



REPUBLIC OF KENYA



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**Wang'odu v Nderitu (Environment & Land Case 94 of 2023)  
[2024] KEELC 4289 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4289 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
ENVIRONMENT & LAND CASE 94 OF 2023**

**YM ANGIMA, J**

**MAY 23, 2024**

**BETWEEN**

**SARAH MURINGI WANG'ONDU ..... PLAINTIFF**

**AND**

**JOHN MAINA NDERITU ..... DEFENDANT**

**JUDGMENT**

**A. Plaintiff's Claim**

1. By a plaint dated 22.10.2020, the Plaintiff sued the Defendant seeking the following reliefs against him:
  - a. A declaration that the Defendant's occupation and use of the property known as Title No. Nyandarua/Ndaragwa/247 amounts to trespass and intermeddling with the deceased's property.
  - b. A mandatory injunction compelling the Defendant to forthwith vacate and remove all structures he has put up on Title No. Nyandarua/Ndaragwa/247 and in the event the Defendant does not comply with this order, an eviction do issue against the Defendant to be enforced by the O.C.S.
  - c. A permanent injunction restraining the Defendant from trespassing, claiming, encroaching, entering, alienating, or in any way dealing with the property Title No. Nyandarua/Ndaragwa/247.
  - d. General damages for trespass.
  - e. Costs of this suit.
  - f. Any other or further or further relief this honourable court may deem fit to grant in the circumstances of this case.



2. The Plaintiff pleaded that she was the administratrix of the estate of the late John W. Ngorongo (the deceased) who was the registered proprietor of Title No. Nyandarua/Ndaragwa/247 (the suit property) measuring approximately 26.0 ha who died on 21.08.2010. It was pleaded that vide an agreement dated 24.02.2018 the Plaintiff allowed the Defendant to utilize the suit property for the purpose of grazing his livestock for a period of one year.
3. The Plaintiff pleaded that in breach of the said agreement the Defendant had settled into the suit property and engaged in other activities such as erecting a fence, drilling a borehole, erecting structures, cutting down trees, burning charcoal and farming which activities had degraded the suit property. It was pleaded that upon the lapse of the agreed period of one year the Defendant had refused to vacate the suit property despite demand.
4. It was the Plaintiff's case that upon the Defendant's refusal to vacate the suit property she reported the matter to the location chief who determined that the Defendant's lease period had expired hence he ought to vacate the suit property. It was the Plaintiff's further case that upon the Defendant's failure to oblige, she reported the dispute to the Assistant County Commissioner who advised her to seek legal redress in court.

### **B. Defendant's Response**

5. The Defendant filed a defence dated 29.03.2021 and amended on 23.05.2022 denying liability for the Plaintiff's claim. He pleaded that the Plaintiff had granted her a contractual licence over the suit property in 2017 in her capacity as trustee de son tort since she was appointed an administratrix of the estate of the deceased in March, 2020.
6. The Defendant pleaded that the said contractual licence allowed him to build a timber house, build stores, drill a borehole, construct a pit latrine and pen for his goats. He denied having entered into the agreement dated 24.02.2018 and contended that his purported signature thereon was a forgery which was the subject of a criminal investigation.
7. It was the Defendant's contention that vide the contractual licence of 31.12.2017 it was agreed that:
  - a. He would occupy the entire suit property with effect from 01.01.2018.
  - b. He would fence the suit land at his own expense with barbed wire.
  - c. He would cut down trees on the suit property and convert it into arable land.
  - d. He was entitled to cultivate crops and undertake any other activities of his choice.
  - e. He would burn charcoal from the trees on the suit property.
  - f. That once the entire suit property was converted into arable land the parties would negotiate terms of a formal lease to the Defendant.
8. As a consequence, the Defendant pleaded that the Plaintiff's claim for the suit property was fraudulent and that she was not entitled to the reliefs sought in the suit or any one of them. He contended that he was entitled to be granted a lease for 15 years under the equitable rule applied in Commissioner of Lands -vs- Hussein [1968] EA 585.



### **C. Defendant's Counter claim**

9. By his counterclaim, the Defendant reiterated the contents of his amended defence and pleaded that he had incurred a sum of Kshs.10,666,504/= in undertaking the developments specified in paragraphs 6 and 7 hereof at the instance of, and for the benefit of, the Plaintiff. It was his case that if the Plaintiff was not willing to negotiate and grant her a lease over the suit property then she was obligated to refund him the expenses incurred in developing it to the tune of Kshs.10,666,504/=.
10. As a result, the Defendant sought the following reliefs against the Plaintiff:
  - a. A declaration that the Defendant to the counterclaim is obligated to grant a lease to the Plaintiff over the suit land.
  - b. In the alternative to (a) above, a declaration that in the event she does not grant a lease to Plaintiff, the Defendant to the counterclaim is obligated to refund to the Plaintiff all the funds spent to fence the suit land, clearing the bushes and putting up various structures in the suit land.
  - c. Kshs. 10,666,504/=
  - d. Costs of this counterclaim.

### **D. Plaintiff's Response to Defence and Counterclaim**

11. The Plaintiff filed a reply to defence and defence to counterclaim dated 07.06.2022. By her reply to amended defence, she joined issue with the Defendant on his amended defence. She denied having allowed the Defendant to undertake the activities specified in paragraphs 6 and 7 hereof and put the Defendant to strict proof thereof. She denied having entered into the contractual licence pleaded by the Defendant and put him to strict proof thereof.
12. The Plaintiff denied that the Defendant's signature on the agreement dated 24.02.2018 was a forgery and put him to strict proof thereof. It was contended that the allegation of forgery was an afterthought and that there was no pending criminal investigation over the issue. It was contended that the Defendant's report to the police on the alleged forgery was made in March, 2022 whereas the Defendant was served with the plaint and supporting documents in November, 2020.
13. By her defence to counterclaim, the Plaintiff denied the Defendant's counterclaim in its entirety and put him to strict proof thereof. She denied the expenses of Kshs.10,666,504/= pleaded by the Defendant and put him to strict proof thereof. It was pleaded that she did not authorize the Defendant to undertake the activities in question and to incur any expenses on her behalf. The Plaintiff contended that the Defendant was the one who was forcibly occupying the suit property hence he was the one liable to pay damages as a trespasser. As a result, she prayed for dismissal of the Defendant's defence and counterclaim.

### **E. Trial of the action**

14. At the hearing of the action, the Plaintiff called 3 witnesses in support of her claim and in defence of the counterclaim whereas the Defendant called four (4) witnesses in defence of the suit and in support of his counterclaim. The Plaintiff's evidence essentially mirrored what she had pleaded in her plaint and her defence to counterclaim. The Defendant's evidence similarly mirrored what was pleaded in his amended defence and counterclaim save for some variations which shall be considered later in the judgment.



## **F. Directions on Submissions**

15. Upon conclusion of the trial the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiff filed written submissions dated 25.03.2024 whereas the Defendant's submissions were dated 22.04.2024.

## **G. Issues for Determination**

16. The court has noted that the parties did not file an agreed statement of issues for determination. They filed separate issues hence it is the duty of the court to frame the issues for determination as provided for under the law. Under Order 15 rule 2 of the Civil Procedure Rules, the court may frame issues from any of the following:
- a. The allegations contained in the pleadings or answers to interrogatories.
  - b. The allegations contained in sworn statements made by or on behalf of the parties.
  - c. The contents of documents produced by the parties.
17. The court has considered the pleadings, evidence and documents on record in this matter. The court is of the opinion that the following are the key issues for determination in the suit and counterclaim:
- a. Whether the Plaintiff has proved her claim to the required standard.
  - b. Whether the Defendant has proved his counterclaim to the required standard.
  - c. Whether the Plaintiff is entitled to the reliefs sought in the suit.
  - d. Whether the Defendant is entitled to the reliefs sought in the counterclaim.
  - e. Who shall bear costs of the suit and counterclaim.

## **H. Analysis and Determination**

- a. Whether the Plaintiff has proved her claim to the required standard
18. The court has considered the evidence and submissions on record on this issue. The Plaintiff's claim was so simple and straightforward. She was claiming recovery of the suit property as the administratrix of the estate of the deceased who was the registered owner thereof. She was seeking recovery on the basis that the agreement for occupation she made with the Defendant in 2018 was for a limited period of one year and that the same had expired but the Defendant had refused to vacate the suit property.
19. There is no doubt from the pleadings and evidence on record that the deceased was still the registered owner of the suit property. There is no dispute that the Plaintiff was the administratrix of the estate of the estate and that she was issued with a limited grant in the year 2020 whereas the deceased died in 2010. There is also no doubt that the grant has not yet been confirmed. It is also evident that the agreement relied upon by the Plaintiff is the one dated 24.02.2018 although the Defendant disputed the signature thereon.
20. The court has considered the Defendant's evidence on the alleged forgery of his signature on the said agreement. The material on record shows that the Defendant was served with a summons and a copy of the plaint and supporting documents in 2020 and he entered appearance on or about 18.11.2020. He did not plead the issue of the alleged forgery in



his original defence dated 29.03.2021. He did not allege any forgery in his original witness statement dated 29.03.2021. The allegation of forgery of his signature only surfaced in the amended defence and counterclaim of 23.05.2022 and further witness statement dated 09.05.2022 which was a copycat of the amended defence and counterclaim.

21. What is even more baffling is that the Defendant purported to report the alleged forgery of his signature to Ndaragwa Police Station for a criminal investigation and 28.03.2022 about 2 years after the filing of the suit and more than one year after service of the Plaintiff's documents including a copy of the agreement dated 24.02.2018. The court finds such a belated reporting to be a mere afterthought which was simply intended to lend some credence to his amended defence and counterclaim of 23.03.2022.
22. The court has further noted that the Defendant did not even seek to put in expert opinion from a forensic document examiner on the genuineness of the signature he disputed. He simply relied on his own word that the signature on the agreement was a forgery. The court finds and holds that the Defendant has failed to demonstrate the alleged forgery of his signature. As a result, the court accepts the agreement dated 24.02.2018 as genuine and encompassing the terms of the Defendant's utilization of the suit property as well as the duration thereof. Given that the Defendant was granted a term of one year with effect from 24.02.2018 then the agreement expired by effluxion of time on or before 23.02.2019.
23. The court has also considered the evidence and submissions on record on whether or not the Defendant was in breach of the terms of the agreement dated 24.02.2018 during its currency. Whereas the Plaintiff contended that the Defendant was only allowed to graze his livestock on the suit property the Defendant contended that there was another agreement which allowed him to undertake the activities listed in paragraph 6 and 7 hereof. However, the Defendant did not produce a copy of the alleged agreement on the basis that he was not supplied with a copy thereof by the Plaintiff.
24. It is evident from the terms of the agreement dated 24.02.2018 which the court has accepted as genuine that the only activity which the Defendant was allowed to undertake on the suit property was to graze 'cows' and 'goats'. The court is unable to import any additional terms as the ones alleged by the Defendant since they were not proved at the trial. It would be really strange for the Plaintiff to have terminated the agreement she had with the previous licensee for allegedly cutting down trees and burning charcoal only for her to allow the Defendant to do the same things soon thereafter.
25. It is also noteworthy that although the Defendant had pleaded in his amended defence and counterclaim that he was expressly allowed to cut down trees and burn charcoal on the suit property, he changed tact in his evidence at the trial and claimed that he did not cut down any trees. In fact, he claimed that the mature trees were sold by the Plaintiff herself and that he was merely using leftovers and shrubs for charcoal burning. The court does not believe the Defendant was a truthful witness in this regard. It is the finding of the court that the Defendant deliberately cut down trees and burnt charcoal on the suit property without any express authority from the Plaintiff and that he carried out the other activities without the consent of the Plaintiff. There was evidence on record to demonstrate that the Defendant had a charcoal store on the suit property and that he used to sell charcoal. The court is thus satisfied that the Plaintiff has proved her claim against the Defendant to the required standard. There is



adequate evidence to demonstrate expiry of the Defendant's terms with no evidence of renewal and there is also credible evidence of unlawful occupation and trespass by the Defendant.

b. Whether the Defendant has proved his counterclaim to the required standard

26. The court has considered the evidence and submissions on record on this issue. The Defendant's case was that there was a separate agreement other than the one dated 24.02.2018 which allowed him to undertake the activities listed in paragraphs 6 and 7 hereof and which may have allowed him an indefinite period of occupation and use of the suit property. It was also the Defendant's case that he did not have a copy of the said agreement because it was in the possession of the Plaintiff or her advocate who prepared the same.
27. The court takes the view that the burden of proof of the existence and the terms of the said agreement squarely fell upon the Defendant under Section 107 of the Evidence Act (Cap.80). The said Section stipulates as follows:
  - “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
28. The Defendant's contention at the trial was that the 'licence' agreement which he sought to rely upon was prepared by the Plaintiff's advocate called Charity Mumbi who was resident in Nyeri County at the material time. However, there is no evidence on record to demonstrate that such an advocate existed in the first place. There was no evidence to show that the Plaintiff was ever supplied with a copy of the said agreement by Charity and there was no notice served upon her under Section 69 of the Evidence Act (Cap.80) for her to produce the agreement in court.
29. Be that as it may, the court finds that the existence of the alleged agreement was not proved at the trial by the Defendant. It is also doubtful if such an agreement, if any, was oral or written. This is because in his original defence dated 29.03.2021 the Defendant had pleaded that the agreement was oral but he amended his pleading on 23.03.2022 to remove the reference to 'oral' and just called it a contractual licence. The court's finding is that the existence of the said agreement, whether oral or written, was not proved at the trial.
30. In the absence of proof of the existence of the expansive terms of the agreement as contended by the Defendant it would not matter whether or not the Plaintiff was a trustee de son tort at the material time. The rule in the case of Commissioner of Lands -vs- Hussein (supra) would not be applicable in the absence of evidence of any oral or written representations by the Plaintiff. Similarly, the doctrine of proprietary estoppel would not apply in the absence of evidence of any representation or promises by the Plaintiff which were relied upon by the Defendant to his detriment.
31. The court has noted that in his written submissions the Defendant relied upon the equitable doctrine of unjust enrichment and cited the case of Chase International Investment Corporation & Another -vs- Laxman Keshra & 3 Others [1978] eKLR in support of his counterclaim. The court has noted that the issue of unjust enrichment was not raised either in the amended defence or counterclaim. It was not even raised at the trial. Nevertheless, the court



finds no credible evidence on record to show that the Plaintiff has been unjustly enriched by the Defendant's actions. There was no evidence that she received any benefit from the Defendant. In fact, the evidence on record shows that the Plaintiff paid the rental fee for one year only. The Defendant admitted at the trial that apart from the initial payment in 2018 he has never paid the Plaintiff any other amount despite his continued occupation and utilization of the suit property. The evidence on record shows that it was the Plaintiff and the estate of the deceased who have suffered loss as a result of the Defendant's forcible and unlawful occupation of the suit property.

32. In view of the court's finding that the Defendant's occupation has been unlawful in view of the absence of the contractual licence pleaded in the amended defence and counterclaim it would follow that the Defendant has not proved his counterclaim to the required standard.
33. The court finds no evidence to demonstrate that the Defendant's impugned activities were carried out at the instance and benefit of the Plaintiff or the estate of the deceased. There is no credible evidence on record to demonstrate that the Defendant actually expended Kshs.10,666,504/= on the suit property either for his own benefit or for the benefit of the Plaintiff. The Defendant may well have taken a loan at the material time but there was no evidence to show that the loan was invested in the suit property.
34. The court finds the Defendant's claim for Kshs.10,666,504/= against the Plaintiff not to have proved in another respect. If the Defendant were to be taken at his word that accounts were to be taken at a future date once he has completed fencing the land, burning charcoal, and conducting his farming activities then common sense would dictate that the income generated from the trees, charcoal, farming et cetera should be taken into account in establishing who should either pay or receive payment from the other party. The Defendant's report only purported to compute his alleged expenses but completely excluded the income generated from his activities on the suit property.
35. During cross-examination by the Plaintiff's advocate the Defendant stated as follows:

“ Yes, it is true that I derive income from my farming activities on the land. I do not know how much income I derive from the land...”
36. The record also shows that when the Defendant's accountant (PW2) was cross-examined by the Plaintiff's advocate he stated that all the figures in his report were provided by the Defendant and that the Defendant did not disclose to him that he was generating any income from the suit property. The accountant also disclosed when questioned by the court that the Defendant had included a sum of Kshs. 2,688,000/= out of his claim of Kshs.10,666,504/= as his expenses for running errands and managing the land. The report contained two (2) entries of Kshs. 1,074,000/= and one for Kshs. 540,000/= as management fees styled as “farm management”.
37. The court is of the view that the Defendant was not honest in his counterclaim. His failure to keep a record of the income generated from the suit property makes it virtually impossible to take credible and accurate accounts. His failure to disclose the income generated from his activities on the suit property also exposes the Defendant's dishonesty in his dealings with the suit property. The Defendant cannot legitimately bill the Plaintiff Kshs.2,668,000/= for allegedly running errands and managing the suit property on behalf of the Plaintiff whereas there was no agreement to that effect and when he was not even disclosing the annual income he



was making from the suit property. The court is of the view that the Defendant's counterclaim is simply untenable and fraudulent.

38. Finally, the court is of the view that there is even a greater reason why the Defendant's counterclaim for payment of Kshs.10,666,504/= should fail. It is obvious that this claim for reimbursement is in the nature of special damages. It is now well settled in law that special damages must be pleaded with particularity and strictly proved. It is evident from the Defendant's counterclaim that the same was not pleaded with particularity. There was no breakdown as to how the sum of Kshs.10,666,504/= was arrived at. One has to search in the Defendant's exhibits to know what the amount is made up of.

39. In the case of Ouma -vs- Nairobi City Council [1976] eKLR it was held, inter alia, that:

“ Thus for a Plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the English leading case on pleading and proof of damage, *Ratcliffe v Evans* (1892) 2 QB 524 where Bowen L J said at pages 532, 533:

“The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”

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

40. The court has found and held that the Plaintiff has proved her claim for recovery of the suit property which forms part of the estate of the deceased pending administration and distribution of the estate. The court is thus inclined to grant the declaration and eviction order sought. However, the court is not inclined to grant a permanent restraining injunction against the Defendant since he is already in possession of the suit property. The court is of the view that the only effective remedy against trespasser in occupation is either a mandatory injunction or eviction order.

41. The court has considered the material and submissions on record on the issue of general damages for trespass. The court does not agree with the Defendant's suggestion that the Plaintiff cannot maintain an action for trespass because she is not in physical possession of the suit property. The court takes the view that the Defendant's permission to be on the suit property expired on or about 23.02.2019 hence he became a trespasser from that moment since there was not extension of his license. The mere fact that his initial entry was with permission cannot preclude his continued occupation after termination or expiry of licence being trespass.

42. The evidence on record shows that the Defendant was in occupation of the entire suit property measuring about 65 acres. He cultivates most of the arable land whereas he grazes his livestock on the rest of the suit property. He has been occupying and generating income from it for about 5 years after expiry of his licence. The court is aware that trespass as a tort is actionable per se hence a claimant does not have to demonstrate particular loss or damage in order to be entitled to general damages. See *Duncan Nderitu Ndegwa -vs- Kenya Power & Lighting Co. Ltd. & Another* [2013] eKLR.



43. The Plaintiff has prayed for general damages of Kshs.5,000,000/= for trespass. The Defendant, of course, prayed for outright dismissal of the Plaintiff's claim hence he did not suggest any figure. The court has considered that judicial awards of general damages for trespass are widely varied. In the case *Simon Nyachae & Another -vs- County Government of Mombasa* [2020] eKLR, the Plaintiff was awarded Kshs.1,500,000/= as general damages for trespass to land, whereas in *Neem Properties Limited -vs- Wells Fargo Limited* [2021] eKLR the Plaintiff was awarded Kshs.1,000,000/= for trespass. However, in *Kenya Power & Lighting Company Ltd & 2 Others (Civil Appeal No. E247 & E248 of 2020 (consolidated) 2022 KECA 104 (KLR) 4 February, 2022 (Judgment)* the first Respondent was awarded Kshs.2,000,000/= whereas the second Respondent awarded Kshs.4,000,000/= as general damages for trespass since the Court of Appeal found that it was a continuing trespass. The court takes the view that the Defendant's trespass in the instant suit is a continuing trespass which has been going on for about 5 years. He confirmed at the trial that he was occupying and utilizing the entire suit property of 65 acres. Taking into account the size of the suit property, the length of the trespass and the fact that the Defendant has been generating income from the suit property, the court is of the view that a sum of Kshs.4,000,000/= as general damages shall adequately compensate the Plaintiff.

d. Whether the Defendant is entitled to the reliefs sought in the counterclaim

44. The court has already found and held that the Plaintiff has failed to prove his pleaded counterclaim to the required standard. It would, therefore, follow that the Defendant is not entitled to an order compelling the Plaintiff to grant her a lease over the suit property nor to refund the Defendant any monies he may have expended on the suit property. In particular, the Defendant is not entitled to payment of Kshs.10,666,504/= claimed in the counterclaim.

e. Who shall bear costs of the suit and counterclaim

45. 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. The court finds no good reason to depart from the general rule. As such, the Plaintiff shall be awarded costs of the suit as well as costs of the counterclaim.

## **I. Conclusion and Disposal Order**

46. The upshot of the foregoing is that the court finds and holds that the Plaintiff has proved her claim to the required standard whereas the Defendant has failed to prove his counterclaim to the required standard. As a consequence, the court makes the following orders for disposal of both the suit and counterclaim:

a. The Plaintiff's suit be and is hereby allowed in the following terms only:

i. A declaration be and is hereby made that the Defendant's occupation and use of Title No. Nyandarua/Ndaragwa/247 amounts to trespass.



- ii. A mandatory injunction be and is hereby granted compelling the Defendant to vacate and remove his structures from Title No. Nyandarua/Ndaragwa/247 within 60 days from the date hereof in default of which he shall be forcibly evicted therefrom.
- iii. The Plaintiff is hereby awarded general damages of Kshs.4,000,000/= for trespass.
- b. The Defendant's counter-claim be and is hereby dismissed in its entirety.
- c. The Plaintiff is hereby awarded costs of both the suit and counterclaim.

It is so decided.

Judgment dated and signed at Nyandarua this 23<sup>rd</sup> day of May, 2024 and delivered via Microsoft Teams platform.

In the presence of:

Mr. Muriungi for the Plaintiff

Mr. Gacheru for the Defendant

C/A - Carol

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**Y. M. ANGIMA**

**JUDGE**

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