

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ELC CASE NO. E080 OF 2023

FRANCIS NJUGUNA THUO..... PLAINTIFF

VERSUS

FRANCIS MWANGI

DEFENDANT

JUDGMENT

Introduction

1. At the heart of this dispute is a question central to the protection of property rights. By a Plaint dated 6th December 2023, the Plaintiff commenced proceedings asserting that the Defendant entered upon the parcel of land known as Land Reference Number 4953/1045 (hereinafter 'suit property'), of which the Plaintiff is the registered proprietor.
2. The Plaintiff further avers that the Defendant is the owner of the parcel adjacent to the suit property known as Land Reference Number 4953/1046.
3. The Plaintiff avers that on or about November 2023, the Defendant started depositing soil along the perimeter wall of his land, which encroached upon a wall constructed on the suit property by the Plaintiff. The Plaintiff alleges that the soil so deposited now rests

against and encroaches upon the Plaintiff's wall, causing damage thereto.

4. The Plaintiff avers that the Defendant's actions have interfered with his lawful use and enjoyment of the suit property.

5. Accordingly, the Plaintiff seeks the following reliefs against the Defendant:

a) *An order for injunction do issue directed at the Defendant whether by himself or through his servants, agents, or employees restraining him from heaping soil on the perimeter of his plot on Land Reference Number 4953/ (sic) or damaging or in any other way attempting to hamper the Plaintiff's enjoyment and use of his land*

b) *An Order Mandatory injunction compelling the Defendant to remove the soil heaped on the Defendant's perimeter wall*

c) *A declaration that the Defendant should construct his own wall on the common perimeter fence with the Plaintiff*

d) *An inquiry as to damages and damages found done*

e) *Damages for trespass*

f) *Costs of the suit*

g) *Interest in c) and d)*

h) *Such other or further orders that may be necessary or as the court may deem just*

6. The Plaintiff filed an affidavit of service sworn on 18th March 2024 indicating that service of Summons to enter appearance together with the Plaint was effected on the Defendant on 15th March 2024.
7. The suit proceeded undefended, the Defendant having neither entered appearance nor filed a Defence to the Plaintiff's claim.

Plaintiff's Case

8. At the formal proof hearing, the Plaintiff testified as PW1 and adopted his witness statement as his evidence-in-chief. The Plaintiff's bundle of documents including the title to the suit property and the photographs depicting the alleged trespass presented by PW1 were received and marked as Plaintiff's Exhibits 1 and Exhibits 2 (PEX1 and PEX2).
9. The Plaintiff was directed to file written submissions at the close of the hearing. However, no submissions were filed within the time prescribed.

Issues for Determination

10. Having considered the pleadings, the evidence adduced by the Plaintiff, and the record before the Court, the issues that arise for determination are as follows:
 - i. *Whether the Defendant has trespassed upon the suit property*

- ii. *Whether the Plaintiff is entitled to the reliefs sought in the Plaintiff.*

Analysis and Determination

11. The law has long regarded the quiet possession of land as a right deserving protection. Land is not merely soil and stone. It is the space within which ownership finds expression and lawful possession exercises its dominion. For that reason, the law does not treat intrusion upon another's land as a trivial inconvenience. It views it as an affront to the order that property rights are meant to secure. When such an allegation is brought before a court, the task of the court is neither to presume wrongdoing nor to overlook interference. Its duty is to examine the evidence carefully and determine whether the Plaintiff has established, on a balance of probabilities, that his right to exclusive possession has been infringed.
12. In undertaking that inquiry, it is necessary for the Court to begin with the legal meaning of trespass to land.
13. ***Clerk & Lindsell on Torts*** (18th edn), 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”

14. **Black's Law Dictionary** (9th ed., p. 1643) defines trespass to land, also known as *trespass quare clausum fregit*, 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 upon land in the possession of another, (2) remaining on the land, or (3) placing or projecting any object upon it.

At common law, it also refers to an action to recover damages resulting from another's unlawful entry upon one's land that is visibly enclosed."

15. **Section 3(1) of the Trespass Act** defines trespass upon private land as follows:

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

16. These definitions underscore an important principle. Trespass is not confined to the act of stepping onto another's land. The law equally recognizes liability where a person causes an object, substance, or structure to intrude upon land in the possession of another. Possession, whether actual or *prima facie* by proof of ownership, is sufficient to ground an action in trespass.

17. The protection afforded by the law therefore extends not only to the physical boundaries of land but also to the integrity of the space that the lawful possessor is entitled to enjoy without interference.

18. In the instant case, to establish ownership and lawful possession, the Plaintiff tendered a copy of the title deed for the suit property as PEX1.
19. The Plaintiff, testifying as PW1, stated that the Defendant started depositing soil along the perimeter of the Defendant's own land. According to PW1, the soil so deposited encroached upon a wall lawfully constructed on the suit property. The Plaintiff further explained that the soil now rests against and leans upon the wall, causing visible damage to the structure. PW1 maintained that the intrusion has, in his view, interfered with the lawful use and enjoyment of the property.
20. In support of his testimony, PW1 tendered a bundle of photographs, marked as PEX2, depicting the soil deposited against the wall. The photographs depict the manner and extent to which the soil rests upon and leans against the Plaintiff's land.
21. The Court notes that photographs, together with PW1's testimony, demonstrate a physical intrusion by the soil, which, if the Defendant deposited it without lawful justification or consent, constitutes an actionable encroachment upon the Plaintiff's land.
22. The Court is mindful that trespass is actionable *per se*, meaning that proof of interference with possession is sufficient to establish the claim; it is not necessary to prove substantial or irreparable damage.

23. Although the suit proceeded undefended, the Plaintiff was nevertheless required to discharge the burden imposed by Section 107(1) of the Evidence Act, Cap 80, by establishing his claim on a balance of probabilities.
24. Upon consideration of the testimony and exhibits tendered, the Court is satisfied that the Plaintiff has discharged that burden. The evidence placed before the Court establishes on a balance of probabilities that the Plaintiff's possession of the suit property was interfered with by the Defendant's actions which amounts to trespass.
25. The Court is guided by the decision in ***Park Towers Ltd v John Mithamo Njika & 7 Others*** [2014] eKLR, where J.M. Mutungi J. observed 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..."*
26. The principle established is clear: proof of interference with lawful possession invokes the Plaintiff's right to redress.
27. The Court's duty is to fashion relief commensurate with the nature, extent, and circumstances of the trespass.
28. Accordingly, judgment is entered for the Plaintiff as prayed in the plaint dated 6th December 2023.

29. The plaintiff is awarded general damages of Kshs. 500,000/-.
30. The Defendant shall bear the costs of the suit together with interest from the time of filing suit until payment in full.

It is so Ordered.

Dated, signed and delivered, at Thika this 13th day of February 2026.

.....
J. M. ONYANGO
JUDGE

In the presence of:

Parties absent.

Court Assistant: Hinga.