



**Kaitheri Housing Investment Company Limited v Ndereve (Environment and Land
Case Civil Suit 73 of 2017) [2023] KEELC 16670 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16670 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND CASE CIVIL SUIT 73 OF 2017
EC CHERONO, J
MARCH 16, 2023**

**BETWEEN
KAITHERI HOUSING INVESTMENT COMPANY LIMITED PLAINTIFF
AND
JAMES MAINA NDEREVE DEFENDANT**

JUDGMENT

1. By an amended plaint dated 26th April, 2017, the plaintiff seeks as against the Defendant the following orders;
 - a. An order of eviction from land parcel number inoi/kerugoya/3157.
 - b. an order of permanent injunction to restrain the defendant, his servants or agents from entering, trespassing, constructing, leasing or interfering with land parcel number inoi/kerugoya/3157 and mesne profit.
 - c. costs of the suit and interest.
2. according to the plaintiff, he is the registered owner of land parcel inoi/kerugoya/3157 (hereinafter the suit property) formerly land parcel inoi/kerugoya/252.
3. it is further averred that the defendant has without any justifiable cause trespassed onto the suit land and erected thereon temporary structures despite demand to cease the trespass.
4. The defendant in response filed his statement of defence admitting that the suit land is indeed registered in the name of the plaintiff but that he was allocated a plot number 20 in kerugoya/kutus and the plot he was allocated is not situated where the plaintiff's land is alleged. He further states that the plot was allocated to him on 3/6/1999 as captured in the part development plan. He therefore denies being in trespass on the plaintiff's land.



5. Anthony njiraini kimbo testified as PW-1 and stated that he is the chairman of the plaintiff company and that the suit land is registered in its name. That the defendant moved onto the parcel and put up structures despite being served with notices of cessation.
6. On cross examination, the witness stated that the original parcel was Inoi/Kerugoya/252 before sub division and was owned by kaitheri housing co-operative society ltd, the plaintiff's predecessor issued around 1959 while the title to the suit parcel was issued in the year 2014. He stated that the plot has houses constructed by Kirinyaga county council which border the suit land. He stated that their land was grabbed by the county council of Kirinyaga.
7. James maina wachira testified as DW-1 and stated that he was allocated the land by the Kirinyaga/kutus municipal council and later complied with the conditions given by the commissioner of lands.
8. On cross examination, he confirmed being allocated the land by the county council though he did not produce a letter of allotment or title deed to the suit property. He was not aware that the plaintiff had already obtained title to the suit property. That he had constructed temporary structures thereon and had never been issued with a lease document over the suit property.
9. Upon close the of their respective cases, the parties agreed to file and exchange their written submissions. Both parties complied.
10. The plaintiff submitted that the suit land belongs to her by virtue of being in possession of a title deed. That there are no allegations of fraud pleaded and proved against it or that the process of obtaining title was fraudulent. That the position on the ground is intact.
11. On the other hand, the defendant did not produce any document showing ownership of the property even minutes showing that he was allocated the land by the defunct county council Kerugoya/Kutus. That the plaintiff has discharged the evidentiary burden placed on it. The plaintiff relies on the authority in Dr. Joseph arap Ngok vs Justice Moiji Ole Keiwua & 5 others nai Civil Appeal 60 of 1997.
12. On behalf of the defendant, it is submitted that he had been allocated land by the Kerugoya/kutus Municipality council and that there was no way the plaintiff could own a freehold title within the township. That upon allocation, a letter of allocation was issued showing the exact location of the plot.
13. It is further submitted on behalf of the defendant that the plaintiff did not call the surveyor to verify the exact location of the property in question. On the claim for mesne profits, it is submitted that there was no evidence tabled in support of such an award and the same ought to be declined.

Analysis and determination

14. At the centre of this suit is the ownership of land parcel inoi/kerugoya/5157 which is claimed by both the plaintiff and the defendant. the plaintiff contends that the defendant has trespassed onto its parcel of land and put up structures thereon. The defendant vehemently denies the allegation and asserts that the suit land rightfully belongs to him having been allocated to him by the defunct Kerugoya/kutus Municipality Council. He however produced no documents in support of this claim, his initial documents having been expunged by this court during the hearing. The plaintiff on his part produced a title deed, certificate of official search and ground map.
15. At the hearing of this suit, both parties laid claim to the suit property by giving descriptions of the exact locations of the parcel. Both agree that the suit parcel is a sub-division of another parcel number 252 in which the plaintiff's witness alleged to have been owned by its predecessor, Kaitheri Housing Co-operative Society Ltd. He describes the location of the suit property as facing kerugoya-karatina road and borders a car wash



16. On his part, the defendant describes the disputed property as located on the right after branching to kerugoya-karatina road. He asserts that he has put up temporary structures thereon.
17. I have considered the evidence adduced by the parties and their witnesses as well as the documents produced in evidence. From the pleadings and the evidence adduced, the issue for determination in my view is not only the ownership of the suit property land parcel no. inoi/kerugoya/3157, but also the location of the same.
18. Regarding the location of suit property, the evidence adduced before this court cannot in my view describe with certainty the location as none of the witnesses called a surveyor to point out to the court where the parcels are actually situated because my analysis may show that there could be in existence 2 separate and distinct parcels. However, in the absence of a report from the surveyor on the same, it is difficult to come to such a conclusion.
19. My finding is supported by Sections 107, 108 and 109 of the *Evidence Act* which provide;
 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.
 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
20. I find that the plaintiff failed to adduce sufficient evidence showing the location of the suit property so that it can be said with certainty that the defendant has indeed encroached onto that parcel. He therefore fell short of the evidentiary burden placed on him.
21. In light of my findings above, I find the plaintiff's suit to be without merit and the same is hereby dismissed with costs to the defendant.

READ, DATED AND DELIVERED VIRTUALLY AT BUNGOMA THIS 16TH DAY OF MARCH 2023

HON. E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Ndana for the Plaintiff

Mr. Ngigi holding brief for Muriithi for the Defendant

C/A Joy

