



**Masheti v County Government of Kakamega, Ministry of Transport,  
Infrastructure, Public Works & Energy (Environment & Land Case  
147 of 2017) [2024] KEELC 1727 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 1727 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 147 OF 2017**

**DO OHUNGO, J**

**APRIL 11, 2024**

**BETWEEN**

**WILSON SHIVACHI MASHETI ..... PLAINTIFF**

**AND**

**THE COUNTY GOVERNMENT OF KAKAMEGA, MINISTRY  
OF TRANSPORT, INFRASTRUCTURE, PUBLIC WORKS &  
ENERGY ..... DEFENDANT**

**JUDGMENT**

1. Proceedings in this matter commenced on 8<sup>th</sup> 15<sup>th</sup> May 2017, when the plaintiff filed plaint dated 27<sup>th</sup> March 2017. He averred in the plaint that he was the registered proprietor of the parcels of land known as Kakamega/Iguhu/1109, Idakho/Iguhu/1986 and Kakamega/Iguhu/1690 (the suit properties) and that the defendant encroached on the suit properties in March 2016 and damaged crops and trees thereby exposing him to great loss. He therefore prayed for judgment against the defendant for a permanent injunction restraining the defendant by itself, agents, or servants from further encroachment on the suit properties, special damages of KShs 26,000 for loss of crops, general damages, interest, and costs.
2. The defendant filed statement of defence in which it denied the plaintiff's averments.
3. The plaintiff testified as PW1. He adopted his witness statement wherein he stated that he was the registered proprietor of the suit properties and that the defendant encroached on the suit properties in March 2016 and started constructing a road on them. That the defendant went beyond the areas designated for the road on the map and started uprooting maize crops, and beans on the suit properties. He added that he lodged a complaint with the National Construction Authority and that he received a letter dated 24<sup>th</sup> June 2016 from the Ministry of Transport, Infrastructure, Public works and Energy telling him to seek legal redress if there was encroachment. He produced copies of title deeds in respect



- of the suit properties, a complaint form and a demand letter and added that he obtained a survey report, a valuation report and an Agricultural Officer's report.
4. Patrick Mudeshi Shitakwa (PW2) stated that he was a retired Ward Agricultural Officer and that at the request of the plaintiff herein, he assessed maize and beans crops that were damaged in March 2016 and prepared an undated report. He also stated that he assessed the approximate total value of the damage to the crops at KShs 26,000. He produced his report.
  5. Fred Juma Aduda (PW3), testified that he was a licensed practicing valuer with 43 years practice experience with a practice under the name of Trans County Royal Valuers. That upon the plaintiff approaching him in the year 2019 claiming that the defendant had excised sections of Idakho/Iguhu/1109, Idakho/Iguhu/1690 and Idakho/Iguhu/1986, he inspected the suit properties and prepared a report dated 27<sup>th</sup> September 2019. That he determined that approximately 0.1 hectares of Idakho/Iguhu/1986 had been excised, 0.0012 hectares of Idakho/Iguhu/1690 had been excised while 0.0156 hectares of Idakho/Iguhu/1109 had been excised. He further stated that he included an executive summary and certificate of valuation at page 6 of his report. He produced the report. I note that in the executive summary, he assessed the affected portions of Idakho/Iguhu/1109, Idakho/Iguhu/1690 and Idakho/Iguhu/1986 at KShs 239,545, KShs 23,000 and KShs 1,006,250, respectively.
  6. PW3 further stated that he arrived at the value of the affected portion of Idakho/Iguhu/1109 by considering that the plaintiff would have engaged in commercial agricultural activities on the plot. That there were no tea bushes on the plot at the time he prepared his report and that he therefore did an approximation. He also stated that he added 15% to cater for compulsory purchase. When shown the defendant's valuation, he stated that the defendant was an interested party and could not give a fair value and that the author of defendant's valuation must have deliberately put his figures much lower since by then the author must have read PW3's valuation.
  7. Gregory Magenya (PW4) testified that he was a surveyor practicing as Pharis Magenya Land Surveyor. That he accompanied Pharis Magenya who was both his boss and father to the filed upon instructions from the plaintiff and that he helped Pharis Magenya to prepare a report dated 20<sup>th</sup> July 2016 which states extent of encroachment on parcel numbers Idakho/Iguhu/1109, Idakho/Iguhu/1690 and Idakho/Iguhu/1986. He produced the report added that he held a Diploma in Survey and that he did not sign the report. That when they visited the site in 2016, the area of encroachment was clearly visible, and that due to rainfall and growth of vegetation, the area of encroachment would have been less visible in 2019 when the defendant's surveyor went to the site.
  8. The plaintiff's case was then closed.
  9. Nicholas Lusava Shiguri, a land surveyor working for the County Government of Kakamega, testified as DW1. He stated that he visited land parcel numbers Idakho/Iguhu/1093, Idakho/Iguhu/1852, Idakho/Iguhu/1109, Idakho/Iguhu/1690 and Idakho/Iguhu/1986 on 8<sup>th</sup> February 2019 and prepared a report dated 22<sup>nd</sup> February 2019 in which he recorded that there was encroachment of 0.02 hectares on Idakho/Iguhu/1109, encroachment of 0.002 hectares on Idakho/Iguhu/1690, encroachment of 0.06 hectares on Idakho/Iguhu/1986 and encroachment of 0.03 hectares on Idakho/Iguhu/1093. He added that the encroached land was taken for purposes of road expansion and that his report was given to the valuer to determine the value of the encroached land.
  10. DW1 further testified that the plaintiff did not have his own surveyor on site when DW1 went to the site and that he could not confirm that there was damage to crops and trees since he went to the site about three years after the date of the alleged encroachment.



11. Jamlax Barasa Mukudi (DW2) stated that he was the County Valuer for the County Government of Kakamega, in charge of valuation across the County of Kakamega. That he visited and valued land parcel numbers Idakho/Iguhu/1093, Idakho/Iguhu/1852, Idakho/Iguhu/1109, Idakho/Iguhu/1690 and Idakho/Iguhu/1986 on 22<sup>nd</sup> October 2019 and prepared a report dated 28<sup>th</sup> October 2019. He produced the report and stated that he used the County Surveyor's report as a basis of his assessment and that all the parcels were undeveloped and vacant.
12. DW2 further stated that his report reflected the true status on the ground and that the proprietors of the parcels were not present during his inspection which took place three years after the encroachment. He conceded that it was possible that owing to passage of time, he may have missed out on such features as any felled trees and damaged crops.
13. The plaintiff submitted that he had proven his case by demonstrating proprietorship of the suit properties and by further showing that the defendant had encroached on the suit properties. He contended that in those circumstances, a permanent injunction should issue. Regarding special damages, he argued that he produced valuation reports which put the value of encroached portion of Kakamega/Iguhu/1109 at KShs 92,000, encroached portion of Idakho/Iguhu/1986 at KShs 230,000 and encroached portion of Kakamega/Iguhu/1690 at KShs 17,250. He urged the court to award special damages as per the said valuations.
14. Regarding general damages, the plaintiff argued that where trespass is proved, a party need not prove that he suffered any particular damage or loss. Contending that there is no dispute that the defendant trespassed into the suit properties and caused damage therein, he urged the court to award general damages. He did not however offer any submissions as to quantum of general damages. He relied on cases of Park Towers Ltd vs John Muthomo Njika et al [2017] eKLR and Klillesden Investment Limited vs Kenya Hotel Properties Limited HCC No. 367 of 2000.
15. On its part, the defendant submitted that there is no dispute that there was encroachment and that the only dispute is the extent of encroachment and valuation. It further argued that the prayer for permanent injunction is overtaken by events since the encroachment is not continuing in nature. Regarding special damages, the defendant argued that the sums sought by the plaintiff were exaggerated. Equally, it contended that the valuations or reports that the plaintiff relied on to prove general damages were exaggerated. It argued that the value of the lost land ought to have been specifically pleaded as special damages and that in the circumstances, the court should disregard the valuation report and instead award general damages of KShs 100,000. Reliance was placed on the cases of Jacob Ernest Ambala Odondi v Violet Shikuku [2021] eKLR, John K Koech v Peter Chepkwony [2019] eKLR and Obadiah K. Macharia v Kenya Power & Lighting Company Ltd [2016] eKLR.
16. I have considered the parties' pleadings, evidence, and submissions. The only issue for determination is whether the reliefs sought should issue.
17. There is no dispute that the plaintiff is the registered proprietor of the suit properties and that there was encroachment into the suit properties by the defendant. The plaintiff produced copies of title deeds, valuation report and complaint to the National Construction Authority all of which indicate the plaintiff as proprietor. The survey report produced by the defendant indicates the plaintiff's interest in the suit properties at page one of the said report. The copies of title deeds produced by the plaintiff state that the plaintiff was registered as proprietor of Kakamega/Iguhu/1109 on 3<sup>rd</sup> April 1987 and the title issued to him on 24<sup>th</sup> April 1987, as proprietor of Idakho/Iguhu/1986 on 25<sup>th</sup> November 1996 and the title issued to him on the same day and as proprietor of Kakamega/Iguhu/1690 on 27<sup>th</sup> June 1994 and the title issued to him on 29<sup>th</sup> July 1994.



18. The plaintiff has sought a permanent injunction against the defendant. To succeed in that quest, he 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 registered of the suit properties, the plaintiff is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Whereas the defendant has argued that there is no continuing threat of encroachment, it is enough that the plaintiff has demonstrated his rights over the suit properties and that the defendant threatened those rights through encroachment. I am persuaded that a case has been made for granting a permanent injunction.
19. The plaintiff prayed at prayer (b) of the plaint for special damages of KShs 26,000 for loss of crops. The law is that special damages must be specifically pleaded and strictly proved with a degree of certainty and particularity. See *Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd* [2013] eKLR.
20. In view of prayer (b) of the plaint, the maximum amount that can be awarded in this matter as special damages is the pleaded sum of KShs 26,000 and even then, only upon being strictly proved with a degree of certainty and particularity.
21. A perusal of the plaint reveals that the plaintiff did not plead any particulars of special damages. Whereas the plaintiff sought to rely on an undated report which was prepared by Patrick Mudeshi Shitakwa, a retired Ward Agricultural Officer, a perusal of the said report shows that the quantum therein was arrived at based on an unknown quantity of damaged maize and bean crops and that the maker of the report states that the figures therein are estimates. I merely made a prediction of what in his view would be the yield and value of such yield. I find that the plaintiff has failed to prove special damages to the required standard. I will therefore not award any special damages.
22. The plaintiff also sought judgment for general damages. It was not pleaded in the plaint what the general damages are for. However, the plaintiff argued in his written submissions that where trespass is proved, a party need not prove that he suffered any particular damage or loss and that he is entitled to damages in view of the encroachment. I take it therefore that the plaintiff is seeking damages for trespass.
23. An owner of land is entitled to nominal damages where there is no actual damage occasioned to him 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.
24. As previously noted, the plaintiff did not offer any submissions as to quantum of the general damages that he seeks. On the other hand, in its submissions, the defendant offered general damages of KShs 100,000. Nicholas Lusava Shiguri, the defendant's land surveyor, testified that there was encroachment of 0.02 hectares on Kakamega/Iguhu/1109, encroachment of 0.06 hectares on Idakho/Iguhu/1986 and encroachment of 0.002 hectares on Kakamega/Iguhu/1690. Jamlax Barasa Mukudi, the defendant's valuer, assessed the value of the encroached portion of Kakamega/Iguhu/1109 at KShs 92,000, the encroached portion of Idakho/Iguhu/1986 at KShs 230,000 and the encroached portion of Kakamega/Iguhu/1690 at KShs 17,250. On the other hand, Fred Juma Aduda, the plaintiff's valuer, put the value of the encroached portion of Kakamega/Iguhu/1109 at KShs 239,545, the encroached portion of Idakho/Iguhu/1986 at KShs 1,006,250 and the encroached portion of Kakamega/Iguhu/1690 at KShs 23,000.



25. I have mentioned the figures in the valuations only to put some context to the values the parties have attached to the areas encroached. I am however alive to the fact that the plaintiff has not claimed the values of the encroached land. Instead, as pleaded in the plaint, his case focuses on the stated special damages, permanent injunction, and general damages. As has often been stated by the courts, parties are bound by their pleadings. See *Raila Amolo Odinga & Another vs. IEBC & 2 others* [2017] eKLR.
26. Doing the best that I can in the circumstances and considering the plaintiff's lack of submissions on quantum of general damages, I consider KShs 200,000 appropriate as general damages for trespass.
27. In view of the foregoing discourse, I enter judgment in favour of the plaintiff as follows:
  - a. A permanent injunction is granted restraining the defendant by itself, its agents, or servants from further encroachment on the parcels of land known as Kakamega/Iguhu/1109, Idakho/Iguhu/1986 and Kakamega/Iguhu/1690.
  - b. The plaintiff is awarded KShs 200,000 (Two Hundred Thousand) being general damages for trespass.
  - c. The plaintiff shall have costs of the suit.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 11<sup>TH</sup> DAY OF APRIL 2024.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Ms Nanjala holding brief for Mr Amasakha for the Plaintiff

Mr Magina holding brief for Ms Muleshe for the Defendant

Court Assistant: M Nguyayi

