



**Flavemart Enterprise Limited v County Government of Kisumu (Environment and Land Case Civil Suit E025 of 2022) [2024] KEELC 5481 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5481 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND CASE CIVIL SUIT E025 OF 2022  
SO OKONG'O, J  
JULY 25, 2024**

**BETWEEN**

**FLAVEMART ENTERPRISE LIMITED ..... PLAINTIFF**

**AND**

**THE COUNTY GOVERNMENT OF KISUMU ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff brought this suit against the defendant through a plaint dated 10<sup>th</sup> August 2022. The plaintiff averred that at all material times, the plaintiff was the registered proprietor of all that parcel of land known as Kisumu/Municipality Block 11/7 (hereinafter referred to as “the suit property”). The plaintiff averred that on 7<sup>th</sup> August 2022, the defendant entered the suit property through its servants or agents and demolished part of the perimeter wall that the plaintiff had put up around the suit property. The plaintiff averred that the defendant’s said servants or agents threatened to come back to demolish the entire perimeter wall and a house on the property. The plaintiff averred that the defendant had no proprietary interest in the suit property and as such its entry into the property and demolition of the said wall was illegal.
2. The plaintiff sought judgment against the defendant for;
  1. A permanent injunction restraining the defendant from demolishing the plaintiff’s perimeter fence around the suit property and other structures on the suit property, and from interfering with the plaintiff’s proprietary interest in the suit property in any manner whatsoever.
  2. General damages for trespass and unlawful demolition of the plaintiff’s structures.
  3. Costs of the suit.
  4. Interest on 2 and 3 above at the rate of 14% per annum from the date of filing suit until payment in full.



3. The defendant was served with a Summons to Enter Appearance. The defendant appointed a firm of advocates to act on its behalf in the matter. The said firms of advocates never filed a defence on behalf of the defendant to the plaintiff's suit. At the trial, the plaintiff called one witness, Peter Ochieng Okore (PW1). PW1 adopted his witness statement filed in court on 12<sup>th</sup> August 2022 as his evidence in chief and produced the documents attached to the plaintiff's list of documents filed in court on the same date as Pexh.1. PW1 told the court that on 7<sup>th</sup> August 2022, the defendant's security personnel came to the suit property and started demolishing a fence that he had put up around the suit property. He stated that he reported the incident to the Police.
4. On cross-examination by the defendant's advocate, PW1 stated that the Plaintiff was incorporated on 16<sup>th</sup> August 2011 while it was registered as the owner of the suit property on 11<sup>th</sup> March 2011. PW1 stated further that there was a previous suit namely, Kisumu ELC No. 48 of 2013 over the suit property in which the plaintiff had sued Kenya Railways Corporation. PW1 stated that in that suit, the Plaintiff sought to be declared the owner of the suit property but the suit was dismissed. PW1 stated that the plaintiff had appealed against the said decision that was made on 30<sup>th</sup> October 2019 to the Court of Appeal. PW1 denied that the suit property belonged to Kenya Railways Corporation which had sold the same to a company known as Dube Holdings Ltd. On re-examination, PW1 stated that the execution of the said decision that was made in Kisumu ELC No. 48 of 2013 was stayed pending the hearing of the plaintiff's appeal to the Court of Appeal. On the issue of the plaintiff having acquired the suit property before it was incorporated, PW1 stated that the plaintiff was registered as a business name in 2007 and was incorporated as a limited liability company when it wanted to acquire the suit property.
5. After the close of evidence, the court directed the parties to make closing submissions in writing. The plaintiff filed its submissions on 17<sup>th</sup> January 2024 while the defendant did not file submissions. I have considered the pleadings and the evidence tendered by the plaintiff in proof of its case. I have also considered the submissions on record. The issues arising for determination in this suit in my view are the following;
  1. Whether the plaintiff is the lawful proprietor of the suit property.
  2. Whether the defendant through its servants or agents unlawfully entered the suit property and demolished part of the plaintiff's perimeter fence.
  3. Whether the plaintiff is entitled to the reliefs sought in the plaint.
  4. Who is liable for the costs of the suit?

### **Whether the Plaintiff is the Lawful Proprietor of the Suit Property**

6. It is not disputed that in a judgment dated 30<sup>th</sup> October 2019 that was delivered by Olao J. in Kisumu ELC No. 48 of 2013, *Flavemart Enterprise Ltd. v. Kenya Railways Corporation*, the court made a finding that Kenya Railways Corporation was the lawful proprietor of the suit property and that the plaintiff herein acquired the property unlawfully. In the judgment, the court issued among other orders;
  - (a) A declaration that the acquisition of the suit property by the plaintiff herein was illegal, null and void.
  - (b) A declaration that Kenya Railways Corporation was the rightful owner of the suit property.
  - (c) An order for the cancellation of the title held by the plaintiff in respect of the suit property.



- (d) A declaration that the occupation by the plaintiff herein of the suit property was illegal.
  - (e) An order for the eviction against the plaintiff herein from the suit property.
  - (d) A permanent injunction to restrain the plaintiff herein from interfering in any way with the Kenya Railway's Corporation's use and occupation of the suit property and/or in any other way dealing with the property.
7. It is also common ground that the said judgment of this court was appealed and the appeal is pending hearing and determination before the Court of Appeal. Although the execution of the positive orders in the said judgment was stayed by the Court of Appeal in Kisumu C.A Civil Application No. 50 of 2020, the findings and orders made in the said judgment have neither been set aside nor reviewed. Save for the stay of the positive orders in the said judgment pending appeal, the decision is binding upon the plaintiff. This court has concurrent jurisdiction with the court that made the judgment in Kisumu ELC No. 48 of 2013, *Flavemart Enterprise Ltd. v. Kenya Railways Corporation*. This court cannot therefore review or set aside the said court's findings on the validity of the title held by the plaintiff in respect of the suit property. Only the Court of Appeal can do that. It follows that the position of the title held by the plaintiff in respect of the suit property remains as found in Kisumu ELC No. 48 of 2013, *Flavemart Enterprise Ltd. v. Kenya Railways Corporation*. The title is a nullity and Kenya Railways Corporation remains the lawful owner of the suit property.

**Whether the Defendant Through its Servants or Agents Unlawfully Entered the Suit Property and Demolished Part of the Plaintiff's Perimeter Fence.**

8. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, *Clerk & Lindsell on Torts*, 18<sup>th</sup> Edition, page 923, paragraph, 18-01. Trespass is a wrong against possession rather than ownership. This means that a squatter in possession of land can maintain an action against a trespasser even though he has no title to the land. This is because a person in possession of land has a better right to the land against all others except those who have a better title to the land than him. This is why a squatter in possession or the first trespasser on land can maintain an action for trespass against third parties or a subsequent trespasser on the same land. He cannot however sue the registered owner of the land for trespass since such owner has a better title to the land. A third party or subsequent trespasser sued by the squatter must establish his title or interest in the land. He has to justify his entry. He cannot challenge the title of the squatter based on the registered owner's better title.
9. As I mentioned earlier in the judgment, the defendant did not file a defence to the plaintiff's claim. The defendant did not therefore tender any evidence at the trial. The averment in the plaint that the defendant's employees and agents entered the suit property and destroyed the plaintiff's perimeter fence was not rebutted. The evidence tendered by the plaintiff at the trial concerning the said entry and destruction was also not challenged. It is my finding that the defendant's servants or agents entered the suit property and caused damage to the wall the subject of the plaintiff's claim. The plaintiff having proved that the defendant's employees or agents entered the suit property which was in its occupation without its permission and destroyed a perimeter fence, the burden shifted to the defendant to justify its entry into the suit property. In the absence of any evidence from the defendant, the only conclusion the court can make is that the defendant's entry into the suit property was unjustified. The defendant's entry into the suit property was therefore unlawful. The defendant was a trespasser on the suit property. It was not a defence to the trespass claim against the defendant that the court had made a declaration that the suit property was owned by Kenya Railways Corporation.



## Whether the Plaintiff is Entitled to the Reliefs Sought in the Plaintiff.

10. As the occupier of the suit property, the plaintiff was entitled to quiet possession and enjoyment thereof subject only to the rights of Kenya Railways Corporation that had been declared by the court to be the owner of the property. The plaintiff sought a permanent injunction restraining the defendant from trespassing on the suit property or interfering with its proprietary interest in the suit property. The plaintiff has established that it had possession of the suit property and that the defendant's employees entered the suit property and caused damage to its perimeter fence. The plaintiff had contended that the defendant's employees or agents aforesaid had threatened that they would come back and continue with the demolition of the remaining part of the said fence. I am satisfied that a case has been made for the grant of an order of injunction. The plaintiff had also sought general damages for trespass. In *Park Towers Ltd. v. John Mithamo Njika and 7 Others* 2014 eKLR, the court stated as follows:

“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case.”

11. In *Halsbury's Laws of England* 4<sup>th</sup> Edition Volume 45 para. 26 1503 the authors have stated as follows on assessment of damages for trespass:

- a) If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.
- b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.
- d) Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
- e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased.”

12. The plaintiff has proved trespass on the suit property by the defendant. The plaintiff has also proved that the defendant's trespass caused loss and damage. The loss and damage were however in the nature of special damages that the plaintiff was required to particularise and to specifically prove. The same was neither pleaded nor proved. In the circumstances, I will only award the plaintiff nominal damages for trespass.

## Conclusion

13. In conclusion, I hereby enter judgment for the plaintiff against the defendant for;

1. A permanent injunction restraining the defendant, its agents, employees or servants from trespassing, demolishing any structures on or interfering in any other manner whatsoever with



the plaintiff's occupation of all that parcel of land known as Kisumu/Municipality Block 11/7 save where the defendant is lawfully exercising any power conferred upon the defendant by law.

2. Kshs. 300,000/- as general damages for trespass.
3. Interest on 2 above at court rates from the date hereof until payment in full.
4. The costs of the suit.

**DATED AND DELIVERED AT KISUMU ON THIS 25<sup>TH</sup> DAY OF JULY 2024.**

**S. OKONG'O**

**JUDGE**

Judgment read virtually through Microsoft Teams Video Conferencing platform in the presence of;

N/A for the Plaintiff

N/A for the Defendant

Ms. J. Omondi-Court Assistant

