



**Asiyo (Holder of power of attorney donated by Juni Awiti Asiyo) v Ojwang & 2 others
(Environment & Land Case 87 of 2017) [2024] KEELC 7287 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7287 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 87 OF 2017**

E ASATI, J

OCTOBER 31, 2024

BETWEEN

**PHOEBE MUGA ASIYO (HOLDER OF POWER OF ATTORNEY DONATED BY
JUNI AWITI ASIYO) PLAINTIFF**

AND

JOSEPH NYAKWA OJWANG 1ST DEFENDANT

GORDON NYAKWA 2ND DEFENDANT

ROSELYN KWAMBOKA 3RD DEFENDANT

JUDGMENT

1. Vide the amended plaint dated 7th April, 2017, the Plaintiff PHOEBE MUGA ASIYO, in her capacity as holder of a Power of Attorney donated by JUNI AWITI ASIYO, sued the Defendants over parcels of land known as Kisumu Municipality/LR/15037/10, LR 15037/14, LR 15037/13, LR 15037/12, LR 15037/9, LR 15037/11 and LR 15037/8 (which were sub-divided from No.L.R.15037) (herein called the suit lands).
2. The Plaintiff's claim was that the Defendants had trespassed onto the suit lands on or about 24th February, 2017 and she therefore sought for cessation of the acts of the trespass onto and destruction on the suit land.
3. The Plaintiff therefore sought for;
 - a. An order of temporary injunction restraining the Defendant by self, servants and agents from entering or encroaching, trespassing upon or interfering with the Plaintiff's user and enjoyment of land parcel numbers Kisumu Municipality/LR/15037/10, LR 15037/14, LR 15037/13, LR 15037/12, LR 15037/9, LR 15037/11 and LR 15037/8 (formerly No.L.R.15037) pending the hearing of this suit.



- b. An order of permanent injunction restraining the Defendants by self, servants and agents from entering or encroaching, trespassing upon or interfering with the Plaintiff's user and enjoyment of land parcel numbers Kisumu Municipality/LR/15037/10, LR 15037/14, LR 15037/13, LR 15037/12, LR 15037/9, LR 15037/11 and LR 15037/8 (formerly No.LR.15037).
 - c. An order of vacant possession of land parcel number Kisumu Municipality/LR/15037/10, LR 15037/14, LR 15037/13, LR 15037/12, LR 15037/9, LR 15037/11 and LR 15037/8 (formerly No.LR.15037).
 - d. General damages for trespass.
 - e. Costs of the suit.
 - f. Interest on (c) above at court rates.
 - g. Any other relief and/or further reliefs that honourable court may deem fit to award.
4. The 1st and 2nd Defendants filed their Statement of Defence dated 28th February, 2024. The same was admitted onto the court record vide the consent made by Counsel for the parties on the same date. The 1st and 2nd Defendants denied that they were in occupation of the suit lands. They averred that the lands they occupy are freehold land which are their ancestral lands since 1980s. They averred that the 1st and 2nd Defendants have never been party to any conversion of their family freehold interest to leasehold interest. They pleaded in the alternative that the Plaintiff was the trespasser in their land.
 5. No defence was filed by the 3rd Defendant. Affidavit of Service filed on 3rd April 2017 and sworn on 21st March 2017 by Julius Otieno Raminya, a process server shows that the 3rd Defendant was served with the plaint, Summons to Enter Appearance and the accompanying documents on 20th March 2017.

The Evidence

6. The Plaintiff called one witness namely; Juni Awiti Asiyo who testified as PW1. She adopted the contents of her witness statement dated 29th November, 2022 as her evidence in chief. She stated that although she had donated Power of Attorney to her mother, Phoebe Muga Asiyo, she had decided to testify in person.
7. She had stated in the witness statement that she was the registered proprietor of suit lands.
8. That on or about 25th February, 2017 the Defendants, illegally and/or without authorization from her, were excavating, fencing and generally trespassing onto the suit lands with the intention of carrying out construction thereon thereby displacing her and dispossessing her of the land. That the Defendants had damaged the water tank and well on the land. That whenever she tries to stop the Defendants they become violent and abusive yet they have no ownership rights over the lands. The Plaintiff produced exhibits namely; Power of Attorney donated to Phoebe Muga Asiyo, certificates of title in respect of the suit lands, copies of deed plans, certificate of sale in respect of Kisumu Municipality/15037, and 2 photographs. The Plaintiff prayed that her claim be allowed.
9. On cross-examination, PW1 stated that she bought the suit lands through auction done by National Bank of Kenya. That the money she paid was 4 million or 7 million as she could not remember well. That she paid by cheque. That the land measured about 7 hectares but that she had sub-divided it in the year 2015. That she sold half of the land and retained half thereof and that part of the land was fully developed.



10. She stated that she did not know whether there was a moratorium on the land.
11. On re-examination, she stated that the certificate of sale produced showed that the land measured 7.163 acres not hectares. That she had visited the land many times and had security guards on the land. That at the time of purchase, the land was vacant. That she had a “mabati” structure on the land in which she kept some goats.
12. That the part she sold is fully developed by the SDA Church who were the purchasers. That she pays land rates in respect of the land to date.
13. The 1st Defendant testified as DW1. He testified on behalf of himself and the 2nd Defendant. He adopted the contents of his witness statement as his evidence in chief. He had stated in the witness statement dated 6th August, 2018 that the 2nd Defendant was his son. That his late father one OJWANG OKUT was the first registered owner of parcel number EAST KISUMU/ KANYAKWAR “B”/415 on 23rd February, 1983.
14. That the said parcel of land forms part of the land claimed by the Plaintiff. That other parcels of land are EAST KANYAKWAR “B”/401, 402, 403, 413 AND 483.
15. That the parcels were registered in the name of the respective owners shown in the green card in 1980s soon after adjudication whereas the Plaintiff obtained titles in 1990s.
16. That it is upon the Plaintiff to explain how title were issued to her long after the lands had been given to other individuals. He produced exhibits namely; map for Kisumu District East Location, Green cards and Certificates of Official Search for Kanyakwar “B”/401, 403, 413 and 483.
17. On cross-examination he stated that none of the parcels he mentioned is registered in his name. That he only built on parcel No.396 but did not destroy any property. That he got parcel No.396 through a court order.
18. That a surveyor came to the land and sub-divided it that he never ignored the surveyor’s advice.
19. The 3rd Defendant adduced no evidence.

Submissions

20. It was submitted on behalf of the Plaintiff vide the written submissions dated 4th March, 2024 that under section 26 of the [Land Registration Act](#), the titles held by the Plaintiff in respect of the suit land are prima facie evidence of proprietorship. That the Defendants do not lay claim to the suit land and asserted that they are not in occupation of the suit lands.
21. Counsel relied on section 3(i) of the [Trespass Act](#) and the case of Rhoda S. Kiilu -vs- Jiangxi Water Hydropower Construction Kenya Limited (2019)eKLR on the definition of trespass.
22. Counsel further relied on the case of Duncan Nderitu Ndegwa -vs- KP & LC Limited and Another (2013)eKLR where it was held that;

“once a trespass to land is established, it is actionable per se and indeed no proof of damages is necessary for the court to award general damages”.
23. Counsel submitted that damages for the blatant action of trespass on the part of the 1st Defendant are owed to the Plaintiff. Counsel also relied on the case of Giella vs Cassman Brown Co. Ltd (1973)



358 and submitted that the Plaintiff has a prima facie case as held in the ruling of the court dated 30th May, 2018.

24. Counsel further relied on the case of Kenya Power and Lighting Company Limited -vs- Shariff Molana Habib (2018) on permanent injunctions.
25. Counsel concluded that it was not contested that the Plaintiff is the rightful owner of the suit property hence she should be granted vacant possession thereof and that any ill-constructed fence, buildings, or any other structures be demolished and/or be removed from the suit lands.
26. No submissions were filed by the Defendants.

Issues for Determination

27. The issues that emerge for determination are;
 - a. whether or not the Defendants trespassed onto the suit land.
 - b. whether or not the Plaintiff is entitled to the relief sought.
 - c. who pays the costs of the suit?

Analysis and Determination

28. The first issue for determination is whether or not the Defendants trespassed onto the suit land. The Plaintiff pleaded and testified that she is the owner of the suit land. She produced documents of ownership and testified on how she acquired the suit lands.
29. She narrated how the Defendants had entered onto the suit lands and engaged in activities that are adverse to her titles to the land. She produced photographs to show.
30. While the Defendants denied entry onto the suit land on the one hand, on the other hand, they averred that the land they have entered is ancestral land. They produced documents in respect of the land they claim to be the ancestral land.
31. DW1 stated that none of the parcels he mentioned belonged to him and the other defendants.
32. In the section 3 of the *Trespass Act*, Cap 294 Laws of Kenya trespass to land is stated to happen when:

“ 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 thereof shall be guilty of an offence.”
33. Clerk and Lindsell on Tort 18th Edition at page 23 defines trespass as:

“ any unjustifiable intrusion by one person upon the land in possession of another.”
34. According to Black’s Law Dictionary 11th edition Bryan and Garner at page 667 is:

“ an interference with or intrusion into another’s property.”
35. In the case of Alex Waigara Mwaura -vs- China Power Company Limited and another [2020]eKLR the court defined it as

“ an intrusion by a person into land of another who is in possession or ownership.”



36. Winfield and Jolowicz on Tort 12th edition at page 359 states that:
- “trespass to land is the name given to that form of trespass which is constituted by unjustifiable interference with possession of land.....it consists of interference with possession.”
37. In order to prove trespass the claimant has a burden to demonstrate to the required degree that the Defendant entered his/her land without his/her consent.
38. In this case the plaintiff has vide the documents produced proved that she is the registered owner of the suit land. The 1st and 2nd Defendants do not contest this but require the plaintiff to explain how she got title in the 1990s yet other people had been given titles in the 1980s. These other people were not the 1st and 2nd Defendants. The plaintiff also demonstrated that there was entry onto the suit land by the Defendants without her permission. The 1st Defendant admitted that he put up a house on a parcel that he called No. 386 which house was demolished.
39. I find that the Plaintiff has proved the tort of trespass to land as against the Defendants on a balance of probabilities.
40. On whether or not the Plaintiff is entitled to the prayers sought; prayer 1 is already spent. Prayers 2 and 3 of the plaint are merited.
41. On prayer3 which a prayer for general damages for trespass, taking into account the circumstances of the case and given that there was a temporary injunction that stopped the trespass in the year 2018, it is my considered view that an award of Kshs.200,000/= will be adequate.
42. On costs of the suit, under Section 27 of the *Civil Procedure Act*, costs follow the event.
43. The upshot is that the plaintiff has proved her case on a balance of probabilities and judgement is hereby entered in her favor for: -
- a. An order of permanent injunction restraining the Defendants by self, servants and agents from entering or encroaching, trespassing upon or interfering with the Plaintiff's user and enjoyment of land parcel numbers Kisumu Municipality/LR/15037/10, LR 15037/14, LR 15037/13, LR 15037/12, LR 15037/9, LR 15037/11 and LR 15037/8 (formerly No.LR.15037).
 - b. An order of that the Defendants vacate land parcel number Kisumu Municipality/ LR/15037/10, LR 15037/14, LR 15037/13, LR 15037/12, LR 15037/9, LR 15037/11 and LR 15037/8 (formerly No.LR.15037) and hand over vacant possession thereof to the plaintiff within ninety (90) days hereof failing which an eviction order for the forceful removal of the defendants from the suit lands to issue.
 - c. General damages for trespass in the sum of Kshs 200,000/-.
 - d. Costs of the suit.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 31ST DAY OF OCTOBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,



JUDGE.

In the presence of:

Maureen: Court Assistant.

Ojuro h/b for Yogo for the Plaintiff.

Indimuli for the 1st and 2nd Defendants.

No appearance for the 3rd Defendant.

