



Tuiyot v Board of Management Koige Secondary School (Environment & Land Case 161 of 2018) [2024] KEELC 3946 (KLR) (15 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3946 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 161 OF 2018**

**A OMBWAYO, J
MAY 15, 2024**

BETWEEN

JANE WANJIRU TUIYOT PLAINTIFF

AND

BOARD OF MANAGEMENT KOIGE SECONDARY SCHOOL DEFENDANT

JUDGMENT

1. Jane Wanjiru Tuiyot, (hereinafter referred to as the plaintiff) has sued the Board of Management Koige secondary school (hereinafter referred to as the defendant) stating that at all times material to this suit, the plaintiff was and remains the first registered owner of Land parcel known as Nakuru Sachangwany (Lower Tall Trees)/149 measuring approximately 35.9 Hectares (90 acres) situated along Nakuru-Eldoret Highway near Mau Summit Area within the county of Nakuru (hereinafter referred to as the suit property).
2. At all times material to the proceedings herein, the defendant was and remains the registered owner and occupier of the parcel of land adjacent(neighboring) the plaintiffs aforesaid parcel known as Nakuru/ Sachangwany (Lower Tall Trees)/148,
3. Sometimes in the year 2009 the defendant herein, illegally, without any colour of rights and or the permission, or license or authorization of plaintiff encroached onto, annexed, occupied and o has been farming a portion said plaintiffs property measuring approximately six(6) acres and has persisted in so doing to date despite protestation of the plaintiff.
4. The plaintiff avers that despite her entreaties, demands, protests to the defendant to remove therefrom, cease farming or occupying its said property or otherwise despite her attempts to have the local administration and or land offices intervene and resolve the matter, the defendant has refused to vacate the occupied portion of the plaintiff's land and continues to farm thereby denying the plaintiff the beneficial use of her land and putting her to the consequent loss.



5. The plaintiff avers that the defendant's conduct described herein is callous capricious, oppressive and constitute wrongful invasion of private property, violation of her right to private property and interference with her enjoyment of possession of private property guaranteed by both statute and *the constitution*.
6. The plaintiff's claim against the defendant is therefore for orders of mandatory injunction to compel the defendant to vacate the portion of the plaintiffs aforesaid property that it currently occupies, permanent injunction restraining the defendant by itself, agents, officers from encroaching onto, occupying, trespassing onto, remaining on, farming or in any way dealing with the plaintiff's aforesaid parcel of land or any part thereof.
7. The plaintiff prays for judgment for an eviction order compelling the defendant, its agents, officers and any person claiming under it to vacate the plaintiff's parcel of land known as Nakuru/Sachngwany (lower tall trees)/149.
8. Permanent injunction restraining the defendant, its employees, agent, officials or any person claiming under it from trespassing, occupying, farming remaining onto or in any way dealing with the plaintiff's parcel of land known as Nakuru/Sachngwany (lower tall trees)/149. The plaintiff further prays for General damages for trespass and Mesne profit plus Costs of the suit.
9. In its defense, the defendant states that the suit is bad in law and that the Nakuru Sachengwany (Lower Tall Trees) 148 measures 17.5 acres. The defendants states that 2.5 of its acres were given up to the Ministry of roads for a diversion road when the Ministry was carrying out construction work in 2008-2010 and the defendant was duly compensated. The defendant states that she is in occupation of the land due to a presidential decree. The defendant prays that the suit be dismissed with costs.
10. When the matter came up for hearing, the plaintiff testified that she the first registered owner of all that parcel known as Nakuru/Sachangwany (Lower Tall Trees)/149. She became the registered owner of the parcel of land in the year 2007 and was issued with title deed thereto which she still holds. That the defendant herein is her neighbor and holds the title to the parcel of land known as Nakuru Sachangwany(Lower Tall Trees)/148.
11. They had co-existed as neighbors peacefully until 2009 when the principal or headmaster of the defendant started encroaching onto her parcel of land and growing crops. Her family has held discussions with successive administrations of the school to peacefully persuade them to move out of the land in vain. She has reported the matter to the local administration as well as the relevant land offices in Nakuru, but each time a forum is set up to discuss and try to resolve the matter amicably, the defendant does not show up. In the meanwhile, the school continues to till her land drawing illegal benefits without her permission while at the same time denying her use of the whole six (6) acres they occupy. To the extent that the encroachment was done without her permission or sanction, the same is illegal and capricious. She therefore prays that the Honorable court be pleased to grant the prayers sought in the suit.

The defendant called David Kimani Mbugua who stated that

12. He is the current principal of Koige Secondary School working in that capacity as from May 2023. The school acquired the parcel through a presidential decree of the then president, I-I.E. former Presidential Daniel Toroitich Arap Moi. The land initially belonged to the Agricultural Development Corporation (ADC) farm. Other people were settled in the same area and the area came to be known as Sachagwan tall trees area. In 1997, 20 acres of land was set aside for a secondary school through a presidential decree. In 2003, the area Member of Parliament allocated Kshs.500,000/- for a new project, Koige Secondary School. In 2004, four (4) classrooms and eight (8) toilets were constructed, In 2007 the school was



started with fifteen (15) students. In January 2008, the school was closed due to post election violence and it became an IDP camp. In July 2008 the school reopened.

13. Later in the year 2010, the principal at the time realized the school was very open; one could enter and leave without any restrictions. It is then that he decided to put up a fence and did so in consultation with the Tuyiot family. The Tuyiot family is the immediate neighbors to the school. The Tuyiot family actually pointed out to the then principal where the boundaries were and where the fence should cut across. After the meeting, the principal put up the fence and planted trees and the Plaintiff never complained of the setting up of the fence up until the year 2011 when the plaintiff complained that the school had encroached their land.
14. They tried as a school to solve the dispute amicably by having a series of meetings, that begun in January and February 2016. They were not able to resolve the dispute and the Plaintiff proceeded to file this suit in court in 2018.
15. The school managed to file in court a survey report whose findings deferred from the Plaintiffs survey report. The report is dated 2nd June 2021 prepared by V.Kirui for the Regional Surveyor Rift Valley Region. The findings of said report are that the school fencing is in conformity with the development and there are existing old Cyprus trees along the school boundary and a reinforced fencing poles along its boundary. Further the surveyor found that the area of land occupied by the school corresponds to the scaled distances on the map.
16. The plaintiff counsel submits that the plaintiff has produced a copy of title deed dated the 20th day of August 2007 as proof of ownership to the parcel of land Nakuru/Sachangwany (Lower Tall Trees)/149. The titles shows that the land measuring 35.9 hectares (90 Acres).
17. That the plaintiff is the legal owner of the said parcel of land. That as a legal owner of the suit property the plaintiff is entitled to enjoying quiet and uninterrupted possession over the said parcel of land alongside the right to exclude others, rights to posses and use and right to transfer.
18. The defendant on his part submits that there is no trespass as the plaintiff was present when the school erected the fence and consented to it. It is submitted that it was Tuyiot Family that pointed out the border and the fence was put up. The defendant reiterated that it is not true that the defendant trespassed on the plaintiffs land because it was by consent of the plaintiff.
19. The defendant relies on the case of Benjoh Amalgamated Limited and another -vs- Kenya Commercial Bank Ltd (2014) eKLR which states:-

“this court will be reluctant to invoke its residual jurisdiction of review where, as here, there is laches or where legal rights of innocent third parties have vested during the intervening period which cannot be interfered with without causing further injustice. It will not entertain review of decisions made before the 2070 constitution came into being.⁶³ in dealing with Laches, Halsbury's Law of England, 4th ed. Vol 16(2) at970 has this to say; "a claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statues of limitation equity aids the vigilant, not the indolent' or 'delay defeats equities'. A court of equity refuses its aid to stale demands where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay (laches')
20. The defendant further relies on the case of Rajnikanthkhetshi Shah -Vs- Habib Bank A.G Zurich (2016) eKLR where the court observed:-



21. In law waiver of a right or relief may be express or implied. Almost no difficulty arises where the waiver is made expressly by consent and the party benefitting from it has acted on upon it: that is sufficient consideration. where waiver is not express and is to be implied from the conduct of the parties. the court has to consider the entire circumstances of the case for establish conduct which is inconsistent with the continuance of the right. See *The Laws of England* eds. Viscount Simonds Vol 14 London; Butterworth & Co. (1956) para 1175. That is the law on waiver. I will now re-state the concept of acquiescence. According to the *Laws of England* (ibid) para 77:

“the term “acquiescence” is used in two senses. In its proper legal sense, it implied that a person that abstains from interfering while a violation of his legal rights is in progress: in another sense implies that he refrains from seeking redress when a violation of his rights, of which he did not know at the time, is brought to his notice. Here the term js used in the former sense; in the second sense acquiescence is an element in laches. ”

22. I have considered the rival submissions and evidence on record and do find that the suit property is registered in the names of the plaintiff but part of it is occupied by the defendant. The defendant states that the plaintiff has consented to the defendant occupying the suit property. I have not seen such consent. Section 3 (1) an (2) of the [Trespass Act](#) Cap 294 provides:-

23. section 3 (1) of the [Trespass Act](#) (Cap 294). The section reads as follows:

“Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier there of shall be guilty of an offence.”

24.

(2) The penalty for this offence is provided for under section 11 of the same Act which states thus:

“Any person guilty of an offence under this Act for which no penalty is expressly provided shall be liable to a fine not exceeding five hundred shillings or to imprisonment for a term not exceeding two months, or to both such fine and imprisonment.”

25. I do find that the defendant has no reasonable excuse to enter, remain upon or erect any structure on or cultivate or till or graze stock or permit stock to be on the plaintiffs land without the plaintiffs consent. The regional surveyor issued a report dated 20th May 2022 that showed that the defendant had trespassed upon the plaintiff’s property.

26. On what amount of damages should be granted, I do find the dictum by justice E.Obaga in the case of *Philip Ayaya Aluchio v Crispinus Ngayo* [2014]eKLR useful where it was held as follows:

“The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less See *Hostler – VS – Green Park Development Co.* 986 S. W 2d 500 (No. App. 1999).



27. In Nakuru Industries Limited v S S Mehta & Sons [2016] eKLR where the court faced such a similar situation it was held as follows:

“ A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the defendants did trespass onto the plaintiff’s land and conduct some excavation. For this reason I award the defendant damages in the amount of Ksh 500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.”

28. In the case of *Willesden Investments Limited vs. Kenya Hotel properties limited NBI H.C.C. NO. 367 of 2000* (a case cited by the plaintiff), the court stated that;

“There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that K.Sh. 10 000 000 is a reasonable award for general damages”.

29. Ultimately, I do find that the school has been utilizing the plaintiff’s land and therefore I award general damages of kshs5, 000,000 to be paid by the Ministry of Education through the office of the Attorney General.

30. I do grant orders of mandatory injunction to compel the defendant to vacate the portion of the plaintiff’s aforesaid property within a period of 90 days.

31. Further I do grant a permanent injunction restraining the defendant by itself, agents, and officers from encroaching onto, occupying, trespassing onto, remaining on, and farming or in any way dealing with the plaintiff’s aforesaid parcel of land or any part thereof.

32. Moreover, I do an order that the defendants be evicted from the suit parcel of land known as Nakuru/ Sachngwany (lower tall trees)/149 after lapse of 90 days from today.

33. Lastly, I do award cost of the suit to the plaintiff to be paid by the Ministry of Education and the honorable Attorney General.

Judgment dated, signed and delivered virtually at Nakuru this 15th day of May 2024.

A. O. OMBWAYO

JUDGE

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