



**Liyayi v County Government of Kakamega, Ministry of Transport,
Infrastructure, Public Works & Energy (Environment & Land Case
141 of 2017) [2024] KEELC 3531 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3531 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 141 OF 2017**

DO OHUNGO, J

APRIL 11, 2024

BETWEEN

PETER SABATIA LIYAYI PLAINTIFF

AND

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

JUDGMENT

1. Proceedings in this matter commenced on 8th May 2017, when the plaintiff filed plaint dated 6th April 2017. He averred in the plaint that he was the registered proprietor of the parcel of land known as Kakamega/Iguhu/1093 (the suit property) and that the defendant encroached on the suit property in March 2016 and damaged crops and trees thereby exposing him to great loss. He further averred that the encroachment led to damage of spring water which he used to draw for use within his homestead. 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 property, special damages of KShs 278,500 for loss of trees and 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 dated 6th April 2017 wherein he stated that he was the registered proprietor of the suit property and that the defendant encroached on the suit property in March 2016 and started constructing a road on it. That the defendant went beyond the areas designated for the road on the map and started uprooting plants on the suit property. He added that he lodged a complaint with the National Construction Authority and that he received a letter dated 24th June 2016 from the Ministry of Transport, Infrastructure, Public works and Energy



- telling him to seek legal redress if there was encroachment. He further stated that 0.04 hectares was encroached upon and that he did not agree with the defendant's survey report.
4. Francis Majoni Juma (PW2) testified that he had been a Forest Officer since 1987 and that he was based in Kakamega South from the year 2017. That he took over from another Forest Officer by the name Herbert Amiani who had since retired and who prepared a report dated 16th March 2016 regarding damage to trees on the suit property. PW2 produced the report.
 5. Next on the stand was Patrick Mudeshi Shitakwa (PW3) who stated that he is a retired Ward Agricultural Officer for Idakho East and South Wards. That he prepared a report for the plaintiff in mid-March 2016. He produced the report.
 6. Gregory Soud Magenya (PW4) testified that Pharis Magenya who was both his boss, father and fellow surveyor prepared a report dated 27th July 2016 but was unable to attend court due to age and ill health. He added that he participated in drawing up the report and that the total encroached area of the suit property was 0.04 hectares. He produced the report and added that he was not present when County surveyors went to the site and determined the encroached area as 0.02 hectares on 8th February 2019. He explained that the variation between his measurements and those of the County surveyors was due to the fact that he went to the site immediately after encroachment while the County surveyors went to the site 18 months after encroachment by which time vegetation must have covered the encroached area.
 7. Nobert Kisanya (PW5) stated that he was a property valuer working with Chrisca Real Estate and that he inspected the suit property at the instruction of the plaintiff on 15th May 2019 and prepared a valuation report dated 22nd June 2019. That he assessed the value of the encroached land at KShs 400,000, value of damaged trees at KShs 166,000 based on valuation by the Forest Department and value of damaged crops at KShs 73,000 based on valuation by the Agriculture Department. That the total valuation was therefore KShs 639,000 to which he added a disturbance allowance of 15% thereby making the combined total KShs 734,850.
 8. Herbert Amiani Najoli (PW6) testified that he is a retired Forest Officer and that he was based at Ikolomani prior to retirement. That when the plaintiff went to his office and complained that his trees had been cut, he proceeded with the plaintiff to the suit property and found a damaged hedge and two damaged avocado trees. That he valued each avocado tree at KShs 5,000 and assessed the total value of destroyed trees at KShs 166,000. He added that he prepared an undated report. He produced the report and further stated that he relied on the ages of the trees to determine their values. He also stated that part of the damaged trees were converted into timber with the plaintiff's knowledge.
 9. The plaintiff's case was then closed.
 10. 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 8th February 2019 and prepared a report dated 22nd 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.
 11. 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.



12. 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 22nd October 2019 and prepared a report dated 28th 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.
13. 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.
14. Defence case was then closed, after which parties filed and exchanged written submissions.
15. The plaintiff submitted that he had proven his case as regards permanent injunction and special damages. He therefore urged the court to award both prayers. In particular, he urged the court to award him KShs 734,850 as special damages, in terms of the valuation report prepared by Chrisca Real Estate and dated 22nd June 2019.
16. 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 property 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.
17. 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 they 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.
18. I have considered the parties' pleadings, evidence, and submissions. The sole issue for determination is whether the reliefs sought should issue.
19. There is no dispute that the plaintiff is the registered proprietor of the suit property and that there was encroachment into the suit property by the defendant. The plaintiff produced a copy of a title deed which states that the plaintiff was registered as proprietor on 9th October 1976 and the title issued to him on 1st August 2002. Pursuant to Section 26 (1) of the [Land Registration Act](#), the title deed is to be taken by the court as prima facie evidence of proprietorship.
20. The plaintiff is seeking 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 property, 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 property and that the defendant threatened those rights through encroachment. I will therefore grant a permanent injunction.
21. The plaintiff also sought judgment at prayer (b) of the plaint for special damages of KShs 278,500 for loss of trees and 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.
 22. It follows that the maximum amount that can be awarded in this matter as special damages is the pleaded sum of KShs 278,500 and even then, only upon being strictly proved with a degree of certainty and particularity. A perusal of the plaint reveals that the plaintiff did not plead any particulars of special damages. In his submissions, the plaintiff urged the court to award him KShs 734,850 as special damages, in terms of the valuation report prepared by Chrisca Real Estate and dated 22nd June 2019. The departure from the pleadings is stark.
 23. The plaintiff relied on a report dated 16th May 2016 which was prepared by Herbert Amiani Najoli, a retired Sub-County Forest Officer Kakamega South. The said report states that a total of 22 trees were destroyed. It attaches values to the trees but does not state the basis of the values. I have also perused the report prepared by Patrick Mudeshi Shitakwa, a retired Ward Agricultural Officer for Idakho East Ward, and I note that it also simply has estimates that are not justified. Additionally, he included the value of a compost pit, an item that is not included in the prayer for special damages. I find that the plaintiff has failed to prove special damages to the required standard of certainty and particularity. I will therefore not award any special damages.
 24. Regarding the prayer 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 general damages for trespass.
 25. It is trite that 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 quantum of general damages is a matter for the discretion of the court, which has to be exercised judiciously.
 26. As I pointed out earlier, 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 0.03 hectares on the suit property while Jamlax Barasa Mukudi, the defendant's valuer assessed the value of the encroached land at KShs 138,000. On the other hand, Nobert Kisangi, the plaintiff's valuer, put the value of the encroached land at KShs 734850.
 27. 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 value 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.
 28. Doing the best that I can in the circumstances, I consider KShs 200,000 appropriate as general damages for trespass.
 29. In view of the foregoing, 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 parcel of land known as Kakamega/Iguhu/1093.
- 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 11TH 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

