Mwaura & another v Naserian (Legal representative of the Estate of Josephine Asiagi Kasembe) (Environment and Land Appeal E035 of 2023) [2025] KEELC 482 (KLR) (12 February 2025) (Judgment)

Neutral citation: [2025] KEELC 482 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND APPEAL E035 OF 2023

MAO ODENY, J

FEBRUARY 12, 2025

BETWEEN

PETER MWAURA ..... 1ST APPELLANT

BENSON NG'ETHE MUIRURI ..... 2ND APPELLANT

AND

CAROL IPITE NASERIAN (LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPHINE ASIAGI KASEMBE) ..... RESPONDENT

(Being an Appeal from a Judgment and orders delivered by Hon. K.I, Orenge (PM) on 27th October, 2023 in Nakuru CMELC 1003 of 2013)

JUDGMENT

1. This appeal arises from the Judgment and orders delivered by Hon. K. I. Orenge (PM) on 27th October, 2023 in Nakuru CMELC 1003 of 2013. The Appellants herein being aggrieved by the entire judgment and orders lodged a Memorandum of Appeal dated 20th November, 2023 and listed seventeen grounds of Appeal.
2. The Appellants prayed that the Judgment in the lower court be set aside and grant vacant possession of respective portions to be hived off Plot No. 105 ADC Ndabibi Central Farm.
3. The Respondent had sued the Appellants in the lower court vide a plaint dated 4th October, 2013 which was subsequently amended on 9th February, 2022. The Respondent sought the following orders:
    a. A perpetual/Permanent Injunction restraining the Defendants or their servants/agents from constructing, moving-in, entering, remaining, taking-up, evicting and/or interfering with the Plaintiff's quiet use, enjoyment, possession and occupation of parcel Plot No 105 A.d.c Ndabibi Central Farm without any legal basis or justifiable cause to do so.

b. A declaration that the Plaintiff is entitled to exclusive and unimpeded possession of the suit property and that the Defendants are trespassers occupying the Plaintiff's parcel unlawfully.

c. Vacant possession of the suit property.

d. General damages for trespass.

e. Costs and interests at court rates.

4. The suit was heard and the Trial Magistrate in his judgment dated 27th October, 2023 found that the Plaintiff (now Respondent) had proved her case and judgment was entered as per prayers a, b, c, d and e of the plaint.

Appellants' Submissions

5. Counsel for the Appellants filed submissions dated 27th November, 2024 and submitted on the grounds of Appeal as listed in the Memorandum of Appeal. It was counsel's submission that the Respondent had no ownership documents to prove their claim to the suit property.

6. On the issue as to whether the suit was time barred, counsel submitted that the delay in filing the suit was inordinate hence the court lacked jurisdiction to hear and determine the matter. Counsel relied on Section 4 (2) of the *Limitation of Actions Act* and the cases of Henry Maina Gatete vs Jane Njoki Ngugi & another [2014] eKLR and Peter Ogweno Malimu (Suing as Legal Administrator of Johnson Malimu Ajuang, Deceased) vs Joseph Odongo Oguttu [2015] eKLR.

7. Ms. Sabaya further submitted that the Appellants' entry into the land parcel was with the Respondent's consent hence the tort of trespass does not arise and cited the case of John Kiragu Kimani vs Rural Electrification Authority [2018] eKLR. Counsel further submitted that the Appellants purchased the land while the Respondent alleged that she leased the land to them and no lease or tenancy agreement was tendered in evidence to support that assertion. Counsel relied on Section 100 of the *Evidence Act* and the cases of Taidora Tata Ernest vs Africanus Okada Omadede [2019] eKLR and Kenneth Njiriri Mwaniki vs David Chira Kagiri & 3 others [2018] eKLR.

8. According to counsel, the sale agreements filed by the Appellants and marked for identification were admissible and ought to have been considered and relied on the case of Tulip Properties Limited vs Noor Mohamed Hassan & 3 others. Further that the damages awarded were excessive, arbitrary and not based on any valuation report and cited the case of Aboud *& 18 others vs Khan (Civil Appeal 21 of 2020*) [2023] KECA 1286 (KLR).

Respondent's Submissions

9. Counsel for the Respondent filed submissions dated 16th December 2024 and identified the following issues for determination:

a. Whether the learned trial Magistrate erred in law by failing to make a finding that the Respondent's suit was statute barred?

b. Whether the trial Magistrate erred by failing to take cognizance of the sale agreements that were filed in court by the appellants signifying that they were purchasers of portions of the suit parcel?

c. Whether the Respondent was able to prove that the Appellants were trespassers on the suit parcel Plot No 105 A.d.c Ndabibi Central Farm?

d. Whether the award of general damages on trespass to land was arbitrary and/or excessive?

e. Whether there is a competent appeal in light of the uncertified copy of order extracted instead of a certified decree as exhibited in the record of appeal?

10. Counsel submitted that an Appellate court rarely interferes with the decision of an inferior court unless certain errors of principle are manifestly exhibited in the decision of the inferior court and relied on the case of United India Insurance Co. Ltd Vs. Eat African Underwriters (kenya) Ltd [1985] KLR

11. On the first issue, counsel submitted that the Appellants' ground of appeal on the issue of limitation has no basis in law as it was neither pleaded nor argued before the trial court. Counsel stated that the Appellant raised the issue in the final submission prior to delivery of judgment therefore the respondent was never accorded a chance to respond.

12. Counsel relied on Order 2 Rule 4(1) of the Civil Procedure rules on the need for matters to be specifically pleaded including limitation of actions.

13. Counsel further relied on the cases of David Sironga Ole Tukai vs Francis Arap Muge & 2 others [2014] eKLR, Lulu Drycleaners Ltd & another vs Kenya Industrial Estates & another [2005] 2KLR 97, Achola & another vs Hongo & another [2004] 1KLR, Challo vs City Chicken and Eggs Dealers Co-operative Society Limited & another [2023] KECA 244 (KLR) and Isaack Ben Mulwa vs Jonathan Mutunga Mweke (2016) eKLR and urged the court to ignore the ground of Appeal on limitation of action as it cannot be litigated on appeal as it was neither pleaded nor raised during the hearing.

14. Mr. Ngure stated that the Respondent's pleadings indicated that the action of trespass was a continuous tort, which accrues afresh every time the transgression occurs.

15. On the second issue as to whether the trial Magistrate erred by failing to take cognizance of the sale agreements filed by the appellants' counsel it is the duty of every litigant to plead and specifically particularize an issue regarding payments for land which gives him/her to make a claim for ownership in respect of the subject land. That the Appellants failed to specifically plead the dates/and or place where they made their contracts for purchase of land from the Respondent. Counsel relied on the cases of Independent Electoral and Boundaries Commission & another vs Stephen Mutinda Mule & 3 others [2014] eKLR and Kenneth Nyaga Mwige vs Austin Kiguta & 2 others [2015] eKLR.

16. According to counsel, the Appellants' argument that they had bought land from the Respondent was not supported by any evidence since the agreements allegedly made between the Respondent and the Appellants for the sale of portions of the subject land were not produced as evidence before the court.

17. Counsel further stated that the Respondent's evidence that she had leased out temporary kiosks to the Appellants was supported by sufficient evidence which was never challenged or controverted by the Appellants.

18. On the third issue as to whether the Respondent proved that the Appellants were trespassers of the suit plot, counsel submitted that the Respondent pleaded and testified that the Appellants had initiated charges of obtaining by false pretense against the Respondent at Naivasha Law Court the charges were withdrawn by the Appellants on their own volition and that the Appellants had confirmed that they had received demand letters to vacate the suit land but they had ignored.

19. Counsel also stated that the Appellants became trespassers on the suit land when they stopped paying rent from the time they were issued with demand letters to vacate. Counsel relied on Section 3 (1) of the *Trespass Act*, Cap 294 and the case of M'Mukanya vs M'Mbijiwe [1984] KLR 761.

20. On the fourth issue, as to whether the award of general damages for trespass was arbitrary and or excessive, counsel submitted the court took into account several factors including inflation before arriving at the award. Counsel relied on the cases of Catholic Diocese of Kisumu vs Tete [2004] 2KLR and Simon Njage Njoka vs Simon Gatimu Kanyi (2007) eKLR and further stated that trespass to land is actionable per se without proof of actual damages hence the Respondent was entitled to damages.

21. On the fifth issue, counsel submitted that the order exhibited by the Appellants at page 141 of the Record of Appeal has not been certified as required by law and relied on Order 21 (7), Order 42 Rule 2 of the Civil Procedure Rules, Section 65 of the *Civil Procedure Act* and the cases of Premier Dairy Ltd vs Amarjit Singh Sagoo & another [2009] KLR, Elvis Anyimbo vs Orange Democratic Movement & 4 others [2018] eKLR and Silrack Industries Ltd vs Kioko [2020] 1EA 214 and urged the court to uphold the trial court's judgment dated 27th October, 2023 and dismiss the appeal with costs to the Respondent.

Analysis And Determination

22. The Appellants' Memorandum of Appeal listed 17 grounds which can be condensed to 4 grounds of Appeal therefore the issues for determination are:

    a. Whether the learned trial Magistrate erred in law by failing to make a finding that the Respondent's suit was statute barred?

    b. Whether the trial Magistrate erred by failing to take cognizance of the sale agreements that were filed in court by the appellants signifying that they were purchasers of portions of the suit parcel?

    c. Whether the Respondent proved that the Appellants were trespassers on the suit parcel Plot No 105 A.d.c Ndabibi Central Farm?

    d. Whether the award of general damages on trespass to land was arbitrary and/or excessive?

23. The main issue in this appeal is that the Trial Magistrate did not make a finding that the suit was Statute-barred. From the Record of Appeal and the evidence on record, it is trite law that Order 2 Rule 4 (1) of the Civil Procedure Rules provided for matters which must be specifically pleaded as follows:

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        (1) "A party shall in any pleading subsequent to a Plaint plead specifically any mater, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant statute of limitation or any fact showing illegality

            (a) Which he alleges makes any claim or defence of the opposite party not maintainable

            (b) Which if not pleaded, might take the opposite party by surprise or

            (c) Which raises issues of fact not arising out of the preceding pleading

24. Similarly, in the case of Mohamed Abdikadir Mohamed v Sammy Kagiri & Another (2016) eKLR the court elaborated the provisions of Order 2 Rule 4 of the Civil Procedure Rules, 2010 as follows:

> " In my understanding, our law on pleadings as encapsulated in Order 2 Rule 4 of the CPR is that, the party relying on limitation should specifically plead it. He may or may not do so for any or no reasons at all. Thus the plaintiff is entitled to wait to hear from the defendant

whether limitation is taken up as a defence. If the defence is taken, it is upto the Plaintiff to bring his case within the exceptions to the *Limitation of Actions Act* or other statutes of limitation as the case may be. There are good reasons for the position of the law that the defence of limitation should be pleaded specifically. First it is intended to avoid ambush upon taking the plaintiff by surprise on such a fundamental issue as limitation of actions. Second, the Plaintiff is notified of the defence of limitation, in effect, he is told that his claim is not maintainable in law. And third, the Plaintiff gets the opportunity to plead such facts as are necessary to bring his claim within the exception of section 27 of the *Limitation of Actions Act*. Ordinarily he will do so in his Reply to Defence. Accordingly, a party who wishes to invoke or rely on a defence of limitation must specifically plead it in his defence or any other subsequent pleading, if he is to rely on limitation as a basis for defeating the plaintiff's claim.

"... I must admit that the requirement of Order 2 Rule 4 is not merely a matter of form which can be diminished by Article 159 (2) (d) of *the Constitution* of Kenya 2010. It is a rule which serves substantive justice and a pertinent component of fair hearing, for it prevents a party from taking the other by surprise on an important matter as defence of limitation. I am conveying a subtle judicial hint; that a defence of limitation if successful, is not a mere pin-prick thrust or just a rapier like stroke; it is a sure downright bludgeon -blow on the Plaintiff's suit. It will completely defeat the Plaintiff's claim. Therefore, for a party to enjoy the exception to the rule and challenge an ex-parte order of extension of time, must give the other party proper notice of his defence on limitation so that the party to be affected will have an opportunity to plead such facts as are necessary to bring his case within the exception of section 27 of the *Limitation of Actions Act*"

25. The requirement for specifically plead a defence of limitation of time is to enable the opposing party to respond to such a claim. In an adversarial system, there is no trail by ambush. There are exceptions provided for in the Statute of *Limitation of Actions Act* which are available to the Plaintiffs if they so apply them. Litigants are therefore bound by their pleadings and are not allowed to spring surprises to steal a match on their opponents.

26. In the case of David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR the Court of Appeal held as follows:

> " In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense."

27. I have looked at the defence filed by the Appellants and have not seen anywhere where they pleaded that the suit was time barred. They also did not have a counterclaim to claim ownership in any form that would be available to them. They had general denials to the plaintiff's claim. I find that this ground must fail.

28. On the issue that the Magistrate did not take cognizance of the sale agreements, the sale agreements in issue were marked for identification but were never produced as required by law and procedure. Therefore, there was no evidence tendered to lay the foundation of the authenticity and relevance of

the documents as was held in the case of Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR where the Court of Appeal held that:

> " The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.
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> 20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account."

29. The mere marking of a document for identification does not make them part of documents produced to be relied upon by the court as evidence. There is a clear distinction between documents produced as exhibits and those that have been marked for identification. Relying on such documents is like considering a defence where the defendant has not given any evidence to rebut the plaintiff's evidence. It remains an unproven allegation. I find that this ground of appeal must also fail.

30. On the issue of whether the Respondent proved her case for trespass, from the record it was not in dispute that the Respondent had an allocation letter for the suit plot issued on 30th January 2006 by ADC and that the Respondent's testimony that the Appellants were tenants and refused to pay rent when they were issued with letters of notice to vacate was not controverted. The Respondent therefore proved her case that the Appellants were tenants who refused to pay rent and subsequently became trespassers on the suit land.

31. In the case of *Nguruman Ltd -v- Shompole Group Ranch & 3 Others C.a. Civil Appeal NO 73 of 2004* [2007 KLR] where the Court, citing Clerk and Lindsel On Torts 16th Edition paragraphs 23-01 stated thus:

> " Every continuance of a trespass is a fresh trespass in respect of which a new cause of action arises from day to day as the trespass continues."

32. On the last issue of the award of damages being excessive, an appellate court is not justified to substitute a figure awarded by a lower court simply because it would have awarded a different figure. The award of damages is discretionary but the discretion must be applied judiciously. The court is justified to interfere with an award of the lower court if the court is satisfied that the court applied wrong principles by taking into account irrelevant factors.

33. According to the 10th Edition of Black's Law Dictionary trespass is defined as follows:

> " an unlawful act committed against the person or property of another; especially wrongful entry on another's real property. Clark & Lindsell on Torts, 18th Edition on page 923 defines trespass as any unjustifiable intrusion by one person upon the land in possession of another.

The onus is on the Plaintiff to proof that the Defendant invaded his land without any justifiable reason".

34. Trespass is actionable per se and once it is proved that there was trespass then there would be no need to prove the actual damages hence the respondent was entitled to damages which I will not interfere with the figure as it was reasonable

35. In the case of Park Towers Ltd...Vs... John Mithamo Njika et al (2014) eKLR, the Court held that:

> "I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The Court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case."

36. I have considered the Appeal, the submissions by counsel and find that the appeal lacks merit and is therefore dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 12TH DAY OF FEBRUARY 2025.

M. A. ODENY

JUDGE