



Mburu v Kenya Rural Roads Authority & another (Environment & Land Case 21 of 2020) [2024] KEELC 3296 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3296 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 21 OF 2020**

**YM ANGIMA, J
APRIL 11, 2024**

BETWEEN

ISABEL WARUGURU MBURU PLAINTIFF

AND

KENYA RURAL ROADS AUTHORITY 1ST DEFENDANT

**CABINET SECRETARY, MINISTRY OF TRANSPORT AND
INFRASTRUCTURE 2ND DEFENDANT**

JUDGMENT

A. Plaintiff's Claim

1. By a plaint dated 12.08.2020 the Plaintiff sued the 1st and 2nd Defendants seeking the following reliefs;
 - a. A permanent injunction restraining the Defendants from further trespassing on LR. Euaso Nyiro/Suguroi Block VI/199 and for restoration of the property to its condition before June 2020.
 - b. Special and General Damages for trespass to land.
 - c. Costs of the suit plus interest at court rates.
 - d. Any other or further reliefs that this honourable Court may deem just and fit to grant.
2. The Plaintiff pleaded that he was the personal representative of the estate of the late John Samuel Mburu (the deceased) who was at all material times the proprietor of Title No. EUASO NYIRO/SUGUROI BLOCK VI/199 (the suit property). She pleaded that in or about the month of June 2020 the Defendants encroached upon the suit property and embarked on construction of a public road thereon without any lawful justification or excuse.



3. The Plaintiff further pleaded that as a result of the Defendants' said actions the estate of the deceased had suffered loss and damage as a result of damage to trees, vegetation, the perimeter fence on the suit property for which the Defendants were liable. The Plaintiff pleaded particulars of special damages amounting to Kshs.343,700/- in paragraph 8 of the plaint.
4. It was the Plaintiff's case that despite demand and issuance of a notice of intention to sue the Defendants had failed to make good her claim thus rendering the suit necessary.

B. Defendants' Response

5. The record shows that the 1st Defendant filed a defence dated 28.10.2020 denying liability for the Plaintiff's claim. The 1st Defendant denied that the deceased was the registered proprietor of the suit property and denied unlawfully encroaching thereon. It denied having destroyed the Plaintiff's fence, trees or vegetation and put her to strict proof thereof. It also denied the particulars of special damages pleaded in the plaint and put the Plaintiff to strict proof thereof.
6. In the alternative, the 1st Defendant pleaded that the road construction works were undertaken with the knowledge and consent of the Plaintiff. It was further pleaded that the Plaintiff had consented to the use of a portion of the suit property and she was to be compensated with a portion of public land nearby by way of exchange.
7. The 1st Defendant denied issuance of a demand or notice of intention to sue and put the Plaintiff to strict proof thereof. As a result, the 1st Defendant denied that the Plaintiff was entitled to the reliefs sought or any one of them and prayed for dismissal of the suit with costs.
8. There is no indication on record of the 2nd Defendant having filed any defence to the action despite the Attorney General having made several court appearances on his behalf.

C. Trial Of The Suit

9. At the trial hereof, the Plaintiff testified on her own behalf and also called a valuer to produce a valuation report in support of her claim for special damages. The Plaintiff contended that although she was the administrator of the estate of the deceased she had no legal capacity to grant consent for the construction works because the grant had not been confirmed at the material time. It was thus her contention that the consent she signed with the 1st Defendant on 01.07.2020 was invalid.
10. The 1st Defendant called 3 witnesses at the trial and closed its case. It was the 1st Defendant's evidence that the Plaintiff had consented to the construction works on the suit property vide an agreement dated 01.07.2020 but when she changed her mind afterwards the road was constructed through an alternative route without traversing the suit property. It was also the 1st Defendant's case that the Plaintiff had initially agreed to a land exchange to compensate her for a portion of the suit property on which the public road was to pass but the exchange did not materialize after she changed her mind.
11. The 2nd Defendant did not call any evidence at the trial and was not represented in court during the defence hearing.

D. Issues For Determination

12. The court has noted that the parties did not file an agreed statement of issues for determination. As such, the court shall frame the issues for determination in accordance with the provisions of Order 15 Rule 2 of the Civil Procedure Rules, 2010. Under the said rule, the court may frame issues from any of the following;



- a. The allegations contained in the pleadings.
 - b. The allegations made on oath by or on behalf of the parties.
 - c. The contents of documents produced by the parties.
13. The court has considered the pleadings, the evidence and documents on record in this matter. The court is of the opinion that the following are the key issues which arise for determination herein;
- a. Whether the Plaintiff has proved her claim against the Defendants to the required standard.
 - b. Whether the Plaintiff is entitled to the reliefs sought in the suit.
 - c. Who shall bear costs of the suit.

E. Analysis And Determination

a. Whether the Plaintiff has proved her claim against the Defendants to the required standard

14. The court has considered the pleadings, evidence and submissions on record on this issue. It is evident from the material on record that the Plaintiff's claim was based upon alleged trespass to suit property and alleged damage to her fence, trees and vegetation. There is no doubt from the material on record that the road works were being undertaken by the 1st Defendant who had various engagements with the Plaintiff at the material time. There is no evidence on record to link the 2nd Defendant to the works and actions complained of.
15. The Plaintiff's case was that even though she signed a written consent dated 01.07.2020 the same was invalid, null and void for all purposes because the grant to the estate of the deceased had not been confirmed at the material time. She further contended that the consent of the Land Control Board had not been obtained for the intended land exchange hence her consent was of no legal effect.
16. The court is unable to agree with the Plaintiff's contention that as administrator of the estate of the deceased she could not give a valid consent for the 1st Defendant to enter the suit property and undertake construction works thereon. There is no claim before the court for enforcement of the land exchange and the 1st Defendant had no counterclaim for specific performance in that regard. In terms of the consent by the concerned parties dated 01.07.2020, the Plaintiff gave two types of consent. The first authorized the resident engineer to "access" the suit property for the purpose of road construction. The second consent was for a land exchange.
17. The court is of the opinion that the first consent does not require the consent of the land control board and neither does it require a confirmation of grant. It is only the land exchange aspect which required both the consent of the land control board and confirmation of grant. As it turned out, the Plaintiff later changed her mind on the exchange hence the intended exchange did not materialize. The material on record further shows that the 1st Defendant decided to use an alternative route hence the suit property was never utilized for road construction at all. In the premises, the court finds and holds that the 1st Defendant's entry into the suit property was with the consent of the Plaintiff hence the allegation of trespass has not been proved on a balance of probabilities or at all. By the agreement dated 01.07.2020 the Plaintiff specifically agreed as follows:

- "1. The owner allows the R.E access to her land for the purpose of road construction during surveying and construction of the same."



18. The second aspect relates to special damages as a result of the 1st Defendant's entry into the suit property in preparation for the road construction works. There is no doubt from the material on record that the 1st Defendant cleared some vegetation and trees on a portion of the suit property and that it also removed a barbed wire fence. The Plaintiff produced a valuation report on the alleged damage occasioned by the 1st Defendant. The mere fact that the Plaintiff had consented to the entry did not mean that she had relinquished her right to claim compensation for any damage occasioned by the road works. She certainly retained her common law right to seek compensation for such damage. In any event, the Plaintiff did not waive her right to compensation under the terms of the agreement dated 01.07.2020.
19. What the 1st Defendant disputed at the trial was the quantum and extent of damages claimed by the Plaintiff. Although the 1st Defendant claimed to have commissioned its own valuer to assess the damage occasioned to the suit property it did not produce the resultant valuation report at the trial. In the premises, the court is inclined to rely upon the Plaintiff's valuation report on the nature and extent of the damage occasioned to the suit property.

b. Whether the Plaintiff is entitled to the reliefs sought in the suit

20. The court has already found that the Plaintiff has failed to prove her allegation of trespass against the 1st Defendant in view of the consent agreement she signed on 01.07.2020. As a result, she is not entitled to any damages for trespass. The Plaintiff would also not be entitled to a permanent injunction to restrain the 1st Defendant from further trespassing on the suit property. The material on record shows that the 1st Defendant utilized an alternative route hence the road did not traverse the suit property at all. It would, therefore, follow that the 1st Defendant is no longer occupying any portion of the suit property to warrant the issuance of a permanent injunction against it.
21. The court is of the opinion that the Plaintiff is only entitled to special damages for the actual damage caused to the suit property by the 1st Defendant, not as a result of the alleged trespass but as a result of the consent granted by the Plaintiff on 01.07.2020. The court has noted that there is a discrepancy between the amount of special damages pleaded in the plaint and the amount indicated in the valuation report tendered at the trial. Whereas the Plaintiff particularized special damages at Kshs.343,700/- in paragraph 8 of the plaint, the valuation report computed the same at Kshs.350,000/-. The court is inclined to award a maximum amount of Kshs.343,700/- since that is the amount which was specifically pleaded.

c. Who shall bear costs of the suit

22. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the [Civil Procedure Act](#) (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. Since the Plaintiff has partly succeeded and partly failed in her claim, the court is of the opinion that each party should bear his own costs. The 2nd Defendant should also bear his own costs since he did not file any defence to the action. As a consequence, the court shall order that each party shall bear his own costs of the suit.

F. Conclusion And Disposal Order

23. The upshot of the foregoing is that the court finds and holds that the Plaintiff has failed to prove her claim for trespass against the Defendants on a balance of probabilities. However, the court finds that



the Plaintiff is entitled to the special damages claimed as a result of damage to the suit property. As a consequence, the court makes the following orders for disposal of the suit;

- a. The Plaintiff's claim against the Defendants for damages for trespass to land is hereby dismissed.
- b. The Plaintiff's prayer for a permanent injunction against the Defendants is hereby dismissed.
- c. The Plaintiff is hereby awarded Kshs.343,700/- as special damages against the 1st Defendant only for damage occasioned to the suit property.
- d. Each party shall bear his own costs of the suit.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU AND DELIVERED THIS 11TH DAY OF APRIL, 2024.

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Y.M. ANGIMA

JUDGE

In the presence of:

Ms. Wanjiru Muriithi holding brief for Mr. Waichungo for the Plaintiff

Mr. Rapando for the 1st Defendant

Ms. Chepkurui for the A.G. for the 2nd Defendant

C/Assistant: Vanessa

