



Gitau & another (Suing as the Administrators of the Estate of Jane Muthoni Ngugi – Deceased) v Mwangi (Environment & Land Case 80 of 2019) [2023] KEELC 780 (KLR) (13 February 2023) (Judgment)

Neutral citation: [2023] KEELC 780 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 80 OF 2019
JG KEMEL, J
FEBRUARY 13, 2023**

BETWEEN

**STEPHEN GACHUHI GITAU 1ST PLAINTIFF
CHARLES GITAU NGUGI 2ND PLAINTIFF
SUING AS THE ADMINISTRATORS OF THE ESTATE OF JANE MUTHONI
NGUGI – DECEASED**

AND

NGANGA MWANGI DEFENDANT

JUDGMENT

1. The Plaintiffs filed suit against the Defendant on the 2/5/2019 seeking the following orders;
 - a. A declaration that land Title Ruiru/Kiu Block 2/3878 rightfully belongs to the Estate of the late Jane Muthoni Ngugi.
 - b. That an eviction order do issue against the Defendant from the suit land where the Plaintiffs are joint administrators.
 - c. That a permanent order of injunction do issue restraining the Defendant by himself his interfering agents and servants and or employees from in any way dealing with or interfering with the suit property, the suit land.
 - d. An order of Mesne Profits from the 23/9/2013 to the day of judgement
 - e. Costs.
2. The Plaintiffs are the joint administrators of the estate of Jane Muthoni Ngugi who is the registered owner of the suit land.



3. It is their case that the Defendant has continuously trespassed on to the suit land since 23/9/2013 and has erected a residential home on one part of the suit land and rented out some other part for various businesses thus infringing the Plaintiffs right to ownership. In addition, that the Defendant has intermeddled with the property of the deceased and that despite demand to vacate the Defendant has remained adamant.
4. The Plaintiffs case is denied by the Defendant. In his statement of defence filed on the 7/6/2019 the Defendant contended that he is the owner of parcel 3877 which is adjacent to the parcel 3878 belonging to the late Jane Muthoni Ngugi. He stated that the suit of the Plaintiffs is frivolous given that no particulars of trespass have been pleaded and that the boundaries between the two parcels of land are defined in alignment with the RIM. In addition, that the Court lacks jurisdiction to determine the matter which is merely a boundary dispute.
5. At the hearing, the Plaintiff's evidence was led by 4 witnesses. PW1 Stephen Gachuhi Gitau relied on his witness statement dated the 12/5/2019 and produced the documents marked as PEX No 1 - 4. He stated that the suit land belonged to his late mother, Jane Muthoni Ngugi and has filed the suit as the legal administrator of her estate. He stated that the Defendant has encroached on the land and built on 53.5. meters, approx. one acre out of the total 1.25 acres of the whole land and in addition he has refused to vacate despite demands to do so. He informed the Court that the Defendant was present when the surveyor visited the suit land and produced the report dated the November 25, 2021.
6. PW2 - Charles Gitau Ngugi testified and relied on his witness statement dated the 18/4/2019 and gave similar evidence as PW1 as his evidence in chief.
7. PW3 - Samwel Mwangi Waweru stated that he is the proprietor of Geomax, a surveying firm and a registered surveyor by profession of 7 years' experience. He stated that he visited the suit land and his findings are that; parcel 3877 encroached parcel 3878 by one acre; that parcel 3877 is owned by Samuel Kariuki Chege while parcel 3878 is owned by Jane Muthoni Ngugi, deceased. That the Defendant has constructed his house on the Plaintiffs land and operates businesses on another portion of the said land. That the total land encroached is one acre. He produced pictorials showing the extent of the encroachment by the Defendant. That the approximate rent for each of the businesses is about Kshs 60,000/-. In his opinion the suit land is valued at approx. 45 Million given its proximity to the Eastern Bypass. He produced the surveyors report marked as PEX No 5. In cross examination, he explained that he used the GPS coordinates to measure the two parcels and arrive at his finding. That though the Defendant refused them entry his GPD machine was able to pick the beacons of the two plots without going into the land.
8. PW4 - Ruth Machina, the District Surveyor in Ruiru having worked as such for a period of 13 years. That pursuant to the Court order served on her office she carried out the survey of the two parcels – 3877 and 3878 in the presence of the Land Registrar Ruiru, the owners of the two parcels, private surveyors' representative (PW3), the OCPD from Gatongora Police Station and the representative of the area chief. That upon carrying out the measurements of the two parcels of land she found out that parcel 3877 encroached 3878 by 66 meters square which is approx. an acre. That on the ground parcel 3878 is smaller as a result. She produced the report on page 45-48 marked PEX 6 in support of her evidence which included the RIM for the area.
9. DW1 - Michael Nganga Mwangi solely led evidence in defence. He relied on his witness statement dated the 24/2/2020. He stated that he is the registered owner of parcel No 3877 which borders the suit land. He refuted any encroachment and contended that the boundaries of the two parcels are as defined in the RIM. That parcel 3878 belonged to Jane Muthoni Ngugi who died in 2014. That all along the said deceased never raised any issue since 1984 when they settled in the area but is being raised now



by her sons after her demise. That the parcels were acquired from Githunguri Constituency Ranching Co. Limited. That upon taking possession of his land in 1984, he fenced it and he has never moved the fence since. That he was present when the surveyor visited the land and that he has leased part of the land to third parties who pay Kshs 25,000/- for each stall /structure. That though the land is situate along Eastern bypass he cannot tell the value of the same although he is aware that it is now prime given the proximity to the highway. That the boundaries of the two plots are defined in the RIM.

10. Parties have filed written submissions which I have read and considered.
11. As to whether the Defendant trespassed onto the suit land, the Plaintiffs submitted that trespass is the intrusion by a person into the land of another who is in possession and ownership. See section 3 (1) of the *Trespass Act*. It was submitted that the boundary dispute arose in 2013 when the title of the suit land was issued in the name of the late Jane Muthoni Ngugi, deceased. That her title was indicated as 0.5 ha but was significantly small on the ground. That the dispute was referred to the Land Registrar Thika who instructed the surveyor to visit and confirm the measurements on the ground. That the land was found to have been encroached to the extent of 53.3 meters. That the Defendant refused to vacate the area encroached prompting the Plaintiffs to file suit.
12. That the area encroached stands at 66 meters or one acre according to the District Surveyor and that despite the second survey the Defendant has been adamant in his trespass. That the evidence of PW3 and PW4 both surveyors agree that the encroached area is about 1 acre.
13. As to whether the Plaintiffs are entitled to damages the Plaintiffs submitted and relied on past decisions of Courts in *Joshua Ngeno v Kenya Power & Lighting Company Limited and the County Government of Kericho* (2021) eKLR where the Court held that trespass on land is actionable per se. In other words where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded and that the Court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. See the decision of the Court in *Park Towers Limited v John Mithamo Njika & 7 others* (2014) eKLR.
14. It was also submitted that an order of permanent injunction should be given on the basis that trespass is founded and therefore an eviction order ought to ensue.
15. The Plaintiffs submitted that they are entitled to mesne profits given that the Defendant has been in unlawful possession of the suit land renting it to earn income to their detriment as the owners, a position that was not denied by the Defendant. That the Defendant admitted having rented out the trespassed portion of the land at the sum of Kshs 25,000/- per month. They relied on the case of *Attorney General v Halal Meat Products Limited* (2016) eKLR which stated as follows;

“It follows therefore that where a person is wrongfully deprived of his property he or she is entitled to damages known as mesne profits for the loss suffered as a result of the wrongful period of occupation of his her property by another.”
16. On behalf of the Defendant, it was submitted that the Plaintiffs have failed to prove trespass by the Defendant at all for the following reasons; the surveyor’s report by PW3 dated the 6/9/16 is unreliable; the District surveyors report dated the November 25, 2021 is not clear as to which side of the land is encroached by 66 meters; the surveyors report dated the 6/9/16 states that parcel 3878 had been encroached by 53.5 meters making parcel 3877 larger than it should be hence it is unclear which side of 3878 was encroached by 53.5 meters or by 0.29 ha ; parcel 3877 belongs to Samuel Kariuki Chege who was not sued in this case hence no adverse orders can be issued against him; the valuation of Kshs 45 Million is not supported by evidence.



17. On the issue of mesne profits, the Defendant submitted that the premises referred by the Plaintiffs are profits due to improvements allegedly made by the Defendant and hence do not fall under the ambit of an award of mesne profits.
18. Having considered the Pleadings of the parties, the evidence tendered at the trial, the written submissions and all the materials placed before me I find that the issues for determination are; whether the Defendant has trespassed onto the suit and; if the answer is yes, whether the Plaintiffs are entitled to damages for trespass, mesne profits and what orders should the Court issue and finally the costs of the suit.
19. It is not in dispute that the suit land is registered in the name of Jane Muthoni Ngugi. The Defendant led evidence and informed the Court that parcel 3877 belongs to him. I note that none of the parties presented a copy of the title to beef up this point. The Defendant has submitted that the land belongs to Samuel Kariuki Chege. The Court will take the uncontroverted evidence of the Defendant as truthful, that is to say that he is the registered owner of the land as pleaded in paragraph 4 of the statement of defence.
20. It is the Plaintiffs case that the Defendant has encroached onto the land by about one acre. The Defendant's case is that the Plaintiffs have not proven any trespass against him. He opines that he acquired the land from Githunguri Constituency Ranching in 1984 took possession upon being shown the beacons fenced and occupied it todate with no dispute even from the registered owner Jane Muthoni Ngugi who died in 2014. He accused her sons, the Plaintiffs herein, for brewing trouble in form of trespass, a charge that he claims has not been proven. He does not dispute that he has built on the land and that he leases some part of the land to third parties who pay Kshs 25,000 per month.
21. The Defendant has argued that the Plaintiff and their witnesses have given varied extent of the encroachment as 55 meters, 66 meters and on that basis argued that fact of trespass has not been proven.
22. I have perused the surveyors report prepared by PW4 dated the November 25, 2021 where the surveyor found as follows;

“This office visited the parcel of land on November 24, 2021 in the company of the Land Registrar and that of the interested parties. The ground measurement for both parcel were measured. Measurements were scaled form the official registry index map (RIM) Block 2 sheet 5. It was found that there is encroachment where parcel 3877 encroaches on parcel 3878 by 66 metres and 3878 encroaches the neighbouring parcel 3946 by 53.4 metres.”
23. PW3 – led evidence and produced a report with respect to the site visit on the 20/3/2019 where he stated as follows;

“Nganga Mwangi is the trespasser where he has encroached on about 0.4047 H of the whole land which sits on 0.5 ha. He has built a residential home which is permanent and made of stones and iron sheet fencing. Next to his house is a banana planted where he was supposed to bury his son Kariuki Nganga but the administrators managed to obtain a Court order which was dated the 14/8/2018 banning the same. Nganga has leased the trespassed land to the following businesses; Luton Tavern which occupies 0.04 ha; Joysca Auto garage and spares – 0.028 ha; Munish steel and great fix hardware – 0.027 ha and Great Fix Auto garage -0.028 ha.”
24. I find that the reports of the surveyors agree that the extent of the encroachment by the Defendant is 1 acre. I find that the Plaintiff has proven trespass.



25. Where a party has proven trespass there is no need to proof damages as trespass is actionable perse. The Court therefore is being called upon to assess the damages payable in the circumstances of this case. I have considered the length of time the Defendant has encroached onto the land, the size of the land being one acre and in my view a sum of Kshs 1.0 Million is adequate to compensate the Plaintiffs for the trespass. I shall make the final orders in the end.
26. Section 2 of the *Civil Procedure Act* provides as follows;
- “Includes a petition or summons, and the statements in writing of the claim or demand of any Plaintiff, and of the defence of any Defendant thereto, and of the reply of the Plaintiff to any defence or counterclaim of a Defendant:”
27. Having held that the Defendant has utilised the land of the Plaintiffs from 1984 and going by the admission by the Defendant that he earns Kshs 25,000/- from each stall which stalls according to the surveyors report on record are 4. It is not clear whether the rent is monthly or yearly. Neither party confirmed the period of the rent. Even if I was to take that it is monthly, taking from the year 2013 the total figure comes to Kshs 12 million.
28. In the end I enter judgement in favour of the plaintiffs as follows;
- a. A declaration that land Title Ruiru/Kiu Block 2/3878 rightfully belongs to the Estate of the late Jane Muthoni Ngugi.
 - b. That the Defendant and his leases be and are hereby ordered to vacate the suit land within the next 60 days in default eviction to ensue.
 - c. That a permanent order of injunction do issue restraining the Defendant by himself his interfering agents and servants and or employees from in any way dealing with or interfering with the suit property, the suit land.
 - d. An order of Mesne Profits from the 23/9/2013 to the date of judgement in the sum of Kshs 12 Million.
 - e. Damages for trespass in the sum of Kshs 1,000,000/-
 - f. Costs are payable to the Plaintiffs.
29. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 13TH DAY OF FEBRUARY, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Muiruri for Plaintiff

Defendant - Absent

Court Assistant – Esther / Kevin

ELC80.2019-THIKA 4J of 4

