



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

ELC NO.398 OF 2015

(Formerly Kisumu HCCC No.11 of 2007 and Kisumu HCCC No. 19 of 2010

consolidated by order of the court made on 2nd March 2011)

ISAAC. E. N. OKERO.....1ST PLAINTIFF

BEATRICE. A. OKERO.....2ND PLAINTIFF

VERSUS

TOM SOYA OKWATCH.....1ST DEFENDANT

SAMWEL ONYANGO OTIENO.....2ND DEFENDANT

JUDGMENT

The Plaintiffs vide a plaint dated 17th January 2010 claim that they are the registered owners of the parcel of land known as **KISUMU/NYALENDA`B`928**. They have commenced this suit, which was predicated by the events of 28 April 2008 when Mrs. Beatrice Okero was informed by a neighbor of people digging in her plot. She informed her husband of the trespass and thereafter confronted the trespassers. They found Samwel Onyango Otiemo who stated that he was there to carry out construction on Mr. Peter Odhiambo's land. The plaintiffs contend that the defendants trespassed into the suit land and purported to take possession and even went as far as to construct structures thereon. The plaintiffs now bring this suit seeking possession of the suit property, a permanent injunction against the defendants and an order compelling the defendants to demolish and remove all structures within the suit property at their own cost.

The 1st Defendant filed his defense dated 8th March 2010 denied the plaintiff's claim and specifically that they were the registered owners of the suit property. He further contended that the plaintiffs had not fixed the boundaries of the plot hence trespass couldn't be ascertained. He called for dismissal of the Plaintiff's suit with costs.

The 2nd Defendant on his part filed a statement of defense dated 23rd May 2008 in which he generally denied the Plaintiff's claim. He further contended that his plot is **KISUMU/NYALENDA`B`1540** and if at all the boundaries of his plot encroached on the Plaintiff's land then it was due to the measurements done by the Kisumu Surveyors office. He prayed for dismissal of the Plaintiff's suit.

ANALYSIS OF THE EVIDENCE AT TRIAL

PW 1 ISAAC. E. OKERO testified on his behalf and that of the 2nd Plaintiff that he was an Advocate of the high court practicing in Kisumu and Nairobi. It was his testimony that with his wife they are the registered proprietors of **KISUMU/NYALENDA`B`928**. He produced a copy of the title deed, search certificate as proof of ownership. He further testified that the dimensions of the plot were confirmed by the District surveyor way back in June 1994 as evidenced by the sketch map lodged with the title.

It was his testimony that from sometime in mid-September 2006 the 1st Defendant unlawfully entered his land and constructed a gate and a perimeter fence disrupting his peaceful enjoyment of the property. That later on the 28th of April 2008 the 2nd Defendant followed suit by trespassing into the property and constructing structures thereon.

He further testified that a report was filed by the County Surveyor showing that the Defendants had trespassed. And stated that they had been deprived off the use and enjoyment of the land by the Defendants' action.

On cross-examination he stated that the 2nd Defendant was arrested and charged in a criminal case of trespass but was acquitted. That the 2nd Defendant was arrested on the suit property. He further stated that the alleged boundary problems did not affect the suit property and that he never admitted to not knowing the boundaries.

It was his testimony that there was no shared boundary between the suit property and plot no. **KISUMU/NYALENDA 'B'/1200**.

PW2 Ombok Geoffrey Okong'o testified that he was the acting county surveyor and had prepared a report on the suit property in conjunction with the land registrar. He produced the report as Plaintiff's Exhibit 2. It was his testimony that the two plots were distinct, with a physical lantana fence separating them. On cross-examination he stated that the 1st Defendant Trespaced on the Plaintiffs' land.

DEFENCE CASE

DW1 TOM SOYA OKWATCH testified on his own behalf and stated that on the day the survey was carried out by the County Surveyor he was present and that the report prepared by the Surveyor favoured the Plaintiffs.

It was his testimony that a survey report prepared by J.K. Tanui dated 9/10/2007 was the proper one that could be used to shed light on the current boundary dispute. That the said report stated that parcels nos **KSM/NYALENDA'B' 1540** and **KISM/NYALENDA'B'/928** have a common boundary on the western side, yet the report produced by PW2 states the opposite. In light of the foregoing it was his testimony that PW2 was uprooting his plot no, **KISM/NYALENDA'B'1540** from its current position and replacing it with **KISM/NYALENDA 'B'928**.

It was his further testimony that all evidence points towards the fact that the boundaries are unclear and that the 1st Plaintiff had even acknowledged this in the civil and criminal cases at the magistrates' court.

He recommended the adoption of the report by J.K Tanui as he alleged that the one by PW2 was doctored. On cross examination he stated that he bought his land **KISM/NYALENDA 'B'1540** from one Zadock Tado and that he wasn't aware of the original title the land was subdivided from. That before buying the land he investigated and looked at the map and sketch plans. On the court ordered survey of the 30/10/2019 he testified that he didn't appoint an independent surveyor due to financial constraints.

DW 2 SAMUEL OTIENO ONYANGO testified that his criminal case for trespass was dismissed at the magistrate's court and that he did not own any land in the area. Further that the 1st Plaintiff had accused him together with one Peter Odhiambo of Trespass yet at that time the latter had long passed on, raising doubt as to the credibility of his accusations. In further denying the trespass allegations he stated that he was retired and was at home and had never set foot on the land.

On cross examination however, he stated that he was on Peter James Odhiambo's land known as **KISM/NYALENDA 'B'1200** when he was accused of trespass. It was his testimony that Peter Odhiambo was by then deceased and he did not know whether letters of administration had been taken out on his estate.

He testified that he was the one who sent workmen to go and fence Peter Odhiambo's plot at the instigation of Dr Aluoch who is the alleged administrator Peter Odhiambo's Estate. He testified that he was shown where to fence by the surveyor and he began fencing.

PLAINTIFFS' SUBMISSIONS

In their submissions dated 17th May 2021, the Plaintiffs contended that they had proven ownership of the suit property via production of a copy of the title deed and a certified copy of the green card. It was their further submissions that the boundaries of the suit property were fixed on 7th June 1994 as evidenced by the green card.

The plaintiffs averred that they had presented cogent evidence to prove that both the 1st and 2nd Defendants had trespassed on the suit property, with the former doing so in mid-September 2006 and the latter on the 28th of April 2008.

It was their contention that the field report (PEXH3) clearly shows that the portion claimed by the defendants clearly falls within the suit property.

That the second defendant admitted having trespassed in his statement and testimony. That the 2nd Defendant's further admission that he was unaware of whether an administrator had been appointed in the estate of Peter Odhiambo and the fact that he produced no map or survey report that guided him while erecting his fence, clearly indicated that he unknowingly trespassed into the Plaintiffs' property.

It was their contention that the evidence establishing trespass against the Defendants was overwhelming and for that reason they submitted that an award of Kshs 1,500,000/= and Kshs 50,000/= against the 1st and 2nd Defendants respectively would suffice. The plaintiffs relied on the case of **CHRISTINE NYANCHYAMA OANDA VS CATHOLIC DIOCESE OF HOMA BAY REGISTERED TRUSTEES [2020] eKLR.** and **PARK TOWERS LTD VS JOHN MITHAMO NJIKA & 7 OTHERS [2014]** to buttress this point. They urged the court to grant the prayers as sought in the plaint. The 1st Defendant did not file any submissions in support of his case.

2ND DEFENDANTS SUBMISSIONS

The 2nd Defendant filed his submissions dated 18th May 2021 and 7th October 2021 in which he averred that his only connection with the area in which the alleged trespass took place was his assignment of work on **KISM/NYALENDA 'B' 1200**. That he never trespassed on the Plaintiff's land as he was acquitted of the offence vide WINAM CRIMINAL CASE NO. 424 OF 2008.

It was his further submission that the Plaintiffs having previously acknowledged the existence of a boundary issue their claim was untenable as trespass cannot be ascertained in the absence of clear boundaries.

He further argued that the Survey Report dated 9/12/2021 relied on by the Plaintiffs does not implicate him in trespass as it was for determination of the boundary between the suit property and plot no 1540, and not plot no 1200 which he was dealing with. That the Plaintiffs were well aware of the need for harmonization as the report done in the year 2007 had shown hence the report of 9/12/2021 could not be considered as conclusive.

He submitted that the Plaintiffs failure to prove his presence on the suit parcel on the day of his arrest made their claim for trespass unsustainable.

He concluded his submissions by stating that the Plaintiffs' suit against him was actuated by malice.

ISSUES FOR DETERMINATION

1. Whether the Defendant's have trespassed into the suit property KISM/NYALENDA 'B' 928.
2. Whether the Plaintiffs are entitled to damages.
3. Whether the Defendants should be permanently enjoined from dealing with the suit property.
4. Who is to pay costs.

WHETHER THE DEFENDANT'S HAVE TRESPASSED INTO THE SUIT PROPERTY KISM/NYALENDA 'B' 928.

Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 defines trespass as follows:

"Any unjustifiable intrusion by one person upon land in possession of another." Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession"

Further 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."

The plaintiffs produced a copy of the title deed for the suit property to prove ownership of the suit property. PW2 also testified to the effect that the 1st Defendant had trespassed on the Plaintiff's land. There's however nothing produced in court in the form of photographs to demonstrate the nature of the trespass save for the testimony of the Plaintiffs' witnesses. PEX2 the survey report also only alludes to the fact that the portion claimed by the 1st and 2nd Defendants' falls exclusively within the Plaintiffs' property.

The 1st Defendant on his part alleges that PEX2 is misleading, as it alleges that there's no common boundary on the western side between the suit property and **KISM/NYALENDA 'B'1540**. A look at the Plaintiffs' documents PEXH1, especially the map of the area shows that there's a common boundary to the west between the suit property and **KISM/NYALENDA'B'1540**.

The evidence of PW2 the surveyor to the effect that the 1st Defendant had trespassed on the Plaintiffs' land has largely been unchallenged. From the foregoing the Plaintiffs have proved trespass on a balance of probabilities as against the 1st Defendant. On the 2nd Defendant it is not very clear given that he was acquitted by the magistrate's court in the criminal case. A look at the map of the area also shows that the plot the 2nd Defendant was dealing in **KISM/NYALENDA'B'1200** does not share a common boundary with the suit property. There is clearly no evidence of the nature of trespass by the 2nd Defendant. There is no evidence that the 2nd Defendant deposited building materials, and /or constructed a perimeter wall in the suit property. For this reason, the claim of trespass has not been proven on a balance of probabilities as against the 2nd Defendant.

WHETHER THE PLAINTIFFS ARE ENTITLED TO DAMAGES

It was the Plaintiffs' submission that they are entitled to damages for trespass. They relied on the cases of **CHRISTINE NYANCHYAMA OANDA VS CATHOLIC DIOCESE OF HOMA BAY REGISTERED TRUSTEES [2020] Eklr. And PARK TOWERS LTD VS JOHN MITHAMO NJIKA & 7 OTHERS [2014]** which generally allude to the fact that it is not a must for the plaintiff to prove specific loss for the court to award damages.

It is trite law that damages are awarded as a way to compensate a party for the loss he or she had incurred due to a wrongful action on the part of the other party. The damages so awarded are intended to return the party back to the position he or she was in before the wrongful act was committed. **Halsbury's Laws of England 4th Edition Volume 45 para 26 1503** provides as follows on computation of damages in an action 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, 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”

In the circumstances of this case the Plaintiffs have not suffered any monetary loss as a result of the trespass. As such limb (a) would apply herein. The Plaintiffs have proposed a nominal fee of Kshs 1,500,000/= as damages. I do find that this figure is a bit high given the circumstances of the case. There is no proof of continued trespass, even then the above figure has not been supported by any factors such as the cost of deprivation and continued land use by the 1st Defendant. In the circumstances a figure of Kshs 50,000/= would suffice in the circumstances. I rely on the case of MAINA KABUCHWA V GACHUMA GACHERU [2018] EKL.R.

WHETHER THE DEFENDANTS SHOULD BE PERMANENTLY INJUCTED FROM THE SUIT PROPERTY

Having found that the 1st Defendant had indeed trespassed on the Plaintiffs' land and that indeed the land belongs to the Plaintiff then it follows that the prayer of permanent injunction as against the Defendants is merited, and the same should be, and is hereby allowed as prayed. There's proof on a balance of probabilities that the 1st Defendant trespassed on the Plaintiffs' land but not the 2nd Defendant. A nominal amount of Kshs 50,000/= be paid by the 1st Defendant as damages for trespass. A permanent injunction do issue against the 1st Defendant from interfering with the suit property. The 1st defendant to pay the plaintiffs the costs of this suit. The claim against the 2nd defendant is dismissed with costs.

DATED AT KISUMU THIS 7TH DAY OF DECEMBER, 2021

ANTONY OMBWAYO

JUDGE

This judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE