



**Majani v County Government of Kakamega, Ministry of Transport,  
Infrastructure, Public Works & Energy (Environment & Land Case  
142 of 2017) [2024] KEELC 1731 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 1731 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 142 OF 2017**

**DO OHUNGO, J**

**APRIL 11, 2024**

**BETWEEN**

**WILSON NDOLO MAJANI ..... 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> May 2017, when the plaintiff filed plaint dated 31<sup>st</sup> March 2017. He averred that he was the registered proprietor of the parcel of land known as Kakamega/Iguhu/1852 (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 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 84,000 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 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 trees, maize crops, and bananas on the suit property. 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 further stated that 0.04 hectares was



- encroached upon and that he is claiming KShs 84,000 for the damaged trees and crops. He also stated that the suit property was also valued but he did not agree with the defendant's valuation.
4. Gregory Soud Magenya (PW2) testified that Pharis Magenya who is both his boss and father prepared a report dated 23<sup>rd</sup> May 2016 but was unable to attend court due to age and ill health. He added that he accompanied Pharis Magenya to the site and participated in drawing up the report. That there was a 6 metre road running parallel to the suit property and that at the Western end of the suit property there was an encroachment of 4 metres and another of encroachment of 10 metres at the eastern end. That the total encroached area was 0.04 hectares. He produced the report and added that he was not present when County surveyors went to the site on 8<sup>th</sup> February 2019. That the measurements that he and Pharis Magenya took were up to the point where the excavator blade touched as of the time they were on site and that owing to rainfall and passage of time, the area may have changed by the time the county surveyors went to the site. He also stated that he and Pharis Magenya went to the site soon after the encroachment and that vegetation must have grown over the excavation point by the time the county survey team went to the site.
  5. Herbert Amiani Najoli (PW3) testified that he is a retiree and that he was Sub-County Forest Officer Kakamega South. That when the plaintiff went to his office and complained that his trees had been cut and destroyed, he visited the suit property and prepared a report dated 16<sup>th</sup> May 2016. He produced the report and added that he assessed the total value of the loss at KShs 60,000.
  6. Next on the stand was Patrick Mudeshi Shitakwa (PW4) who stated that he is a retired Ward Agricultural Officer for Idakho East Ward where the suit property is located. That when the plaintiff complained to him that a county tractor had damaged his crops, he visited the site and prepared an undated report in mid-March 2016 wherein he assessed the total value of the loss at KShs 32,000. He produced the report.
  7. Lastly, Nobert Kisangi (PW5) and stated that he is a property valuer and that he inspected the suit property at the instruction of the plaintiff on 15<sup>th</sup> May 2019 and prepared a valuation report dated 22<sup>nd</sup> June 2019. That he assessed the total damage at KShs 492,000 plus a disturbance allowance of KShs 73,800 thereby making the total valuation KShs 565,800. He produced the report and added that he estimated the value of the land based on valuation of land in the area. That regarding the value of the trees and crops, he relied on information supplied by other officers.
  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 0.02 hectares on Idakho/Iguhu/1852, 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.
  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. Defence case was then closed, after which parties filed and exchanged written submissions.
  14. 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. 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.
  15. 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 grossly exaggerated and unfair. 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 sole 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 property and that there was encroachment into the suit property by the defendant. I note that the suit property as pleaded in the plaint is Kakamega/Iguhu/1852. However, both parties led evidence in connection with land parcel number Idakho/Iguhu/1852. The plaintiff produced title deed, valuation report and complaint to the National Construction Authority all of which refer to Idakho/Iguhu/1852. Both exhibits produced by the defendant refer to Idakho/Iguhu/1852 and indicate the plaintiff as proprietor. The title deed produced by the plaintiff states that the plaintiff was registered as proprietor on 21<sup>st</sup> June 1989 and the title issued to him on 7<sup>th</sup> February 1990. In the circumstances, I have deemed Idakho/Iguhu/1852 as the correct title number in view of the consensus between the parties.
  18. 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 land parcel number Idakho/Iguhu/1852, 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 land parcel number Idakho/Iguhu/1852 and that the defendant threatened those rights through encroachment. I will therefore grant a permanent injunction.

19. The plaintiff also sought judgment at prayer (b) of the plaint for special damages of KShs 84,000 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 v South Nyanza Sugar Co. Ltd* [2013] eKLR.
20. It follows that the maximum amount that can be awarded in this matter as special damages is the pleaded sum of KShs 84,000 and even then, only upon being strictly proved with a degree of certainty and particularity. I note that the plaintiff did not plead any particulars of special damages. Whereas the plaintiff sought to rely on a report dated 16<sup>th</sup> May 2016 which was prepared by Herbert Amiani Najoli, a retired Sub-County Forest Officer Kakamega South, the said report states that the figures therein are estimates. I have equally 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. I find that the plaintiff has failed to prove special damages to the required standard. I will therefore not award any special damages.
21. 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.
22. It is trite that an owner of land is entitled to nominal damages where there is no actual damage occasioned to the owner 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.
23. 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 0.02 hectares on Idakho/Iguhu/1852 while Jamlax Barasa Mukudi, the defendant's valuer assessed the value of the encroached land at KShs 92,000. On the other hand, Nobert Kisangi, the plaintiff's valuer, put the value of the encroached land at KShs 565,800.
24. 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 v IEBC & 2 others* [2017] eKLR.
25. 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.
26. In the end, 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 Idakho/Iguhu/1852.



- 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

