



REPUBLIC OF KENYA



**KENYA LAW**  
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**Bowskill v Jofwe & 7 others (Environment & Land Case 89 of 2018)  
[2023] KEELC 16694 (KLR) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16694 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 89 OF 2018**

**MAO ODENY, J  
MARCH 27, 2023**

**BETWEEN**

**ANN JANE BOWSKILL ..... PLAINTIFF**

**AND**

**SIDY JOFWE ..... 1<sup>ST</sup> DEFENDANT**

**ALICE ERNESTINE ..... 2<sup>ND</sup> DEFENDANT**

**JENIFFER ERNESTINE ..... 3<sup>RD</sup> DEFENDANT**

**SANDY ERNESTINE ..... 4<sup>TH</sup> DEFENDANT**

**JIMMY ERNESTINE ..... 5<sup>TH</sup> DEFENDANT**

**RONNY ERNESTINE ..... 6<sup>TH</sup> DEFENDANT**

**TOMMY ERNESTINE ..... 7<sup>TH</sup> DEFENDANT**

**JILL ERNESTINE ..... 8<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By an amended Plaint dated November 18, 2021, the Plaintiff herein sued the Defendants seeking the following orders: -
  - a) A permanent injunction restraining the Defendants by themselves, their servants or agents from entering, occupying, using, or in any other way interfering with the Plaintiff's quiet possession and enjoyment of MN/III/ 5131.
  - b) An order of eviction directing the Defendants and/or their servants or agents to vacate the suit property known as MN/III/ 5131 within 30days of the Judgment and in default, the Defendants be forcefully evicted under the supervision of the OCS Mtwapa.



- c) Costs of this suit.
2. The Plaintiff averred that she is the registered owner of a fee simple interest over all that parcel of land known as MN/III/ 5131 a subdivision of a property formerly known as Plot No MN/III/ 3047 Kilifi. She further averred that the Defendants have trespassed into the suit property since 2009 and have remained on her land without her consent.
  3. The Defendants were served with summons to enter appearance but neither filed a Memorandum of Appearance nor filed a defence hence the matter proceeded undefended.
  4. PW1 Marie Russmann adopted her witness statement as her evidence in chief and stated that her mother, Adriana Ernestine (deceased), was the registered owner of the property formerly known as MN/III/3047 Kilifi (Orig No 284/167) who died on June 20, 2009, leaving behind a will dated March 18, 2009 and under clause 1 of the will appointed the deceased's her as the executrix of her will whereby clause 3 bequeathed to the Plaintiff Ann Jane Bowskill 0.34 Hectares of the deceased's said property formerly known as MN/III/3047.
  5. It was PW1's testimony that on July 5, 2010, the High Court at Mombasa issued a grant of probate to her effectively vesting her with the power to subdivide the property of the deceased in accordance with the will and on March 21, 2011 PW1 was issued with a certificate of confirmation of grant.
  6. PW1 also stated that on June 14, 2011 the County Council of Kilifi certified that the deceased's property formerly known as MN/III/3047 Kilifi, was successfully subdivided into six new sub-plots being MN/III/5128, MN/III/5129, MN/III/5130, MN/III/5131, MN/III/5132 and MN/III/5133.
  7. PW2 Ann Jane Bowskill also adopted her witness statement and stated that on June 15, 2011 upon the sub-division, she was registered as the owner of one of the sub-plots being subdivision number MN/III/5131 the suit property herein but the Defendants entered and remained on the Plaintiff's land without her consent and continue to trespass over the said parcel of land. It was PW2's testimony that she acquired the property as a beneficiary of her parent's estate.
  8. PW2 produced the following document in support of her case namely, a will of Adriana Ernestine dated March 18, 2009, grant of probate to Marie Russman dated July 5, 2010, certificate of confirmation of grant dated March 21, 2011, confirmation of subdivision of Plot No MN/III/ 3047 Kilifi by the Kilifi County Council dated June 14, 2011, certificate of title for subdivision No 5131 (Original No 3047/5) Section III Mainland North to Ann Jane Bowskill dated June 15, 2011, and certificate of title for subdivision No 3047 (Original No 284/167) Section III Mainland North to Adriana Ernestine dated September 16, 2003 and urged the court to enter Judgment in her favour as per the plaint with costs.

### **Plaintiff's Submissions.**

9. Counsel filed submissions and identified the following issues for determination; whether the Plaintiff is the registered owner of the suit property, whether the Defendants trespassed on the suit property, whether the Plaintiff is entitled to the reliefs sought in the plaint.
10. On the 1<sup>st</sup> issue, counsel submitted that the Plaintiff acquired one of the resulting sub plots, being MN/III/ 5131 in accordance with Clause 3 of the will dated March 18, 2009 and that the property was subsequently registered in the name of the Plaintiff as per the Certificate of Title No CR 52387.
11. Counsel relied on Section 26 (1) of the *Land Registration Act* and the case of *Keiyan Group Ranch v Samwel Oruta & 9 others [2021] eKLR* and submitted that the Plaintiff remains the absolute



indefeasible registered owner of the suit property and is entitled to all her rights including the right to use and quiet possession.

12. On the 2<sup>nd</sup> issue as to whether the Defendants are trespassers on the suit land, counsel relied on Section 3 (1) of the *Trespass Act*, on the elements of trespass which provide that any person who without reasonable excuse enters, or remains upon... private land without the consent of the occupier thereof shall be guilty of an offence and the case of *Rboda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited [2019]*.
13. Counsel submitted that in July, 2011, the 1<sup>st</sup> -8<sup>th</sup> Defendants entered into the Plaintiff's property without any reasonable excuse and remained on the property without the consent of the Plaintiff relied on the cases of *Muchiri Ephraim Mwai & 2 others v Julius Luka Nanteya & 2 others [2019] eKLR* and *Robert Mwaniki Ndwiga v Agatha Kaugi Riungu [2018] eKLR*.
14. Counsel therefore urged the court to find that the Plaintiff has proved her case against the Defendants and therefore is entitled to the reliefs sought in the plaint.

### **Analysis and Determination**

15. The issues for determination that stems from the pleadings are as to whether the Defendants are trespassers on the Plaintiff's suit land, whether the Plaintiff is entitled to reliefs sought for a permanent injunction against the Defendants and an order of eviction of the Defendants from the suit land together with costs.
16. From the evidence on record and the documents produced, it is not disputed that the Plaintiff is the registered owner of the suit land. The issue that brings the Plaintiff to court is the trespass by the Defendants who were served with summons to enter appearance but failed to enter appearance or file a defence as stipulated by the law and procedure.
17. The Plaintiff produced a Certificate of Title No 52387 dated June 15, 2011 which shows that she is the absolute indefeasible registered owner of the suit property which means that she is entitled to peace and quiet and enjoyment of the suit property without interference from anybody.
18. The Plaintiff also gave a detailed chronology of the root of the title which was vide inheritance from the late mother who bequeathed her through a will which was processed through probate and administration which culminated into a certificate of confirmation of grant dated March 21, 2011.
19. Trespass to land is defined under Section 3 of the *Trespass Act* as;  

“ 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.”
20. According to *Black's Law Dictionary 8th Edition*, Trespass is defined, in the strictest sense, as:  

“ An entry on another's ground, without a lawful authority, and doing some damage, however inconsiderable, to his real property”
21. A continuing trespass is defined as: -  

“ A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property”



22. In the case of *Municipal Council of Eldoret v Titus Gatitu Njau [2020] eKLR*, the Court of Appeal cited the case of *M'Mukanya v M'Mbijiwe [1984] KLR 761*, and highlighted the ingredients of the tort of trespass as follows:

“Trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership” (*Thomson v Ward, (1953) 2QB 153.*)

23. The Plaintiff has proved ownership of the suit land to the exclusion of others like the Defendants who have no right to interfere with the possession of the Plaintiff. From the evidence on record which was uncontroverted, it is evident, the Defendants have trespassed into the Plaintiff's land since 2011 and have remained on the suit property without her consent.

24. I find that the Plaintiff has proved her case on a balance of probabilities against the Defendants and is therefore entitled to the orders sought in the amended Plaint. I therefore enter judgment in favour of the Plaintiff in the following specific terms: -

- a) A permanent injunction is hereby issued restraining the Defendants by themselves, their servants or agents from entering, occupying, using, or in any other way interfering with the Plaintiff's quiet possession and enjoyment of MN/III/ 5131.
- b) The defendants and/or their servants or agents to give vacant possession of the suit property known as MN/III/ 5131 within 30 days of the Judgment and in default, the Defendants be forcefully evicted under the supervision of the OCS Mtwapa.
- c) Defendants to pay costs of the suit.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 27<sup>TH</sup> DAY OF MARCH, 2023.**

**M A ODENY**

**JUDGE**

**NB: In view of the Public Order No 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the *Civil Procedure Rules*.**

