



Ongeri v County Government of Nyamira (Environment & Land Case E038 of 2021) [2024] KEELC 1537 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1537 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE E038 OF 2021**

JM KAMAU, J

MARCH 14, 2024

BETWEEN

GESAKA ONGERI PLAINTIFF

AND

THE COUNTY GOVERNMENT OF NYAMIRA DEFENDANT

JUDGMENT

1. This suit was filed on 14/7/2016 where the Plaintiff described himself as the Legal Administrator of the Estate of the late Ongeri Ogucha, his father who died on 17/11/1993.
2. He attached to the Plaint a copy of the grant of letters of administration intestate obtained from Kisii High Court Succession Cause No. 200 of 2008 on 29/7/2008 as proof of his legal capacity, the Plaintiff's claim is that the Defendant's engineer, one Cornelius Obure directed the driver of the Defendant's bulldozer to create a foot path on the Deceased's plot No. 3A- Metamaywa Market the effect of which was the destruction of the structures thereon. This was unlawful since the said footpath did not exist in the area map at all - Mwamangera Registration section Diagram No.28.
3. This was on 8/7/2016. There was also intention to proceed with the said trespass by widening the said road. The Plaintiff prayed for mandatory orders to back filing the dug out parts on plot No. 32A- Metamaywa Market, a permanent injunction restraining further excavation, earth pushing or any further trespass. He also prayed for the costs of the suit. The said prayers were framed as follows: -
 - A. Permanent injunction to restrain the Defendant, her agents and/or servants from any further trespass into plot No. 32A Metamaywa Market with a view of causing further excavation and / or earth-pushing to create an illegal road on the Estate of a Deceased person.
 - B. A mandatory injunction directed at the Defendant, her agents and /or servants to back -fill the dugout parts of the Plaintiff's plot No. 32A- Metamaywa Market (with a view of creating an illegal foot path/road)-forthwith.



- C. Costs of this suit and interest be awarded to the Plaintiff from the date of filing of this suit up to the time of judgment.
4. In defence thereof, the Defendant denied ever trespassing on the Plaintiff's parcel of land and while admitting that this court has jurisdiction to hear and determine this suit, she asked the court to dismiss the same.
5. The plaintiff amended the plaint on 29/5/2023 and filed the same on 30/5/2023 which he sought interest from the date of filing suit until the time of judgment. He also added the alternative prayer of special damages of Ksh. 3,700,000/- in accordance with the Valuation Report dated 18/3/2017. The said amended plaint was centered by the amended Defence of 7/6/2023 which was filed in court the following day. Witness statements were later filed and the suit commenced for Hearing on the 1/11/2023 when the Plaintiff Mr. Gesaka Ongeru repeated the averments contained in the plaint and also adopted his statement filed in court on 11/7/2023. The same is dated 6/7/2023. He also produced the following documents:-
1. Copy of grant of letters of Administration.
 2. Copies of Probate and Administration -Application in Kisii High succession cause No.200 of 2008.
 3. Copy of the Extract of minutes of Keroka Town Council dated 26/5/2008 which gave him the parcel of land in question.
 4. Letter dated 26/5/2008 showing that he had cleared all the rates and rents to the Council.
 5. Receipts showing the payments he has been making to the council
6. On cross examination by Ms. Kembo for the Defendant, the Plaintiff said that he did not have approvals for the buildings on the suit land. He also said that the building materials were indeed destroyed at site which included iron sheets, sand and bricks. On re -examination the witness said that he was up to date in the payment of rates.
7. Mr. Donald Mutinda, a private Valuer produced the valuation Report dated 18/3/2017 after carrying out the valuation of the destruction on the suit land on instructions from the plaintiff. The same was carried out on 18/3/2017 after almost 1 year after demolition in July, 2016, he put the value of demolition at Ksh. 3,700,000/- itemized as follows: -
- a. Land element Ksh. 2,000,000/-
 - b. Loss of income and business Ksh. 100,000/-
 - c. Loss of materials, labour and construction at Ksh.1,000,000/-
 - d. Building materials – Ksh. 500,000/-
 - e. Miscellaneous – Ksh. 100,000/-
8. He also testified that no road has been earmarked for construction on the suit land. He also testified that nothing was done on the suit land after demolition. On cross examination the valuer said that he estimated the value of the stolen materials and that the information came from his client, the plaintiff.
9. After the close of the Plaintiff's case, the chief works officer of the Defendant, Mr. Zacharia C.O. Ocharo adopted his recorded statement dated 26/9/2023 and produced a map sheet No. 28 for Mwamangera Registration section as well as a copy of the official search in respect of East Kitutu/



Mwamangera/967, a public land. He said there was no encroachment and on cross examination he said there was a road reserve.

10. After the close of the case, I invited both parties to file their submissions which I have considered before writing this judgment.
11. It is indeed factual that the Plaintiff's late father given by the County Council of Keroka plot No 32A at Keroka, Metamaywa Market as shown in the minutes to that effect dated 26/05/2008 signed by Mr. Astarico Onguso on the sale date. A letter to the commissioner of lands, the precursor to the chairman of the National lands Commission dated the same day was written. There are receipts from Keroka Town Council to the deceased being rent receipts for Ksh.1400 and 700/- respectively dated 8/3/2010 and 19/11/2012, a miscellaneous receipt for Ksh.5,100/- dated 19/08/2008. And a clearance certificate Ref. MIN/SP/TPW/18/08 in respect of plot No 32A. the Plaintiff has a grant of letter of Administration intestate in respect of the estate of the Deceased. The evidence on demolition has not been controverted. Photos of destruction and fresh dug out ground were produced in court and the only issue for determination is the quantum of damage which I will assess later after awarding Judgment for the plaintiff against the defendant in terms of prayer A of the amended plaint dated 29/5/2023.
12. I will not grant prayer Number B since executing the same may cause more harm than good.
13. In the case of special damages I will award of Kshs. 1,150,000/= made up as follows:-Demolitions Kshs. 750,000/=Loss of income not provedLoss of building materials – Kshs. 200,000/=Stolen materials not provedTotal Kshs. 950,000/=
14. I will also give damages for Trespass of Kshs. 100,000/= bringing the total figure of Kshs. 1,150,000/= . Costs of the same to the plaintiff plus interest on the same from the date of filing suit till payment in full.

JUDGMENT READ AND DELIVERED IN OPEN COURT ON 14TH MARCH, 2024.

HON. MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: - Brenda

Plaintiff's Counsel - Mr. Bigogo

Defendant's Counsel – Ms. Kerubo

