in the year 2012 from Equatorial Bank through an auction.
3. The first Defendant owns L.R. 4371 which is adjacent to the Plaintiff's land. The first Defendant excavated a pit measuring 7x 7 meters and 3 metres deep next to the Plaintiff's land as a result of which the foundation of the Plaintiff's house has been exposed.
4. The excavation of the pit by the first Defendant caused the following defects in the Plaintiff's building.
 - i. Visible cracks on the ground slabs of the entrance porch and external terrace next to the lounge area.
 - ii. Visible cracks on the wall at the entrance porch due to settlement.
 - iii. Visible dampness on the wall and floor of bedroom next to the lounge due to the first Defendant directing rain water to drain on the affected damp wall.
 - iv. The roof structure and supports were deliberately knocked down when the first Defendant was erecting the boundary wall.
 - v. The boundary wall next to the main gate is damp due to the moisture transfer from backfilled soil on the first Defendant's land. The total cost of the rectification works will be Kshs. 556,684.00/=.
 - vi. The first Defendant has also continuously blocked and inhibited access to the Plaintiff's land by digging trenches and dumping material.
5. The above mentioned actions of the first Defendant amount to malicious damage to property, trespass and harassment which has denied the Plaintiff the right to peaceful enjoyment of his land.
6. The Plaintiff complained to the second Defendant on 14/3/2016 about the first Defendant's actions whereupon the second Defendant issued a notice to the first Defendant to remedy the situation within three (3) days by refilling the pit.
7. Instead of the first Defendant putting the Plaintiff back to the position before the injury to his property, he took only small measures which did not recompense the Plaintiff adequately. They included covering the pit with iron sheets and soil to give the false impression of compliance. This means that the pit remains hollow beneath the iron sheets and this exposes the Plaintiff's house to collapse since there is nothing to support it.
8. The Plaintiff has engaged the services of experts who include a structural engineer, a land surveyor and a quantity surveyor to ascertain the extent of the encroachment. The total fees paid to the three experts amounts to Kshs. 348,942/=.
9. In support of his case, the Plaintiff filed the following evidence.
 - i. Witness statement by the Plaintiff.
 - ii. Nine (9) documents which include copy of title deed for L.R. 4370, photographs, notice to county public health office dated 14/3/2016, the reports by the three (3) experts mentioned earlier among other exhibits.



10. The first Defendant entered appearance through his counsel Swan and Company Advocates on 14/12/2016 but did not file a defence on time. Later on 18/1/2023 he filed an unsigned and undated statement of defence.
11. The second Defendant filed an amended statement of defence dated 5/9/2019 in which liability by the second Defendant is generally denied. In the defence, the second Defendant avers that it was never served with notice of intention to sue.
12. In support of its case, the second Defendant filed the following.
 - a. Witness statement by Peter Kariuki Mugo.
 - b. Copy of notice dated 14/3/2016 issued to the first Defendant requiring him to stop any construction on L.R. 4731, back fill all the illegal excavations among others.
13. At the trial, only the Plaintiff, his three (3) expert witness and one witness from the second Defendant testified. They were subjected to cross-examination after their respective testimonies. The counsel for the first Defendant cross-examined the witnesses who testified on 18/1/2023 only. This was the first appearance by the said counsel in this case. The case had proceeded earlier on 3/10/2022 in her absence and also in the absence of the first Defendant.
14. Counsel for the parties filed written submissions on 8/2/2023, 24/3/2023 and 25/4/2023. The first Defendant's counsel identified three (3) issues for determination namely;
 - i. Whether the first Defendant is the registered owner of L.R. Kajiado/Kaputiei-North/4371.
 - ii. Whether the first Defendant is liable.
 - iii. Whether the Plaintiff is entitled to the orders sought.The second Defendant identified only one issue for identification namely,
Whether the second defendant failed in its duty to ensure proper compliance with the notice to the first defendant.
The plaintiff generally replied to the issues raised by the counsel for the Defendants. He did not identify his own issues distinct from those filed by the counsel for the Defendants.
15. I have carefully considered all the evidence adduced in this case by the parties including the witness statements, documents, testimony at the trial as well as the submissions filed by counsel for the parties and the law cited therein. I find that the four issues as identified by the counsel for the Defendants will determine the dispute.
16. On the first issue, I find that the first Defendant is the owner of L.R. Kajiado/Kaputiei-North/4371 for the following reasons.
Firstly, there is the Plaintiff's evidence given on oath that the first Defendant is the owner of the said land. This evidence is uncontroverted by any evidence by the Defendant. Even though the Defendant had ample opportunity, he did not file or adduce any evidence to controvert the Plaintiff's evidence. It is trite law that "where no evidence is called on behalf of the defendant, the evidence tendered on behalf of the Plaintiff stands uncontroverted". See *Interchemie EA Limited v Nakuru Veterinary Center Limited* HCCC No. 165B of 2000. I believe that the Plaintiff knows the first Defendant to be the owner of L.R. 4731.



Secondly, the statutory notice issued by the second Defendant to the first Defendant dated 14/3/2016 identifies the first Defendant as the owner or occupier of L.R. 4371. Under Section 81 of the Evidence Act it is provided as follows.

“Certified copies of public documents may be produced in proof of the contents of the documents or parts of the documents of which they purport to be copies”

The fact that the first Defendant is named in the statutory notice as the owner of L.R. 4731 means as far as official records go, he is the registered owner. He cannot therefore be heard to say in submissions that he is not the owner when the official records show that he is.

17. On the second issue, I find that the first defendant is liable for the following reasons.

Firstly, the damage that has been proved to have occurred on the Plaintiff's land is directly attributed to the first Defendant's action of digging the 7x7x3 metres pit. This is the evidence of the experts. They include the land surveyor, the quantity surveyor and the civil engineer. The evidence by these experts is uncontroverted by the Defendants. They have not called any experts to dispute this strong, cogent and credible evidence.

Secondly, were it not for the actions of the first Defendant, the structural deficiencies on the Plaintiff's building and the land would not have occurred.

Thirdly, the second Defendant did not approve of the construction of the pit that first Defendant was putting up on his land. The construction did not comply with the law particularly the Public Health Act and the Building Code. The first Defendant not only build any illegal pit on his land but it also caused damage to the Plaintiff's property. He is therefore liable.

18. Regarding whether the Plaintiff is entitled to the orders sought, I find that he is so entitled. As we have seen, the pit contravenes the law. Everything done in contravention of the law is a nullity.

Secondly, we have seen the damage caused by the pit and actions of the first Defendant or the Plaintiff's property. All the orders sought in the plaint are well deserved.

19. On the final issue of the liability of the second Defendant, I find that there is evidence to show the second Defendant took appropriate action of issuing a statutory notice to the first Defendant after the Plaintiff complained. What is lacking is enforcement in the face of defiance by the first Defendant who has not complied with the statutory notice. The second Defendant must therefore enforce the law by either charging the first Defendant or back filing the pit at his expense or both and taking other appropriate steps to ensure that there is restitutio in integrum on the part of the Plaintiff so that he is put back to the position he was before the damage caused by the first Defendant.

However this damage is solely attributed to the first Defendant.

20. For the above stated reasons, I enter judgment for the Plaintiff as prayed for in paragraphs 24(a) to (f) of the further amended plaint dated 25/2/2022 but only against the first Defendant.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 14TH DAY OF NOVEMBER, 2023.

M.N. GICHERU

JUDGE

