Muriithi v China National Aero-Technology International Engineering Corporation (Environment and Land Appeal E003 of 2022) [2024] KEELC 6486 (KLR) (23 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6486 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ENVIRONMENT AND LAND APPEAL E003 OF 2022

AK BOR, J

SEPTEMBER 23, 2024

BETWEEN

DUNCAN WANDERI MURIITHI ..... APPELLANT

AND

CHINA NATIONAL AERO-TECHNOLOGY INTERNATIONAL ENGINEERING CORPORATION ..... RESPONDENT

JUDGMENT

1. As the registered proprietor of the land known as Marmanet/North Rumuruti Block 2/1075 (Ndurumo) ("the suit property"), the Appellant brought a suit before the Chief Magistrates' Court claiming that while carrying out construction of the Rumuruti/Sipili/Ndindika D-372 Road Project within Laikipia County, the Respondent unlawfully dumped and diminuted the suit property by removing the top soil to make a deviation road thereby causing the land to be of no or very little economic value for which he claimed to be entitled to compensation. He sought the sum of Kshs. 5,100,000/= being the diminution in value of the suit property based on the valuation report dated 14/12/2018 prepared by Artex Realtors Limited. He also sought damages of Kshs. 64,000/= comprising Kshs. 50,000/= for the valuation and Kshs. 15,000/= on account of travel expenses to and from Nyahururu to the Respondent's offices on several occasions.

2. The Respondent denied the Appellant's claim and further denied that it had unlawfully dumped and diminuted the suit property by removing the top soil to make a deviation road. The Respondent amended its defence and averred that if any damage occurred on the suit property, it was minimal and inconsequential to render the entire parcel of land measuring approximately 10 acres valueless. It went further to state that the valuation report which the Appellant relied on was exaggerated, embellished and flamboyant because the total value of the suit property could not amount to Kshs. 5,600,000/= as the Appellant alleged.

3. The Respondent intimated that it would apply for an independent valuation report from a government land valuer to counter the Appellant's report. Further, it averred that the suit property was situated at a rocky and semi-arid area which made the value exaggerated. Additionally, the Respondent contended that it had not constructed a diversion as the Appellant claimed and added that the diversion was an existing dusty road which was being used by members of the public to access the local police station and local Chief's office which was adjacent to the suit property. The Respondent denied that the Appellant had subdivided his land.

4. After hearing the matter, the Learned Chief Magistrate, Hon. Charles Obulusta, found that the Appellant had failed to prove his case on a balance of probabilities and dismissed the suit with costs. Being aggrieved by that decision the Appellant lodged this appeal where he faulted the Learned Magistrate for finding that the suit property, that is, Marmanet/North Rumuruti Block 2/1075 (Ndurumo) did not exist based on the mutation forms which were not registered. He contended that the issue before the trial court was trespass which is actionable per se whether or not damage had been proved.

5. The other point taken up by the Appellant was that the Learned Magistrate erred when he based his findings on a site visit conducted three years after the cause of action arose and failed to appreciate that the topography of the suit land had already changed by that time. The Appellant faulted the Learned Magistrate for disregarding the photographic and other evidence of the damage done to the suit property. Further, he faulted the Learned Magistrate for disregarding the receipts he produced as proof of special damages on the ground that they did not have revenue stamps. He also faulted the Learned Magistrate for finding that there was no trespass.

6. The court gave directions for the appeal to be canvassed through written submissions. Parties filed written submissions which the court considered. The Appellant submitted that this being a first appeal, this court was not bound to accept the findings of fact made by the trial court. Further, that this court must reconsider the evidence, reevaluate it itself and draw its own conclusions bearing in mind that it did not see or hear the witnesses and should therefore make due allowance for this.

7. The Appellant submitted that he was the registered proprietor of the suit property and that after hearing the case, the Learned Magistrate concluded that the subject matter, that is parcel number 1075, did not exist since the land had been subdivided into 37 plots pursuant to the mutation forms presented by the Appellant which showed new plot numbers. The Appellant pointed out that the mutation had not been registered just as it had not been endorsed by the Land Registrar so that the original title could be closed on subdivision. He referred the court to the official search attached to the valuation report confirming this position.

8. Secondly, that the valuation report in the Respondent's documents clearly confirmed that there was no subdivision shown on the registry index map (RIM) hence there was no basis for the Learned Magistrate to conclude that the suit property did not exist on account of the incomplete subdivision. He urged the court to take judicial notice of the fact that for a title to be closed on subdivision, the subdivision ought to the reflected in the RIM and the land register is marked as showing the new numbers when new registers are opened for the subdivisions. The Appellant submitted that at the time of trespass complained of, this had not happened.

9. The Appellant argued that what was before the trial court was a case of trespass to land which as a tort is actionable per se whether or not actual damage was proved. The Appellant relied on Duncan Nderitu Ndegwa v KPL Limited and Another [2013] eKLR where Lady Justice Nyamweya held that once trespass to the land was established, it was actionable per se and no proof of damage was necessary for the court to award damages. The Appellant submitted that he presented evidence to demonstrate

that the Respondent was guilty of dumping and diminution of the suit property by removing the top soil to make a diversion through it making the land lose its economic value for which he was entitled for compensation. He relied on the valuation report and the evidence of the valuer who he urged, confirmed that there was a diversion created through his land and photos had been taken at the time of undertaking the valuation.

10. The Appellant referred the court to the Respondent's surveyor's report prepared by Pixol Arch Limited where it stated that the area covered by murram rocks and the legal diversion was approximately 1.3 acres and that there was no damage to the remaining part of the suit property. Further, that dumping was only 0-10 meters along the road and not on the entire parcel of land. He submitted that the map and pictures attached to the report clearly showed the diversion created and the dumping by the Respondent which in his view demonstrated that he had proved trespass against the Respondent and was entitled to an award of damages.

11. The Appellant also faulted the Learned Magistrate for basing his findings on whether or not a diversion had been created on the suit property on the site visit yet the visit was done three years after the cause of action arose and the topography of the land had changed. The Appellant clarified that he had a duty to mitigate his loss after the trespass to his land and that it was not possible for the Learned Magistrate to see the exact damage caused three years earlier.

12. The Appellant pointed out that even though the Respondent's valuation report was not produced in evidence, it had described the loss he suffered at Kshs. 400,000/= and that the Learned Magistrate ought to have gone by this sum. The Appellant submitted that the Respondent deliberately failed to call his valuer and surveyor for cross-examination fearing that they would have confirmed the trespass and damage caused to the Appellant's property. He surmised that the Respondent's valuation of Kshs. 400,000/= related to a portion measuring 1.33 acres before the tarmacking of the road and was not in respect of the diminution in value of the Appellant's property.

13. The Appellant invited the court to consider the findings of other courts in similar cases with regard to assessment and award of damages in situations such as his. He relied on Ochako Obinchu v Zachary Oyoli Nyamongo & Sons [2016] eKLR where the court observed that in tort damages were awarded to compensate the plaintiff for loss he had incurred due to a wrongful action on the part of the defendant. The damages are intended to return the plaintiff to the position he was in before the wrongful act was committed.

14. Where trespass to land resulted in damage then the computation of damages was on the basis of restitution of the land while factoring in the value of the soil which had been removed from the land and the cost of restoring the land to the position it was in before the commission of the wrongful act. The court went on to state that where a plaintiff proved trespass he was entitled to recover nominal damages even if he had not suffered actual loss. Where the trespass caused the plaintiff actual damage he was entitled to receive an amount which would compensate him for his loss. Where the defendant made use of the plaintiff's land, the plaintiff was entitled to receive by way of damages the sum which would reasonably be paid for that use.

15. Additionally, that where the trespass was accompanied by aggravating circumstances which did not allow an award of exemplary damages, the general damages would be increased. The court referred to the decision in Duncan Ndegwa v Kenya Pipeline Nairobi HCCC No. 7527 of 1990 where the court held that the general principles regarding the measure of damages to be awarded in cases of trespass to land where damage had been occasioned to the land was the amount of diminution in value or the cost of reinstatement of the land.

16. The Appellant faulted the Learned Magistrate for failing to look at his valuation report and the documentary evidence which showed that the Respondent trespassed on the suit property and for failing to award him compensation. The Appellant argued that general damages for diminution in value of the land could not be equivalent to special damages which must be specifically pleaded and strictly proved while urging that they were damages in rem. That in the absence of the Respondent's valuer's testimony, there was no evidence to controvert his evidence and the valuation report he tendered. Further, that there was no basis for the trial court to disagree with the valuation report which was specific on diminution of value of his land.

17. The Appellant also faulted the Learned Magistrate for failing to award him the special damages on the ground that the receipts he tendered did not have revenue stamps affixed on them and that they were not electronic tax register (ETR) generated. He faulted the Learned Magistrate for finding that the receipt showed that the fuel was filled but did not show where the vehicle went. The Appellant added that such details could not be expected to be indicated on a receipt for the purchase of fuel, more so, when the receipts were not objected to at the time of production. He relied on some decisions of the High Court stating that a receipt ought to be stamped by the recipient of the payment and not the payee since Section 88 of the *Stamp Duty Act* placed a duty upon the receiver and not the person paying to affix revenue stamp on the receipt.

18. The Appellant relied on Wycliffe Lubanga Kefa v Dennis Ochala & Another [2020] eKLR where the court observed that if a party seeks to rely on an unstamped receipt, the trial court should give time to that party to correct the anomaly and once the stamp duty was paid, the court was to receive the document in evidence. He added that the impugned receipts were never contested at the point of production and were actually received in evidence. That it was irregular for the Respondent to attack them at the close of the case and the trial court could not refuse to consider them in evidence on the basis of lack of revenue stamps or payment of stamp duty.

19. He submitted that the trial court should have awarded what was proved and not dismissed the whole claim for special damages on the basis of failure to affix revenue stamps or to prove the whole amount pleaded. The Appellant maintained that he had proved his case on a balance of probabilities based on the material presented before the trial court and that it was wrong for the trial court to dismiss his case in its entirety. The Appellant added that it was noteworthy that most of the issues raised in the Respondent's submissions were never pleaded in its defence and did not form part of the issues for determination by the trial court, and that as such, they could not be raised on appeal since they did not form part of the grounds of appeal while pointing out that the Respondent was bound by his pleadings.

20. On its part, the Respondent urged the court to uphold the trial court's findings which it submitted were based on a proper evaluation of the facts on record and anchored in established principles of law. The Respondent submitted that the Appellant deviated from his pleadings by introducing a valuation of subdivided plots and allegations of dumping of rocks which were not part of the case originally. It was in support of the finding made by the trial court and added that the mutation forms indicated that the suit property had been subdivided into 37 plots on 18/7/2018 and the suit was filed on 13/3/2019 which showed that the suit property had ceased to exist at the commencement of the case. It added that the Appellant testified that he experienced problems from the purchasers of the 37 plots and pondered whether those purchasers should have been the ones suing for the alleged trespass on their respective plots.

21. The other issues which the Respondent took up were that the special damages of the value of the top soil allegedly removed was not pleaded and that the expenses alleged to have been incurred were not proved; that the valuer assessed the value of the entire parcel instead of evaluating the alleged

diminution caused by the removal of the top soil during the creation of the alleged diversion by the Respondent; the uncertainty about the creation of a diversion through the land and their defined boundary with the road reserve. He also raised the issue of lack of a nexus between the details of the vehicle on the fuel receipts and the amount pleaded as the fuel expenses.

22. The Respondent emphasised that based on the mutation form dated 19/7/2018, it was evident that as at 18/7/2018 the suit property had been divided into 37 plots and the new parcels were assigned numbers 13765 to 13784. It added while the Appellant sought redress over the allegation of trespass to parcel no. 1075, the evidence on record related to parcel numbers 13765 to 13784. It argued that the Appellant should have sought an amendment to reflect the new suit property. The Respondent argued that the burden of proof lay with the Appellant to provide expert evidence through a surveyor regarding the status of the suit property and ascertain its boundaries. It maintained that the Appellant failed to prove trespass especially based on the non- existence of parcel no. 1075.

23. Regarding the site visit, the Respondent submitted that the Appellant did not raise any objection during the site visit despite being given an opportunity to agree, deny or contradict the observations. On the photographic evidence, the Respondent submitted that the Appellant did not produce any photographs and on cross-examination he claimed that the land valuer took the pictures. The Respondent relied on Section 106 B (4) of the *Evidence Act* regarding the need for a certificate of electronic evidence for the admissibility of digitally processed evidence such as photographs. The Respondent contended that non-compliance with this legal provision justified the exclusion of such evidence by the court. It went further to submit that the Appellant failed to produce a certificate of electronic evidence.

24. On whether the receipts without the ETR were admissible, the Respondent submitted that the absence of ETR receipts raised concerns about the authenticity and legality of the receipts presented by the Appellant. It argued that the evidence contravened established laws and therefore should not be admitted.

25. The Respondent submitted that it was incumbent on the Appellant to establish trespass on the suit property showing the cost of restoring it to the condition it was in originally before the trespass. Additionally, that the claim for compensation for soil taken away from the suit property was a claim for special damages which must be specifically proved. It maintained that the Appellant failed to discharge that burden of proof. Further, that he only provided the value of the sub plots without adducing evidence as to the state or the value of the property before and after the trespass which made it difficult to assess the general damages.

26. The Respondent adverted to the observation by the trial court that the Appellant went on a tangent by seeking to assess the value of the sub divided plots yet what was pleaded as being diminuted was plot no. 1075. That by seeking the value of the subdivided plots, the plaintiff was in effect introducing a new subject matter to the case without amending the plaint. It expressed the view that in the absence of clear pleadings on the cost of restoration, the sum of Kshs. 5,100,000/= sought as general damages for diminution in value of the suit land lacked any legal basis. The Respondent urged the court to dismiss the appeal on the basis that the Learned Magistrate did not consider extraneous matters in arriving at its judgment.

27. The issue for determination is whether the court should allow the appeal by setting aside the decision of the trial court and enter judgment for the Appellant as sought in the plaint. The Appellant faulted the Learned Magistrate for finding that the suit land did not exist since it had already been subdivided into 37 plots. There was no basis for this finding since no evidence was provided of the new titles or the registered owners of the resultant plots created from the subdivision.

28. The mutation forms which guided the trial court in arriving at this finding formed only part of the survey process which is completed at the point when the old title is submitted to the Land Registrar for closing once the subdivision exercise is complete and the new parcels are registered and reflected in the land register. New titles are then issued for the new parcels resulting from the subdivision.

29. In declining to grant the reliefs sought in the suit, the Learned Magistrate noted that the Appellant's claim was that the Respondent removed the top soil and created a diversion on his land thereby diminishing its economic value but that the valuer did not focus on this aspect in his report and instead went ahead to assess the value of the subdivided plots. Did the trial court fall into error when it made this finding? This court thinks not. Looking at the plaint filed in court, the Appellant sought judgment for Kshs. 5,100,000/= being compensation for the diminution in value of the land known as Marmanet/ North Rumuruti Block 2/1075 (Ndurumo).

30. What the Appellant was actually pursuing was compensation for the diminution in value of his land which he claimed had been caused by the Respondent's actions of creating a diversion through his land while constructing the Rumuruti-Sipili-Ndindika Road. Artex Realtors Limited, the valuer whose report the Appellant relied on, stated in the addendum to the valuation report dated 23/10/2020 that the value ascribed of Kshs. 5,100,000/= was based on the possible sale value of the 37 sub plots at the market value of Kshs. 136,500/= per plot. The valuation report did not mention the value of the diminution of the Appellant's land. The Appellant failed to lead evidence to show the alleged diminution caused by the Respondent's removal of the top soil during the creation of the alleged diversion by the Respondent.

31. Going by the finding in the Duncan Ndegwa v Kenya Pipeline Nairobi case where the court held that the measure of damages to be awarded in cases of trespass to land where damage had been occasioned to the land was the amount of diminution in value or the cost of reinstatement of the land, the Appellant needed to prove the diminution in value of the suit property or the cost of reinstating the land after the trespass.

32. The Appellant also faulted the Learned Magistrate who visited the site for basing his findings on the visit while ignoring the fact that that visit took place 3 years after the cause of action arose. Additionally, that the court failed to appreciate that the suit land's topography had changed within that period. He also submitted that he had a duty to mitigate his loss after the trespass to his land after filing the suit. Had the Appellant tendered evidence showing the cost he incurred in mitigating his loss, it would have guided the court in ascertaining the cost of restoring the land to its original value and showed the value of the diminution to the Appellant's land occasioned by the diversion he claimed was created by the Respondent on his land.

33. The Appellant relied on the valuation report filed by the Respondent which in essence showed that only 1.33 acres of the Appellant's land and not the entire parcel measuring approximately 10 acres was affected by the diversion. The valuation report assessed the value of the affected land as Kshs. 400,000/=. That report was not tendered in evidence and cannot form the basis for the determination of this appeal.

34. The Appellant did not lead evidence to show the value of the land before and after the road construction. The evidence of a surveyor would have been helpful to ascertain the area affected by the alleged diversion on the Appellant's land, which would have assisted the valuer in establishing the extent of the diminution of the suit land. The extent of the damage caused or diminution in value of the Appellant's land was not proved at the trial.

35. The appellant sought special damages of Kshs. 64,000/= comprising the cost of the valuation report of Kshs. 50,000/= and travelling expenses of Kshs. 15,000/= to and from Nyahururu to the Respondent's office in Rumuruti on several occasions. He produced copies of four receipts totaling up to Kshs. 8,000/= but did not lead evidence to link those receipts from the petrol stations to the claim in the suit. This court is not inclined to award the special damages sought by the Appellant having found that the valuer did not establish the diminution in value of the suit land.

36. This court is satisfied that the Appellant proved on a balance of probabilities that he was the owner of the suit land and that the Respondent trespassed on his land while undertaking the road construction. Having proved that the Respondent trespassed on his land, the Appellant was entitled to damages for trespass in line with the court's finding in the Duncan Nderitu Ndegwa v KPL Limited case that once trespass to the land was established, it was actionable per se and no proof of damage was necessary for the court to award damages.

37. The court allows the appeal by awarding the Appellant general damages of Kshs. 500,000/= for trespass to his land. The Appellant is awarded the costs of the suit and of the appeal.

DELIVERED VIRTUALLY AT NANYUKI THIS 23RD DAY OF SEPTEMBER 2024.

K. BOR

JUDGE

In the presence of: -

Ms. Eunice Ndegwa for the Appellant

Mr. Patrick Muchangi for the Respondent