



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wanjohi & another v Auto Show Limited & another (Environment & Land  
Case 256 of 2015) [2024] KEELC 4422 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4422 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 256 OF 2015**

**EK WABWOTO, J**

**MAY 30, 2024**

**BETWEEN**

**ISAAC GATHUNGU WANJOHI ..... 1<sup>ST</sup> PLAINTIFF**

**ISABELLA NYAGUTHII WANJOHI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**AUTO SHOW LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MBUGUA HOLDINGS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs seeks the following reliefs vide their amended plaint dated 10<sup>th</sup> February 2023:-
  - a. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have trespassed onto the Plaintiffs' property.
  - b. A mandatory injunction compelling the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whether by themselves, their employees, servants and/or agents or otherwise to vacate the Plaintiffs' property.
  - c. A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whether by their employees, servants and/or agents or otherwise from entering, selling, disposing off, transferring, charging, pledging, leasing, wasting, trespassing into, encroaching, fencing off, attempting to fence off, entering, constructing, dumping of any material or howsoever interfering with or dealing with the Plaintiffs' property.
  - d. Damages for loss of user and trespass.



- e. Mesne profits for user of the Plaintiffs' land together with interest thereon at court rates including rent collected by the 2<sup>nd</sup> Defendant from the date of trespass into the Plaintiff's land.
  - f. The Officer Commanding Police Station (O.C.S) and/or the Officer Commanding Police Division (O.C.P.D) Kasarani Police Station do enforce the orders issued by this Honourable Court.
  - g. The costs of this suit.
  - h. Interest on (e) and (g) above at court rates until payment.
    - i. Such further relief that this Honourable Court may deem fit and just to grant.
2. The suit was contested by the defendants. The 1<sup>st</sup> Defendant filed a statement of defence dated 6<sup>th</sup> May 2015 disputing the averments made in the plaint. The 2<sup>nd</sup> Defendant on the other hand filed a Preliminary Objection dated 28<sup>th</sup> November 2023 which Preliminary Objection was premised on the following grounds:-
1. The Plaintiffs have failed to comply with the mandatory provisions of Order 5 Rule 1 of the Civil Procedure Rules in that no Summons has been served on the 2<sup>nd</sup> Defendant.
  2. The 2<sup>nd</sup> Defendant therefore has not been given an opportunity to defend itself.
  3. Relying on the above 2<sup>nd</sup> Defendant prays that this suit be struck out on the basis of non compliance with the law.
3. It was the Plaintiffs case that they are the registered and joint owners of L.R. No. 28/1, the 2<sup>nd</sup> Defendant was the registered owner of all that property known as L.R. No. 29/1 which property is adjacent to the Plaintiff's property and the 1<sup>st</sup> Defendant occupied all that property known as L.R. No. 29/1 as a tenant of the 2<sup>nd</sup> Defendant.
4. The Plaintiffs averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant have jointly and severally illegally and without any right or consent purported to encroach and/or trespass and claim ownership of a portion of the Plaintiff's properties without just cause or consent which action is fraudulent and in flagrant breach of the Plaintiffs' rights.
5. It was also averred that the Defendants are trespassers on their property and have continued to frustrate the Plaintiffs by forcefully encroaching on their land and have adamantly refused to vacate the same. The particulars of trespass by the Defendants were pleaded at paragraph 7 of the Plaintiff's amended plaint.
6. The Plaintiffs also averred that due to the Defendants actions, they have been wrongly deprived ownership, occupation and enjoyment of their interest on the Plaintiffs' property and as such they have suffered loss and damages.
7. During trial, Isaac Gathungu Wanjohi testified on behalf of the Plaintiffs he relied and adopted his witness statement dated 12<sup>th</sup> June 2023 and a bundle of documents of even date as his evidence in chief. He testified that he bought the land through a private treaty from Standard Chartered Bank for Kshs. 22,000,000/= in 2008. He also stated that they had no issues after purchasing the land until about 2013



- 2014 when the adjacent land L.R. No. 29/1 changed hands and that the new owner got a surveyor and established a line which became diagonal as shown in the map that was produced in evidence.
8. The witness stated that when the boundary was established diagonally, part of the property placed that on a different side. A new boundary was established and they tried to amicably sort out the issue but all was in vain. The court was also informed that the 1<sup>st</sup> Defendant was the owner of L.R. No. 29/1. The court was also informed that the Director of Survey was invited to the site and indeed a Surveyor visited the site and they filed a map showing the area of encroachment to be about 200.02sqm. The map was produced as part of the Plaintiffs’ bundle of documents appearing at page 12.
  9. The 1<sup>st</sup> Defendant filed a statement of defence dated 6<sup>th</sup> May 2015. The 1<sup>st</sup> Defendant denied encroaching on the suit property known as L.R. No. 28/1 and stated that she occupies L.R. No. 29/1 as a tenant. It was stated that she has been paying rent to Mbugua Holdings Limited with whose permission and authority she occupies and has erected structures on part of that property known as L.R. 29/1. It was also stated that L.R. No. 29/1 and 28/1 are adjacent to each other and if any dispute exists then the same is a boundary dispute between the parties.
  10. It was pleaded that the proceedings herein relate to a boundary dispute and this court is barred from adjudicating on the same pursuant to the provisions of Section 18(2) of the [Land Registration Act](#).
  11. During trial, the 1<sup>st</sup> Defendant never testified, participated nor called any witness to testify on her behalf.
  12. The 2<sup>nd</sup> Defendant did not file any defence save for filing a Notice of Preliminary Objection seeking to have the suit struck out on the basis of non-compliance with the provisions of Order 5 Rule 1 of the [Civil Procedure Rules](#) to the effect that no summons has been served on the 2<sup>nd</sup> Defendant. The said Preliminary Objection was however dismissed on 14<sup>th</sup> February 2024 for want of prosecution. During trial the 2<sup>nd</sup> Defendant never called any witness nor participated in the proceedings.
  13. The parties were directed to file and exchange written submissions after the close of their respective cases. The Plaintiffs filed their written submissions dated 21<sup>st</sup> May 2024 which the court has duly considered. The Defendants never filed any written submissions and there was none on the e-filing portal as at the time this court retired to write its judgment. That notwithstanding this court still has an obligation to consider the pleadings on record, the oral and documentary evidence adduced and render its judgment.
  14. Having considered the pleadings, oral and documentary evidence adduced herein, together with the written submissions filed by the Plaintiffs. This court is of the view that the following are the salient issues for consideration herein:-
    - i. Whether this court has jurisdiction to hear this matter in view of the provisions of Section 18(2) of the [Land Registration Act](#).
    - ii. If the answer to the above is in the negative, whether the Plaintiff’s have proven their case to the required standard.
    - iii. What are the appropriate reliefs to grant herein.
  15. The 1<sup>st</sup> Defendant objected to the court’s jurisdiction for the reasons that the dispute herein was a boundary dispute which ought to be referred to the Land Registrar for Resolution pursuant to the provisions of Section 18 of the [Land Registration Act](#).



16. In the instant suit, the Plaintiffs pleaded that sometimes in December 2013, they realized that the 1<sup>st</sup> Defendant had set up its premises on a portion of the Plaintiffs' property and this prompted them to seek assistance from Director of Survey. It was further pleaded that the Director of Survey did visit the site on 22<sup>nd</sup> July 2016 and confirmed the position of L.R. No. 28/1 and 29/1. The Director of Survey confirmed that the 1<sup>st</sup> Defendant had encroached the Plaintiff's property by approximately 0.05 acres.
17. From the evidence that was adduced herein it is evident that the dispute herein had been considered by the Director of Survey. Section 18(2) of the [Land Registration Act](#) stipulates that:-  
Section 18(2)  
"The court shall not entertain any action or other proceedings relating to a dispute as to boundaries of registered land unless the boundaries have been determined in accordance with this section."
18. In view of the foregoing, and considering that the dispute herein had been referred to Director of Survey who prepared his report dated 15<sup>th</sup> September 2016, this court has jurisdiction to consider the matter.
19. During trial, the Plaintiffs adduced evidence as to how the 1<sup>st</sup> Defendant had encroached onto their property L.R. No. 28/1. The Plaintiff also produced a survey report confirming the same. From the said report it was clear that the 1<sup>st</sup> Defendant ought only to have been within L.R. No. 29/1 and not to occupy part of 28/1. The Plaintiffs evidence was not controverted and the court is satisfied that Plaintiffs have proved their case to the required standard.
20. In respect to the reliefs sought, the Plaintiffs sought for a number of reliefs including mandatory injunction, permanent injunction, damages for trespass, mesne profits and costs of the suit. The Plaintiffs submitted that they were entitled to a monthly rent payment of Ksh 65,000/- by the Defendants and as such they were entitled to recover the mean profit from the Defendants from the year 2009 when the 1<sup>st</sup> Defendant began its unlawful occupation of part of their land. However, it is instructive to note that though a prayer has been made for mesne profits same has however not been particularized in the body of the Plaint, either as required by the law or at all. A claim for mesne profits is akin to a claim for Special Damages and therefore same requires to be particularly pleaded and thereafter specifically proved by adduction cogent and credible evidence and not otherwise. In this regard, the position of the law, was elaborated upon and succinctly expounded in the case of [Christine Nyanchama Oanda versus Catholic Diocese of Homa Bay Registered Trustees \[2020\]](#) eKLR.
21. The evidence that was tendered herein confirmed that the trespass occurred sometimes from December 2013 when the Plaintiffs wrote to the Defendants demanding them to vacate the encroached part of their property. However as earlier stated this claim of mesne profit being akin to special damages, the court is not satisfied that the same has been proved to the required standard. The receipts referred to were not produced in court by the Defendants since no evidence was tendered on behalf of the Defendants during trial. The Plaintiffs have laid a basis for grant of the same.
22. In respect to general damages for trespass, trespass was pleaded and particularised and further as earlier stated the court is satisfied that the Plaintiffs were able to prove the particulars of trespass as against the Defendants. The plaintiffs did not indicate any amount to guide the court in assessing general damages for trespass. The court would have expected the Plaintiffs to do so in their submissions but none was provided. That notwithstanding this court is still obligated to consider the same as general damages are awarded as recognition of an infringement of a legal right or duty. In the case of [Mwihaki vs Safaricom PLC \(Formerly Known As Safaricom Limited\) \(Environment & Land Case E165 Of 2021\) \[2023\] KEELC 19802 \(KLR\) \(30 August 2023\) \(Judgment\)](#) which had similar issues in respect to the instant case, the Learned Judge awarded Kshs.2,000,000/= for general damages. Considering all the



circumstances of this case and the duration of the trespass this court shall proceed to award nominal damages in the sum of Kshs. 2,000,000/= as a result of the Defendants act of trespass.

### **Final orders**

23. In conclusion, this court makes the following disposal orders:-
- a. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have trespassed onto the Plaintiffs' property known as L.R. No. 28/1.
  - b. A mandatory injunction be and is hereby issued compelling the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, whether by their agents, employees, servants and/or agents or otherwise to vacate the Plaintiffs' property within 60 days from the date of service of the decree.
  - c. A permanent injunction be and is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, whether themselves, employees, servants and/or agents or otherwise from entering, selling, disposing off, transferring, charging, pledging, leasing, trespassing into, encroaching, fencing, entering, constructing, dumping of any material or interfering or dealing with the Plaintiffs' property.
  - d. General damages for trespass for Ksh 2,000,000/-
  - e. The OCS and or OCPD Kasarani Police Station to enforce the orders issued herein.
  - f. Costs of the suit are awarded to the Plaintiffs.

Judgment accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> DAY OF MAY, 2024.**

**E. K. WABWOTO**

**JUDGE**

**In the presence of:-**

**Mr. J.B. Macharia h/b for Edwin Mukele for the Plaintiffs.**

**N/A for the Defendants.**

**Court Assistant: Caroline Nafuna.**

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