



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MIGORI**

**ELCC NO. 289 OF 2017**

**(Formerly Kisii Elc case No. 357 of 2017)**

**GEORGE AWUOR OKULLO.....PLAINTIFF**

**VERSUS**

**CHINA WUYI COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**AND**

**JACK BARAZA BARAZA.....1<sup>ST</sup> THIRD PARTY**

**BERNARD ALIWA.....2<sup>ND</sup> THIRD PARTY**

**JUDGMENT**

**A. Introduction**

1. The property in dispute in the instant suit is a parcel of land known as Suna West/Wasweta II/844 measuring approximately 10.15 hectares in the area situate in Migori County within the Republic of Kenya (herein after referred to as the suit land). The suit land is registered in the name of the plaintiff, George Awour Okullo, who is represented by learned counsel, Mr. Ouma Njoga of Messrs Ouma Njoga and Company and advocates.
2. The dependent, China Wu Yi Company Limited is a Company incorporated under the Companies Act Chapter 486 of the Laws of Kenya. The defendant's place of business is located within the Republic of Kenya. The defendant herein is represented by learned counsel, Mr. A.Mudeyi.
3. The 1<sup>st</sup> third party, Jack Baraza Baraza was at all material times a caretaker of the plaintiff on the suit land. He is the plaintiff's brother in law. He is not represented in the present suit.
4. The 2<sup>nd</sup> third party, Benard Aliwa was the chief Suna Nyabisawa location, Migori County at all material times herein. He is represented by learned counsel, Sam Onyango of Sam Onyango and Company Advocates.
5. On 1<sup>st</sup> March, 2017, this suit was filed at Kisii Environment and land Court. On 5<sup>th</sup> March 2017, the same was transferred to this court for hearing and determination. On 17<sup>th</sup> October, 2016, parties consented that the issues of the 3<sup>rd</sup> parties be heard simultaneously with the plaintiff's case and the defendant's case.

**B. Summary of the plaintiff's case**

6. By a plaint (Fast Track) dated 26<sup>th</sup> May, 2015 and filed in court on 23<sup>rd</sup> July, 2015, the plaintiff has sued the defendant for the following reliefs;-

***a) A permanent injunction restraining the defendant, through its lawful agents, servants and or employees whatsoever or howsoever acting from trespassing and encroaching upon and or excavating and harvesting murrum/soil thereon or in any other way interfering with the plaintiff's right to the enjoyment an use of the parcel of land.***

*b) An order directing the defendant to restore the plaintiff's parcel of land to wit; Suna West/Wasweta II/844 to the state and condition prior to the defendant's illegal activities.*

*c) General damages for trespass.*

*d) Kshs. 22,924,895/= being value of excavated murrum.*

*e) Costs for this suit plus interest on (c) and (d) at court rate.*

7. The gist of the plaintiff's case is that he is registered owner of the suit land. That on diverse dates between the year 2015 and 2014, he defendant trespassed into the suit land excavated and harvested soil thereon for use in the Masare-Swori-Kehancha and Awendo-Mariwa road. In the result, the suit land has been defaced, environmentally altered and left with gullies causing damages to the plaintiff thus provoking the instant suit.

8. On 21<sup>st</sup> September, 2017, the plaintiff (PW1) testified and relied on his statement filed in court on 23<sup>rd</sup> July, 2015 (P Exhibit 1). He stated that he owns the suit land as per title deed issued to him on 31<sup>st</sup> November, 1997 (P Exhibit 2). He also relied on other exhibits which include photographs showing that soil was excavated from the suit land P Exhibits 3(a) to (c), a valuation report dated 17<sup>th</sup> February, 2015 (P Exhibit 4), an invoice and a receipt showing Kshs. 80,631/- fees paid to the valuer (P Exhibits 5(a) and (b) a demand notice dated 4/2/2015 (P Exhibit 6(a) and a way bill of 5<sup>th</sup> February, 2015 (P Exhibit 6 (b)).

9. PW2, Francis Ochieng Oketch, a property valuer of Apex valuers Limited visited the suit land, prepared and produced (P Exhibit 4) on the instruction of PW1. He assessed the cost of the soil extracted from the suit land at Kshs 22,838,264/=.

10. PW3, Stephen Ochieng Ngongo relied on his statement dated 23<sup>rd</sup> July, 2015 (P Exhibit 8) in his testimony. He stated in part that his land is next to the suit land.

11. In his submissions dated 15<sup>th</sup> July, 2018 and filed in court on 16<sup>th</sup> July, 2019, learned counsel for the plaintiff made reference to orders sought in his plaint, framed and analyzed in favour of plaintiff the issues for determination as follows:-

*a) Whether the plaintiff was at all material times the registered proprietor of land parcel number Suna West/Wasweta II/ 844 measuring approximately 10.15 hectares.*

*b) Whether on diverse dates between 2013 and 2014 the defendant entered upon land parcel No. Suna East/Wasweta II/ 844 and harvested soil/murrum therefrom.*

*c) Whether the plaintiff is entitled to the relief sought and what quantum of damages is awardable.*

12. Counsel relied on the case of **Park Towers limited –vs- John Mithamo Njika & 7 others (2014) eKLR** on assessment of damages for trespass to land. He urged the court to award the plaintiff a refund of Kshs. 86,631/- being the valuer's fees in addition to other reliefs sought in the plaint.

13. Counsel further filed supplementary submissions dated 26<sup>th</sup> August, 2019. He framed and analyzed two (2) issues that fall for determination relating to wrong principles in calculating special damages and double compensation and relied on the case of **Nakuru Industries Limited –vs-S.S Mehta and Sons (2016) eKLR** on computation of damages for trespass to land. He disputed the valuation done by the defendant. Counsel also cited **Noah Kaisha Kedogo -vs- Chania Construction Company Limited (2018) eKLR**, **Obadiah K. Macharia-vs-Kenya Power and Lightening Company Limited (2016) eKLR**, **Halsbury's Laws of England 4<sup>th</sup> Edition Vol.45 at paragraphs 26,1503 and John Mutungu Waititu -vs- China Wuyi (Kenya) Co. Limited (2018) eKLR** in support of his submissions.

### **C. Summary of the Defendant's Case**

14. The defendant denied the plaintiff's claim in a written statement of defence dated 27<sup>th</sup> August, 2015. The defendant stated therein that the excavation of soil was done at the behest of the 1<sup>st</sup> third party upon confirmation by the 2<sup>nd</sup> third party.

15. The defendant termed the amount sought in the plaint unmerited as the same is enormous and the estimate based on wrong principles of calculating special damages. The defendant sought dismissal of the instant suit with costs.

16. **DW1, Fredrick Robi Musimo**, an internal security officer with the defendant relied on the defendant's list of documents dated 23<sup>rd</sup> May 2016 and filed on 25<sup>th</sup> May 2016 (D Exhibits 1 to 9). He stated that the defendants had authority of PW1 through the 1<sup>st</sup> and 2<sup>nd</sup> third parties to excavate the soil from the suit land.

17. **DW2, Philip Odongo Kabita**, a registered and practicing valuer testified that he prepared a report dated 13<sup>th</sup> March, 2018 (DExhibit 10) for the defendant. He did produce D Exhibit 10 wherein the value of loss of excavated soil was assessed at **Kshs. 3,989,580/=**.

18. On his part, learned counsel for the defendant filed submissions dated 25<sup>th</sup> October, 2019 whereby he urged the court to dismiss the suit with costs. He submitted that in the event the court finds in favour of the plaintiff, our jurisprudence tends to award a sum of Kshs. 100,000/- as general damages for trespass. That P Exhibit 4 is speculative, unrealistic and exaggerated. He urged the court to treat PExhibit 4 with

suspicion, caution and follow a more factual report (D Exhibit 10) for an informed decision.

#### **D. The 1<sup>st</sup> third party's case**

19. By a notice of motion dated 23<sup>rd</sup> May 2016, brought under **Order Rule 15 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act (Cap 21)**, the defendant sought leave of the Court to file third party notice against the 1<sup>st</sup> and 2<sup>nd</sup> third parties herein. The application was unopposed. The same was allowed on 13<sup>th</sup> July, 2016 accordingly.

20. Consequently, on 22<sup>nd</sup> July, 2016 the defendant filed and served the 3<sup>rd</sup> party notice dated evenly. The defendant is seeking compensation and indemnity payment and costs on the grounds and particulars set out in the notice.

21. The 1<sup>st</sup> third party failed to enter appearance or file a statement of defence in the instant suit. He testified not. He did not file submissions, too.

#### **E. The 2<sup>nd</sup> third party's case**

22. The 2<sup>nd</sup> third party filed two (2) statements of defence dated 27<sup>th</sup> February, 2017, (8 –paragraphed) and 19<sup>th</sup> July, 2017 (10-paragraphed) filed on 28<sup>th</sup> February, 2017 and 20<sup>th</sup> July, 2017 respectively. He denied the defendant's claim and sought that the same be dismissed with costs to the 2<sup>nd</sup> third party.

23. On 22<sup>nd</sup> January, 2019, the 2<sup>nd</sup> third party testified that the suit land is within his location and that he knew the 1<sup>st</sup> third party as the caretaker of the suit land. He relied on his letter dated 11<sup>th</sup> November, 2013 as per his list of documents dated 19<sup>th</sup> July, 2017 (2<sup>nd</sup> third party Exhibit 1).

24. In his submissions dated 30<sup>th</sup> October, 2019, learned counsel for the 2<sup>nd</sup> third party referred to the reliefs sought in the third party notice dated 22<sup>nd</sup> July, 2016 and framed issues 1 to 7 for determination and analyzed the same in favour of the 2<sup>nd</sup> third party. Counsel submitted that the defendant's claim is not proved against the 2<sup>nd</sup> third party. He urged this court to dismiss the defendant's claim with costs.

#### **F. Issues for determination**

25. I have thoroughly studied the plaintiff, the defendant's statement of defence, the 2<sup>nd</sup> third party's notice, and his statement of defence, the evidence of PW1, PW2, PW3, DW1, DW2, and the 2<sup>nd</sup> third party as well as rival submissions in this suit. I also consider the plaintiff's issues dated 29<sup>th</sup> September, 2015 and issues identified in the plaintiff's submissions and the 2<sup>nd</sup> third party's submissions.

26. On that score, I subscribe to the Court of Appeal decision in the case of **Great Lakes Company (U) Limited -vs- Kenya Revenue Authority (2009) KLR 620** on the issues for determination in a suit generally. So, the issues for determination are compressed to issues (i) and (ii) framed in the plaintiff's submissions. The third issue (iii) is whether the plaintiff and the defendant are entitled to the reliefs sought in the plaintiff and in the 3<sup>rd</sup> party's notice respectively and the quantum of damages awardable in this matter.

#### **G. Analysis and Disposition**

27. In the respect of the first issue, PW1 stated at paragraph 3 of his plaintiff that he is the registered owner of all the suit land together with all rights and privileges appurtenant thereto. He relied on his statement duly filed in court on 23<sup>rd</sup> July, 2015 ( PExhibit 1) filed together with the plaintiff. Paragraphs 2 and 3 of his statement read;

***“ That I am the registered owner of land parcel No. Suna West/ Wasweta II/844 and that the parcel of land is 10.15 hectares or- 25.07acres.”***

28. During examination in chief, PW1 also testified in part:

***“I own LR NO. SUNA WEST/WASWETA 11/844 issued on 3/11/1979 (PEXhibit 2). It is approximately 10.15 hectares.”***

29. The land certificate (P Exhibit 2) issued on 3<sup>rd</sup> November 1997 shows that PW1 is the absolute proprietor of the suit land registered under the Registered Land Act chapter 300 laws of Kenya (the repealed Act); see also **Wainaina -vs- Murai & others (1976-80) 1KLR 283 at 290.**

30. This court is aware of sections 27, 28 alongside section 30 of the Repealed Act and section 2 of the Land Registration Act 2016(2012) on the meaning of the term **“certificate of title.”** Furthermore, interests conferred by registration, rights of proprietor, certificate of title to be held as conclusive evidence of proprietorship, overriding interests and certificate of title are provided for under **sections 24, 25, 26, 28 and 30 of the same Act** respectively.

31. In cross examination by Mr. Mudeyi for the defendant, PW1 stated that his land is twenty five (25) acres. During cross examination by learned counsel, Mr. Sam Onyango for the 2<sup>nd</sup> third party, PW1 testified that he did search and bought the suit land.

32. It was the testimony of PW2 that the suit land belonged to PW1. He, too, stated that the property existed in the name of PW1.

33. PW2 further stated that he visited the suit land and prepared his report (P Exhibit 4) which reveals under the "title" part that:

**"Registered owner**

***The property is registered- at the Migori County land Registry under the Land Registration Act (No. 3 of 2012) 9section 108) the Registered Land Act. Cap 300 of the Laws (Repealed) in the name of George Awuor Okullo.***

**Tenure**

***The property is held on a freehold interest (absolute proprietorship)"***

34. Additionally, an annexed copy of certificate of official search dated 13<sup>th</sup> February, 2015 is in support of P Exhibit 4. Clearly, part B of the said certificate discerns that the plaintiff (PW1) is the proprietor of the suit land with effect from 16<sup>th</sup> August, 1977 and PExhibit 2 was issued on 3<sup>rd</sup> November, 1979 accordingly.

35. At paragraph 4 of his statement filed in court on 23<sup>rd</sup> July, 2013, PW3 plainly stated that PW1 is his neighbor. That PW1 is the owner of the suit land while he (PW3) owns LR.No. Suna West/WaswetaII/843.

36. Besides, DW1 maintained in cross examination that they extracted soil on the suit land belonging to PW1. This was affirmed by DW2 who prepared ( D Exhibit 10) which discloses that PW1 is the registered owner of the suit land. It was further confirmed by a copy of annexed certificate of official search dated 9<sup>th</sup> March, 2018 at part B to the effect that the suit land is registered in the name of PW1 as already stated in paragraph 34 hereinabove.

37. The 2<sup>nd</sup> third party at paragraph 8 of his statement of defence was emphatic that PW1 is the owner of the suit land. The same position is indicated in paragraph 2 of his Exhibit 1. Thus, the first issue is resolved thereby.

38. As regards the second issue, PW1 was clear in his statement including paragraph 9 thereof that he established that the soil excavated from the suit land was harvested by the defendant. Again, he testified in examination in chief that;

***"Morrum was excavated from my land as shown on these photos 9PEXhibit 3 (a) to (c). It was on my land approximately 9.00 hectares and done by the defendant without my consent" (emphasis added)***

39. PW1 maintained in cross examination that nine (9) acres of the suit land was affected by the defendant through soil excavation. ( PExhibits 3 (a) to (c) fortify his position.

40. Paragraphs 8 to 17 and 19 of the statement of PW3 (P Exhibit 8) quite clearly reveal that the defendant carried out excavation of soil on the suit land. That same position is affirmed by PW2 who prepared and produced P Exhibit 4 and remarks No. 4 therein provide that:-

***"The parcel has been rendered partly unsable by the extraction."***

41. Moreover, DW1 testified and maintained that the defendant proceeded to extract soil on the suit land pursuant to an agreement dated 20<sup>th</sup> November, 2013 (D Exhibit 1). During cross examination, by learned counsel for the 2<sup>nd</sup> third party, he stated as follows;

***"The 1<sup>st</sup> 3<sup>rd</sup> party told us that he was a caretaker of the land. DExhibit 21 shows that the suit land belongs to the plaintiff (PW1)."***

42. DW2 confirmed the testimony of DW1 by way of DExhibit 10 in the general remarks that;

***"Area of the land affected by the excavation is (3.5 hectares) or (8.673) acres."***

43. DW2 also adduced evidence in chief, inter alia,

***"I came to scene and found evidence of excavation of three large dams spread on the southern section of the suit land. I made a finding of 52,791 m3 of excavated soil approximately 1/3 of the entire land. It is what approximately 8.67 acres is."***

***"***

44. The testimonies of PW1, PW2, and PW3 speak to the excavation of soil and the suit land carried out by the defendant. The testimonies of DW1 and DW2 as well as PExhibits 1, 5, 7 and 10 reinforce that very position.

45. In that scenario, did the defendant trespass into the suit land? The answer is in the affirmative as discerned from the common baseline

evidence of PW1, PW2, PW3, DW1 and DW2.

46. In the case of **James Njeru-vs-Ericson Kenya Limited (2015) eKLR**, it was held that trenches dug across the plaintiff's land amounted to trespass. The court therefore assessed damages for trespass at Kshs.50,000/- in favour of the plaintiff.

47. Similarly, **Clerk and Lindsell on Torts (18<sup>th</sup> Edition)** Paragraph 18-01 defined "Trespass" thus;

**"An unjustifiable entry by one person upon the land in possession of another. Removing any part of the soil of land also constitutes trespass"** (emphasis added)

48. It was the testimony of PW2 that the rate of extracted soil per one ton lorry was Kshs. 3,000/- as revealed in P Exhibit 4. He told the court, inter alia;

**"There are assumptions which we make and the total volume of morrum extracted was 68,088.16 M3 or 2,404,515.63 ft3 translated to kshs. 5,674.10 trips of 10 ton lorry that would costs Kshs. 3,000/= to 35000/= depending on the quality of the morrum.**

**I came up with a figure of kshs. 19,859,360 value of the entire morrum extracted from the holes at the rate of kshs. 3,000/= per one tonner lorry."** (emphasis laid)

49. During cross examination, PW2 stated that the defendant extracted soil from a total of 24419 hectares of the suit land which translated to 6.03 acres thereof. That market forces and not value determine the price of land. He stated that what was crucial in P Exhibit 4 is the lorries of extracted hard soil only.

50. With regard to the third issue, in the preparation of DExhibit 10, DW2 adopted the then open market value of land approach (at that time). D Exhibit 10 in the general remarks bullet No. 4 reads in part:-

**" we could not justify the value of the excavated material on the affected area as we do not have an authentic geological report to support to the specific types of excavated material and quantities then at the same time of the said excavation"** (emphasis added)

51. It has emerged from the evidence of PW2 and DW2 that the valuation provided for in P Exhibit 4 and D Exhibit 10 are mere assumptions. The same are not supported by any formulae or geological report (s). I am conscious of sections 48 and 54 of the Evidence Act (Cap 80 Laws of Kenya) regarding opinion evidence including PExhibit 4 and DExhibit 10 which are not binding on the court as recognized in the case of **Amosom Builders Developers Ltd –vs- Gachie and 2 others (2009) KLR 628**. Nonetheless, the evidence of PW1 and DW2 including P Exhibit 4 and D Exhibit 10 are useful guidelines in the instant suit.

52. Be that as it may, I find that the value of the land before and after the trespass is not proved in PExhibit 4 ; **see Nakuru industries case (supra)**.

53. Quite clearly, the 1<sup>st</sup> third party did not challenge the claim put forth by the plaintiff and the defendant against him. PW1 was very succinct that the excavation of the morrum on the suit land was done by the defendant courtesy of the 1<sup>st</sup> third party as shown in 2<sup>nd</sup> third party Exhibit 1. DW1 confirmed that the 1<sup>st</sup> third party did D Exhibits 1, 5 and 7 with the defendant. In the circumstances, the defendants claim against the 1<sup>st</sup> third party stand cogent and unchallenged hence succeeds. The defendant's claim against the 2<sup>nd</sup> third party fails in the obtaining circumstances.

54. So, all the plaintiff' is entitled to is a modest amount in respect of general damages for trespass. The value of the extracted soil is only proved at Kshs. 13,050,430/= applying a reasonable rate of Kshs,2,000/- per ton lorry of extracted soil inclusive of PExhibits 5 (a) and 5(b) being professional fees of PW2. I am of the considered view and considering the entire case and circumstances, general damages are assessed at **Ksh. 100,000/=** for the plaintiff and against the defendant.

55. In a nutshell, it is the finding of this court that the plaintiff who is the absolute registered proprietor of the suit land is entitled to the land under **Article 40 (1) of the Constitution of Kenya, 2010**. The defendant with the aid of the 1<sup>st</sup> third party trespassed into the suit land rendering damage to the suit land and the plaintiff who is entitled to the reliefs sought in the plaint. The plaintiff and the defendant have proved their claims against the defendant and the 1<sup>st</sup> third party respectively on the balance of probabilities.

56. A fortiori, I make final orders in this suit as follows;

(a) The defendant's claim against the 2<sup>nd</sup> third party is hereby dismissed with costs to the 2<sup>nd</sup> third party.

(b) Judgment be and is hereby entered for the plaintiff and against the defendant and the 1<sup>st</sup> third party jointly and severally in terms as hereunder;

***i. Reliefs (i), (ii) and (v) sought in the plaint dated 26<sup>th</sup> May 2015 and filed in court on 23<sup>rd</sup> July 2015.***

***ii. Kshs. 100,000/= general damages for trespass.***

*iii. Kshs. 13,050,430/= being value of the extracted soil from the suit land.*

**DELIVERED DATED and SIGNED at MIGORI this 4<sup>th</sup> Day of DECEMBER 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of:**

Mr. Mabonga holding brief for Mr. Njoga learned counsel for the plaintiff

Mr. Mudeyi learned counsel for the defendant

Mr. Sam onyango learned counsel for the 2<sup>nd</sup> third party

Tom Maurice – Court Assistant