



**Mushanki v Mombasa Cement Limited & another (Environment & Land Case E037 of 2022) [2024] KEELC 13889 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13889 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E037 OF 2022  
NA MATHEKA, J  
DECEMBER 18, 2024**

**BETWEEN**

**JAMES MUSHANKI ..... PLAINTIFF**

**AND**

**MOMBASA CEMENT LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**COAST GENERAL TEACHING & REFERRAL HOSPITAL ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff's claim is that at all material relevant and material to this suit, he was the beneficial/registered proprietor of plot Mombasa Block X/315. That the plaintiff is a duly registered owner of plot Mombasa Block X/315 as demonstrated by a certificate of lease issued to him on 21<sup>st</sup> September 2021 and copy of green card showing the plot is in his name. That the plaintiff is the current rate payer and has his name on the rates statement meaning he is the bonafide owner of the said plot of land. That the plaintiff obtained the plot by virtue of being a beneficiary of the estate of his late mother one Nancy Nasieku having filed letters of administration in succession cause no 2608 of 2014 in the matter of the estate of Nancy Nasieku (Deceased) having obtained a grant of letters of administration issued on 14<sup>th</sup> February 2018. That the plaintiff obtained a certificate of confirmation of grant on the 4<sup>th</sup> December 2019 from the High Court at Nairobi confirming him as the beneficiary of the estate of his late mother Nancy Nasieku.
2. That sometimes in the year 2021 the plaintiff visited his plot Mombasa Block X/315 in order to inspect the same as he was desirous of disposing off the same but was shocked to find out that it has been fenced off and could not gain access to the same. That upon an inquiry as to who might have encroached his plot illegally the plaintiff found out that it was the 1<sup>st</sup> defendant who had erected a perimeter wall and 2<sup>nd</sup> defendants who had put up temporary illegal structures without his consent and/or knowledge. That the 1<sup>st</sup> defendant has put up a perimeter wall around the plaintiff's property making it inaccessible



completely. That the 2<sup>nd</sup> defendant has put up temporary structures and put hospital beds together with various waste materials in the plaintiff's plot Mombasa/Block X/315 albeit illegally. That the defendant's continuous trespassing of the land denies the plaintiff a chance to enjoy his property as he has already gotten several potential buyers who all have been put off by lack of access to the suit land despite him showing them copies of lease certificate showing that he is a registered owner. The plaintiff prays that judgment be entered against the defendants jointly and severally for:

- a. A mandatory order, restraining the defendants by themselves, their agents, servants, employees and/or assigns from trespassing, building any structures, dumping debris or in whatever way interfering with the subject suit property.
  - b. A mandatory order to the 1<sup>st</sup> defendant to demolish illegally erected perimeter wall to the said plot of land.
  - c. Without prejudice to (b) the plaintiff be authorized to demolish the illegally erected perimeter wall erected by the 1<sup>st</sup> defendant.
  - d. A mandatory order to the 2<sup>nd</sup> defendant to demolish illegal temporary structures and remove debris dumped on the said suit property.
  - e. Without prejudice to (d) the plaintiff be authorized to demolish illegal temporary structures and remove debris dumped by the 2<sup>nd</sup> defendant.
  - f. An order stopping the defendants by themselves, his agents, assignees, servants and/or third parties and any other occupants from land grabbing and/or trespassing the suit Plot Mombasa Block X/315.
  - g. An Order directing the O.C.S. of the area/Tononoka Police Station to offer security to enable the plaintiff to demolish perimeter wall erected and demolish temporary structures and remove debris dumped in the suit plot of land.
  - h. Costs of this suit together with interest thereon.
  - i. Any other order(s) the Court may deem fit to grant in the circumstance.
3. The 1<sup>st</sup> defendant stated that they only helped renovate the already existing fence and paint the same at the request of the 2<sup>nd</sup> defendant. That there is a similar suit dubbed MC ELC NO E034 of 2022 between Wakf Commissioners of Kenya and another versus Coast Province Hospital and 2 others relating to the same suit in existence. The 1<sup>st</sup> defendant avers that it was struck out of the aforesaid suit for being wrongly sued and/or included as a party. The 1<sup>st</sup> defendant avers that due to the ongoing case they have had to put on hold CSR projects direct towards health and health facilities improvements, thus affecting the general public who would have benefited from same.
  4. The 2<sup>nd</sup> defendant stated that they worked with the 1<sup>st</sup> defendant to fence the 2<sup>nd</sup> defendant's property to avoid encroachment. That they never attempted to dispose off land by selling it to third parties as alleged and states that it has only worked with the 1<sup>st</sup> defendant to fence off its property which does not include the property being alluded to by the Plaintiff. That they have consolidated the plots owned by the 2<sup>nd</sup> defendant and Wakf Commissioners of Kenya with a view to relocate their plot to a convenient location to allow easy access to the plot and shall during hearing tender evidence to support this position.
  5. This Court has considered the evidence and the submissions therein. It is the plaintiff's case that sometimes in the year 2021 the plaintiff visited his plot Mombasa Block X/315 in order to inspect the



- same as he was desirous of disposing off the same but was shocked to find out that it has been fenced off and could not gain access to the same.
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 18<sup>th</sup> 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 4<sup>th</sup> 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 Plot No. Mombasa Block X/315 as demonstrated by a certificate of lease issued to him on 20<sup>th</sup> September 2021 and copy of green card showing the plot is in his name. That the 2<sup>nd</sup> defendant has put up temporary structures and put hospital beds together with various waste materials in the plaintiff's plot. The question therefore before this court is whether the defendants trespassed onto the suit property.
  11. DW2 Francis Wambua a planner with the 2<sup>nd</sup> defendant testified that the 2<sup>nd</sup> defendant Coast General Hospital is currently situated on Plot No. MI/X/474. The title owned by the 2<sup>nd</sup> defendant is a result of an allocation of plot No. 57 and 59 from what was referred to as crown land. Plot 58 was allocated to the Wakf Commissioners of Kenya. The 2<sup>nd</sup> defendant agreed with the plot owner of Plot No. 58 to consolidate the plots and relocate Plot No. 58 to a convenient location. These changes were reflected under survey plan Folio Reference Number 674/127 dated 28<sup>th</sup> October 2021. The excised plot became No. 473 and the 2<sup>nd</sup> defendant remained with Plot No. 474. The plaintiff is now claiming the excised



plot and calling it Mombasa Block X/315. The 2<sup>nd</sup> defendant has produced a survey report dated 14<sup>th</sup> November 2022 to corroborate their evidence. He stated that;

*“ It is quite clear to us that plot 299 as surveyed in survey map F/R 79/175 is no longer in existence i.e. the relevant portion of land reverted back to be part and parcel of land reserved for Coast General Teaching and Referral Hospital – being original Plots No. MI/X/57 & MI/X/59 – and this is confirmed by the fact that this site (MI/X/299) is located within an area that is a vital component of and is indeed part and parcel of Coast General Teaching and Referral Hospital and has been so for many years at least since 1964.”*

12. He found no records of plots falling within that property and found that Plot No. MI/X/474 is intact and is registered in favour of Coast General Teaching and Referral Hospital. I find that the 2<sup>nd</sup> defendant is the bonafide proprietor of Plot No. MI/X/474 which they fenced with the help of the 1<sup>st</sup> defendant. I find that the suit land is public land and was allocated to the hospital way back in the 1960s. Article 62(1) of *the Constitution* defines public land as:

- (a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;
- (b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;
- (c) land transferred to the State by way of sale, reversion or surrender;
- (d) land in respect of which no individual or community ownership can be established by any legal process;
- (e) land in respect of which no heir can be identified by any legal process;
- (f) all minerals and mineral oils as defined by law;
- (g) government forests other than forests to which Article 63 (2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;
- (h) all roads and thoroughfares provided for by an Act of Parliament;
- (i) all rivers, lakes and other water bodies as defined by an Act of Parliament;
- (j) the territorial sea, the exclusive economic zone and the sea bed;
- (k) the continental shelf;
- (l) all land between the high and low water marks;
- (m) any land not classified as private or community land under this Constitution; and
- (n) any other land declared to be public land by an Act of Parliament—
  - (i) in force at the effective date; or
  - (ii) enacted after the effective date.

13. Private land on the other hand is defined by Article 64 as consisting of:

- (a) registered land held by any person under any freehold tenure;



- (b) land held by any person under leasehold tenure; and
- (c) any other land declared private land under an Act of Parliament.

14. I find that Plots Numbers 57 & 59 (Now Plot No. MI/X/474.) is public land reserved for the hospital. The hospital being a public institution, the land it occupies and utilizes therefore public utility and is not available for allocation. The allocation if any is irregular and unlawful. The plaintiff states that he is the registered proprietor of Plot No. Mombasa Block X/315 and the defendants have fenced it. No survey report has been adduced to show where his plot is located physically on the ground. The root of the title is not explained and it is clear his title was issued on 20<sup>th</sup> September 2021 when the hospital has been in existence from the 1960s. I find that the 1<sup>st</sup> defendant helped renovate the already existing fence and painted the same at the request of the 2<sup>nd</sup> defendants a CSR activity. Indeed, PW2 states that the excised plot became No. 473 and the 2<sup>nd</sup> defendant remained with Plot No. 474. That the plaintiff is now claiming the excised plot and calling it Mombasa Block X/315 and that he has sued the wrong party. I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 18<sup>TH</sup> DAY OF DECEMBER 2024.**

**N.A. MATHEKA**

**JUDGE**

