



Kenol Kobil PLC v Narok County Government (Environment & Land Case 40 of 2019) [2023] KEELC 16321 (KLR) (21 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16321 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 40 OF 2019
CG MBOGO, J
MARCH 21, 2023**

BETWEEN

KENOL KOBIL PLC PLAINTIFF

AND

THE NAROK COUNTY GOVERNMENT DEFENDANT

JUDGMENT

1. The plaintiff filed a plaint dated 12th July, 2019 seeking judgment against the defendant for: -
 - a. A permanent injunction restraining the defendant whether by itself, employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on its behalf and/or under its mandate or instructions from alienating, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with the property known as Narok Township/343.
 - b. An order compelling the defendant to vacate the suit property and to deliver vacant possession thereof to the plaintiff.
 - c. An order that any structures erected by the defendant on the suit property be demolished at the defendant's cost.
 - d. Damages for trespass and damage to the plaintiff's property being Narok Township/ 343.
 - e. Costs of the suit.
 - f. Interest on e) and f) above at court rates from the date of filing this suit until payment in full, or whichever period this court may deem fit, and
 - g. Any other order or relief the honourable court may deem fit to grant.



2. In the plaint, the plaintiff stated that it is the registered owner of the suit property known as Narok/ Township/343 and at all material times, it has been in occupation and possession of the same.
3. The plaintiff further stated that the defendant had through its agents, forcibly entered into the suit property and demarcated a portion of the same on the allegation that it is on a road reserve.
4. The plaintiff pleaded particulars of loss and damage as follows: -
 - a. The plaintiff had been deprived of the use, possession and quiet enjoyment of the suit property
 - b. The defendant's misuse of the suit property, including erecting of structures on the suit property has occasioned serious detriment to the plaintiff
 - c. The defendant's erection of structures on the suit property has defaced and devalued the suit property.
 - d. The defendant's action of trespassing and erecting structures on the suit property has caused the plaintiff loss as it is unable to carry its business on the suit property as it intends to.
 - e. The plaintiff has been denied its constitutional right to exclusively own and develop the suit property.
5. The plaintiff further stated that the forcibly acquired portion was excised without the laid down procedure and payment of compensation which is illegal, null and void. The plaintiff pleaded particulars of illegality as follows: -
 - i. No notice of intention to compulsorily acquire the suit property was served on or given to the plaintiff as required by law.
 - ii. There was not published in the Kenya Gazette any notice informing the plaintiff of the intention to compulsorily acquire any portion of the suit property.
 - iii. The defendant did not invite the plaintiff to make representations regarding the compulsory acquisition of a portion of the suit property.
 - iv. No compensation offer has been made to the plaintiff as required by Section 111 of the Land Act, 2012 for the excised portion of the suit property.
 - v. The 2nd defendant abdicated its statutory duty under Section 120 of the Land Act, 2012 in failing to serve on the plaintiff a notice specifying the possession of the land and that the title to excised would vest in the national or county government as the case may be, following the compulsory acquisition.
 - vi. The defendant is in breach of article 47 (1), 50(1) of the Constitution and section 13 of the Fair Administrative Action Act and its actions are unlawful, illegal and void for all intents and purposes.
 - vii. The defendant failed to follow the laid down statutory provisions on compulsory acquisition of private property.
6. The plaintiff case proceeded for hearing on 14th February, 2023. Mwema Mugo Karobia (PW1) while adopting his witness statement dated 19th September, 2022 testified that the suit land is a 99 years lease from 1st October, 1976, which it purchased from Stephen Kanyinke Ntutu vide an agreement of sale dated 13th November, 2007.



7. PW1 further testified that sometime in the month of May, 2019, they noticed some officials of the defendant had wrongfully entered into the suit property and began demarcating the same without the consent of the plaintiff. That upon further enquiry, the plaintiff was informed that part of the property was allegedly on a road reserve. Further, that on 13th May, 2019, the plaintiff issued a demand notice to the defendant.
8. PW1 produced the documents contained in the list of documents dated 12th July, 2019 and a further list of documents dated 27th September, 2022 as PEX Nos. 1 to 5 and PEX No. 6.
9. Amos Ilavonga Shibusse (PW2) testified that he is a registered surveyor working at Maps Surveys Kenya Limited. He testified that he received instructions to check on the extent of the suit property which is registered under a survey plan number Land Reference 328/46 which he obtained from the Survey of Kenya. Further, that he conducted a survey of the suit property and shared the findings with the advocates in conduct of the plaintiff's suit.
10. PW2 further testified that he obtained a register plan from Narok Town Council which is R163/2016/01 and duly certified by the Cabinet Secretary Lands, Housing and Urban Development. Further, that based on the two documents, he concluded that the said road that had been constructed on the suit property is not supposed to go through the said parcel of land. Another finding was that according to the survey plan, beacons Nt4 and Nt5 constitute the common boundary line boundary between the plaintiff's property and any other property. Further, that the murrum road and the bridge are encroaching into the suit property and should be removed.
11. PW2 testified that from a report which he obtained from the Ministry of Lands and Physical Planning in Narok dated 6th August, 2018 done by the District Surveyor, Narok, the conclusion was that the ground measurements correspond with the survey plan from the Survey of Kenya. The other finding was that the original beacons on the suit property were on their right position as per the Survey Plan (FR). In essence PW2 testified that the District's Surveyor report agreed with their report on the extent of the suit property. PW2 produced his report as PEX No. 7.
12. The plaintiff filed written submissions dated 10th March, 2023. The plaintiff raised two issues for determination which were whether the plaintiff's suit should be allowed as prayed and who ought to bear the costs of the suit.
13. On the first issue, the plaintiff submitted that it has proven its case on a balance of probabilities and is entitled to the orders sought as is required under sections 107, 108 and 109 of the *Evidence Act*. Further, that the plaintiff's suit has not been challenged by the defendant since the defendant did not file a defence despite being granted ample time to do so. The plaintiff relied on the case of *Penmain Company Limited v Likoni Community Development & 6 Others* [2021] eKLR.
14. The plaintiff further submitted that its ownership of the suit property has not been denied or challenged and as such, the plaintiff's title is to be taken as conclusive evidence as per the provisions of the law and the doctrine of sanctity of title. Reliance was placed on the cases of *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015] eKLR and *David Chege Mwangi v Mugambo Wa Gachocho Company Limited* [2005] eKLR.
15. The plaintiff further submitted that it is entitled to the orders of injunction as prayed. The plaintiff relied on the cases of *Giella v Cassman Brown and Company Limited* [1973] EA 358, *Kenya Commercial Finance Company Limited v Afraba Education Society* [2001] 1 EA 86 (CAK) and *Mrao Limited v First American Bank of Kenya Limited & 2 Others* [2003] eKLR.



16. The plaintiff further submitted that it has produced two reports dated 6th August, 2018 and 29th August, 2019 which clearly show that the boundary of the suit property extends to where the defendant alleges the road reserve is and which has encroached on the suit property. Further, that having proven that it is the registered owner of the suit property, it is entitled to vacant possession of the same and any structures built by the defendant ought to be demolished. Further, that the defendant has trespassed on the suit property by carrying out constructions therein. The plaintiff relied on the cases of *Songoro Kitenge Mtimi & Another v George Njoroge & 4 Others* [2017] eKLR, *Park Towers Limited v John Mithamo Njika & 7 Others* [2014] eKLR and *Philip Aluchi v Crispinus Ngayo* [2014] eKLR.
17. The plaintiff also submitted that although it did not adduce evidence as to the value of the suit property, this court retains jurisdiction and discretion to make an award for damages for trespass. The plaintiff relied on the case of *John Chumia Nganga v Attorney General & Another* [2019] eKLR where the court in its discretion awarded the plaintiff kshs. 500,000/- as general damages for trespass.

Given the above, I am of the view that the sum of kshs. 500,000/- would be adequate compensation for trespass and in my judgement, this is the amount that I shall award the plaintiff herein.

18. The defendant filed a memorandum of appearance dated 19th July, 2019 but did not file a defence. Be that as it may, I have analysed and considered the pleadings, the evidence, the written submissions and authorities cited and the issue for determination is whether the plaintiff is entitled to the orders as sought in the plaint.
19. It was the evidence of PW1 that sometime in the month of May, 2019, the defendant through its officials and without any authorization entered into the suit property and began demarcating the same without the consent of the plaintiff. This evidence was supported by the demand letter dated 13th May, 2019 written to the defendant. It appears that the defendant went ahead and ignored the claims in the demand notice and proceeded with its actions.
20. The ownership of the suit property is not denied and/or challenged. I am of the view that an owner of property is entitled to rights over every portion of that property and not part of it. Section 26 of the *Land Registration Act*, 2012 provides that: -

- “(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”



21. PW2 testified that the defendant has encroached to a large extent into the suit property and that based on the two reports dated 6th August, 2018 and 29th August, 2019 the murram road and the bridge ought not to be within the suit property.
22. I have perused both reports and the common finding is that the beacons are intact on the ground in their rightful position and the ground measurements correspond with that in the plan. This is evidence that indeed the defendant has encroached on a portion of the suit property. Also, this report has not been invalidated by the defendant. In this case, the defendant has trespassed and encroached onto the plaintiff's property.
23. I am satisfied that on a balance of probabilities, the plaintiff has proved its case and I hereby make the following orders: -
 - i. A permanent injunction is hereby issued restraining the defendant whether by itself, employees, servant and/or agents or otherwise any person from interfering in any manner whatsoever with the property known as Narok/Township/343.
 - ii. The defendant is hereby ordered to remove any structures erected on property known as Narok/Township/343 or in the alternative the same to be demolished.
 - iii. The plaintiff is awarded general damages for trespass at Kshs. 500,000/-.
 - iv. Costs and interest from the date of filing this suit. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 21ST DAY OF MARCH, 2023.

HON. MBOGO C.G.

JUDGE

