



**Ndua v Waititu & another (Environment & Land Case 862 of 2017)
[2024] KEELC 3543 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3543 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 862 OF 2017**

JG KEMEI, J

APRIL 30, 2024

BETWEEN

JAMES MBURU NDUA PLAINTIFF

AND

FERDINAND NDUNGU WAITITU 1ST DEFENDANT

COUNTY GOVERNMENT OF KIAMBU 2ND DEFENDANT

JUDGMENT

1. Through an amended Plaintiff dated the 10/1/2018, the Plaintiff filed suit against the Defendants seeking the following orders;
 - a. A permanent injunction restraining the Defendants, their servants, workmen, licensees, agents or any other persons acting on their own behalf or on behalf of the Defendants from howsoever trespassing, entering, encroaching, remaining in, selling, subdividing, taking over, dispossessing, alienating, fencing, cultivating, returning into constructing and or harassing the Plaintiff or interfering with his peaceful entitlement and possession of land Number LR 4953/2471.
 - b. Kshs. 18,729,545.60 and interest.
 - c. General damages for trespass and interest.
 - d. Costs of the suit and interest.
2. It is the Plaintiff's case that the 1st Defendant in the Company of others trespassed the suit land, demolished the perimeter wall and occasioned him loss and damage.
3. The Defendants denied the Plaintiff's claim vide the statement of defence dated the 5/6/2018. In the alternative the Defendants further denied the allegations of demolishing of the boundary wall.



Interalia, that the Plaintiff did not submit building plans within one month from the date of approval of the boundary wall and that there is no certificate of workmanship availed on the construction works and that the erected boundary wall did not observe road reserves, way leaves and drainage reserves. That the alleged demolitions were carried out by unknown persons and not by the Defendants as alleged by the Plaintiff.

4. At the hearing the PW1 - Dr James Mburu Ndua testified and relied on his witness statement dated the 10/1/2018. That he is the owner of the suit land measuring 7.5 acres in Thika – Industrial area. That he built a permanent boundary wall on the suit land.
5. That on the 13/11/2017 his caretaker called him and informed him that the then Governor of Kiambu, the 1st Defendant had entered the suit land with a group of people and was busy destroying the boundary wall. That he called his brother Peter Chege Ndua to rush to the suit land with the documents evidencing ownership which he did but the 1st Defendant did not even give him a chance to present the said documents. That he got the second call from Rev. Francis Manyara Kamau who informed him that he went to site and met the 1st Defendant and inquired from him why the suit land was being invaded. That the 1st Defendant retorted that the land was public land that had been grabbed by the Plaintiff. That on the 14/11/2018 he visited the suit land in the Company of his brother Peter and Githaiga, the caretaker and found the demolition ongoing. That the goons who were undertaking the demolition refused him entry. He found that his animals had been stolen and crowds were carting away stones and steel from the suit land. That he attempted to report the matter on the 14/11/2018 but the police informed him that they could not interfere with what the Governor (1st Defendant) had said and done. That on the 17/11/2018 he returned to the Police Station and managed to report the complaint.
6. Further he stated that prior to the invasion and demolition no one had claimed the land nor had he been notified that it was a public land. That he sought and obtained building approvals from the Municipal Council of Thika to construct the boundary wall. That neither did the National Land Commission or any Government Agency raise any issue with his land. That he complied with the payment of land rates and rent fully. That he sought and obtained Court orders and with the help of the police removed people who had gone into the land and subdivided it amongst themselves.
7. That he suffered damages which he has caused to be assessed and presented the damage assessment report marked as MFI 18 and 19. In addition that his caretaker was also injured in the process of the demolition.
8. In cross examination the witness stated that he spent about Kshs 18 Million to construct the perimeter wall. That he was informed that the 1st Defendant and some Members of the County Assembly (MCAs) from Kiambu County were destroying the boundary wall. That he possessed the approvals for the construction of the wall from the Council. Asked about the survey plans, he informed the Court that he did not have the original plan nor architectural plans. With respect to the report to the police he stated that the first time he reported the matter to Makongeni Police Station, the police refused to record his complaint but he went back again on 17/11/2018 when his statement was finally recorded. That he was never served with any complaint that the boundary wall was not compliant with the by-laws of the Council/building permit.
9. PW2 – Royford Mwenda Muthamia stated that he is a loss assessor and that he was commissioned by the Plaintiff to carry out the assessment of the loss suffered as a result of the demolition of the boundary wall. That he visited the suit land took pictures and prepared the report dated 6/12/2017.



10. In cross he stated that the entire wall was pulled down and the stones and material carted away and there was debris all over. That he visited the site two weeks after the demolition took place. That the assessment was based on replacement or reinstatement basis. That he also used the building plans to prepare the report. That a section of the wall remained and that the debris on the site could not be reused.
11. PW3 stated that Harun Githaiga Muturi informed the Court that he was employed as the caretaker at the suit land. He stated that on the material date he and his colleagues were working at the suit land when he heard a loud bang at the gate and upon opening he was met by the 1st Defendant and other people who were beginning to demolish the perimeter wall and the gate. That he took photographs of the invasion and called the Plaintiff to inform him of the occurrences on the suit land.
12. PW4 - Rev Francis Manyara Kamau stated that he was present when the 1st Defendant and some officers from the 2nd Defendant pulled down the wall. That the people demolishing the wall were being supervised by the 1st Defendant. That he knew that the land belonged to Dr Mburu, the Plaintiff. That he went up to 1st Defendant and asked him what was happening and he replied that the land had been grabbed by the Plaintiff. That he met the 1st Defendant on the land. That thereafter he called the PW1 and informed him the happenings on the suit land. That there were armed police on the land too.
13. PW5- Peter Chege Ndua stated that he is the brother to the Plaintiff. That on 13/11/2017 he was at the Majengo area of Thika Town and at around 11.30 am he received a call from Githaiga, the caretaker, who informed him that the 1st Defendant had demolished the perimeter wall. That he looked for the land ownership documents and sped to the suit land. That the armed police on the ground kept him away from the 1st Defendant whom he had intended to show the ownership documents. That he then went to the Officer Commanding Station (OCS) Makongeni who was with the 1st Defendant and explained that the land belonged to the Plaintiff but the demolition went on unheeded. That later he reported the matter to Makongeni police where he was given police officers to escort them to the land to rescue the domestic animals.
14. PW6 – Chief Inspector Peter Ileri Nyaga testified and produced Occurrence Book No. 38 of 17/11/2017 and OB No. 50 of 29/11/17. The report for 17/11/2017 was with respect to malicious damage. That an Inspector Alice was directed to investigate the complaints. He stated that upon checking in their office he found out that there were no investigations that were conducted despite the Plaintiff having reported a complaint of malicious damage to his property.
15. The Defendants failed to lead any evidence during the hearing of the case in support of their defence.

The written submissions

16. The Plaintiff framed two issues for determination by the Court; whether the Defendant trespassed on the Plaintiff's land; whether the Plaintiff is entitled to the reliefs sought.
17. It was submitted that if no evidence is tendered in support of an averment in a pleading such defence or averment remains a mere statement. That in this case the Plaintiff's case against the Defendants remain uncontroverted.
18. On the question of trespass, it was submitted that the suit land belongs to the Plaintiff as can be seen from the certified copy of the title. That PW2, 3, 4 & 5 all testified that they witnessed the 1st Defendant supervising the demolition of the perimeter wall on the suit land. That the presence of the County Motor Vehicles at the scene shows that the 1st Defendant was there in his official capacity as



the Governor of Kiambu. Secondly the incident attracted public attention and media including the print media. That the act of trespass was not controverted and the Court was urged to so find.

19. It was submitted that Section 24, 25 and 26 of the [Land Registration Act](#) confers absolute ownership rights and privileges to the Plaintiff including the right to peaceful occupation and enjoyment of the suit land. That no evidence was adduced before the Court to impeach the title of the Plaintiff. The Court was urged to restraint the Defendants from interfering with the suit land.
20. The Plaintiff submitted that trespass having been proven, the Plaintiff is entitled to damages without the necessity of having to proof damages. The case of [Duncan Nderitu Ndegwa Vs Kenya Pipeline Company Limited & Anor](#) (2013)eKLR was cited where the Court stated as follows;

“On the issue and quantum of general damages, once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary to for the Court to award general damages.”
21. For the above reason it was submitted that the sum of Kshs 10 Million being general damages for trespass is adequate in the circumstances. The case of [Rhoda S Kiilu Vs. Jaingxi Water and Hydropower Construction Kenya Limited](#) (2019) eKLR was cited in support of the proposition.
22. In relying on the loss assessment report dated the 6/12/2017, the Court was urged to award the sum of Kshs 18,729,545.60 being the assessed costs for the reinstating the perimeter wall.

Analysis and determination

23. Having considered the pleadings the evidence adduced at the trial, the written proceedings, the key issue for determination is whether the Plaintiff has proven his case.
24. The standard of proof in civil cases is that of proof on a balance of probabilities. Section 107 of the [Evidence Act](#) provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The Plaintiff therefore bears the onus to proof his case on a balance of Probabilities.
25. The Plaintiff led evidence that he is the registered owner of the suit land. According to the record, the Plaintiff was issued with a title for a term of 99 years from the 1/1/1996. On 15/9/2012 the Plaintiff sought and obtained a development permission from the Municipal Council of Thika to construct a boundary wall around the suit land. There is also evidence of payment of land rates and rent by the Plaintiff as shown by the Clearance Certificates dated the 30/11/2010, 4/2/2011 and 10/6/2014. It is not in dispute that the suit land is not included in the National Land Commission report adduced in evidence or that it is one of the properties earmarked for revocation of titles for one reason or another.
26. The Court is satisfied that the Plaintiff has proven proprietary interest in the suit land.
27. The next question is whether there was trespass on the suit land by the Defendants. The [Trespass Act](#) defines trespass as follows;
 1. Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.
 2. Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.



28. Evidence was led by PW2 that the 1st Defendant led members of public together with some County officials in demolishing the perimeter wall. He tried to explain to the 1st Defendant that the land was private property but the 1st Defendant shouted back that they had blocked the water and ordered the mob to continue demolishing. In surrender, he called the Plaintiff and explained about the trespass and the demolition of the wall that was ongoing. PW3 – Rev Francis Manyara Kamau stated that he was driving along the road between BAT and Broadway Bakery when he saw many vehicles parked on both sides of the road. Among the vehicles was a police car and County Government of Kiambu vehicles. He stated that there were many people on the suit land. That he knew the land belonged to the Plaintiff. He entered the suit land to inquire what was going on and he was told that the 1st Defendant had come to demolish the wall on the basis that it was public land. That he spotted the 1st Defendant standing with a group of people and approached him as to the goings on and he said that the land was grabbed by the Plaintiff and that there was a public road cutting across. By then a 1/3 of the wall had been demolished and the rest was in the process of being demolished.
29. Peter Chege Ndua testified that he came to the suit property with copies of documentary evidence that the Plaintiff owned the land after he received a call from the Plaintiff. On arrival he found the 1st Defendant directing the demolition of the perimeter wall. He approached the 1st Defendant with the copies of title but he was rebuffed.
30. The long and short of the evidence is that the 1st Defendant was not only present with some officials of the County but was actively directing the mob to demolish the wall while being guarded by armed police.
31. On the basis of the above evidence the Court is of the view that the Plaintiff has proven trespass and demolition of the perimeter wall by the Defendants.
32. It is trite that a land owner enjoys special protections provided for under Sections 24, 25 and 26 of the [Land Registration Act](#). I shall reproduce the paras for emphasis;

“Interest conferred by registration

24. Subject to this Act –

- a) The registration of a person as the proprietor of land shall vest in the person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of proprietor

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 interest 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.
26. Certificate of title to be held as conclusive evidence of proprietorship
- 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 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.
 3. A certified copy of 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.”
33. As earlier alluded to in the Judgment the Plaintiff holds a title for the suit land. This Court is mandated to recognize a title 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.”
34. The Court did not receive any evidence to challenge the title of the Plaintiff and the Court is satisfied that on the basis of the evidence adduced the Plaintiff is the absolute owner of the land.
35. *The Constitution* provides that even in circumstances where the land was not obtained lawfully the due process of the law must be followed before a proprietor of title is dispossessed of the land. Even for the sake of argument, if the land was public (no evidence was given) then there exists a legal framework under which the land is recovered back to the public. This country being governed by the rule of



law cannot countenance the rule of the jungle where individuals enter another's land in the name of recovering it for the public.

36. In end I find that trespass has been proven.
37. It is trite that trespass is actionable per se without having to prove actual damages. In this case the land measures 7.5 acres and the perimeter wall was demolished. The 1st Defendant was advised that the land was private but he refused to stop the demolition. For that reason the Court is of the view that a sum of Kshs. 10 Million is awardable as general damages.
38. On the question of special damages, evidence was adduced by way of a loss assessors report which indicates the replacement cost of rebuilding the wall is Kshs. 18M. This evidence remains further bolstered with the Bill of Quantities adduced in evidence which shows that the total construction costs was in the sum of Kshs 18.0 M. This evidence remains unrebutted. It is allowed.
39. In the absence of any evidence to the contrary and based on the evidence adduced in this case, I enter judgement in favour of the Plaintiff as follows;
 - a. A permanent injunction restraining the Defendants, their servants, workmen, licensees, agents or any other persons acting on their own behalf or on behalf of the Defendants from howsoever trespassing, entering, encroaching, remaining in, selling, subdividing, taking over, dispossessing, alienating, fencing, cultivating, returning into constructing and or harassing the Plaintiff or interfering with his peaceful entitlement and possession of land Number LR 4953/2471.
 - b. Kshs. 18,729,545.60 and interest.
 - c. General damages for trespass is awarded in the sum of Kshs. 10,000,000/-
 - d. Costs of the suit and interest shall be in favour of the Plaintiff.
40. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 30TH DAY OF APRIL, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff – Absent

1st and 2nd Defendants – Absent

Court Assistants – Phyllis/Oliver

