



**Odhiambo v Acceller Global Logistics & another (Land Case E050 of 2024)
[2024] KEELC 6093 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6093 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE E050 OF 2024
JO MBOYA, J
SEPTEMBER 23, 2024**

BETWEEN

GEORGE ONYANGO ODHIAMBO PLAINTIFF

AND

ACCELLER GLOBAL LOGISTICS 1ST DEFENDANT

PETER NDUNDA 2ND DEFENDANT

JUDGMENT

1. The Plaintiff herein approached the court vide Plaint dated 2nd February 2023 and wherein same [Plaintiff] sought for various reliefs pertaining to and concerning L.R No. 20750. Subsequently, the Plaint herein was amended culminating into the Amended Plaint dated 2nd February 2024 and wherein the Plaintiff has sought for the following reliefs:
 - i. A permanent injunction restraining the Defendants, their agents and/or servants from entering, fencing, encroaching or in any manner interfering with the Plaintiff's use and occupation of L.R No. 20750.
 - ii. General damages for trespass.
 - iii. Costs of the suit.
 - iv. Any other alternative relief that this Honourable Court may deem fit and just to grant.
2. The Plaint and Summons to Enter Appearance were duly served upon the Defendants. However, the Defendants neither entered appearance nor filed any statement of defence. In this regard, the matter was thereafter subjected to the requisite pre-trial directions.



3. Furthermore, there being no statement of defence, the matter was scheduled for formal proof whereupon the Plaintiff herein testified and produced assorted documents in line with the list and bundle of documents dated 2nd February 2024.

Evidence by the Parties:

a. The Plaintiff's Case

4. The Plaintiff's case revolves around the evidence of one [1] witness, namely, George Onyango Odhiambo. Same testified as PW1.
5. It was the testimony of the witness [PW1] that same is the Plaintiff in respect of the instant matter. Besides, the witness averred that by virtue of being the Plaintiff, same [witness] is conversant with the facts of the matter. Furthermore, the witness averred that same has since recorded a witness statement dated 2nd February 2024.
6. In addition, the witness sought to adopt and rely on the contents of the witness statement dated 2nd February 2024. Suffice it to point out, that the witness statement was thereafter adopted and admitted as the evidence in chief on behalf of the witness.
7. On the other hand, the witness adverted to the List and Bundle of Documents dated 2nd February 2024, containing four documents which the witness sought to tender and produce before the court. In this regard, the documents under reference were thereafter tendered and admitted in evidence as exhibits P1 to P4 respectively.
8. Other than the foregoing, the witness alluded to the Amended Plaint dated 2nd February 2024, and whereafter implored the court to grant the reliefs sought thereunder, inter alia, permanent injunction to restrain the Defendants from entering upon and/or encroaching onto the suit property.
9. With the foregoing testimony, the Plaintiff's case was closed.

b. Defendants' Case:

10. Though the Defendants were duly served with the Plaint and Summons to Enter Appearance, same, [Defendants], neither entered appearance nor filed any statement of defence. Furthermore, neither of the Defendants attended court nor participated in the proceedings.
11. For good measure, the proceedings beforehand proceeded on the basis of formal proof wherein the Plaintiff was the only witness.

Issues for Determination:

12. Having reviewed the evidence tendered by and on behalf of the Plaintiff and upon taking into consideration the contents of the documents produced before the court, the following issues crystallise [emerge] and are thus worthy of determination:
 - i. Whether the Plaintiff herein is the lawful/legitimate owner of the suit property;
 - ii. Whether the Plaintiff is entitled to the reliefs sought or otherwise.



Analysis and Determination

i. Whether the Plaintiff herein is the lawful/legitimate owner of the suit property

13. The Plaintiff herein approached the court and contended that same [Plaintiff] is the lawful and legitimate proprietor of L.R No. 2750 [hereinafter referred to as the suit property]. In this regard, the Plaintiff tendered and produced before the court a copy of the certificate of title as well as a copy of the certificate of official search. Same were produced and admitted as exhibits P1 and P2, respectively.
14. Suffice it to point out that the certificate of title and the official search that were tendered and produced by the Plaintiff demonstrated that the Plaintiff is indeed the registered owner of the suit property.
15. Other than the foregoing, it is also apposite to state that the evidence that was tendered by and on behalf of the Plaintiff herein, including the documentary evidence, was neither challenged nor controverted. In this regard, there is no gainsaying that the contents of the evidence on record remain unshaken and same is thus credible and believable.
16. Based on the totality of the evidence on record, I come to the conclusion that the Plaintiff herein has indeed established and proved that same [Plaintiff] is the lawful and legitimate proprietor of the suit property. For good measure, the proprietary rights of the Plaintiff herein are vindicated vide the provisions of Sections 24 and 25 of the *Land Registration Act*, 2012.
17. Furthermore, it is not lost on this court, that the certificate of title that has been tendered and produced before the court was issued pursuant to the provisions of the Registration of Titles Act Chapter 281 Laws of Kenya [now repealed]. In particular, the provisions of Section 23 of the said Act underscored the sanctity and indefeasibility of title unless same [title] was procured by fraud, mistake and/or misrepresentation for which the proprietor was privy to.
18. However, the evidence before the court does not advert to any fraud and/or mistake attendant to the acquisition of the certificate of title by the Plaintiff. To this end, it suffices to underscore that the Plaintiff is thus entitled to partake of and benefit from the concept of indefeasibility of title.
19. Before departing from this issue, it is instructive to cite and reference the holding of the Court of Appeal in the case of Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 others [1997] eKLR where the court held thus:

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”
20. The extent and scope of the doctrine of indefeasibility of title was revisited by the Court of Appeal in the case of Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR where the court stated as hereunder:

“If a certificate of lease duly issued by the Registrar is prima facie evidence of ownership and if the owner is proved to have exercised due diligence at the point of acquisition, on what basis could the appellants’ petition for protection under Article 40 be defeated?”



It has long been accepted beyond debate that the land registration process in Kenya is a product of the Torrens system. This was acknowledged in, among a long line of decided cases, this Court's judgments in Dr. *Joseph Arap Ngok V. Justice Moiwo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997* and *Charles Karathe Kiarie & 2 Others V Administrators of Estate of John Wallance Muthare (deceased) & 5 others, Civil Appeal 225 of 2006.*

Under that system, the title of a bona fide purchaser for value without notice of fraud cannot be impeached; that the land register must mirror all currently active registrable interests that affect a particular parcel of land; that the Government, as the keeper of the master record of all land in Kenya and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world; and that in case of loss arising from an error in registration, the Government guarantees the person affected of compensation. Finally, the statutory presumption of indefeasibility and conclusiveness of title based on the register can be rebutted only by proof of fraud or misrepresentation which the buyer is himself shown to have been involved.

The object of the Torrens system was, in very compelling language, explained in the decision of the Privy Council in *Gibbs V. Messer* [1891] AC 247 P.C. at page 254 as follows:

“The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.” (Emphasis supplied).

In order to discharge the burden on them and for them to secure their titles, it was enough for the appellants to show that they acquired interests to their properties from the vendors who were registered owners; that they did so in good faith, without notice and did not participate in any fraud. This burden was discharged. It was not their duty to ensure the accuracy of the information contained in the register. They fully relied on the information contained in the register before committing themselves as they did beyond recall. Though not a consideration, the appellants took possession of the suit properties and have invested millions of shillings to put up palatial upmarket properties without knowing the existence of any other interest, through no fault of their own. It must have taken the appellants' considerable period of time, in view of the massive nature of those developments, to complete the construction. All through the Government and its agencies cheered them on. They were granted all the requisite permits and licenses prior to commencing the construction. There is no proof that the respondents raised any objection to their activities.”

21. Arising from the foregoing analysis and taking into account the totality of the evidence on record, my answer to issue number one [1] is to the effect that the Plaintiff herein has established and proved that same is the lawful and legitimate proprietor of the suit property. For good measure, the certificate of title bearing the name of the Plaintiff suffices.



ii. Whether the Plaintiff is entitled to the reliefs sought or otherwise.

22. Having addressed and disposed of issue number one herein before, the next question that merits deliberation relates to the extent and scope of the rights conferred upon the registered proprietor of land on the basis of a certificate of title. In this regard, it is imperative to take cognisance of the provisions of Sections 24 and 25 of the *Land Registration Act*, 2012.
23. The said provisions stipulate and provide as hereunder:
- “24. 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; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
25. 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, but subject—
- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”
24. The import and tenor of the provisions supra is to the effect that the registered proprietor of a designated parcel of land is conferred with assorted rights including but not limited to exclusive occupation, possession and use thereof, to the execution of all and sundry. In this regard, it suffices to underscore that the registered proprietor is therefore entitled to enjoy the benefits attendant to the designated property without interference from third parties.
25. Where a third party, in this case the Defendants, enter upon and/or encroach onto the land belonging to the Plaintiff, the Plaintiff is at liberty to approach the court and to procure not only an order of eviction but also an order of permanent injunction whose net effect is to protect and preserve the Plaintiff's rights and/or interests over the designated property. [See the holding of the Court in the case of *Waas Enterprises Limited versus City Council of Nairobi and Others* [2014]eKLR]
26. To understand the scope and import of an order of permanent injunction it suffices to cite and reference the decision in the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR where the court discussed the scope of an order of permanent injunction.



27. For coherence, the court stated thus:

“ 8. It is apparent from the pleadings that the Respondent was seeking a permanent injunction against disconnection of his electricity by the Appellant. 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.

9. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties.”

28. Premised on the foregoing, it is my finding and holding that the Plaintiff herein, by virtue of being the registered proprietor of the suit property is truly entitled to an order of permanent injunction whose net effect is to vindicate the Plaintiff’s proprietary rights to the suit property.

29. On the other hand, the Plaintiff has also sought for an order of general damages for trespass. In this respect, there is no gainsaying that by virtue of being the registered owner of the suit property, the Plaintiff was entitled to benefit from the suit property.

30. However, owing to the activities by and on behalf of the Defendants, the Plaintiff’s rights to and interest over the suit property have been interfered with. In this case, the Plaintiff is no doubt entitled to recompense on account of trespass and loss of user, which flow from ownership rights.

31. To underscore the fact that the Plaintiff was entitled to benefit from the suit property and that same [Plaintiff] has suffered loss as a result of the offensive activities of the Defendants, it suffices to cite and reference the decision in *Mohansons (Kenya) Limited v Registrar of Titles & 2 others* [2017] eKLR where the court discussed the nature of rights that inhere in the title holder.

32. The court stated as hereunder:

“(18) As held by the Court of Appeal for East Africa held in *Moya Drift Farm Ltd. v. Theuri* (1973) EA 114 a registered proprietor of land is the absolute and indefeasible owner of land and is entitled to take proceedings for trespass and eviction of a trespasser even if he did not have possession of the property. *Spry, V-P* at 116, considered the effect of section 23 of the Registration of Titles Act and held –

“I cannot see how a person could possibly be described as “the absolute and indefeasible owner” of land if he could not cause a trespasser to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has physical possession.”



Sir William Duffus, P. ibid at p.117 agreed with Spry, JA as follows:

“In any even I agree with the Vice-President that the fact that the appellant was the registered proprietor as owner in fee simple under the Registration of Titles Act, and as such vested with the absolute and indefeasible ownership of the land, was sufficient to vest legal possession of the land in the appellant and that this possession would be sufficient to support the action of trespass against a trespasser wrongly on the land.”

The third member of the Court, Lutta, JA agreed with the judgment prepared by the Spry, V-P.”

33. Arising from the ratio decidendi espoused in the decision supra, it is my finding and holding that the Plaintiff herein has established a basis to warrant an award of general damages for trespass as against the Defendants.
34. As concerns the quantum of damages, it suffices to underscore that the assessment of such damages is premised on a plethora of factors. To start with, the court is called upon to take into account the location of the property, the size of the property, the nature of the trespass and the longevity of the activities complained of. Furthermore, the court is also obligated to discern whether the trespasser has derived unjust enrichment from the offensive activities or better still, whether the conduct was oppressive.
35. Guided by the foregoing factors and appreciating that assessment of general damages is not based on any mathematical formula, I find and hold that an award in the sum of Kenya Shillings Five Million Only (KES 5,000,000) suffices. In this regard, I decree and award the sum of Kenya Shillings Five Million Only (KES 5,000,000).
36. The award of general damages in terms of the preceding paragraph is anchored on and vindicated by the comprehensive decision of the Court of Appeal in the case of *Kenya Power & Lighting Company Ltd v Ringera & 2 others (Civil Appeal E247 & E248 of 2020 (Consolidated))* [2022] KECA 104 (KLR), where the Court distilled the various factors to be taken into account.
37. For coherence, the Court state as hereunder;
 - “ 38. The principles both parties have relied upon in their invitation for the Court to decide either way are those enunciated by the predecessor of this Court and either crystallized or restated by this Court which we find prudent to distill and replicate as hereunder:”
 - i) Harlshurys Laws of England 4th Edition Vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner’s land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/



her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.

- ii) *Duncan Nderitu Ndegwa vs. Kenya Pipeline Company limited & Another* [2013] eKLR - damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.
- iii) *Philip Ayaya Aluchio vs. Crispinus Ngayo* [2014] eKLR, - the measure of damages for trespass is the difference in the value of the plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less.
- iv) *Ephantus Mwangi & Another vs. Duncan Mwangi* [1981 – 1988] I KAR 278, - an appellate court is not bound to accept and act on the trial court's findings of fact if it appears clearly that the trial court failed to take account of particular circumstances or probabilities material to an estimate of evidence. b) a Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.
- v) *Kiambu Dairy, Farmers Co-operative Society Limited vs. Rhoda Njeri & 30 Others* [2018] eKLR, - the extent of an award of compensatory damages lies in the discretion of the trial court and interference therewith on appeal must be approached with a measure of circumspection and well settled principles.
- vi) *Kemfro Africa Limited vs. Lubia & Another* [No. 2] [1987] KLR 30 as approved in *Peter M. Kariuki vs. Attorney General* [2014] eKLR, - before interference with the quantum of damages awarded by a trial court the appellate court must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or short of the above, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages payable.
- vii) *Johnson Evans Gicheru vs. Andrew Martin & Another* [2005] eKLR, - this Court on appeal will be disinclined to disturb the finding of the trial Judge as to the amount of damages awarded by the trial court merely because if it had tried the case itself in the first instance, it would have awarded either a higher or lesser sum b) justification for reversing a trial Judge on an award of damages only applies where the court is convinced either that the Judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very low as to make



it an entirely erroneous estimate of the damage to which the aggrieved party is entitled.

- viii) Sumaria & Another vs. Allied Industries Limited [2007] 2 KLR I, - an appellate court should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence or based on a misapprehension of the evidence or that the Judge had been seen demonstrably to have acted on a wrong principle in reaching the finding he/she did
- ix) Butt vs. Khan [1981] KLR 349, - an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate
- x) it must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.
- vii. Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited vs. Janevans Limited [2015] eKLR, - whether the claim is in contract or tort, the only damages to which an aggrieved party is entitled to is the pecuniary loss;
 - (b) the accruing awardable damages is aimed at putting the aggrieved party into as good a position as if there had been no such breach or interference. In other words, in the position it/he/she was in with regard to the object trespassed upon before the onset of such a trespass;
 - (c) it is meant to cushion the aggrieved party against the expenses caused as a result of the trespass and loss of benefit over the period of the duration of the trespass.”

Final Disposition:

- 38. Flowing from the discussion,[whose details have been enumerated in the body of the judgement], there is no gainsaying that the Plaintiff herein has tendered and produced before the court plausible and cogent evidence to underpin his claim to and in respect of the suit property. In this regard, the Plaintiff has indeed proved the case to the requisite standard of proof.
- 39. In the premises, I find and hold that the Plaintiff’s claim is meritorious. Consequently, I proceed to enter judgement in favour of the Plaintiff as hereunder:
 - i. An order of permanent injunction be and is hereby granted to restrain the Defendants either by themselves, agents, servants, employees and/or anyone claiming under their instructions from entering upon, remaining on and or otherwise interfering with the suit property belonging to and registered in the name of the Plaintiff.
 - ii. There be and hereby granted an order of eviction against the Defendants and or their agents/ representatives from the suit property.



- iii. The Plaintiff be and is hereby awarded Kenya Shillings Five Million Only (KES 5,000,000) on account of general damages for trespass.
- iv. The award of general damages in terms of clause (iii) shall attract interest at court rates (14% per annum) from the date of judgement until payment in full.
- v. The Plaintiff be and is hereby awarded costs of the suit.

40. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 23RD DAY OF SEPTEMBER 2024

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – Court Assistant.

Mr. George Okatch for the Plaintiff.

No Appearance for the Defendants.

