



Kinya v Buchex Company Limited & another (Land Case E039 of 2023) [2024] KEELC 4196 (KLR) (22 April 2024) (Judgment)

Neutral citation: [2024] KEELC 4196 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
LAND CASE E039 OF 2023**

AE DENA, J

APRIL 22, 2024

BETWEEN

WARUI GITARI KINYA PLAINTIFF

AND

BUCHEX COMPANY LIMITED 1ST DEFENDANT

KENYA URBAN ROADS AUTHORITY 2ND DEFENDANT

JUDGMENT

1. The Plaintiff, as per the plaint instituting this suit which is dated 8/6/2023 states that he is registered as the absolute proprietor of parcels No. Kwale/Diani Complex/439 and Kwale/Diani Complex/275 (suit properties). It is his case that the Defendants have without his consent unlawfully entered into the suit properties and have commenced a construction of a road thereon which act amounts to trespass. The Plaintiff states that he has been deprived of the use of his land hence necessitating this suit. The Plaintiff prays for Judgement against the Defendants jointly and severally for; -
 1. An order of injunction restraining the Defendants either by themselves, their servants and/or agents or otherwise howsoever from entering upon, or carrying out any construction of any nature on the suit premises known as Kwale/Diani Complex/439 and Kwale/Diani Complex/275 dealing with the suit premises in any manner whatsoever.
 2. A mandatory injunction compelling the Defendants to remove any structure of any nature erected by the Defendants either by themselves, their servants and/or agents on the suit premises.
 3. General damages.
 4. Costs.



2. The suit is undefended despite service. An affidavit of service was filed on 23rd July 2023 sworn by Daniel Mitsanze Thoya.
3. The case was heard on 25/1/2024. PW1 the Plaintiff herein adopted his witness statement filed before court on 8/6/2023 as his evidence in chief. It is his evidence that he is the registered proprietor of the suit properties as per the title deeds in his list of documents. That the Defendants have invaded the land and begun construction of a road thereon without his consent and without any colour of right. The Plaintiff states that a report by Mr. Maina Rwingo a licensed land surveyor confirms that the suit properties do not form part of the road reserve. The report is listed under the Plaintiff's list of documents and so is the registry map sheet indicating all the public roads which the Defendants were free to maintain and carry construction thereupon.
4. The Plaintiff further testified that under Section 23 of the [Kenya Roads Act](#) 2007 the 2nd Defendant must acquire land through negotiation and agreement and which has not taken place between the parties herein. The Plaintiff pledges that his rights to ownership of property as envisaged under Article 40 of [the Constitution](#) of Kenya 2010 are being violated and hence the suit herein. The Plaintiff produced as exhibits, Copies of title deeds for Kwale/Diani Complex/439 and Kwale/Diani Complex/275, Photographs showing the construction, a copy of the survey report by Mr. Maina Rwingo and the Registry Map sheet No. 1 (PEXh 1-4). He sought for the reliefs pleaded in the Plaintiff.

Submissions

5. The Plaintiff's submissions were filed before court on 28/2/2024. It is submitted that the Plaintiff is entitled to ownership of the suit property subject to the provisions of section 26 of the [Land Registration Act](#) 2012. That the Plaintiff produced photographs as evidence of the activities of the Defendants which were commenced on the suit property. According to the Plaintiff, the suit properties were never acquired from him as provided for under section 23 of the [Kenya Roads Act](#). For those reasons the Plaintiff submits that he has proved his case to the required standard and ought to be granted the orders sought.
6. On general damages the Plaintiff made reference to the holding in *Hosea Nyandika Mosagwe & 2 Others V County Government of Nyamira* [2020] eKLR where the court made an award of Ksh 500,000/- for general damages for trespass. The Plaintiff in this case seeks for the sum of Kshs 1,500,000/- as damages.

Determination

7. Having considered the foregoing the main issue for determination is if the Plaintiff is entitled to the orders sought.
8. On the prayer for an injunction restraining the Defendants from dealing with the suit properties in any manner whatsoever, 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 courts as prima facie evidence that the person named as proprietor of the land is the 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.
9. The court has perused the title deeds for the suit properties herein as produced in evidence. The title for Kwale/Diani Complex/439 was issued on 9/8/1993 while the title for Kwale/Diani Complex/275 was issued on 16/8/2000. It is noted that no evidence has been tendered by the Defendants disputing the authenticity of the title deeds to the suit properties. As such their legality remains unchallenged. Having this in mind, it is this court's finding that the Plaintiff is the lawfully registered proprietor of the suit properties to the exclusion of the Defendants. I have further noted the photographs produced before court as evidence of the ongoing construction to confirm the alleged trespass by the Defendants. This is corroborated by the report prepared by Maina Rwingo a licensed surveyor practising as Seline Consultants Limited. At page two thereof the surveyor intimates that the alleged constructed road encroaches on the two parcels by 0.043Ha for plot No. 275 and 0.051 for plot No. 439.
10. Based on the above evidence, it is safe to state that the Plaintiff has established a prima facie case in proof of his ownership of the suit properties. Indeed, in the event that the Defendants are left to continue with the encroachment as has been stated and proved, their actions are bound to cause irreparable harm and damage to the Plaintiff hence violating his rights for ownership and use of property as envisaged under Article 40 of *the Constitution* of Kenya 2010. The balance of convenience tilts in favour of the Plaintiff. It is my finding that the Plaintiff has met the threshold for grant of the injunctive orders sought.
11. The second prayer for mandatory injunction compelling the Defendants to remove any structure of any nature erected by the Defendants, with the above finding that the Plaintiff is the duly registered proprietor of the suit property, it follows that the Plaintiff has the rights over the suit property as set out under Section 24(a) of the *Land Registration Act* which provides as follows:
- “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 rights and privileges belonging or appurtenant thereto.”
12. It is this court's finding that the Plaintiff is entitled to the exclusive use and possession of the suit property to the exclusion of the Defendants as prayed. The orders for mandatory injunction are merited.
13. The court has been invited to grant general damages against the Defendants. It is trite law that trespass to land is actionable per se (without proof of any damage). In the case of *Park Towers Ltd v. John Mithamo Njika & 7 others* (2014) eKLR, J.M Mutungi J., stated: -
- “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.”
14. In the case of *Philip Aluchio...Vs...Crispinus Ngayo* [2014] eKLR, the Court held as follows: -
- “The plaintiff is entitled to General Damages for trespass. The issue which arises is as to what is the measure of such Damage. It has been held that the measure of Damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less.”



15. While the report by Seline Consultants Limited intimated that the alleged constructed road encroaches on the two parcels by 0.043Ha for Kwale/Diani Complex/275 and 0.051Ha for Kwale/Diani Complex/439 it did not place any value on the extent to which the said encroachment affected the land. In the case of *Keiyian Group Ranch v Samuel Oruta & 9 others* [2021] eKLR the court held as follows; -
40. From the evidence on record, the Plaintiff has proved trespass but there is nothing in its evidence that can be used to enable this court determine the actual damage and/or measure of the damage or loss that the plaintiff and its members suffered for them to be compensated for the loss. However, in relying on the above case law and the principles laid out, I find the Plaintiff indeed suffered damages as a result of the Defendants' continued acts of trespass. I will proceed and award him Kshs. 100,000/= as general damages.
16. The Court persuaded and guided by the above holding is of the view that an award of Kshs. 300,000 / = general damages should suffice.
17. As things stand, it is clear that the Plaintiff has proved his case against the Defendants and enter Judgement for the Plaintiff against the Defendants in the following terms;
1. An order of injunction is hereby granted restraining the Defendants either by themselves, their servants and/or agents or otherwise howsoever from entering upon, or carrying out any construction of any nature on the suit premises known as Kwale/Diani Complex/439 and Kwale/Diani Complex/275 or dealing with the suit premises in any manner whatsoever.
 2. A mandatory injunction is hereby issued compelling the Defendants to remove any structure of any nature erected by the Defendants either by themselves, their servants and/or agents on the suit premises
 3. General damages of Kshs 300,000/- plus interest from the date of this judgement.
 4. Costs of the suit.

Orders accordingly.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 22ND DAY OF APRIL 2024.

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A.E DENA

JUDGE

In the presence of: -

Mr. Omollo for the Plaintiff

No appearance for the Defendants

Mr. Daniel Disii – Court Assistant

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