

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NUMBER E009 OF 2023**

FRANSISCAN SISTERS ST JOSEPH (ASUMBI)

REGISTERED TRUSTEES .....PLAINTIFF

**VERSUS**

PHOEBE ONYANGO.....DEFENDANT

**J U D G E M E N T**

The Plaintiff approached the court vide the Plaint dated 12<sup>th</sup> June, 2023 seeking for the following relief against the Defendant: -

- 1) A declaration that the Plaintiff, as the registered proprietor of the land, is entitled to an exclusive and unimpeded right of possession and occupation of all that parcel of land known as L.R. NO.15234 LR NO.53147/1 including the 0.34 ha portion trespassed on and occupied by the Defendant.
- 2) A declaration that the Defendant by herself, servants or agents and/or otherwise howsoever are trespassers and are wrongfully in occupation of a portion of the property measuring 0.34 ha and should vacate the said portion of the land forthwith.

- 3) An order that the Defendant and all other trespassers do forthwith vacate and deliver vacant possession of the said 0.34 ha portion of the property to the Plaintiff within thirty days of the decision and in default, an order of eviction be issued against the Defendant, its agents, servant as well as any other persons whom the Defendant has permitted to occupy the said 0.34 ha portion of the suit property.
- 4) A mandatory order of injunction directing Defendant to demolish and remove from the said 0.34ha portion of the suit property, all illegal structures created and being thereon forthwith.
- 5) A permanent injunction restraining the Defendant whether by herself or servants or agents and/or otherwise howsoever from claiming, occupying, continuing with the unlawful occupation, development on the said 0.34 ha portion of the suit land, and or continuing in occupation of any portion of the property.
- 6) Loss of use of the said 0.34 ha at the rate of Kshs.3,000,000/= per year for each year and duration of trespass with interest at commercial rates until possession shall be given to the plaintiff.

- 7) General damages for the trespass.
- 8) Costs of this suit.
- 9) Interest at court rates and for such period of time as this court shall deem just and fit to grant on the monetary awards and costs from the date of filing suit until payment shall be made in full.
- 10) Any such further relief as this Honourable court may deem appropriate.

The Plaintiff's case as pleaded in the plaint is that it is the registered proprietor and owner of all that parcel of land known as KISUMU IR 53147/1 being L.R. NO.15234 which land is with Deed Plan No.156631 and file Reference No.240/4 measuring 5.0 hectares or thereabouts situated in Kisumu Municipality, Kisumu City, Kisumu County. That the Plaintiff became so registered on 24<sup>th</sup> April, 2009 as I.R. 53147/5.

That the Defendant has without any colour of right using brutal force, wrongfully, illegally and unlawfully entered onto and remained on a portion of the suit property measuring 0.34 Ha without permission or authorization from the Plaintiff and has erected illegal structures and continues to illegally occupy, remain

on and develop the said portion thus preventing the Plaintiff from peaceful enjoyment, use and occupation of part of the property.

That the Defendant has been using the illegally erected structures on part of the property as a school. That the opportunity cost of the deprivation of the land by the Defendant's continued occupation is about Kshs.3,000,000/- annually.

That by reason of the Defendant's actions of trespass, the Plaintiff has suffered loss and damage since the Plaintiff has been deprived of economic use of the portion of the land for which the Plaintiff seeks the court's intervention.

In response to the Plaintiff's claim, the Defendant filed Defendant's Statement of Defence dated 1<sup>st</sup> December, 2023 through the firm of Onyango Onunga Advocates. The Defendant denied the Plaintiff's claim and averred that she had built the school on a different parcel of land and not on the land occupied by the Plaintiff. She denied the claim of trespass onto the Plaintiff's land.

### The evidence

On behalf of the Plaintiff, 3 witnesses testified. PW1, a member and a Trustee of the Plaintiff, adopted the contents of her witness statement dated 10<sup>th</sup> June, 2023 as her evidence in chief. She had rehashed the contents of the plaint in her witness statement and

added that the suit land was bought from a previous owner through auction and that the Plaintiff became registered owner thereof on 24<sup>th</sup> April, 2009 as I.R. NO.53147/5. That demands to the Defendant to vacate the land have not been heeded.

PW1 produced a copy of provisional title deed for the suit land, certificate of incorporation, copy of Registry Index Map, copy of Surveyor's ground report and a valuation report as exhibits.

She testified further that the Defendant stopped using the illegal structures which she had erected on the land in the 2023 when the suit was filed. That now the structures are abandoned and pose a risk to the rest of the suit property. She urged the court to allow the claim.

PW2 was a land Surveyor. He testified that he was requested by the Plaintiff to re-establish all the beacons and to confirm whether the land exists on the ground and to ascertain whether there was encroachment. That upon conducting the ground survey, he established that there was encroachment to the extent of 0.34 Hectares which is equivalent to 0.85 acres. He identified his ground survey report which had already been produced by PW1 as exhibit.

PW3 was a Valuer. He testified that he conducted a valuation of the encroached portion of land which he valued at Kshs.8 million as per

his valuation report which had already been produced by PW1 as exhibit P.5.

The Defendant produced no evidence. She did not attend court for the hearing. Affidavits of service filed demonstrated that service had been effected. The matter proceeded to hearing in her absence.

### Submissions

At the close of the evidence, directions were given for parties to file written submissions on the case within given timelines.

Written submissions dated 20<sup>th</sup> May, 2025 were filed on behalf of the Plaintiff by the firm of Okong'o Wandago & Company Advocate. Relying on the case of *Ethics & Anti-Corruption Commission -vs- Joseph Muindi Tevulo and Others (Anti-Corruption suit No.E026 OF 2018)* where it was held that where a Defendant who has filed a defence fails to attend court and to testify on it, or elects not to testify or call evidence his filed defence is to be disregarded, Counsel urged the court to disregard the pleadings filed by the Defendant for failure of the Defendant to call evidence.

Counsel submitted that the rights of a registered owner and/or proprietor conferred by registration are absolute and indefeasible under sections 25 and 26 of the Land Registration Act. That the

Plaintiff has proved its claim that it is the registered proprietor and owner of all that parcel of land known as IR 53234. That section 26(1) of the Land Registration Act provides that certificate of title issued by the Registrar upon registration... 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.

That the Defendant has not denied that she constructed on the property belonging to the Plaintiff and had been operating a school, but which property the Defendant seems to have abandoned after the suit was filed. That it is obvious that the Defendant has altered the use of the suit property to the detriment of the Plaintiff who has been denied the use and occupation of the same. That the estimated financial loss to the Plaintiff is Kshs.3,000,000/- per year.

Counsel relied on the case of Kenya Hotel Properties Limited -vs- Willesden Investment Limited (2009) KECA 439 (KLR) and Philip Ayaya Aluchie -vs- Crispinus Ngayo [2014]eKLR to support the submissions and urged the court to award the relief sought.

The Defendant filed no submissions.

Issues for determination

The main issue for determination is whether or not the Defendant encroached onto the Plaintiff's land and whether the Plaintiff is entitled to the relief sought.

### Analysis and determination

Although she filed a defence through Counsel, the Defendant failed to adduce evidence to substantiate and prove the averments in the defence. The court is in agreement with the holding in Kenya Power & Lighting Co Ltd vs Rassul Nzembe Mwadzaya [2020] eKLR, that; -

“It is noteworthy that the Appellant in its amended Statement of Defence filed on 15<sup>th</sup> October 2012, denied all the allegations raised by the Respondent and attributed contributory negligence on the part of the Respondent. Although a defence was filed on behalf of the Appellant, no witness was called to prove that defence. Since no evidence was adduced in support of the defence case, the defence on record therefore remained as a mere allegation. This is the position in law and was restated in the case of Edward Muriga through Stanley Muriga... vs...Nathaniel D. Schulter, Civil Appeal No.23 of 1997, where the Court of Appeal stated: -

“In this matter, apart from filing its statement of defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere

allegations. Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

13. Further, it is trite that if no evidence is tendered to support an averment in a pleading, in this case, the defence, such averment stands as such as mere statement. Further, if there is no rebuttal of evidence by a party, that evidence remains uncontroverted. In the case of John Wainaina Kagwe vs Hussein Dairy Ltd[2013]eKLR, the Court of Appeal held as follows:-

“The Respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify meaning that the allegations in its defence with regard to the blame worthiness of the accident on the Appellant either wholly or substantially remained just that mere allegations. The Respondent thus never tendered any evidence to prop up its defence. Whatever the Respondent gathered in cross-examination of the Appellant and his witnesses could not be said to have built up its defence. As it were therefore, the Respondent’s defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tended to exonerate it fully from culpability.”

This however does not mean that the burden of proof on the plaintiff is lifted. Whether the Defendant calls evidence or not the burden to prove the assertions in the plaint remains with the

plaintiff in accordance with the provisions of sections 107 to 109 of the evidence Act. In *Gichinga Kibutha vs Caroline Nduku (2018) eKLR*, the Court held that:

“It is not automatic that instances where the evidence is not controverted the claimant shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

Similarly, in *Mary Wanjiru v Lucy Njeri Munyua & another [2020] eKLR* in which the court held that:

“The fact that the evidence is not challenged does not then mean that the Court will not interrogate the evidence of the Plaintiff. The Court still has an obligation to interrogate the Plaintiff’s evidence and determine whether the same is merited to enable the Court come up with a logical conclusion, as *exparte* evidence is not automatic prove of a case. The Plaintiff has to discharge the burden of proof.”

The Plaintiff produced documents of ownership of the suit property namely; a provisional title deed which showed that the Plaintiff is the registered owner of the suit land. No document or evidence was produced to challenge the Plaintiff ownership of the land. Under section 26 of the Land Registration Act certificate of title is *prima facie* evidence of ownership of land.

As a registered owner, the Plaintiff's right to property is protected under the provisions of section 24 and 25 of the Land Registration Act and article 40 of the Constitution of Kenya.

The Plaintiff's complaint was that the Defendant encroachment onto the suit land. Trespass to land is constituted by an unjustified interference with the possession of land. In Black's Law Dictionary 11<sup>th</sup> Edition, it is defined as;

“a person's unlawful entry on another's land that is visibly enclosed. This tort consists of doing any of the following without lawful justification: (1) entering on to land in possession of another, (2) remaining on the land, or (3) placing or projecting any object on it.”

section 3 of the Trespass Act, Cap 294 Laws of Kenya provides;

“any person who without reasonable excuse enters or remains upon or erects any structure on or cultivates, tills or grazes or permits stock to be on private land without the consent of the occupier thereof shall be guilty of an offence.

The ingredients or elements of the tort of trespass therefore include; unauthorized entry onto another's land, remaining on another's land without permission, carrying out activities such as

cultivating, tilling or even grazing animals, or construction on another's land without permission or placing projecting an object over someone's land without permission.

Although the Defendant vide the statement of defence denied trespassing or encroachment onto the suit land, the evidence produced by the Plaintiff showed otherwise. A part from the testimony of PW1, the Plaintiff produced a surveyor's report which confirmed that the Defendant had indeed encroachment onto 0.34 Ha portion of the suit land.

On the basis of the evidence placed before court, the court finds that the Plaintiff is entitled to prayers (a) to (e), (g) and (h) of the plaint.

Prayer (f) of the plaint seeks for compensation for loss of use estimated at Kshs.3,000,000/- annually. This being a claim in the nature of special damages, ought to have been proved as required by law. No evidence has been placed before court as to how the sum of Kshs.3,000,000/- was arrived at.

In Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, where it was held inter alia that;

If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the

date of trial it must be a sum that has actually been spent or loss that has already been incurred.”

The court finds that this prayer has not been proved.

Prayer (g) is prayer for general damages. Trespass is actionable *per se*. Taking into account the facts of the case, namely; the Defendant put up and was running a school on the encroached premises and making money therefrom and that for the entire period the Defendant has had possession of the encroached portion, the Plaintiff has been prevented from using and enjoying it as the registered owner thereof, a sum of Kshs.3,000,000/- is in my assessment adequate compensation as general damages for trespass.

Under the provisions of section 27 of the Civil Procedure Act, costs follow the event unless there is good reason for the court to order otherwise.

### Conclusion

The result is that the court finds that the Plaintiff has proved its case on a balance of probabilities. Judgement is entered in favour of the Plaintiff against the Defendant for the prayers in the plaint save for the prayer for special damages as follows;

1. A declaration that the Plaintiff, as the registered proprietor of the land, is entitled to an exclusive and unimpeded right of possession and occupation of all that parcel of land known as L.R. NO.15234 LR NO.53147/1 including the 0.34 ha portion trespassed on and occupied by the Defendant.
2. A declaration that the Defendant by herself, servant or agent and/or otherwise howsoever are trespassers and are wrongfully in occupation of a portion of the property measuring 0.34 ha of the suit land and should vacate the said portion of the land forthwith.
3. An order that the Defendant and all other trespassers on the land as agents of the Defendant, do forthwith vacate and deliver vacant possession of the said 0.34 ha portion of the property to the Plaintiff within sixty (60) days of this decision and in default, an order of eviction is hereby issued against the Defendant, its agents, servant as well as any other persons whom the Defendant has permitted to occupy the said 0.34 ha portion of the suit property.
4. A mandatory order of injunction directing Defendant to demolish and remove from the said 0.34ha portion of the suit

property, all illegal structures erected and being thereon forthwith.

5. A permanent injunction restraining the Defendant whether by herself or servants or agents and/or otherwise howsoever from claiming, occupying, continuing with the unlawful occupation or development on the said 0.34 ha portion of the suit land, and or continuing in occupation of any portion of the property.
6. Kshs.3,000,000/- being general damages for trespass and interest thereon at court rates.
7. Costs of the suit.

**Judgement dated and signed at Kisumu and delivered virtually this 30<sup>th</sup> day of October, 2025.**

**E. ASATI,  
JUDGE.**

**In the presence of:**

Maureen - Court Assistant.

Okong'o for the Plaintiff

No appearance for the Defendant

