



South East Development Co Limited v Mutiso & 2 others (Environment & Land Case E011 of 2022) [2024] KEELC 392 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEELC 392 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E011 OF 2022
A NYUKURI, J
JANUARY 31, 2024**

BETWEEN
SOUTH EAST DEVELOPMENT CO LIMITED PLAINTIFF
AND
BISHOP DANIEL MUTISO 1ST DEFENDANT
ALEX MUTUKU 2ND DEFENDANT
ERIC NDINDA 3RD DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated 9th February 2022, the plaintiff sought against the defendant the following orders;
 - a. A declaration that the plaintiff is and continues to be the registered proprietor of all that property known as, LR. No. 209/27791, Mavoko.
 - b. The defendants jointly and severally be strictly enjoined and restrained whether by themselves or by their servants, agents or otherwise howsoever from trespassing on, alienating and/or in any way whatsoever interfering with the plaintiff's quiet possession over all that piece of property known as, LR. No. 209/27791, Mavoko.
 - c. A permanent injunction to issue requiring the defendants forthwith to desist either by themselves or their servants, agents or otherwise, from degrading the suit property, digging trenches on the suit property, subdividing the suit property or putting beacons on the suit property.
 - d. An order of restitution requiring the defendants jointly and severally to rebuild the destroyed perimeter fence on the suit property, remove any beacons or black cotton soil dumped on,



around or adjacent to the suit property and to refill all the trenches dug thereon, to return the suit property to its original form.

- e. Special damages.
 - f. Damages for trespass.
 - g. Aggravated damages.
 - h. Costs of this suit.
 - i. Interest of (e), (f), (g) and (h) at court rates until payment in full.
 - j. Such other and/or further relief as to this Honourable Court may deem just and fit to grant.
2. The plaintiff averred that at all material times they were the registered proprietor of the parcel of land known as LR. No. 209/27791 Mavoko (suit property), which they acquired for valuable consideration. They stated that for the past two years, the defendants were intermittently trespassing on the suit property, destroying the perimeter fence, digging trenches thereon and subdividing the same, without the plaintiff's authority, and despite their protests.
 3. The suit was opposed. The 1st defendant filed defence dated 29th November 2022 wherein he denied the plaintiff's claim in its entirety. Similarly, the 2nd and 3rd defendants vide their defence dated 2nd February 2023 denied the plaintiff's claim in its entirety. Subsequently, the plaintiff filed reply to defence.
 4. Upon close of pleadings, the suit proceeded to hearing by way of viva voce evidence.

Plaintiff's evidence

5. PW1 was Paul Wasanga, a director of the plaintiff's company. He adopted his witness statement dated 9th February 2022 as his evidence in chief. His testimony was that the plaintiff was the registered proprietor of the suit property. That the plaintiff pays land rates and other charges.
6. He stated that in October 2021, the defendants trespassed on the suit property, attempted to subdivide it and threatened to sell it to unsuspecting citizens. He stated further that the defendants had dug trenches and destroyed the fence on the suit property and dumped black cotton soil thereon. He sought for orders stated in the plaint. He produced several documents to wit; plaintiff's certificate of incorporation; certificate of title; clearance certificate; official receipts; rates payment request; photographs of the suit property; police OB; letter dated 27th August 2021; demand letter; a resolution to sue; and a report by the County Surveyor.
7. PW2 was Robert Abuga Morisi. He adopted his witness statement dated 9th February 2022 as his testimony in chief. He stated that he was the property manager of the suit property and the eye witness of the illegalities of the defendants herein. He stated that he had been on the suit property on a number of occasions when a gang of youths entered thereon and made attempts to subdivide the same and put beacons thereon and that the three defendants in concert with others did trespass on the suit property causing wanton destruction thereon, by digging deep trenches on the suit property to mark illegal subdivisions. That they also brought down the plaintiff's perimeter wall.
8. That marked the close of the plaintiff's case. The defendants failed to attend court despite service and therefore their respective cases were marked as closed without any evidence from them. The plaintiff filed submissions dated 2nd June 2023, in support of their case.



Plaintiff's submissions

9. Counsel for the plaintiff submitted that the plaintiff had proved to be the registered proprietor of the suit property by producing a certificate of title dated 9th November 2007. Reliance was placed on Sections 26 and 105 (b) (i) of the [Land Registration Act](#) to argue that titles issued under the repealed Registration of Titles Act are deemed to have been issued under the [Land Registration Act](#) and that a certificate of title is proof of indefeasibility of title.
10. The court was also referred to the case of Charles Karathe Kiarie & 2 Others v. Administrators of the Estate of John Wallace Mathare (deceased) & 5 Others [2013] eKLR for the proposition that in the absence of fraud, a title is indefeasible.
11. Counsel argued that the defendants' defence were mere allegations not backed by any evidence and that the 1st defendant did not avail any competing title to defeat the plaintiff's title. Counsel faulted the defendants' failure to avail any witness and argued that the plaintiff's evidence was un rebutted.
12. On whether there was trespass, counsel argued that the plaintiff's witnesses proved trespass by the defendants by producing photographs showing destruction of the fence and the report by the County Surveyor; which evidence was uncontroverted. Counsel argued that the plaintiff was entitled to the orders sought. They relied on the case of Duncan Nderitu Ndegwa v. KPLC & Another [2013] eKLR, to argue that once trespass is proved, it is actionable per se and indeed no proof of damage is necessary for the court to award general damages.

Analysis and determination

13. I have carefully considered the pleadings, evidence and submissions on record. The issues that arise for determination are as follows;
 - a. Whether the plaintiff is the lawful owner of the suit property.
 - b. Whether the defendants trespassed on the suit property.
 - c. Whether the plaintiff deserves the orders sought.
14. Section 26 of the [Land Registration Act](#) provides for indefeasibility of title upon registration as follows;
 26.
 - (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.



15. It is therefore clear that in the absence of proof that a title was obtained by fraud, misrepresentation, want of procedure or through a corrupt scheme, such title confers on the registered proprietor absolute and indefeasible ownership of the land in issue.
16. In this case, the plaintiff has produced a certificate of title as proof of payment of land rates, yet none of the defendants pleaded fraud or any other particulars of illegality that could impeach the title under Section 26 of the [Land Registration Act](#). The defendants in their defences merely denied the plaintiff's claim and none of them testified in court against the plaintiff's registration. Having considered the plaintiff's title and noting that the plaintiff was registered as proprietor of the suit property on 1st June 2007 and there being no allegations of fraud, misrepresentation, illegality, want of procedure or corruption, on the part of the plaintiff, I am satisfied that the plaintiff has provided that he is the lawful owner of the suit property.
17. On the question of trespass, the Black's Law Dictionary defines trespass as;
An unjustifiable entry by one person upon the land in possession of another.
In the instant suit, the plaintiff produced photographs showing trenches on the suit property and a destroyed fence which PW2 testified that the damage was caused by the defendants. No evidence was given by the defendants and therefore the plaintiff's evidence remains unchallenged. I therefore hold and find that the defendants trespassed on the suit property.
18. Registration vests rights on the registered proprietor, which rights should not be unlawfully interfered with by anyone. Section 25 of the [Land Registration Act](#) provides as follows;
- 25.
- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
 - (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
19. Therefore, acts of trespass are an interference with the rights conferred by registration and a trespasser ought to be stopped from acts of trespass so that a registered proprietor can enjoy the rights vested on them by registration. For those reasons, the plaintiff is entitled to orders of injunction restraining the defendants from trespassing on the suit property and orders for restitution.
20. It is trite that trespass is actionable per se and once trespass is proved, the registered proprietor is entitled to general damages, despite lack of proof of damages. In this case, the plaintiff has sought for general damages. There is evidence that the defendants entered their property destroyed the fence and dug trenches. The suit property measures 4.58 hectares. In the premises, I award damages of Kshs. 500,000/-.
21. On whether special damages should be granted, it is trite that special damages must not only be pleaded but the same must also be proved. Having considered the plaint, there are no particulars of special



damages suffered, and neither was there any evidence of special damages. The plaintiff pleaded and testified that the defendants destroyed the fence and dug trenches on the property. They sought for restitution. In the premises, I find and hold that the plaintiff did not prove special damages. However having shown that the fence was destroyed and trenches dug on the suit property by the defendants, the plaintiff is entitled to orders of restitution.

22. Aggravated damages are granted for purposes of punishing and deterring the defendants from the acts complained of. (See *Godfrey Julius Ndumba Mbogori & Another v. Nairobi City County* [2018] eKLR). In the instant suit, the plaintiff has not established the basis for claiming aggravated damages.
23. I therefore find and hold that the plaintiff is not entitled to aggravated damages.
24. In the end I am satisfied that the plaintiff has proved their claim as against the defendants and enter judgment for the plaintiff against the defendants jointly and severally as follows;
 - a. A declaration be and is hereby made that the plaintiff is and continues to be the registered proprietor of all that property known as, LR. No. 209/27791, Mavoko.
 - b. The defendants jointly and severally are hereby restrained whether by themselves or by their servants, agents or otherwise howsoever from trespassing on, alienating and/or in any way whatsoever interfering with the plaintiff's quiet possession over all that piece of property known as, LR. No. 209/27791, Mavoko.
 - c. A permanent injunction be and is hereby issued requiring the defendants forthwith to desist either by themselves or their servants, agents or otherwise, from degrading the suit property, digging trenches on the suit property, subdividing the suit property or putting beacons on the suit property.
 - d. An order of restitution be and is hereby issued requiring the defendants jointly and severally to rebuild the destroyed perimeter fence on the suit property, remove any beacons or black cotton soil dumped on, around or adjacent to the suit property and to refill all the trenches dug thereon, to return the suit property to its original form.
 - e. General damages in the sum of Kshs. 500,000/- are hereby awarded to the plaintiff.
 - f. The costs of the suit are hereby awarded to the plaintiff.
25. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 31ST DAY OF JANUARY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Makori for plaintiff

No appearance for defendants

Josephine - Court Assistant

