



**Mutava v Mukumbu (Environment and Land Appeal 25 of 2019)
[2024] KEELC 7253 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7253 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL 25 OF 2019
TW MURIGI, J
OCTOBER 23, 2024**

BETWEEN

MUINDE MUTAVA APPELLANT

AND

NZYOKA MUKUMBU RESPONDENT

JUDGMENT

1. By a Memorandum of Appeal dated 18th October 2019, the Appellant appealed against the Judgment of Hon. J.N Mwaniki delivered on 16th October, 2019 in Makueni PMCC No. 98 of 2012 and set out seven grounds of Appeal

Background

2. The Respondent had sued the Appellant by way of a Plaint dated 11th October 2012 seeking the following orders:-
 - a. Permanent injunction restraining the Defendant, his servants, agents or anyone acting through him from trespassing and or interfering with land parcel Nos. Ukia/Utaati/184 and 1448 as well as general damages for trespass, loss of user and unlawful disturbance.
 - b. General damages for loss of user of parcel Nos. Ukia/Utaati/184 and 1448, trespass and unlawful disturbance.
 - c. Special damages Kshs. 14,036 being the cumulative sum of damage on the Plaintiff's crops and fence assessed by the Agricultural Officer.
 - d. Interest on (b) and (c) above and interest at court rates.
 - e. Any other relief this court may deem necessary to grant.



3. The Defendant filed an amended Statement of Defence on 12th November 2012 denying the Plaintiff's claim.
4. In the proceedings before the lower Court, the Appellant was the Defendant while the Respondent was the Plaintiff. After the trial, the Learned Trial Magistrate delivered his judgment on 16th October, 2019 in the following terms:-
 - i. Permanent injunction restraining the Defendant or anyone acting through him from in any way interfering with the Plaintiff's land No. Ukia/Utaati/184 and 1448.
 - ii. Kshs. 50,000/= as general damages for trespass and unlawful disturbance.
 - iii. Kshs. 14,036/= as special damages on damage of Plaintiff's crops.
 - iv. Cost of the suit plus interest on (ii) and (iii) above
5. Aggrieved by the decision, the Appellant appealed to this court on the following grounds: -
 - i. That the learned magistrate erred in fact and law in upholding the Plaintiff's claim when there was no sufficient evidence to support the same.
 - ii. That the learned magistrate erred in law and fact in failing to appreciate the Appellant's evidence and his witnesses and thereby arriving at the wrong decision.
 - iii. That the learned magistrate erred in law and fact in failing to attach the due weight to the Appellant's evidence and submissions on the primary suit.
 - iv. That the learned magistrate erred in fact and law in failing to appreciate the fact that the Appellant as at the time of the alleged incident was attending his secondary education and resided in Machakos with his father and could not therefore have done the said incident of trespass and damage to the Respondent's property.
 - v. That the learned magistrate erred in fact and law in failing to appreciate that there was no report made to the relevant authorities indeed confirming trespass and damage to the Respondent's property.
 - vi. That the learned magistrate erred in law and fact in failing to appreciate that the Respondent failed to adduce evidence of proprietorship of the parcel of land known as Ukia/Utaati/184 and failing to appreciate the other parcels of land provided for in the assessment report are not pleaded in the suit.
 - vii. That the learned magistrate erred in law and fact in failing to appreciate that the dispute herein arose as a result of the dispute between the father of the Appellant herein and the Respondent.
6. The Appellant prays for:-
 - a. That the judgment of the court delivered on the 16th October, 2019 and any subsequent order and/or decree be set aside and the Respondent's suit before the trial court be dismissed.
 - b. That the costs of this appeal and the suit in the trial court be awarded to the Appellant.
7. The parties were directed to canvass the Appeal by way of written submissions.

The Respondent's Submissions

8. The Respondent filed his submissions dated 7th June 2024.



9. On his behalf, Counsel identified the following issues for the court's determination:-
 - i. Whether the Respondent proved his case before the trial court on a balance of probabilities?
 - ii. Whether the Appeal is merited?
10. On the first issue, Counsel submitted that the Respondent produced title deeds for the suit properties to show that he is the registered proprietor thereof. Counsel further submitted that the Respondent adduced evidence to show that he reported the trespass to Mukuyuni Police Patrol Base. Counsel argued that the assessment reports clearly demonstrate that the assessment and subsequent reports were prepared pursuant to the instructions issued by Mukuyuni Patrol Base.
11. On the second issue, Counsel submitted that the appeal is devoid of merit and the same ought to be dismissed with costs.
12. As at the time of writing this judgment the Appellant had not filed his submissions as directed.

Analysis And Determination

13. The principles which guide a first Appellate Court were discussed in the case of *Selle & Another Vs Associated Motor Boat Company and Others* (1968) 1 EA 123 where the Court of Appeal set out the duty of Appellate Courts as follows:-

“An appeal to this court from a trial court by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate itself and drive its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanour of a witness is inconsistent with the evidence in the case generally.”
14. The Plaintiff Nzyoka Mukumbu testified as PW1 and called one witness in support of his case. He testified that he is the registered owner of the suit properties which are adjacent to each other. It was his testimony that on 21/09/2010, the Defendant trespassed into his land and uprooted the fence and burnt it down together with his avocado trees. That on 18/11/2011, 13th and 24th December 2011 and 5/2/2012 the Defendant caused his cattle and goats to stray into his land thereby destroying his crops which occasioned great financial loss. That he reported the matter to the Ministry of Agriculture, Kaiti Division who assessed the damage on his crops on the suit property.
15. PW2 Joseph Kituku, an Agricultural Extension Officer testified that on instructions of the police, he carried out a crop damage assessment on the suit properties and prepared four reports. He told the court that the damage on the crops was caused by livestock.
16. The Defendant Muinde Mutava testified as DW1 and called one witness in support of his case. He testified that on 21/08/2010 he was in Machakos and denied having any livestock at the time of the incident. He informed the court that the Plaintiff is his uncle and that he has serious grudges with his father.
17. DW2, Sammy Mutava, a cousin to Plaintiff testified that there exists a grudge between him and the Plaintiff. He informed the court that the Defendant was in school and that he had no livestock as at the time when the incident occurred.



18. Before I delve into the issues for determination, I note that the Learned Trial Magistrate did not frame the issues for determination which he was enjoined to do under order 2 rule 5 of the Civil Procedure Rules. Order 21 rules 4 and 5 of the Civil Procedure Rules provide as follows:-
- 4)) Judgments in defended suits shall contain a concise statement of the case, the points of determination, the decision thereon, and the reasons for the decision.
 - 5) In suits in which issues have been framed, the court shall state its findings or decision with the reasons therefore upon each separate issue.
19. This court finds and holds that failure to frame the issues for determination was an irregularity which can be cured in the present appeal.
20. In so finding, I am persuaded by the holding in the case of *Rukidi vs Iguru and Another* (1995-1998) 2 EA 318 where the court held that:-
- “Framing of the issues is an important step in the determination of a case as it defines the areas of controversy and narrows down the scope of inquiry. It makes the hearing of the case more focus oriented and saves the time of the court”
21. Similarly In *Norman vs Overseas Motor Transport (Tanganyika) Limited* Civil Appeal No.88 of 1958 (1959) EA 131 the court held that:-
- “If though no issue is framed on the fact, the parties adduce evidence on the fact and discuss it before the court and the court decides the point, as if there was an issue framed on it, the decision will not be set aside on appeal on the ground merely that no issue was framed.....”
22. Similarly in the case of *Peter Ngumi Gichobo alias Pete Ngumi Gichobo Ngugi vs Ambrose Wanjohi Migwi T/A Migan Hardware Store Nyeri* HCCA NO. 138 of 2003 the court held that:-
- “The deficiency in failing to frame the issues can be corrected by the first appellate court”.
23. The seven grounds of appeal can be condensed into two grounds namely: -
- i) Whether the Appellant trespassed into the suit properties.
 - ii) Whether the learned trial magistrate analyzed the evidence on record before arriving at his decision.

Whether The Appellant Trespassed Into The Suit Properties

24. It is the Respondent’s case that the Appellant unlawfully entered into his land and destroyed his fence and avocado trees. He further averred that the Appellant caused his livestock to stray into his land thereby destroying his crops and occasioned great financial loss. The Appellant denied having trespassed into the Respondent land and asserted that he was in school when the alleged incident occurred. Black’s Law Dictionary 10th Edition defines trespass to land as follows;

“A person’s unlawful entry on another’s land that is visibly enclosed.



25. In the case of *Municipal Council of Eldoret Vs Titus Gatitu Njau* (2020) eKLR the Court of Appeal cited the case of *M'Mukanya Vs M'Mbijiwe* (1984) KLR 761 where the ingredients of tort of trespass were stated as follows;

“trespass is a violation of the right to possession and a Plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership see Thomson Vs Ward (1953) 2 QB 153.”

26. At the hearing before the trial court, the Respondent was bound prove the allegations of trespass to land in addition to his claim for general and special damages against the Appellant herein. The legal threshold for a civil claim is on a balance of probabilities. The Respondent had a duty to discharge his burden of proof as required by section 107(1) and (2) of the *Evidence Act* which provides follows: -

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.’
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

27. At paragraph 4 of the Plaint, the Respondent pleaded trespass as follows:-

“The Plaintiff avers that on or about 21/09/2010 the Defendant trespassed into the Plaintiff’s parcels of land number Ukia/Utaati/184 and 1448 and cleared and or uprooted the fence and later burnt it together with the Plaintiff’s avacodo trees.....”.

28. At paragraph 5 of the Plaint, the Plaintiff pleaded as follows:-

“The Plaintiff further aversthat the on diverse dates and more particularly 7.10.1999 and 2.9.2010 the defendant trespassed on his land and burnt down his sisal plants occasioning the Plaintiff grant financial loss.”

29. The Plaintiff further pleaded trespass in paragraph 6 of the plaint where he stated that the Defendant unlawfully caused his cattle and goats to stray into his land and graze and/or destroy his crops which actions have occasioned great financial loss to the Plaintiff. The Plaintiff testified that he is the registered proprietor of the suit properties. He produced a copy of the title deed for Ukia/Utaati/184(PEX1) to demonstrate that he is the registered proprietor of the suit property.

30. Section 26 of the *Land Registration Act* provides as follows:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:-

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or



- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

- 31. No evidence was adduced to show that the title deed has been revoked or challenged in any way.
- 32. I am satisfied with the material placed before me that the Plaintiff is the registered proprietor of the suit property.
- 33. PW2 carried out a crop damage assessment on the suit property. He produced four crop damage assessment reports in support of his evidence and confirmed that the damage on the suit property was caused by livestock. The Appellant did not produce any report to counter or challenge the Respondent’s evidence. This court finds and holds that the Appellant having entered into the Respondents land without any lawful or justifiable cause is therefore a trespasser.

Whether The Learned Trial Magistrate Analysed The Evidence On Record Before Arriving At His Decision

- 34. The Appellant faulted the learned trial magistrate for failing to analyze the evidence on record before arriving at his decision. The record shows that the learned trial magistrate considered the pleadings and the evidence on record and even took note of the fact that there was an existing grudge between the parties therein.
- 35. In arriving at the award on general damages, the learned trial magistrate relied on the crop damage assessment reports produced by the Agricultural Officer. The Plaintiff/Appellant had sought for Kshs. 500,000/- in general damages for trespass. In the case of *Philip Aluchio Vs Crispus Ngavo* (2014) eKLR the Court held that;

“...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 costs of restoration, whichever is less...

- 36. The court noted that the Defendant did not say anything. The Plaintiff did not provide the value of the land before the alleged trespass occurred. The Plaintiff was awarded Kshs. 50,000/= as general damages which in my view is a nominal figure of general damages for trespass. Having established that the Defendant had trespassed into the Plaintiff land, the learned trial magistrate was correct in awarding the Respondent damages for trespass on the suit properties.
- 37. On special damages it is trite law that for special damages to be awarded, they must be specifically pleaded and strictly proved. The Respondent pleaded Kshs 14036 as special damages and proved the same.
- 38. I find that the learned trial magistrate analyzed the evidence on record before arriving at his decision. In the end, I find that the Appeal herein is devoid of merit and the same is hereby dismissed. In view of the fact that the parties herein are closely related, I direct that each party bears its own costs.

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HON. T. MURIGI
JUDGE

JUDGEMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 23RD DAY OF OCTOBER, 2024.



In the presence of:

Court assistant Steve

Ms. Mutua for the Appellant

Kithuka for the Respondent

