



REPUBLIC OF KENYA



Ouya v Embakasi Ranching Company Limited (Environment and Land Case Civil Suit 424 of 2018) [2024] KEELC 3965 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3965 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 424 OF 2018**

OA ANGOTE, J

MAY 16, 2024

BETWEEN

WILSON OGWANG OUYA PLAINTIFF

AND

EMBAKASI RANCHING COMPANY LIMITED DEFENDANT

JUDGMENT

1. Vide a Plaint dated 1st October, 2018, the Plaintiff seeks the following reliefs as against the Defendant;

i. Permanent Injunction do issue to restrain the Defendant by itself, its servants and/or agents and cahoots from trespassing upon, or entering upon, or in any way interfering with the Plaintiff's enjoyment of quiet possession of the said suit landed properties namely;

- a. Embakasi Ruai Plot No V. 10052/C 500
- b. Embakasi Ruai Plot No V. 10053/C 502
- c. Embakasi Ruai Plot No V. 5411/C 496
- d. Embakasi Ruai Plot No V. 5412/C 501
- e. Embakasi Ruai Plot No V 5413/C 497

All being sub-divisions and/or portions of, or from original land title number Nairobi Block 136 as shown in Survey Plan Map C as Survey Land Titles Series Nairobi Blocks 136/12806, 136/12807, 136/12808, 136/12809 and 136/12810 respectively ALL of which said suit landed properties are situate in Ruai Sub-County in the County of Nairobi in the Republic of Kenya aforesaid.

ii. The Defendant be ordered to issue Titles and/or Certificates of Titles for each of the following landed properties namely;



- a. Embakasi Ruai Plot No V. 10052/C 500
 - b. Embakasi Ruai Plot No V. 10053/C 502
 - c. Embakasi Ruai Plot No V. 5411/C 496
 - d. Embakasi Ruai Plot No V. 5412/C 501
 - e. Embakasi Ruai Plot No V 5413/C 497
- iii. In the alternative, the Plaintiff prays for Title/Ownership by virtue of adverse possession of each and/or all of the suit landed properties listed above.
 - iv. General damages be awarded against the Defendant for loss and damages suffered by the Plaintiff for breach of Sale Agreement.
 - v. Costs and Interests.
 - vi. Such further or other Orders as this Honourable Court may deem fit to grant.
2. It is the Plaintiff's case that on diverse dates between 2004 and 2006, he purchased from the Defendant all those sub-divisional plots of land known as Embakasi Ruai Plots V 10052/C500; 10053/C502; 5411/C496; 5412/C501; 5413/C497 all being sub-divisions and portions of land title Nairobi/ Block 136 as shown in the Survey Plan Map C, as Survey Land Reference Series Nairobi/Blocks 136/12806; 136/12807; 136/12808; 136/12809; 136/12810 all clearly demarcated, fenced on the ground site and located in Ruai in Nairobi sub-county(hereinafter the suit properties).
 3. The Plaintiff has averred that he purchased the said properties for the sum of Kshs 160,000; that upon payment of the purchase price, re-survey, and ground identification, he took immediate possession of the parcels and has remained thereon enjoying quiet un-interrupted possession for over 12 years to date and that he has fenced off all the properties and put up several developments thereon.
 4. According to the Plaintiff, it was a term of the sale that upon payment of the entire purchase price, the Defendant would issue him with titles to the suit properties; that despite notice, and notwithstanding the National Government's intervention, the Defendant failed and/or neglected to issue the titles aforesaid and that as a result thereof, third parties, in collusion with the Defendant, have been interfering with his quiet possession of the suit properties through unfounded claims to ownership and/or title.
 5. The Defendant entered appearance but did not file a Defence.

Hearing and Evidence

6. The matter proceeded for hearing on 6th November, 2011. The Plaintiff, as PW1, adopted his witness statement dated 1st October, 2018 as his evidence in chief and produced the documents of an even date as PEXHB1-8. He produced the supplementary bundle of documents dated 25th October, 2022 as PEXHB9-13.
7. It was his evidence that between the years 2004 and 2006, he purchased from the Defendant five parcels of land measuring approximately $\frac{1}{4}$ of an acre each; that he paid the Defendant the sum of Kshs 96,000 on 16th August, 2004 for Embakasi Ruai Plots V 5411/C 496; V5413/C 497 and V5412/C 501 being Kshs 32,000 each and that he was duly issued with receipts for the payments being receipt numbers 016349/50/51.



8. PW1 stated that on 23rd July, 2006, he purchased two other parcels of land for the total sum of Kshs 64,000 at Kshs 32,000 each being Embakasi Ruai Plots V 10052/C 500 and V 10053/ C502; that upon purchasing the five parcels of land, he was issued with non-member certificates of plot ownership in respect of the same and that he was thereafter shown the ground positions of the suit property and began developments thereon.
9. PW1 informed the court that sometime in 2013, he was approached by the Defendant and asked to handover his original documents to facilitate issuance of the title deeds and that he was later informed that his documents were lost in an alleged hijack incident and the Defendant issued him with certified copies of the same.
10. It was the testimony of PW1 that on 7th June, 2018, the Defendant asked him to produce the aforesaid certified copies for purposes of carrying out official searches and that he was supplied with the application for searches in respect of titles Nairobi Blocks 136/12806; 136/12807 and 136/12810.
11. He stated that upon inquiry, he was informed that he would be supplied with the search in respect of the remaining two properties at a later date; that on 16th July, 2018, the Defendant invited him and other plot owners to visit their offices for issuance of title deeds and revisiting of sites; that he was asked for and paid Kshs 20,000 per plot for viewing and inspection and that despite the foregoing, he was not issued with titles.
12. It was his oral evidence that he has had several trespassers on his property sent by the Defendant and that the Defendant eventually issued him with title deeds in 2019.

Submissions

13. The Plaintiff's counsel submitted that despite the Plaintiff having purchased the suit property in the years 2004 and 2006, the Plaintiff was only issued with the titles thereto on 1st April, 2019 and that during the period before the issuance of the titles, the Plaintiff suffered great anxieties and spent monies on unnecessary expenses in awarding of trespassers including going to the Police Station and the Defendant's offices.
14. Counsel submitted that in view of the issuance of the titles, prayers 2 and 3 of the Plaint have been rendered moot and what remain are prayers 1, 4 and 5; that there are still persons trespassing on the property hence the need for injunctive orders and that as regards breach of contract, whereas damages are ordinarily not available thereto, they can be awarded in instances where the Respondent's conduct is shown to have been oppressive, outrageous, insolent or vindictive. Reliance in this respect was placed on the Court of Appeal decision of *Capital Fish Kenya Limited v Kenya Power & lighting Company Limited* [2016] eKLR.

Analysis and Determination

15. The Plaintiff instituted this suit seeking, inter-alia, permanent injunctive orders restraining interference with the suit properties, issuance of titles with respect to the suit properties and damages for breach of the Sale Agreement. He sought in the alternative, ownership of the suit properties by virtue of adverse possession.
16. He adduced into evidence receipts for payments of the suit parcels; non-member share certificates in respect of the suit parcels; Affidavit of loss of documents sworn by Ben Abuya, a Director of the Defendant and a Police Abstract issued by the O.C.S Buruburu Police Station on 25th March, 2014; site visit payment receipts issued on 16th July, 2018 together with an invitation form of an even date.



17. The Plaintiff also adduced into evidence the application for official search dated 7th June, 2018; demand letter dated 7th June, 2018; newspaper cuttings dated 2nd August, 2018 and a notice to the Defendant on trespass. Vide a supplementary list of documents, he produced the Certificates of Title in respect of the suit properties.
18. The Defendant entered appearance but did not file a Defence. It follows therefore that the Plaintiff's evidence is uncontroverted and unchallenged.
19. Nonetheless, it is now settled that uncontroverted evidence is not automatic evidence. The burden on the Plaintiff to prove his case remains the same and that burden of proof is in no way lessened because the Defendant did not adduce any evidence. That is what was expressed by the Court of Appeal in *Charterhouse Bank Limited (Under Statutory Management) vs Frank N. Kamau* [2016] eKLR:

“The suggestion, however, implicit...that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff's case is proved on a balance of probabilities cannot possibly be correct...While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities.”
20. The *Evidence Act* is clear enough upon whom the burden of proof lies. [see Sections 107 and 109]. It is trite that he who alleges must prove. This is set out under Section 107(1)(2) of the *Evidence Act*, Cap 80 which provides 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.”
21. And Sections 109 and 112 of the same Act which provide as follows;
 - “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
22. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not...”



23. The Court will be guided by the afore-stated principles noting that there is no contest regarding the validity of the adduced evidence.
24. As aforesaid, vide the Plaintiff, the Plaintiff lay claim to the suit properties seeking issuance of titles in respect thereof, permanent injunctive orders and damages for losses suffered for breach of the Sale Agreement. In the alternative, he sought to lay claim to the suit properties by virtue of adverse possession.
25. During his testimony, the Plaintiff informed the Court that he has been issued with Certificate of Titles in respect of the suit properties and subsequently prayers 2 and 3 of the Plaintiff have been rendered moot. The Court agrees.
26. In view of the foregoing and considering the pleadings, testimony and submissions, the issues that remain for the Court's consideration are;
 - i. Whether an order of permanent injunction should issue?
 - ii. Whether the Plaintiff is entitled to general damages as sought?
27. In *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR the Court explained as follows regarding permanent injunctions;

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”
28. The Plaintiff seeks orders of permanent injunction restraining trespass into the suit property. He states that there have been several attempts by the Defendant, and third parties at the prompting of the Defendant, to interfere with the suit property.
29. The Plaintiff has adduced into evidence Certificates of Titles in respect of the suit parcels to wit Nairobi Blocks 136/12806; 136/12807; 136/12808; 136/12809; 136/12810 all registered pursuant to the provisions of the [Land Registration Act](#).
30. The provisions of Section 24(a) and 25(1) of the [Land Registration Act](#), 2012 outlines the rights and interests of a registered proprietor as follows;

“Subject to this Act -

 - a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”
31. Whereas Section 25 (1) under the heading rights of a proprietor provides as follows:

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...”



32. No challenge has been raised to the Plaintiff's proprietorship in terms of Sections 26 of the Act, and the Court finds that he is the legitimate proprietor of the suit parcels.
33. With this finding, it follows that the Plaintiff has exclusive rights over the suit properties as set out in Section 24(a) of the [Land Registration Act](#). This includes the right to quiet possession of the suit property to the exclusion of the Defendant or any person acting under its authority. The Court finds the prayer for permanent injunction merited.
34. The Plaintiff seeks general damages for loss and damages suffered by himself for breach of the Sale Agreement.
35. No Sale Agreement has been adduced herein. Nonetheless, it is apparent that the Plaintiff's claim for breach is based on the Defendant's failure to issue it with title deeds to the suit properties upon payment of the purchase price. This position has now been rectified.
36. However, the Plaintiff contends that the Defendant failed to issue it with the titles timeously and that during the period in which he was entitled to the titles, and did not receive them, he suffered loss and damage to which he is entitled to compensation.
37. The Plaintiff has provided evidence of having purchased the properties in 2004 and 2006, and immediately paid the entire purchase price. It was his evidence that he was entitled to receive the titles upon payment of the purchase price. Going by the last purchase, this was in 2006.
38. There was no evidence placed before me to show that the Defendant was under an obligation to issue the Plaintiff with title documents within a specific period, or that upon purchase, he was denied entry into the said land.
39. In any event, it is trite that general damages do not lie for breach of contract. This position was affirmed by the Court of Appeal in [Sundowner Lodge Limited v Kenya Tourist Development Corporation \(Civil Application Sup 19 of 2018\)](#) [2023] KECA 1131 (KLR) (22 September 2023) (Ruling) citing its earlier exposition in which it stated thus;

“...We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: as a general rule, general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In *Dharamshi v Karsan* [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication. And so, it would be. See also *Securicor (K) v Benson David Onyango & Anor* 2008] eKLR. The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs.30 million merely because he believed that the respondent “had suffered serious damages” (sic). What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove. To award it anything else would be to engage in sympathetic sentimentalism as opposed to proof-based judicial determination. Beyond the non-recoverability of general damages for breach of contract, a proper consideration of the nature of the respondent's claim ought to



have led to the same conclusion that only such proven loss could be compensated by way of damages.”

40. The Court in the case of *Consolata Anyango Ouma v South Nyanza Sugar Co. Ltd* [2015] eKLR explained why general damages cannot be awarded in cases of breach of a contract as hereunder;

“The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase *restitution in integrum* (see *Kenya Industrial Estates Ltd v Lee Enterprises Ltd* NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, *Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000* [2004] eKLR). The measure of damages is in accordance with the rule established in the case of *Hadley v Baxendale* [1854] 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see *Standard Chartered Bank Limited v Intercom Services Ltd & Others* NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others*, NRB CA Civil Appeal No. 192 of 92 (UR) and *Charles C. Sande v Kenya Co-operative Creameries Ltd*, NRB CA Civil Appeal No. 154 of 1992 (UR)).”

41. The Court concurs. Damages arising from breach of contract are ascertainable, and quantifiable. They are essentially in the nature of special damages and should be specifically pleaded and proved.
42. Despite alleging loss and damage for the period he says he was entitled to have received his titles and did not do so, the Plaintiff did not specifically set out the nature of the loss alleged or quantify the same. Consequently, the claim for general damages fails.
43. In conclusion, the court finds that the suit partly succeeds in the following terms;
- i. Permanent Injunctive orders do hereby issue restraining the Defendant or any person acting under it from interfering with the suit properties Nairobi Blocks 136/12806; 136/12807; 136/12808; 136/12809; 136/12810.
 - ii. The Defendant shall bear the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16TH DAY OF MAY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Njogu holding brief for Oluoch for Plaintiff

No appearance for Defendant

Court Assistant - Tracy

