



**Rosewa Agencies Limited v Ruiru Juja Water & Sewerage Co Ltd & another (Environment & Land Case 251 of 2018) [2023] KEELC 3 (KLR) (12 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 3 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 251 OF 2018**

**JG KEMEI, J  
JANUARY 12, 2023**

**BETWEEN**

**ROSEWA AGENCIES LIMITED ..... PLAINTIFF**

**AND**

**RUIRU JUJA WATER & SEWERAGE CO LTD ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF KIAMBU ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff instituted this suit *vide* its plaint dated the 15/10/2018 against the defendants seeking prayers as follows;
  - a. A permanent injunction be issued restraining the defendants by themselves agents servants employees or otherwise howsoever from encroaching into trespassing excavating digging of trenches laying of pipes occupying erecting buildings transferring alienating or in any way dealing with or interfering with the plaintiffs proprietary rights use interests and possession enjoyed by the plaintiff over all that parcel of land in Juja Estate Thika District within Kiambu County known as L R No 18697/4 (suit land).
  - b. An order of mandatory injunction compelling the defendants to remove all the pipes backfill the excavated trenches and remove any unlawful development carried out without the plaintiff's express authority in any part of all that suit land.
  - c. Damages
  - d. Costs of the suit plus interest at court rates.
2. The gist of its case is that the plaintiff is the registered owner of the suit land, a private property measuring approximately 43.23 Ha or 106 acres within Kiambu County. That sometime in August



- 2018, the defendants without any colour of right entered and trespassed on the suit land by excavating deep trenches for purposes of laying water pipes and provision of sewer lines.
3. The suit is opposed by the 1<sup>st</sup> & 2<sup>nd</sup> defendants' statements of defence dated 10/4/2019 and 11/3/2019 respectively.
  4. The 1<sup>st</sup> defendant filed its defence on the 9/5/2018. Whilst denying the plaintiff's claim, the 1<sup>st</sup> defendant stated that its business is laying pipes for water connection for the benefit of the public and in no way did it express any interest of acquiring the suit land as alleged by the plaintiff. It stated that it had made good the damage and the issue of trespass has been overtaken by events as the trespass has ceased.
  5. The 2<sup>nd</sup> defendant denied the plaintiff's claim and asserted that it had not entered the suit land either through its agents' employees and or servants for purposes of digging trenches for laying sewer lines and pipework. On a without prejudice, it contended that the Government and its agencies are empowered to lay any pipeline and sewer lines over any land including privately owned land. In the end it concluded that the suit raises no triable issues against it, it is incurable, vexatious and should be dismissed with costs.
  6. By consent of the parties this suit was partially settled in terms of prayers a & b of the plaint as per the record of November 10, 2021. The outstanding issues falling for determination therefore, before court are; damages for the trespass and costs of the suit, which issues have been canvassed by way of written submissions.
  7. On behalf of the plaintiff, the firm of Prof Albert Mumma & Co Advocates filed submissions dated 26/5/2022. The plaintiff rehashed the facts of the case notably that it is the registered owner of the suit property and the defendants' trespassed on it on or around the end of August, 2018. That its efforts, including sending a demand letter dated 10/9/2018 to have the defendants desist from further trespass were futile prompting it to file the instant suit. That it was only after the service of the pleadings that the defendants stopped the trespass and removed all their pipes from the suit property. Reference was made to the 1<sup>st</sup> defendant's admission of the trespass at para 2 of its defence and the case of *Samco Holdings Ltd t/a Eka Hotel Vs Patrick Nyamweya* [2022] eKLR to buttress the position that trespass is actionable per se; that once trespass is established to have occurred, the person against whom trespass was committed is entitled to damages. See the case of *Kenya Power & Lighting Co Ltd Vs Fleetwood Enterprises Ltd* (2017) eKLR.
  8. On quantification of damages, the plaintiff further relied on the *Halsbury Laws of England* 4<sup>th</sup> Edition, Vol 45 at para. 26 1503 on trespass that "where a 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." That at the minimum the plaintiff was entitled to damages and rent for the period of August 2018 to November 2018 that the defendants trespassed on the suit property. That the rent due for the four months is Kshs 4,240,000/=, exemplary damages of Kshs 1,060,000/= in addition to the costs of the suit.
  9. The 1<sup>st</sup> defendant filed its submissions dated 19/5/2022 through the firm of CR Advocates LLP. On the prayer for damages, it is submitted that the plaintiff maliciously filed this suit after the 1<sup>st</sup> defendant had complied with the demand letter served upon it by the plaintiff's advocate. That the plaintiff did not suffer any loss as its land was restored to its former state and urged the court to follow the reasoning in the case of *Fleetwood Enterprise Ltd vs Kenya Power & Lighting Co Ltd* [2015] eKLR that an award of damages for trespass is discretionary in nature and such discretion ought to be exercised judiciously.



10. On the issue of costs of the suit, the 1<sup>st</sup> defendant maintained that the same are not warranted since the matter was filed despite the trespass having been remedied.
11. Similarly, Learned Counsel JJ Cheserek filed brief submissions dated 19/5/2022 on behalf of the 2<sup>nd</sup> defendant. It submitted that the 2<sup>nd</sup> defendant was wrongly sued in the proceedings and the plaintiff is not entitled to the orders sought.

### **Analysis & Determination**

12. It is trite that he who alleges must prove. See section 107 of the *Evidence Act* is apt in this regard. It states as follows;
  - “ 107(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.”
13. Trespass has been defined by *Clerk and Lindsel on Torts*, 18th edition at page 23 as; “any unjustifiable intrusion by one person upon the land in possession.” In the case of *Park Towers Limited versus John Mithamo Njika & 7 others* (2014) eKLR the court held that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages awardable depending on the unique facts and circumstances of each case.
14. The plaintiff produced evidence in support of his averments leading to the settlement of some of his prayers in the Plaint as already mentioned.
15. The plaintiff prayed for damages in the sum of Kshs 5.3M and relying on *Halsbury’s Laws of England* 4th Edition Vol 45 at para 26 page 1503 on the guidelines that guide the court when assessing and awarding damages for trespass, namely, where there is no proof of actual damage, the aggrieved party is entitled to recover nominal damages; where the trespass has caused the aggrieved party actual damage, he is entitled to receive such amount as will compensate him for his loss; where the trespasser has made use of the aggrieved party’s land, the aggrieved party is entitled to recover by way of damages such sums as would reasonably be paid for that use; where there is an oppressive, arbitrary or unconstitutional trespass by the trespasser or where the trespasser cynically disregards the rights of the aggrieved party on the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded; and lastly, if the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased. These guidelines were echoed recently by the Court of Appeal in *Kenya Power & Lighting Company Ltd Vs Ringera & 2 others* [2022] KECA 104 (KLR).
16. The defendants did not counter offer the sum payable for damages but insisted that the award was not justified since the trespass had been remedied. The 1<sup>st</sup> defendant submitted that an award for damages is discretionary and invited this court to consider the reasoning in the case of *Fleetwood Enterprises supra*. In that case, the court allowed the plaintiff’s claim for trespass against the defendant who had entered the plaintiff’s land without his consent and erected electric poles thereon. The Court awarded a sum of Kshs 3.8 Million for the period of trespass being 5 years as at the time of delivering the judgement. The defendant challenged the judgement at the Court of Appeal in the case of *Kenya Power & Lighting Company Limited vs Fleetwood Enterprises Limited* [2017] eKLR and affirming the judgement, the appellate court, *inter alia*, held that where trespass is proven the affected party need



not prove that it suffered damages or loss as a result of the trespass so as to be awarded damages because once the trespass is proved, the court is bound to assess and award damages on a case by case basis.

17. I have considered the 1<sup>st</sup> defendant's submission that it ceased the trespass upon receipt of the demand letter dated the 10/9/2018. The 1<sup>st</sup> defendant annexed undated photographs showing that the trenches had been backfilled. The plaintiff's position is that the trespass ceased on the service of the summons in the suit upon the defendant's. The suit was filed on the October 17, 2018 and the court concurs with the plaintiff that the trespass must have ceased after the filing of the suit and service of summons upon the defendant's. It is highly probable that the plaintiff would not have filed suit if the trespass had stopped.
18. The plaintiff claims rent due for the four months when the trespass persisted being Kshs 4,240,000/- and exemplary damages of Kshs 1,060,000/-. No documentary evidence of rent earnings was tabled before court for the area trespassed upon and in my view the sums are not justified. The plaintiff failed to produce evidence before the court in terms of a valuation for rent or such other documents in support of the figures.
19. The 1<sup>st</sup> defendant stated that it entered the suit land believing that there was in existence a way leave and having been sued took steps to cease the trespass and made good the injury. I find no evidence to warrant exemplary damages which ordinarily are issued where a party's conduct is malicious and oppressive. The sum of Kshs 1,060,000/- is unsupported and is declined.
20. Having stated that I find that the plaintiff is entitled to damages despite the trespass having been remedied. I have considered the period of trespass which is estimated at 4 months or thereabouts, the land trespassed was along the trenches and the fact that the 1<sup>st</sup> defendant has backfilled the trenches on the land. Taking all these factors into consideration, a nominal sum of Kshs 650,000/= (Six Hundred and Fifty thousand only) is adequate to further put the plaintiff in the position that it was before the trespass. The same is payable by the 1<sup>st</sup> defendant.
21. Final orders and disposal;
  - a. Damages for trespass in the sum of Kshs 650,000/- be and is hereby awarded in favour of the plaintiff and payable by the 1<sup>st</sup> defendant.
  - b. Costs are in favour of the plaintiff payable by the 1<sup>st</sup> defendant
22. It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 12TH DAY OF JANUARY, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Kamande HB Agwara for Plaintiff

Wamulele HB Gichui for 1st defendant

2nd defendant – Absent

Court Assistant – Phyllis / Kevin

