



Ouko (Suing as legal representative of the Estate of William Ouko Mboga) v Waga & 3 others (Environment & Land Case 12 of 2016) [2024] KEELC 3968 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3968 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 12 OF 2016**

**E ASATI, J
APRIL 25, 2024**

BETWEEN

GEORGE MBOGA OUKO (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF WILLIAM OUKO MBOGA) PLAINTIFF

AND

**ELIDA AKELLO WAGA 1ST DEFENDANT
OMONDI WAGA 2ND DEFENDANT
ODIDI WAGA 3RD DEFENDANT
OTIENO WAGA 4TH DEFENDANT**

JUDGMENT

1. William Ouko Mboga (herein called the original plaintiff), vide the plaint dated 20th January, 2016 sued the Defendants herein over a parcel of land known as Kisumu/Bar “B”/1752 (the suit land herein). In the pendency of the suit, William Ouko Mboga passed on and was vide court order dated 20th September, 2021 substituted with George Mboga Ouko the present Plaintiff. Vide the amended plaint dated 25th February, 2022, the Plaintiff sought for;
 - a. an order of permanent injunction restraining the Defendant from trespassing and/or interfering in any way with land parcel number Kisumu/Bar “B”/1752 to be effected by OCS Maseno police station.
 - b. General Damages for trespass.
 - c. Costs of the suit.
 - d. Any other relief that the court deems fit to grant.
2. The Defendants filed a Statement of Defence dated 18th April 2016, denying the Plaintiff’s claim.



DIVISION - The Plaintiff's Case

3. The Plaintiff's case is that the original Plaintiff was the registered owner of the suit land. That on 27th December, 2016 when the Plaintiff commenced construction on the suit land when the Defendants unlawfully trespassed there onto, and forcefully evicted the Plaintiff from the land and have remained on the land to date thereby denying the Plaintiff the use and enjoyment of the property. He therefore sought the intervention of the court.

The Defendants' Case

4. The Defendants denied the Plaintiffs' claim and put him to strict proof thereof.

Summary of the Evidence

5. On behalf of the Plaintiff two witnesses testified. PW1 was the Plaintiff. He adopted the contents of his witness statement dated 25th February, 2022 as his evidence in chief. He had stated in his witness statement that he is the son of the original Plaintiff. That on 27th December, 2015 members of his family and his late father were about to commence construction of his home as the eldest son on the suit land when the Defendants and a group of about ten youths descended upon his family, assaulted them using stones, machetes and forcefully evicted his family from the suit property. That the Defendants threatened the Plaintiff's family members never to set foot on the suit land.

That the Defendants took possession, cut down the live fence and the trees the original Plaintiff had planted for burning charcoal. That the Defendants are harvesting and selling stones from the land. That the Defendants have no right to the suit land.

6. The Plaintiff produced certificate of death for the original Plaintiff, Grant of Letters of Administration, Letter from one Cyrus Ngatigi in respect of L.R. No. Kisumu Bar "b"/1752, letter dated 5/11/1997 by District Land Registrar Kisumu, sketch map, certificate of official search for Kisumu Bar "B"/1752, copy of register for the same land, a court order in Kisumu HCC No.103 of 2005, letter dated 2nd February, 2016 addressed to the District Surveyor, proceedings and Judgement in Kisumu HCCC No.103 of 2005, decree in the same case and title deed for L.R. No. Kisumu /Bar "B"/1752).
7. The Plaintiff stated that the 2nd to 4th Defendants are sons of the 1st Defendant.
8. On cross-examination he stated that the Defendants have been their neighbours for about 30 years. That land parcel Numbers Kisumu/ Bar "B"/1752 and 1729 are separate and distinct parcels. That Caleb Ogonda who had been sued in the Kisumu HCCC No.103 of 2005 vacated the suit land in obedience of the court order. That it was after this that the Defendants came to claim the land.
9. PW2 Edwin Okoth Ouko adopted the contents of his witness statement as his evidence. He stated that the original Plaintiff was his father. That their home is on the suit land. That there had been an earlier suit namely KSM HCCC No.103 of 2005 between the original Plaintiff and one Caleb Ogonda Mbok an in-law of the 1st Defendant which case was decided in favour of the original Plaintiff. That it was after the said Caleb Mbok had vacated the suit land that the Defendants without any colour of right or authority came into the suit property and started cutting down trees, crushing stones and selling them for profit.
10. On cross-examination, he stated that the 1st Defendant owns land in the neighbourhood. That four children of the original Plaintiff live on the suit land and have their homesteads thereon to date. That there was a time when his brother was putting up a house and some people stopped them. That the 1st Defendant was one of the people who stopped them. That some people were charged at Winam court.



11. PW3 Geoffrey Mbok Okongo, a land Surveyor, testified that he conducted a survey of Land Parcels No. Kisumu/Bar/1752 and No. Kisumu/Bar/1729 pursuant to a court order. That his findings were that the portion claimed by the Plaintiff was exclusively in parcel NO.1752. That the two parcels of land do not share a common boundary but that there is an access road separating the two parcels. That parcel No. No. Kisumu/Bar “B”/1752 had marks on the ground and lastly that land parcel No. Kisumu/Bar “B”/1752 had a homestead without any encroachment to parcel No.1729. That the recommendation made was that the portion of land being claimed was a distinct parcel No. No. Kisumu/Bar “B”/1752 and that parties should obey the physical boundaries. He produced the surveyor’s report dated 21st March, 2018 as exhibit.
12. On behalf of the Defendant, the 1st Defendant testified as DW1. She adopted the contents of her witness statement dated and filed on 8th October, 2023 as her evidence in chief. She stated that the Plaintiff who is the owner of land parcel No. No.Kisumu/Bar “B”/1752 is her neighbor. That she lives on land parcel known as No. Kisumu/Bar/1729. That there is a road separating the two parcels. She produced documents as exhibits namely, title deed for No. Kisumu/Bar/1729.
13. On cross-examination, DW1 stated that she was not aware of previous case over the suit lands. That Caleb Ogonda Mbok was her brother-in-law but does not stay on land parcel No.1729 though he stayed there previously but later moved out. She stated that parcel No.1729 was her land which was still registered in the name of her husband by the name Francis, who died in the year 1979.
14. DW2 testified and adopted the contents of his witness statement as his evidence. He stated that he, together with the other defendants stopped the original Plaintiff from constructing a house.

Submissions

15. At the close of the evidence, parties filed written submissions in support of their case. Written submissions dated 4th December, 2023 were filed by the firm of Omondi Abande & Company Advocates on behalf of the Plaintiff. No submissions were filed by or on behalf of the Defendants.

Issues for Determination

16. The Plaintiff framed the issues for determination herein to be;
 - a. whether the Plaintiff has proved his case on a balance of probabilities.
 - b. whether the Plaintiff is entitled to the relief sought in the plaint.
 - c. who is to bear the costs of the suit?

I adopt these as the issues for determination herein.

Analysis & Determination

17. The first issue for determination is whether or not the Plaintiff has proved his case on a balance of probabilities.

The Plaintiff’s suit is based on the tort of trespass. He pleaded in paragraphs 6,7,8 and 9 of the amended plaint that the Defendant trespassed onto his land parcel No. No. Kisumu/Bar “B”/1752 and took possession thereof and remained thereon without any right or justification. That the Defendants forcefully evicted the Plaintiff and his family from the suit land. Vide the statement of Defence dated 18th April, 2016 the Defendant denied that the Plaintiff was owner of the suit land and denied ever trespassing onto the said land.



18. The evidence that was placed before court is that the suit land is difference and distinct from land parcel No. No.Kisumu/Bar/1729 belonging to the Defendants. Each of the parties produced a title deed to prove ownership of their distinct parcels. The Plaintiff produced a title deed dated 18th November, 1992 showing that land parcel No.East Kisumu/Bar/1752 measuring 2.6Ha was registered in the name of William Ouko S. Mboga. The Defendant produced a copy of title deed dated 14th October, 1997 showing that land parcel No. No. Kisumu/Bar/1729 measuring 0.79Ha was registered in the name of Francis Waga Mbok the husband of the 1st Defendant.
19. The evidence of the Surveyor PW3 was that the two parcels of land were separate and distinct and although they are in the same neighborhood, they do not share a common boundary as there is a road separating them. According to the surveyor's report dated 21st March 2018 produced as exhibit P.14, the portion of land being claimed by the Plaintiff is exclusively parcel No. NO. KISUMU/ BAR "B"/1752. That the Plaintiff had built his homestead within land parcel No.1752 and had not encroached onto other parcels and had obeyed the common boundary delineating the extent of the plot.
20. On the evidence on record, I find that the Plaintiff has proved that the original Plaintiff was the owner of the suit land parcel No.1752, that the said land does not share a common boundary with parcel NKisumu/ Bar "B"/1729, that the Defendants who own land parcel No.1729 have no reason to enter land parcel No. Kisumu/ BAR "B"/1752.

The Plaintiff has further proved that the Defendant entered the suit land and stopped an intended construction. DW2 admitted to this and stated that it was him, the 1st Defendant and the other Defendants who stopped the construction because it was on land parcel No.1729. But the Surveyor's evidence is that the portion claimed by the Plaintiff is exclusively parcel number No. Kisumu/BAR "B"/1752.
21. I find that the Plaintiff has proved his case on a balance of probabilities.
22. On whether the Plaintiff is entitled to the relief sought, the substantive orders sought are an order of permanent injunction restraining the Defendant from trespassing and/or interfering in any way with the suit land and general damages for trespass. The recommendation by the Surveyor was partly that the parties should respect the existing physical boundaries. The relief of permanent injunction is appropriate to ensure parties restrict themselves to their respective parcels of land.
23. As regard general damages for trespass, having established that the Defendant had trespassed and interfered with the Plaintiff's enjoyment of the suit land. Once a trespass to land is proved the same is actionable per se. In *Park Towers Ltd v John Mithamo Njika & 7 others* [2014]eKLR the court held that:-

"I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case."
24. In the present case, the Defendants entered the plaintiff's land stopped a construction that was starting and remained on the disputed portion of the land thereby preventing the plaintiff's full enjoyment of the disputed portion of the land.
25. I find that the plaintiff is entitled to damages for trespass which I hereby assess at Kshs.100,000/.



26. In conclusion on the basis of the foregoing reasons I find that the plaintiff has proved his case on a balance of probabilities and enter judgement in his favour for:

- i. an order of permanent injunction restraining the Defendants from trespassing and/or interfering in any way with land parcel number Kisumu/Bar“B”/1752.
- ii. Kshs.100,000 damages for trespass.
- iii. Costs of the suit.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 25TH DAY OF APRIL, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Raburu h/b for M. M. Omondi for the Plaintiff.

No appearance for the Defendants.

