



Fathiya & another v National Oil Corporation of Kenya (Environment & Land Case E042 of 2023) [2024] KEELC 13864 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13864 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E042 OF 2023
NA MATHEKA, J
DECEMBER 19, 2024**

BETWEEN

FATHIYA HAFIDH AL-BUSAIDY AKA FATHIYA HUDSON 1ST PLAINTIFF

THELMA SALIM AL-BUSAIDY AKA THELMA ANDREW

LYALL 2ND PLAINTIFF

AND

NATIONAL OIL CORPORATION OF KENYA DEFENDANT

JUDGMENT

1. The plaintiffs aver that they are the registered and absolute proprietor of all that parcel of land known as Title Number Mombasa/Block XVII/397. In or about 2021, the plaintiffs instructed their surveyor to conduct a survey on the suit property to establish boundaries and the potential illegal occupation of the defendant on their property. The plaintiffs aver that the survey report established that the defendants had trespassed and had been for a number of years carrying on business and occupying a substantial portion of the plaintiffs' property without the plaintiffs' authorization or knowledge. The plaintiffs aver that they have never entered into any agreement with the defendant authorizing the occupation or lease of their property. The plaintiffs state that they had at all material times leased the property to Kenya Shell Limited and not the defendant. The plaintiffs aver that the defendant conducted its own survey report and confirmed that it is indeed a trespasser and encroaching on the plaintiffs' property. This notwithstanding, the parties attempt to explore a settlement have been deliberately ignored and/or thwarted by the defendant.
2. The plaintiff states that they have suffered and continue to suffer irreparable injury and loss in that they are being denied the full use, enjoyment, and benefit of their property by the defendants which as at 21st November 2022 was valued at Kshs. 55 Million. The plaintiff states that through its advocates on record, they wrote to the defendant demanding an immediate end to the trespass and removal of



the structures from its properties within 90 days, however the defendant has ignored and/or refused to comply with the said demand.

3. The plaintiffs pray for judgement against the defendant for;
 - a. a declaration that the defendant whether by themselves or their servants or agents or otherwise howsoever are wrongfully, illegally in occupation of the suit property and are accordingly trespassers on the same.
 - b. An injunction restraining the defendant whether by themselves or their servants or agents or otherwise howsoever from remaining or continuing in occupation of the suit property.
 - c. Vacant possession of the suit property.
 - d. Mesne profits at Kshs. 150,000/- per month from 13th January 2023 until possession is delivered up
 - e. An order be and is hereby issued directing the defendant, at their own cost, and within ten (10) days of the order or within such other time as the court deems fit, to demolish/remove the structures erected on the suit property failing which the plaintiffs be at liberty to demolish the same at the defendant's own costs.
 - f. General damages for trespass.
 - g. Costs.
4. The defendant filed a defence which was a mere denial. They deny that the plaintiffs are entitled to the remedies sought or any remedy. The defendant prays that the suit by the plaintiffs herein against the defendant be dismissed with costs.
5. This Court has considered the evidence and the submissions therein. plaintiffs aver that they are the registered and absolute proprietor of all that parcel of land known as Title Number Mombasa/Block XVII/397. In 2021, the plaintiffs instructed their surveyor to conduct a survey on the suit property to establish boundaries and the potential illegal occupation of the defendant on their property which amounts to trespass on the Suit Property.
6. Trespass to land is a common law tort that occurs when an individual or the object an individual is controlling negligently or intentionally enters onto another's property without the legal right or consent to do so. The plaintiff is required to demonstrate to Court on a balance of probability that he is the registered proprietor of the suit property, the defendants entered onto the suit property and without consent.
7. Section 3 (1) of the *Trespass Act*, Cap 294 provides that;

“ 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.”
8. Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 defines trespass as follows;

“ Any unjustifiable intrusion by one person upon land in possession of another.”Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”



9. Should the trespass be proved the Halsbury's Laws of England 4th Edition Volume 45 para 26 1503 provides as follows on computation of damages in an action 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, 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"
10. In the instant case the plaintiff has demonstrated that it is the registered proprietor of parcel of land known as Title Number Mombasa/Block XVII/397. PW1 testified that the plaintiffs' acquired the property through succession. That in 2021 on following up the assets left behind by the Estate of Meya Salim Khalfan (deceased), they instructed their surveyor to conduct a survey on the suit property to establish boundaries and the potential illegal occupation of the defendant on their property. The plaintiffs aver that the survey report established that the defendants had trespassed and had been for a number of years carrying on business and occupying a substantial portion of the plaintiffs' property without the plaintiffs' authorization or knowledge. the surveyors report dated 30th November 2021 stated that there was a wall encroaching on parcel of land known as Title Number Mombasa/Block XVII/397 by 187.7 square meters or 0.019Ha, that a section of houses (H1 & H2) encroached on the subject properties by 16.35 square meters. His recommendation was that the wall be re aligned so as to avoid encroachment on the subject plot. The plaintiffs produced a valuation report dated 21st November 2022 which stated that the suit land measured 0.071 hectares and was valued at Kshs, 55 million with a monthly market value of Kshs. 150,000/-
11. DW1 the Assistant Development Manager of the defendant company testified that they bought the suit property as a petrol station and they have had quiet enjoyment from 2008. DW2, the land surveyor produced his report Dex 7 confirming there is encroachment on the suit property. That the area of encroachment is about 190 square meters equivalent to 0.019 Ha or 0.046 acres. One of his recommendations is also the re alignment of the wall to respect the surveyed boundaries.
12. I find and it is not disputed that the defendant has encroached on the plaintiffs' land since the year 2008. Both the surveyors have confirmed this and recommended re alignment of the wall. This amounts to trespass as the defendant has intentionally entered onto the plaintiffs' property without the legal right or consent to do so.
13. From the foregoing, it is clear that the plaintiffs are the absolute, rightful and indefeasible owner of the suit property herein, I have also held that the defendant is guilty of encroaching and trespassing onto the plaintiffs' land. The said wall encroachment whose magnitude was found to be 0.019 Ha, did deny the plaintiffs use, occupation, possession and enjoyment of said land, the defendant on the other hand



has been running a petrol station business. It is this loss of use and all the incidental rights that have been infringed by the defendant that the plaintiffs now seek compensation for.

14. In the case of *Duncan Nderitu Ndegwa vs KP& LC Limited & Another* (2013) eKLR where P. Nyamweya J. held that;

“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants trespass”

15. In *Halsbury Laws of England* 4th Edition, Vol 45 at para 26, 1503, it is provided as follows;

- (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 sum as would reasonably be paid for that use.
- (d) --
- (e) --

16. On the issue of general damages for trespass, the issue that arises is: what is the measure of it? This question was answered by E. Obaga J in the case of *Philip Ayaya Aluchio vs Crispinus Ngayo* (2014) eKLR where it was 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 the costs of restoration, whichever is less See *Hostler – vs – Green Park Development Co.* 986 S. W 2d 500 (No. App. 1999).

17. In *Nakuru Industries Limited vs S S Mehta & Sons* (2016) eKLR where the court faced such a similar situation it was held as follows:

“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the defendants did trespass onto the plaintiff’s land and conduct some excavation. For this reason I award the defendant damages in the amount of Ksh 500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.”

18. In the case of *Willesden Investments Limited vs Kenya Hotel properties limited NBI H.C.C. NO. 367 of 2000* (a case cited by the plaintiff), the court stated that;

“There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that K.Sh. 10 000 000 is a reasonable award for general damages”.



19. From the evidence on record, the plaintiffs have proved trespass but there is nothing in their evidence that can be used to enable this court determine the actual damage and/or measure of the damage or loss that the plaintiffs for them to be compensated for the loss. However, in relying on the above case law and the principles laid out, I find the plaintiffs indeed suffered damages as a result of the defendants' continued acts of trespass. I will proceed and award them Kshs. 1,000,000/= as general damages.
20. On the issue of mesne profits, the plaintiffs produced a valuation report dated 21st November 2022 which stated that the suit land measured 0.071 hectares and was valued at Kshs, 55 million with a monthly market value of Kshs. 150,000/- and a yearly market rental value of Kshs. 1,800,000/-. However, this is of the entire parcel of land and not the encroached portion. I find that the same has not been established and it will not be awarded. I find that the plaintiffs' have proved their case on a balance of probabilities and I grant the following orders;
1. A declaration that the defendant whether by themselves or their servants or agents or otherwise howsoever are wrongfully, illegally in occupation of the suit property and are accordingly trespassers on the same.
 2. An injunction restraining the defendant whether by themselves or their servants or agents or otherwise howsoever from remaining or continuing in occupation of the suit property.
 3. The defendant is to vacate the encroached portion of the suit property within the next 90 (ninety) days from the date of this order and in default eviction order to issue.
 4. General damages for trespass of Kshs. 1,000,000/-.
 5. Costs are awarded to the plaintiffs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19TH DAY OF DECEMBER 2024.

N.A. MATHEKA

JUDGE

