



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Bhagani v Okumu (Environment & Land Case 5 of 2019)  
[2022] KEELC 2619 (KLR) (4 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2619 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 5 OF 2019**

**MAO ODENY, J**

**JULY 4, 2022**

**BETWEEN**

**ASHWIN BHAGANI ..... PLAINTIFF**

**AND**

**LUCAS OKUMU ..... DEFENDANT**

**JUDGMENT**

1. By a plaint dated March 14, 2019 the Plaintiff herein sued the Defendant seeking the following orders: -
  - a) A declaration that the entry and putting up by the Defendant through his servants of various structures on the suit property is unlawful.
  - b) A declaration that the continued existence of the said structures on the suit property amounts to an act of trespass by the Defendant.
  - c) An order that the said structures on the suit property be demolished forthwith by the Defendant.
  - d) An order that the Defendant do clear all the debris resulting from the demolition aforesaid.
  - e) A permanent injunction restraining the Defendant whether by himself or through his servants, employees, agents or through anyone deriving title through him or otherwise howsoever from entering, using, occupying, leasing, transferring, charging, selling or in any manner whatsoever dealing adversely with the suit property.
  - f) Damages for trespass.
  - g) Costs of and incidental to this suit.
  - h) Any other or further relief that this Honourable Court may deem appropriate to award.



### Plaintiff's Case

2. PW1 adopted his witness statement and stated that at all material times he has been the registered owner of all that parcel of land known as LR No. 12889/133 situate south of Kilifi Town and measuring approximately 2.022 Ha.
3. PW1 also stated that he had granted the Defendant temporary permission to act as a caretaker on the suit property but learnt in September 2018 that the Defendant had without his permission, commenced construction thereon hence depriving him of his right to use and enjoyment of property. That despite several demands, the Defendant has since neglected to demolish the said structures.
4. PW1 produced a Certificate of Title to the suit land together with demand letters to the Defendant and urged the court to enter judgment as prayed in the Plaintiff.
5. The Defendant filed a defence and Counterclaim dated May 10, 2019 but was not present during the hearing hence the defence case was marked as closed.

### Plaintiff's Submissions

6. Counsel reiterated the Plaintiff's evidence and submitted that the Plaintiff has locus standi to file this suit and that he has proved that he is the rightful owner of the suit land by producing a Certificate of title.
7. Counsel relied on the cases of *Ms. Priscilla Nyokabi Kanyua v Attorney General & Interim Independent Electoral Commission* Nairobi HCCP No. 1 of 2020 cited in *Michael Osundwa Sakwa v CJ and President of the Supreme Court of Kenya & another* [2016] eKLR and *Khelef Khalifa El-Busaidy v Commissioner of Lands & 2 Others* [2002] eKLR.
8. Counsel further submitted that the Defendant had no right to put up illegal structures on the suit land and that he was only allowed to use for temporary farming activities. Counsel urged the court to enter judgment as prayed in the plaintiff.

### Analysis and Determination

9. The Defendant filed a defence and counterclaim but during the hearing on February 3, 2022. Counsel for the Defendant was present virtually when the matter was placed aside for hearing at 12:15pm. Neither the Defendant nor his counsel was present. The defence case was therefore marked as closed and parties granted time to file written submissions within 14 days of which only the Plaintiff's counsel complied.
10. The court gave directions that the matter be mentioned on March 8, 2022 to confirm filing of submissions. On March 8, 2022 counsel for the Defendant informed the court that they would be filing an application to reopen the case of which as at the time of writing this judgment no application had been filed. This is an indication that the Defendant was not interested in defending the case. This case therefore proceeded undefended.
11. The issues for determination are as to whether the Plaintiff is the rightful owner of the suit land, whether the Defendant has trespassed and put up illegal structures on the suit land and whether the Plaintiff is entitled to the orders sought in the plaintiff.
12. The Plaintiff produced a Certificate of title which shows that he is the registered owner of the suit land jointly with his brother. Section 24(a) of the *Land Registration Act*, 2012, provides that the registration



of a person as the proprietor of land vests in that person the absolute ownership of that land together with all rights and privileges associated with that status.

13. Section 26(1) of the said Act provides that the certificate of title issued by the Land Registrar upon registration to a purchaser of land upon transfer 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 thereof and that the said title shall not be challenged save on the ground of fraud or misrepresentation to which the holder is shown to be party or where the title is acquired illegally, un procedurally or through a corrupt scheme.
14. I therefore find that the Plaintiff is the absolute owner of the suit land and is therefore entitled to enjoy rights and privileges associated with such ownership which includes exclusive use, possession and enjoyment thereof without interference by any third party.
15. On the issue as to whether the Defendant is a trespasser, the Plaintiff told the court that he had given the Defendant temporary permission to use the suit land for farming activities which were specific and not to put up illegal structures. The Defendant went ahead to put up structures without the Plaintiff's permission.

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.

16. Further trespass has been defined by Clerk and Lindsell on Torts, 18<sup>th</sup> edition at Pg.23 as;  
“ any unjustifiable intrusion by one person upon the land in possession.”
17. It was the Plaintiff's case that the Defendant's trespass and construction of illegal structures has denied them the use and utilization of the suit land hence they have suffered loss and damage.
18. By the Defendant constructing illegal structures and not farming activities means that the Defendant trespassed on the suit land as he went beyond what the Plaintiff had allowed him to do on the land.
19. On the issue of general damages for trespass, it is trite law that where trespass is proved a party need not prove that he has suffered specific damage or loss as was held in the case of *Park Towers Ltd v John Mithamo Njika & others* (2014) eKLR, where the Court held that: -

“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 damages, The Court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case.”

20. Further In the case of *Philip Aluchio v Crispinus Ngayo* [2014] eKLR, the Court 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 ...”

The Plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass. There was no evidence adduced on the nature of house which the defendant has constructed on the suit land. The court is at a disadvantaged position in reaching at a cost which might be



reasonable for restoration of the property to its former state. However, as I have found that the Plaintiff is entitled to general damages for trespass, I will award a nominal sum of Kshs. 100,000/= as general damages for trespass. This cost will go towards restoration of the suit land to its former state.”

21. I have considered the pleadings, the evidence on record and find that the Plaintiff has proved his case against the Defendant on a balance of probabilities and award nominal damages of Kshs 100,000/, together with costs. The Defendant to remove the illegal structures on the suit land at his own cost within 30 days and a permanent injunction against the Defendants and his agents from interfering with the suit land.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 4<sup>TH</sup> DAY OF JULY, 2022.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the [Civil Procedure Rules](#).

