



REPUBLIC OF KENYA



KENYA LAW
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**Waithaka v Njuguna (Environment & Land Case 1391 of 2013)
[2022] KEELC 14673 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14673 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1391 OF 2013
OA ANGOTE, J
NOVEMBER 3, 2022**

BETWEEN

JOHN ROKI WAITHAKA PLAINTIFF

AND

JULIUS NJUGUNA DEFENDANT

JUDGMENT

Background

1. In the Complaint dated November 7, 2013, the Plaintiff seeks as against the Defendant the following reliefs;
 - a. General damages for trespass.
 - b. An order directing the Defendant to restore the Plaintiff's LR No 20530 to its status quo ante including *inter-alia* removing all deposited materials, leveling the ground and replanting lost or damaged vegetation and in default this Honourable Court be pleased to award to the Plaintiff the sum of Kshs 1,204,900/= to enable the Plaintiff effect the restoration order himself.
 - c. A permanent injunction restraining the Defendant, his servants, agents or work persons from dumping further excavated material or construction waste on the Plaintiff's LR No 20530.
 - d. Any other relief this Honourable Court deems fit and just to grant.
 - e. Costs of and incidental to this suit.
 - f. Interest on such sums found due.
2. It is the Plaintiff's case that he is and has at all material times been the registered owner of all that parcel of land known as LR No 20530 situate in Kileleshwa measuring 0.8270Ha (hereinafter the suit



- property) while the Defendant owns a parcel of land known as LR No 5863 situated at Dagoretti Corner and owns another parcel of land adjacent to the suit property.
3. The Plaintiff averred in the Plaint that sometime in April, 2012, the Defendant by his agents and/or servants entered onto the suit property and dumped cotton soil excavated from his property-LR No 5863, and in the process destroying a portion of his fence and that the Defendant's action in dumping the excavated soil was purportedly done pursuant to the permission granted to him by the then Nairobi City Council vide its letter of March 29, 2012 which letter allowed him to dump the aforesaid material on LR 209/14990/30, a parcel of land unknown to him.
 4. According to the Plaintiff, on May 10, 2015, he, through his advocates authored a letter demanding that the Defendant ceases further encroachment on the suit property and restores the suit property and that he further sought the intervention of the Nairobi City Council and the National Environmental Management Authority who through their letters of May 18, 2012 and June 5, 2012 ordered the Defendant to cease further encroachment, remove the dumped material and restore the suit property.
 5. The Plaintiff averred in the Plaint that whereas the Defendant temporarily ceased dumping soil on the suit property, an inspection of the property by the Plaintiff in May, 2013 revealed that the Defendant had re-commenced dumping materials thereon being waste generated from ballast and concrete remains contrary to the *Environmental Management & Co-ordination Act, 1999*.
 6. It was averred by the Plaintiff that by reason of the Defendant's actions aforesaid, the suit property has been subjected to waste, pollution and possible desertification which the Plaintiff is compelled to restore at an estimated cost of Kshs 1,204,900 and that he is entitled to general damages for trespass, the cost of the restoration of the land, and injunctive orders restraining the Defendant from further trespass and destruction of the suit property.
 7. In his Defence, the Defendant averred that he deposited soil on LR No 209/14990/30 with express authority from the Nairobi County Offices; that the deposit site is clearly riparian land which cannot belong to any individual; that the property on which he deposited the soil being LR No 209/14990/30 is distinct from the Plaintiff's property and the suit is in that respect misguided and that the claim of Kshs 1,204,900/= sought by the Plaintiff is arbitrary and unfounded.

Hearing & Evidence

8. The matter proceeded for hearing on May 5, 2022. The Plaintiff, PW1, stated that sometime in April, 2012, as he was carrying out a routine inspection of the suit property, he noted that some heaps of cotton soil had been dumped thereon; that he made inquiries which revealed that the Defendant was responsible for the dumping and that he confronted the Defendant who informed him that he had been authorized to dump the soil on the suit property by the then Nairobi City Council.
9. It was the evidence of PW1 that he formally asked the Defendant to cease the dumping and further complained to the Nairobi City Council and NEMA who equally ordered the Defendant to cease the dumping; that whereas the Defendant temporarily ceased dumping the waste on his land, he did not remove the deposited soil and soon recommenced the dumping and that he instructed a loss adjustor to quantify the loss occasioned to the suit property and the projected cost of removal and restoration all of which was assessed at Kshs 1,134,900/=.
10. During his testimony, PW1 reiterated that the dumping occurred on the suit property; that the Defendant's property is adjacent to his property; that the Defendant is developing his property and dumping waste on the suit property which is undeveloped; that he was charged Kshs 70,000/= by the loss adjustors; that the Defendant had no authority to dump the soil on his property and that there



is a letter by Nairobi City Council asking the Defendant to cease dumping and remove the materials, which directive the Defendant has not complied with to date. According to the Defendant, the value of restoration of the suit property is Kshs 1, 134,900.

11. In cross-examination, PW1 stated that whereas the matter was ordered to begin afresh in 2020, he still seeks interest from the year 2013; that he knows the Defendant personally and met him at the site sometime in 2013; that whereas the Defendant was authorized to dump materials, he was not supposed to dump them on the suit property and that it is the Defendant who gave him a copy of the letter authorizing him to dump materials on LR 209/4990/30 which is not the suit property.
12. The Defendant did not participate in the hearing.

Submissions

13. The Plaintiff, through his counsel, submitted that it is undisputed that the Plaintiff is the owner of the suit property and the Defendant has, and continuous to trespass on the said property by dumping cotton soil thereon. It was submitted that the general principle with respect to trespass is that the same is actionable per se.
14. Counsel for the Plaintiff submitted that in this case, the trespass complained of has been ongoing for a period of 10 years and has affected a sizeable portion of the suit property which is prime property and that the court in awarding damages should be guided by the decision in [*Rboda S Kiilu vs Jiangxi Water and Hydropower Construction Kenya Limited*](#) [2019]eKLR where the Court awarded damages of Kshs 10,000,000/= where the Defendant had trespassed and deposited waste on the Plaintiff's property.
15. Counsel submitted that the award of Kshs 10,000,000 is reasonable and just in the circumstances; that the continuing trespass can only cease once the property has been restored to its status quo ante hence the necessity of the restoration order; that the Defendant having failed to purge the trespass, the Plaintiff is entitled to the injunctive reliefs sought to avoid a repeat of the trespass and that the Plaintiff is entitled to the costs of the suit.
16. The Defendant's counsel submitted that the question of the Defendant dumping waste onto the suit property was not proven as the Plaintiff was unclear on when exactly the dumping occurred and who dumped the soil on the suit property and that no evidence was produced to show that the Defendant's property is adjacent to the Plaintiff's property.
17. It was submitted by the Defendant's advocate that no officer from the Nairobi City Council was called upon to clarify the contradicting letters of March 29, 2012 and May 18, 2012 referred to by the Plaintiff; that vide its Ruling of January 23, 2020, the court set aside its judgment on the basis that there had been no service of summons to enter appearance as the Defendant who had purportedly been served was out of the country at the time and that it appears that the Plaintiff is once again deceiving the court by the alleging that he went to the Defendant's premises and had discussions with him.
18. It was submitted that the sum of Kshs 1,134,900 allegedly owed to the Defendant has not been proven because the document by Proximate Adjusters Limited was not produced in court by its maker; that the court should equally disregard the receipt of Kshs 70,000 and that whereas the Defendant did not testify, the Plaintiff failed to discharge the burden of proof. Counsel cited the case of [*Alice Wanjiru Rubiu vs Messiac Assembly of Yahweh*](#)[2021]eKLR and urged the court to dismiss the suit.

Analysis & Determination

19. Having carefully considered the pleadings, submissions and testimonies by the parties herein, the following arise as the issues for determination;



- i. Whether the Defendant has trespassed onto the suit property?
 - ii. If so, what are the appropriate orders to issue?
20. The Plaintiff instituted this suit seeking *inter-alia* for general damages for trespass, an order directing the Defendant to restore the suit property to its *status quo ante* and permanent injunctive orders barring the Defendant from further interference with the suit property.
 21. On his part, the Defendant, through his statement of Defence denied the Plaintiff's assertions contending that he deposited the soil on Land Parcel no LR No 209/14990/30 which is distinct from the suit property with the express permission from the Nairobi City Council Offices. Despite having filed the Defence aforesaid, Witness Statements and supporting documents, the Defendant did not testify at the hearing. The effect of the foregoing is that not only does the Defendant's pleadings remain mere statements, but also the Plaintiff's evidence stands uncontroverted, and therefore unchallenged.
 22. Be that as it may, it is common ground that the burden placed on the Plaintiff to prove his case on a balance of probabilities is in no way lessened just because the Defendant did not adduce any evidence. This was aptly expressed by the Court of Appeal in *Charterhouse Bank Limited (Under Statutory Management) vs Frank N Kamau* [2016] eKLR as follows:

“The suggestion, however, implicit...that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his Defence means that the plaintiff's case is proved on a balance of probabilities cannot possibly be correct...”

While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the Defence where the onus is on the plaintiff to prove his claim on a balance of probabilities.”
 23. The general principle of he who alleges must prove is set out under Section 107(1)(2) of the *Evidence Act* which provides as follows:
 - “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
 24. And Sections 109 and 112 of the same Act which states;
 - “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
 - “112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”



25. The Court of Appeal in *Mumbi M'Nabea vs David M Wachira* [2016] eKLR, engaging in a discussion on the standard of proof expressed itself as follows;

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal No 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

26. With respect to the burden of proof, the learned Judges of Appeal in the case of *Palace Investments Limited vs Geoffrey Kariuki Mwenda & another* [2015] eKLR, posited thus:

“Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained.”

27. The court will be so guided. The Plaintiff's claim is primarily that of trespass to his land. According to *Black's Law Dictionary*, 8th Edition, trespass is defined as:

“An entry on another's ground, without a lawful authority, and doing some damage, however inconsiderable, to his real property”

28. Section 3 (1) of the *Trespass Act*, 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.”

29. It is apparent from the definition of trespass that one of the first key elements that needs to be established by a party claiming trespass is ownership and/or possession of the property alleged to have been trespassed upon.

30. It is PW1's uncontroverted evidence that he is the registered owner of the suit property being LR No 20530 situate in Kileleshwa, Nairobi. This assertion is not disputed by the Defendant and is further



supported by an official search. The Court therefore makes a finding that the Plaintiff is the owner of the suit property.

31. As the lawful owner of the suit property, the Plaintiff has rights over the property as expressed under Section 24(a) of the [Land Registration Act](#) which provides as follows:

“Subject to this Act, 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.”

32. Indeed, one of the rights and privileges belonging to an owner of land is the right to have the use and possession of the land to the exclusion of all others. Additionally, Article 40 of the [Constitution](#) guarantees the property rights of every person and provides under Article 40(3) that no person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property.
33. Having affirmed the Plaintiffs’ proprietorship of the suit property, the next question to be answered is whether he has demonstrated that the Defendant illegally deposited soil thereon amounting to trespass.
34. It is the Plaintiff’s case that the Defendant excavated soil from his property and deposited the same on the suit property; and that despite several demands, the Defendant only temporarily ceased the trespass, which he has since re-commenced and has refused to remove the dumped materials on his land, and restore it to the status it was in before.
35. The Plaintiff in this respect adduced a letter from the Nairobi City County addressed to the Defendant granting him permission to dump the excavated soil from his property on L.R No 209/14990/30 at Kileleshwa; a demand letter from the Plaintiff to the Defendant asking him to cease dumping waste on the suit property and letters by the Nairobi City County and NEMA respectively asking the Defendant to cease dumping soil on the suit property.
36. It is clear from the foregoing that whereas the Defendant had been given permission to dump excavated soil from his property, he was directed to dump the same on LR 209/14490/30 and not on the Plaintiff’s property. Having regard to the Plaintiff’s oral testimony and documentary evidence, and in particular the letters from Nairobi City Council and NEMA dated the March 29, 2012, May 18, 2012 and June 5, 2012, all of which are unchallenged, the Court finds that the Plaintiff has established on a balance of probabilities that the Defendant dumped soil on his property which action is tantamount to trespass.
37. The legal position with respect to trespass to land is that the same is actionable per se, meaning that once it is established that trespass has occurred, the person against whom the trespass was committed is entitled to damages. This position was affirmed by the Court of Appeal in [Kenya Power & Lighting Company Limited vs Fleetwood Enterprises Limited](#) [2017] eKLR where the Court stated as follows:

“Where trespass is proved as in this case, the affected party such as the respondent need not prove that it suffered any damages or loss as a result so as to be awarded damages. The court is under the circumstances bound to award damages, of course, depending on the facts of each case.”



38. *Halsbury's Laws of England* 4th ed, Vol 45 at para 26, 1503 provides as follows on computation of damages in an action of 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 sum 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 or 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, the general damages may be increased.”

39. The Plaintiff seeks both the quantified sum of Kshs 1, 204,900 as well as general damages to the tune of Kshs 10,000,000. With respect to the sum of Kshs 1, 204,900, the same is premised on the loss adjustor's report of May 27, 2013. However, the aforementioned report, despite having been marked for identification, was never admitted into evidence and as such is of no probative value. This position was affirmed by the Court of Appeal in *Kenneth Nyaga Mwigie vs Austin Kiguta & 2 Others* (2015) eKLR which held as follows:

“The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification

Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case.”

40. With respect to general damages, the Plaintiff opines that the award of Kshs 10,000,000 would be sufficient as guided by the decision in the case of *Rhoda S Kiilu vs Jiangxi Water & Hydropower Construction Kenya Limited*(supra).

41. In the *Rhoda* (supra) case, the acts of trespass committed by the Defendant included clearing trees and bushes, creating roads, quarries, deep gullies and carrying out acts of excavation of soil, murrum and rocks. The court in awarding the sum of Kshs 10,000,000 noted that the damage occurred in a rather expansive chunk of land.

42. In the instance case, the Plaintiff states that the Defendant, apart from dumping soil on the suit property, destroyed a portion of the fence and vegetation growing on the suit property. Despite the assertions aforesaid, no evidence has been produced with respect to the state of the property before and after the trespass and the cost of restoration of the land, if at all.

43. The Plaintiff is entitled to damages for the trespass on his land. In the circumstances, having found the Defendant liable for trespass, the Court will award a sum of Kshs 5,000,000 as damages for trespass. As to the prayers for injunction, having affirmed the Plaintiff's proprietorship of the suit property, it



follows that the Defendant has no mandate to use the suit property in any manner and as such this prayer is merited.

44. The net result is that the court finds that the Plaintiff's suit against the Defendant has been proved on a balance of probabilities and proceeds to enter judgment in favor of the Plaintiff as against the Defendant in the following terms:
- i. The Plaintiff is awarded Kshs 5000,000 damages for trespass together with interest at court rates from the date of judgment until payment in full.
 - ii. A permanent injunction is hereby issued restraining the Defendant, his servants, agents or work persons from trespassing and dumping excavated material or construction waste on LR No 20530.
 - iii. The Defendant to pay the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF NOVEMBER, 2022

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Wachira for Plaintiff

No appearance for Defendant

Court Assistant - June

