



**Mustafa (The administratrix of the Estate of Alia Bilkhekhan (Deceased) v Vaad Limited
(Environment & Land Case E179 of 2023) [2024] KEELC 4018 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 4018 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E179 OF 2023**

EK WABWOTO, J

APRIL 30, 2024

BETWEEN

**FAMIDA GULAH MUSTAFA (THE ADMINISTRATRIX OF THE ESTATE OF
ALIA BILKHEKHAN (DECEASED)) PLAINTIFF**

AND

VAAD LIMITED DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide a plaint dated 15th March, 2023 seeking for the following reliefs;
 - a. A declaration that the Plaintiff is the rightful and bona fide owner of the suit property.
 - b. A permanent injunction as against the Defendant restraining the Respondent by itself, its agents and/or servants from in any way trespassing, interfering with the suit property known as LR. No. 35/1/125 Eastleigh within Nairobi County.
 - c. Damages for trespass.
 - d. Costs of this suit.
2. The defendant never filed any responses nor participated during trial and hence the suit proceeded as undefended cause.
3. It was the Plaintiff's case that she was the administratrix of the Estate of Alia Bilkhekhan (deceased) and that she was in possession of the Letters of Administration of the Estate of the deceased. It was averred that on or about July 2021, the Defendant without any colour of right trespassed and begun constructing, excavating and has illegally obtained all necessary permits from all relevant authorities entered and began digging and alienating the Plaintiff's suit property.
4. The particulars of trespass were pleaded at paragraph J of the Plaint.



5. During trial, the Plaintiff relied on her witness statement dated 15th March, 2023 in her evidence in chief and she testified as the sole Plaintiff witness. She also reiterated the averments made in her plaint and urged the court to grant her the prayers sought.
6. The Plaintiff also filed written submissions dated 5th February 2024 wherein it was submitted as follows; that the Plaintiff is the rightful owner of the suit property known as LR. No. 35/1/125 and was in possession of the original title. It was also argued that the actions of the Defendant amounted to trespass. The following cases were cited in support of the Plaintiff's case; Rhoda S. Kiilu vs Jiangxi Water and Hydropower Construction Kenya Limited [2019] eKLR, African Inland Church – Kenya (Registered Trustees) vs Catherine Nduku & 12 others [2017] eKLR, and Nyangeri Obiye Thomas vs Yunike Sakagwa Nyoiza ELC Case No. 277 of 2018.
7. The court has considered the pleadings filed herein together with the oral and documentary evidence adduced herein and is of the position that the main issue for consideration is whether the Plaintiff has proved her case to the required standard to warrant the grant of the orders sought.
8. Even though this suit proceeded as undefended cause, the Plaintiff equally has a duty to prove her case to the required standard. In the case of Kirugi and Another Vs Kabiya & 3 others (1987) KLR 347 the Court of Appeal held that;

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”

Similarly, in the case of Gichinga Kibutha Vs Caroline Nduku (2018) eKLR the Court held that;

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

9. In the instant case, evidence was tendered to the effect that the Plaintiff is the owner of the suit property. A copy of the title deed was produced in evidence. Evidence was also tendered to the effect that the Defendant without any justification has trespassed on the suit property from July 2021.
10. The law is very clear on the position of a holder of a title in respect to the land. Section 24(a) of the [Land Registration Act](#) provides for the interest conferred by registration. It provides;

“Subject to this act the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or apparent thereto.”

Section 26(1) of the [Land Registration Act](#) provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible owner 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.”
11. The evidence adduced by the Plaintiff was not controverted and the court is satisfied that the Plaintiff has proved her case to the required standard.
12. The next issue for consideration is whether the Plaintiff is entitled to the reliefs sought. The Plaintiff sought for several reliefs as numbered in her plaint. In respect to trespass, the Plaintiff made reference to the case of *Nakuru Industries Limited vs S S Mehta & Sons* [2016] eKLR where the court found that the Defendants had trespassed onto the Plaintiff’s land and proceeded to award Ksh. 500,000/- for trespassing and excavating onto the Plaintiff’s land.
13. In assessing and awarding the quantum of general damages, this Court has taken into account and adopted the principles espoused in the case of *Kenya Power & Lighting Company Ltd v Ringera & 2 others (Civil Appeal E247 & E248 of 2020)* (Consolidated) [2022] KECA 104 (KLR) (4 February 2022) (Judgment), where the Court of Appeal stated and held thus;
- “The principles both parties have relied upon in their invitation for the Court to decide either way are those enunciated by the predecessor of this Court and either crystallized or restated by this Court which we find prudent to distill and replicate as hereunder:
- i. Harlburys Laws of England 4th Edition Vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner’s land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.
- ii. *Duncan Nderitu Ndegwa vs. Kenya Pipeline Company limited & Another* [2013] eKLR - damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.
- iii. *Philip Ayaya Aluchio vs. Crispinus Ngayo* [2014] eKLR, - the measure of damages for trespass is the difference in the value of the plaintiffs’ property immediately before and immediately after the trespass or the cost of restoration whichever is less.”
14. Considering the elaborate principles which have been encountered and highlighted above, coupled with the locality of the suit property as well as the duration of trespass complained of and considering the right of ownership to land as espoused vide Article 40(3) of *the Constitution* of Kenya 2010, it is the finding of this court that an award of Kshs. 1,000,000 for general damages would be sufficient.



15. In respect to cost, the same is at discretion of the court. However having considered that the Defendant's actions as being that which led the Plaintiff to file the instant suit, this court shall award costs to the Plaintiff.

Final orders

16. In conclusion, the court is satisfied that the plaintiff has proved her case to the required standard and this court shall proceed to grant the following orders;
- a. A declaration be and is hereby issued that the Plaintiff is the rightful and bonafide owner of the suit property
 - b. A permanent injunction be and is hereby issued as against the Defendant restraining the Defendant by himself, its agents and/or agents from in any way interfering with the suit property known as LR. No. 35/1/125 Eastleigh within Nairobi County.
 - c. General damages for trespass for Ksh. 1,000,000/- is hereby awarded to the Plaintiff.
 - d. The Plaintiff is hereby awarded costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Cheboin for the Plaintiff.

N/A for the Defendant.

Court Assistant: Caroline Nafuna.

