



**Waweru v Waweru (Environment and Land Appeal 44 of 2018)
[2024] KEELC 1782 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 1782 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 44 OF 2018**

JG KEMEI, J

APRIL 12, 2024

BETWEEN

REV JOSEPH WAWERU APPELLANT

AND

TABBY WAMBUI WAWERU RESPONDENT

*(Being an appeal from the Judgment and orders of Hon G Omodho
(SRM) in CMELC No 1259 of 2005 -Thika delivered on the 13/12/2018)*

JUDGMENT

1. Vide a Plaintiff dated 31/8/2005 filed in Thika CMCC No. 1259 of 2005, the plaintiff (now Respondent) claimed that she was the lawful owner of Plot No. Ruiru/Kiu Block 6/273 measuring 0.1Ha (hereinafter the suit land) which the Appellant had unlawfully trespassed, created a foot path and erected pit latrines thereon. She sought a raft of orders namely; eviction against the Appellant (then Defendant) from the suit land, demolition of structures thereon, permanent injunction against the Appellant and his servants, agents or employees, damages for trespass and mesne profits together with costs of the suit.
2. Refuting the claims, the Appellant filed his statement of defence dated 14/8/2007 and averred that the suit land was leased from Michael Philip Njoroge who was allocated the land by Githurai Ting'ang'a Co. Ltd. Accordingly he defended his occupation as lawful. The matter was set down for hearing and parties led their rival evidence. The Court found in favor of the Respondent that being a holder of a title, she had proven her claim on a balance of probabilities and therefore the Appellant was a trespasser and condemned him to pay Kshs. 300,000/- as general damages. Further the trial Court granted the prayers for eviction, demolition and permanent injunction against the Appellant.
3. Aggrieved by those findings, the Appellant lodged the instant appeal through his Memorandum of Appeal dated 21/12/2018 on grounds THAT;



- a. The Learned Magistrate erred in law and fact by delivering a judgement that was against the weight of evidence and submissions.
 - b. The Learned Magistrate erred in law and fact in relying on a surveyor's report which was illegally carried out without a Court order.
 - c. The Learned Magistrate erred in law and fact in finding that the Appellant was a trespasser on parcel Ruiru/Kiu Block 6/273.
 - d. The Learned Magistrate erred in law and fact in failing to appreciate that the whole of land parcel Ruiru/Kiu Block 6 had occupation problem that was being addressed by the residence of Ruiru/Kiu Block 6.
 - e. The Learned Magistrate erred in law and fact in failing to fully consider the evidence adduced by the Appellant.
 - f. The Learned Magistrate erred in law and fact in awarding high amount of damages that was not supported by evidence.
4. The Appellant pleaded with the Court to allow the appeal with costs; set aside the impugned Judgment and dismiss the Respondent's suit.
 5. With leave of Court and on Application, the Appellant was allowed to adduce additional evidence on appeal pursuant to Section 78 [Civil Procedure Act](#) and Order 42 Rules 27, 28 & 29 of the Civil Procedure Rules. The Appellant filed his Supplementary Memorandum of Appeal (sic) dated 31/1/2023 and annexed copies of letters dated 11/3/2020 and 7/7/2020 and a new map for Ruiru/Kiu Block 6. However, the Supplementary Record of Appeal having been filed out of time granted by the Court (14 days) and on the Respondent's objection, it was struck out and thus expunged from the record.
 6. On 2/5/2023 directions were taken to canvass the appeal by way of written submissions.
 7. The Appellant through the firm of J.K Ngaruiya & Co. Advocates filed submissions dated 6/6/2023.
 8. Abandoning ground 2 of his appeal, the Appellant submitted that the suit land was leased to Kenya Assemblies of God (KAG) church and that he later bought the suit land from Michael Njoroge who sold it with his mother's (Josephine Wambui Njoroge) authority. That the suit land was purchased as Plot 589 and the Ruiru/Kiu Block 6 generally had a problem in that occupation of the land and the ground area did not correspond with the survey map. That the said inconsistencies were highlighted in the trial Court as shown by letters at pages 57 – 62 of the Record of Appeal and faulted the trial Court for not considering the issue of inconsistencies. That the trial Court erred in concluding that the Appellant was a trespasser when the district surveyor's report recommended demarcation of Ruiru/Kiu Block 6/273 and Ruiru/Kiu Block 6/272 an indication that there were no beacons on the ground.
 9. The Appellant also argued that not only were the general damages high but unwarranted because the surveyor found that parcel Ruiru/Kiu Block 6/272 was encroaching on the suit land and without beacons on the ground, it was not clear which parcel of land the Appellant was occupying. The Appellant contended that since resurvey has been done and parties shown their respective parcels of land, the trial Court ought to have followed the provisions of Section 123 of the [Land Registration Act](#) on reparation of the land.
 10. On the other hand, the firm of Mbiyu Kamau & Co. Advocates filed submissions dated 6/7/2023 on behalf of the Respondent.



11. It was submitted that the Appellant by his own testimony, admitted to being in possession of the suit land and his claims of ownership of the suit land were proven in evidence. That according to the Land Registrar's testimony, the suit land was occupied 85% by the Appellant's church hence the finding on trespass was well founded.
12. On the issue of inconsistencies in occupation of the land viz-a-viz the survey map, the Respondent pointed out that the Appellant did not adduce any evidence to support those allegations in the trial Court just as the recommendations by the Land Registrar were not an issue before the Court. That the Registrar's task was to establish physical occupation of the suit land which he duly determined as 85% by the church. The award of Kshs. 300,000/- was also defended as properly arrived at and the Court was urged to dismiss the appeal with costs.
13. The sole issue for determination is whether the appeal is merited.
14. As a first appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The Court has however to bear in mind the fact that it did not have the opportunity to see and hear the witnesses first hand. This duty is enunciated by Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate Court which is to: '..... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions.'
15. In the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was pronounced thus:

“...this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court ... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
16. The Respondent was obliged to prove her case on a balance of probabilities in light of Section 107 of the *Evidence Act*. Supporting her claim, the Respondent adopted her witness statement found at page 23 of the Record of Appeal as evidence in chief. That she was the lawful and registered owner of the suit land and in 2003, she realized that the Defendant had trespassed onto her land. She reported the matter of trespass to the police leading to the charging of the Defendant in Thika Criminal Case No. 1902 of 2003. She produced documents as listed in her List of Documents dated 28/3/2018 including copies of the Certificate of Lease, Allotment Letter, Green Card and Official Search dated 17/10/2017. In cross, PW1 stated that the Defendant was acquitted in the Criminal Case. She added that she bought land from Githurai Tinganga Company.
17. The second Respondent's witness was Napeso Abisai, Thika District Surveyor. She told the Court that she was ordered by the Court to survey plot No. Ruiru 6/273 and found 3 points. That plot 6/273 was 85% occupied by a Church compound of PAG (sic) and 15% by an access road. In cross, PW2 maintained that plot 6/273 was occupied as stated above and could not verify the details in the Appellant's possession. She urged the Court to order the closure of the access road.
18. The Appellant took the stand as DW1. He testified that he worked at KAG and knew the Respondent. That they occupied the suit land as a church having leased it from Philip Njoroge. That the problem with Githurai Block 6 is that the map and ground occupation of the residents do not tally. That they got a letter from Chief Registrar Lands asking the surveyor to rectify the anomalies (Pex. 16). He in



turn produced exhibits in support of his defence including a lease, sale agreement dated 30/6/1999, certificates of ownership and correspondences between Githurai Ting'ang'a Co. and the Director of Survey as listed in his List of Documents dated 25/9/2014.

19. In cross, DW1 conceded that according to the lease document, the Respondent is indicated as the suit land owner. That he had no lease in his possession and despite finding structures on the land, they had other constructions on it. That they did not obtained consent from the suit land owner and the certificates of ownership are in respect to plots 589 and 590 and not the suit land. DW1 admitted that he did not know how his lessor Michael Philip Njoroge acquired the land. Further the witness did not have receipts as proof for lease payment.
20. The Appellant's second witness was Michael Philip Njoroge. He stated that he had two plots in Kimbo with DW1 being a tenant on plot 590. That the plots belonged to her deceased mother prompting him to take out Letters of Administration of the estate. DW2 said the plots were shown to his mother in 1981 and at the material time he did not have titles. His evidence in cross was that he had no documents to prove ownership of Plot No. 6/273 and in 1999 he was selling plots 589 and 590 on his mother's behalf. That he did not have authority to sell as such and the sale agreement does not disclose as much.
21. The Appellant wished to call the land registrar but on 13/11/2018 he informed the Court that the Registrar could not trace the documents and the defence case was closed.
22. The totality of the foregoing evidence in my view is that the Respondent produced her ownership documents notably the certificate of lease in her name issued on 22/5/1995. Section 26 (1) of the [Land Registration Act](#) (LRA) 2012 provides;

“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 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.”

23. On the other hand, the Appellant produced evidence of his lease from DW2. The rent agreement dated 30/6/1998 was entered three years after the certificate of lease was issued in the Respondent's name. DW1 admitted he did not have any documents in respect of the suit land. He also could not proof how his mother acquired the documents for Plots 589 and 590. By his own admission DW2 said he lacked capacity to transact on behalf of his mother who was said to be ailing.
24. Going from the above the Respondent proved that she is the registered owner of the suit and according to Section 25 of the [Land Registration Act](#), she is entitled to quiet and peaceful enjoyment of proprietary rights. The section states as follows;

“25. Rights of a 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 interests 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.”

25. I find that the Appellant failed to impeach the title of the Respondent in the trial Court and in the end, I do not find fault in the ultimate finding of the trial Court to warrant a different outcome.

26. In this case the cause of action of the Respondent is premised on a tort of trespass. Trespass is defined at Section 3(1) of the Trespass Act defines trespass as follows;

“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.”

27. According to the 10th Edition of Black’s Law Dictionary trespass is defined as follows;

“An unlawful act committed against the person or property of another; especially wrongful entry on another’s real property.”

28. In the case of Entick Vs. Carrington (1765) Lord Camden stated that;

“Our law holds the property of every man so sacred that no man can set his foot upon his neighbour’s close without his leave.”

29. The Appellant admitted trespass but argued that the land belongs to another person inter alia that he had leased the land from one Philip Njoroge, the alleged owner. The trial Court made the correct finding on trespass.

30. It is trite that trespass is actionable per se. Halsbury 4th Ed, Vol 45 at para 26, 1503 provides as follows on computation of damages in an action of trespass: -

- (a) If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
- (b) If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- (c) Where the Defendant has made use of the plaintiff’s land, the plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.
- (d) Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the Defendant cynically disregards the rights of the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
- (e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.”



31. In Nakuru Industries Limited Limited Vs. S S Mehta & Sons [2016]eKLR the Court cited the case of Duncan Ndegwa Vs. Kenya Pipeline HCC No. 2577 of 1990 (Nairobi) where the Court held:-

“The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land. The overriding principles is to put the claimant in the position he was prior to the infliction of the harm.”

32. The record attests to the fact the Appellant was warned of the trespass since 2003 but has failed to vacate the premises and continued in the acts of trespass thereby interfering with the quiet and peaceful possession of the Respondent’s land. I am satisfied with the trial Court assessment of damages awarded to the Respondent.

33. In the end I find that no fault with the findings of the Hon Court to warrant disturbing its decision.

34. The appeal is unmerited and it is for dismissal with costs to the Respondent.

35. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 12TH DAY OF APRIL, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Wainaina HB Ngaruiya for Appellant

Ms. Mbiyu HB Mbiyu Kamau for Respondent

Court Assistants – Phyllis / Oliver

