



**Wetwe v Zakayo (Environment and Land Appeal E033 of 2022)
[2024] KEELC 3480 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3480 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E033 OF 2022**

DO OHUNGO, J

APRIL 30, 2024

BETWEEN

JOSEPH SHIUNDU WETWE APPELLANT

AND

FRANCIS CHITECHI ZAKAYO RESPONDENT

(Being an Appeal from the Judgment and Decree of the Senior Principal Magistrate's Court at Butere (Hon. B Ojoo, Senior Principal Magistrate) delivered on 5th July 2022 in Butere MCELC No. E052 of 2021)

JUDGMENT

1. Litigation leading to this appeal started in the Subordinate Court on 20th December 2021 when the appellant filed a plaint dated 20th December 2021 against the respondent. The appellant averred in the plaint that he was the registered proprietor of land parcel number North Wanga/Koyonzo/3592 (the suit property) and that the respondent trespassed into the suit property in September 2021 and later raided his (the appellant's) homestead on 7th October 2021 in the company of twenty young men and forced him to enter into an agreement dated 7th October 2021.
2. The appellant therefore prayed for judgment against the respondent for:
 - a. A declaratory order do issue that agreement dated 07/10/2021 between the Plaintiff and the Defendant was obtained illegally by coercion and the same be declared void and be cancelled.
 - b. An order of eviction do issue against the Defendant, his agents, servants or whosoever claims from him from L.R. No. North Wanga/Koyonzo/3592.
 - c. An order of permanent injunction do issue against the Defendant in person, his servants, agents or whosoever claims from him be restrained from dealing in any manner with L.R. No. North Wanga/Koyonzo/ 3592.



- d. Damages for illegal trespass to the suit land.
 - e. Costs of this suit with interest.
3. The respondent neither entered appearance nor filed any defence. The matter proceeded undefended.
 4. Upon hearing the matter, the Subordinate Court (Hon. B Ojoo, Senior Principal Magistrate) delivered judgment on 5th July 2022 wherein she found no merit in the case and dismissed it with costs in the cause.
 5. Dissatisfied with that outcome, the appellant filed this appeal on 16th August 2022 through Memorandum of Appeal dated 13th August 2022. He prayed that the judgment be set aside.
 6. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:
 1. That the learned trial Magistrate erred both in law and in fact in failing to appreciate the fact the appellant was the registered proprietor of L.R. No. North Wanga/Koyonzo/3592 as such has unfettered rights and privileges to deal with or dispose of the suit land in any way he so wishes including evicting the Respondent by himself, all his agents or servants or whosoever claims title from him from the suit land or restraining the Respondent and all his agents, servants or whosoever claims from him from dealing with the suit land.
 2. That the learned trail Magistrate erred both in law and fact when she dismissed the suit before her that the Appellant had not proved the Respondent had trespassed on the Appellant's suit land yet the evidence on record vide an agreement executed by the Appellant and Respondent prepared on 07/10/2021 which was adduced before court clearly expressed the Respondent was in occupation and use of the suit land.
 3. That the learned trial Magistrate erred both in law and fact in considering irrelevant issues in arriving at her decision when she stated that the Appellant did not avail a surveyor's report and the photograph presented by the Appellant was undated yet Respondent has admitted in the agreement before court he was in possession of the Appellant's suit land and was carrying on a "*posho mill*" business.
 4. That the learned trial Magistrate erred both in law and fact by not appreciating the evidence presented by the Appellant that he did not authorize the Respondent's entry into the Appellant's suit land and the agreement through which the Respondent based his entry on the Appellant's suit land was procured through duress hence void and further the alleged person who sold the Appellant's suit land to the Respondent had no title to pass to the Respondent.
 5. That the learned trial Magistrate failed to appreciate both the law and fact that the agreement entered into between the Respondent and Appellant was procured through duress thus was void.
 6. That the trial learned Magistrate misapprehended both the law and facts thus arriving at a decision which was unlawful and unjust.
 7. The learned trial magistrate delivered Judgment against the weight of evidence presented in court.
 7. The appeal was canvassed through written submissions. The appellant argued that as the registered proprietor of the suit property, he was entitled to expel encroachers like the respondent and that the learned magistrate erred in disregarding his rights of proprietorship. That pursuant to the agreement dated 7th October 2021, which was executed by the parties, the respondent expressly admitted that



he was in occupation and use of half an acre of land parcel number North Wanga/Koyonzo/1166 where he was carrying on his “posho” mill business. The appellant further argued that he produced a photograph of the “posho” mill and that land parcel number North Wanga/Koyonzo/1166 was previously registered in his names as was evidenced by certificate of official search at page 44 of the record of appeal. That in the agreement dated 7th October 2021, the respondent clearly expressed himself that he purchased a half an acre out of land that was formerly land parcel number North Wanga/Koyonzo/1166 from Martin, a son to the appellant.

8. The appellant further argued that he did not sanction the respondent’s entry into the suit property and that the trial magistrate erred in holding that he had not demonstrated trespass. He added that a surveyor’s report was not mandatory to determine whether the respondent was in occupation of the suit property. Regarding the issue of whether he was forced to sign the agreement dated 7th October 2021, the appellant argued that having been assaulted by the respondent on 6th October 2021, he was forced to execute the agreement on 7th October 2021 through duress in the presence of a gang and that consequently, the was void and ought to have been cancelled. The appellant therefore urged this court to allow the appeal.
9. Although evidence of service of directions and notices was availed, the respondents neither filed submissions nor participated in the hearing of the appeal.
10. This being a first appeal, this court’s mandate is as stated by the Court of Appeal in *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR:

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority vs Kustron (Kenya) Limited* 2000 2 EA 212.

11. I have considered the grounds of appeal, the pleadings, the evidence, and the submissions. The issue that arises for determination is whether the reliefs sought ought to have issued.
12. There is no dispute that the appellant is the registered proprietor of the suit property. A perusal of the certificate of search dated 16th November 2021 shows that the appellant became the first registered proprietor of the suit property on 29th June 2021. Further, perusal of the certificate of search dated 8th November 2021 in respect of North Wanga/Koyonzo/1166 shows that the suit property was created on 29th June 2021 following subdivision of North Wanga/Koyonzo/1166 into several new parcels. The appellant was also the registered proprietor of North Wanga/Koyonzo/1166.
13. To the extent that the appellant is registered proprietor of the suit property, is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Section 26 of the Act obligated the trial court to accept his certificate of title as conclusive evidence of proprietorship unless the provisos under Section 26 (1) (a) or (b) were established. There was no case before the trial court seeking nullification of the appellant’s title.
14. The appellant’s testimony that the respondent entered the suit property in September 2021, planted trees and established a posho mill therein was not controverted by the respondent. The appellant sought eviction of the respondent from the suit property, a registered parcel of land whose eliminations are established pursuant to the *Land Registration Act*. In those circumstances, there was no need to avail a surveyor’s report. The learned magistrate erred in declining to issue the order of eviction on account of absence of a survey report.



15. The appellant also sought a permanent injunction to restrain the respondent, his servants, and agents from dealing with the suit property. A litigant seeking a permanent injunction must demonstrate that his case is meritorious and that he will suffer damage if the order is not granted. See *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR and *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR. As the registered proprietor of the suit property and in view of the evidence that the respondent had entered the suit property, planted trees, and established a *posho mill* therein, the appellant met the test for grant of a permanent injunction.
16. The appellant further sought a declaration that what he termed as “agreement dated 7th October 2021” was obtained illegally by coercion hence void and should be cancelled. For a valid contract to exist, there must be an offer, acceptance, consideration, and an intention to create a legal relationship. The Court of Appeal of Jamaica stated in *Keith Garvey v Ricardo Richards JM* 2011 CA 47 thus:

It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into the contractual relationship and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement, is in existence.
17. Once the existence of a contract is established, a Court of Law cannot rewrite the contract between the parties and the parties are bound by the terms of the contract, unless coercion, fraud or undue influence are pleaded and proved. See *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR.
18. I have perused the document referred to as agreement dated 7th October 2021. As correctly observed by the learned magistrate, it is titled “*Agano Ya Kulipa Deni*” which is Kiswahili for “Agreement to repay debt.” The document is not signed by the respondent. The appellant is indicated as “Host” while against the respondent’s name some digits are inserted. The digits could be the respondent’s national identity card number. I have not seen any signature by the appellant in the document. It is unclear from the faint copy that was produced before the Subordinate Court if the appellant affixed a thumb print as opposed to signing. I also note that the document concerned plot number “North Wanga Koy 1166” and not the suit property herein. Even if one were to say that it concerned North Wanga/Koyonzo/1166, it will be noted that as of 7th October 2021 when the document was prepared, North Wanga/Koyonzo/1166 was no longer in existence, having been closed on 29th June 2021 upon subdivision. The appellant failed to establish existence of an agreement or contract dated 7th October 2021. I agree with the learned magistrate the appellant failed to make a case for cancellation of what he termed as “agreement dated 7th October 2021.”
19. The appellant also sought damages for trespass. It is trite that an owner of land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass. Reasonable damages are payable where the trespasser has made use of the owner’s land. See *Halsbury’s Laws of England* 4th Edition Vol. 45 at paragraph 26 page 1503. Determination of the quantum of general damages is a matter for the discretion of the court, which has to be exercised judiciously.
20. In his submissions before the Subordinate Court, the appellant urged the said court to award him Kshs 50,000 being nominal damages for trespass. Considering that the respondent entered the appellant’s land, planted trees, and established a *posho mill* therein, I am satisfied that Kshs 50,000 as nominal damages for trespass is reasonable in the circumstances, and I award it.



21. In view of the foregoing discourse, this appeal partly succeeds. I set aside the judgment of the Subordinate Court and replace it with the following orders:
- a. The respondent to vacate the parcel of land known as North Wanga/Koyonzo/3592 within Sixty (60) days of service upon him of the orders made in this judgment. In default, the Subordinate Court to issue an eviction order.
 - b. A permanent injunction is issued restraining the respondent, his servants, agents, or anyone claiming under him from dealing in any manner with the parcel of land known as North Wanga/Koyonzo/3592.
 - c. The appellant is awarded Kshs 50,000 (Fifty Thousand) being nominal damages for trespass.
 - d. The appellant shall have costs of the suit in the Subordinate Court and interest thereon.
 - e. Considering that the respondent did not resist this appeal, I make no order as to costs of this appeal.

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

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Luchivya for the Appellant

No appearance for the Respondent

Court Assistant: M Nguyayi

