



**Luva v Kimbio & 3 others (Environment & Land Case 95 of 2018)  
[2023] KEELC 16462 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16462 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 95 OF 2018**

**TW MURIGI, J  
MARCH 15, 2023**

**BETWEEN**

**VICTORIA NGENGE LUVA ..... PLAINTIFF**

**AND**

**RACHEL NM KIMBIO ..... 1<sup>ST</sup> DEFENDANT**

**MAKUENI LAND REGISTRY ..... 2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**MAKUENI COUNTY GOVERNMENT ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By a further Amended Plaintiff dated December 3, 2019, the Plaintiff sought the following orders against the Defendants:-
  - a) An order of permanent injunction restraining the 1<sup>st</sup> Defendant, her agents, servants and/or employees or whomsoever from entering, constructing, wasting, selling, trespassing, entering, destroying or in by other way from interfering with the Plaintiff's properties known as UNS. Commercial Plot No A Makueni Township on plan No MKN/78/98/04.
  - b) That an order to issue restraining the Land Registrar Makueni County the 4<sup>th</sup> Defendant its servants/agents from interfering with the quiet possession of the plaintiff in relation to parcel No UNS. Commercial Plot No "A"- Makueni Township on plan No MKN/78/98/04.
  - c) A declaration that the Plaintiff is the indivisible owner of parcel of land known as Parcel No UNS. Commercial Plot No "A" Makueni Township on plan no MKN/78/98/04.
  - d) That the orders of the Honourable Court be enforced by the OCS Wote Police Station.
  - e) Costs and interest of the suit.



- f) Any other order as may be deemed fit and just in the interest of justice.
2. The 1<sup>st</sup> Defendant vide an amended Statement of Defence and Counter Claim dated November 1, 2019 sought the following orders:-
- a) A declaration that the Plaintiff in the Counter Claim is the bona fide allottee of land parcel No Plot No A3-MKN/78/98/04 and any other subsequent allotment is null and void.
  - b) Eviction of the 1<sup>st</sup> Defendant in the Counter Claim from parcel of land known as Plot No A3-MKN/78/98/04 and demolition of the structures thereon.
  - c) An order of permanent injunction restraining the Defendant in the Counter Claim either by themselves, their agents and/or servants from leasing, selling, conveying and /or interfering with the Plaintiff's legal, equitable interests and/or rights of quiet ownership, possession, occupation and enjoyment of land parcel known as Plot No A3-MKN/78/98/04.
  - d) An order directing forthwith issuance of title documents for the land parcel no plot No A3-MKN/98/78/04 to the Plaintiff upon revocation of any other certificate of lease and/or proprietorship documents which may have been issued to any other party other than the Plaintiff in the counter claim and rectification of the land records to reflect the plaintiff in the counter claim as the proprietor of the said land.
  - e) Mense profits and general damages for loss of user.
  - f) Costs of and incidental to the suit and interest at Court rates.
3. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants vide their Statement of Defence dated October 1, 2019 denied the Plaintiff's claim.
4. The 4<sup>th</sup> Defendant vide an amended Statement of Defence dated November 27, 2020 denied the Plaintiff's claim.
5. On March 2, 2022 the Plaintiff withdrew her suit against the Defendants with no orders as to costs.
6. On 6<sup>th</sup> July, 2022, the matter proceeded for hearing of the 1<sup>st</sup> Defendant Counter Claim.
7. The 1<sup>st</sup> Defendant is the Plaintiff in the Counter Claim. She adopted her statement sworn on June 18, 2021 as her evidence in chief and produced the documents in the list dated 18<sup>th</sup> June, 2021 as exhibit 1 to 9 respectively. It was her testimony that she was allocated the suit property by the Ministry of Lands on 1<sup>st</sup> of May, 1999.
8. That upon allocation, she paid the requisite fees and took possession of the suit property She further testified that she does not know how the Plaintiff took possession of the suit property. She went on to state that on September 3, 2004, she visited the Ministry of Lands offices in Nairobi to request for the title deed for the suit property where she was advised her to engage a surveyor at Makueni.
9. That upon visiting the defunct Makueni Town Council she was informed that she must register the suit property and it as at that point that she discovered that one Mbuvi Ngangi Mutuku was claiming ownership over the suit property. She went on to state that she wrote a letter to the Town Clerk complaining about the trespass on her property but received no response which prompted her to follow up the issue with the Ministry of Lands Offices in Nairobi. That the Ministry of Lands wrote a letter to the Town clerk Makueni Town Council confirming that she was allocated the suit property. That upon receipt, the Town Clerk wrote a letter to the Plaintiff instructing her to stop constructing on the suit property until the issue of ownership was settled.



10. It was her further evidence that the town clerk of the defunct Town Council of Wote forwarded to the Commissioner of Lands the allocation documents for plot A for Mbuvi Ngangi Mutuku. It was her testimony that the 4<sup>th</sup> Defendant, the custodian of all the documents related to the suit property confirmed that she is the bonafide owner of the suit property. She went on to state that the Plaintiff continued constructing houses on the suit property despite being directed by the Town Clerk to stop constructing on the suit property.
11. On cross examination by Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the Plaintiff testified that she received the letter of allotment for the suit property from the Ministry of Lands.
12. She went on to state that after she discovered that someone was constructing on her plot, she reported the matter to the Ministry of Lands who confirmed to the Town clerk that she was the owner of the suit property.
13. It was her testimony that the Ministry of Lands confirmed that the Plaintiff's letter of allotment was fraudulent.
14. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not call any evidence and closed their case.
15. After the hearing, the parties proposed to file written submissions.

#### **The 1st Defendant's Submissions**

16. The 1<sup>st</sup> Defendant's submissions were filed in Court on September 25, 2022.
17. Counsel for the 1<sup>st</sup> Defendant identified the following issues for the Court's determination:-
  - i. Whether or not the 1<sup>st</sup> Defendant is the bona fide allottee of land parcel No A3 MKN/98/78/04 and if any other allocation of the land is null.
  - ii. Whether or not the 1<sup>st</sup> Defendant is entitled to the prayers sought.
18. In answer to the first issue, Counsel submitted that the Commissioner of Lands in exercise of the powers delegated to him by the President under the Government Lands Act, allocated the suit property to the 1<sup>st</sup> Defendant on May 1, 1999. Counsel submitted that upon allocation, the Plaintiff fulfilled the conditions in the letter of allotment within the prescribed period.
19. Counsel further submitted that in its Defence, the 4<sup>th</sup> Defendant confirmed that the suit property belongs to 1<sup>st</sup> Defendant. It was further submitted that the Plaintiff letter of allotment was issued irregularly as the suit property was not available for allocation. Counsel argued that the Plaintiff evidence was not challenged and thus she has proved her case.
20. On the issue of whether the 1<sup>st</sup> Defendant is entitled to the orders sought Counsel submitted that the Plaintiff has been in illegal occupation of the suit property where she has put up rental houses and continues to enjoy rental income therefrom. Counsel argued that the Plaintiff failed to comply with the Court order which directed that the rental income from the suit property be deposited in Court. Counsel urged the Court to award the 1<sup>st</sup> Defendant damages for loss of use as well as eviction orders.

#### **The 2nd and 3rd Defendant's Submissions**

21. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's submissions were filed in Court on December 8, 2022.



22. Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants raised the following issues for the Court's determination:-
- i. Whether the Plaintiff has successfully proved her case.
  - ii. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are liable to pay the Plaintiff mesne profits and general damages for loss of user.
  - iii. Who is to pay costs of the suit.
23. On the first issue Counsel submitted that the Plaintiff in the Counter Claim had proved her case as her evidence with regards to the ownership of the suit property was not rebutted by the 1<sup>st</sup> Defendant in the Counter Claim.
24. On the 2<sup>nd</sup> issue, Counsel submitted that mesne profits are payable to the person wrongfully deprived of his property and are the amounts the person in possession actually received. Counsel submitted that the Plaintiff did not prove her case against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants since they have never been in occupation of the property. Counsel argued that the Plaintiff's claim for mesne profits cannot succeed since the Plaintiff did not substantiate the same.
25. On the issue of costs, Counsel submitted that the Plaintiff is not entitled to costs as failed to issue a Notice of Intention to Sue the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Finally, it was submitted that the Plaintiff's Counter Claim partially succeeds against the Defendant as far as ownership of the suit property is concerned.

#### **The 4<sup>th</sup> Defendant's Submissions**

26. The 4<sup>th</sup> Defendant's submissions were filed in Court on 19<sup>th</sup> of December, 2022.
27. Counsel for the 4<sup>th</sup> Defendant identified the following issues for the Court's determination:-
- i. Whether the 1<sup>st</sup> Defendant is the bona fide owner of the suit property.
  - ii. Whether the 4<sup>th</sup> Defendant is liable to pay the 1<sup>st</sup> Defendant mesne profits or general damages for loss of use.
  - iii. Who should bear the costs of the suit.
28. Counsel for the 4<sup>th</sup> Defendant submitted that the Plaintiff in the Counter Claim is the bona fide owner of the suit property having been allocated the same vide a allotment letter dated May 1, 1999.
29. In addition, Counsel submitted that the 1<sup>st</sup> Defendant's ownership of the suit property was confirmed vide a letter dated October 29, 2013 by the National Lands Commission.
30. On the second issue Counsel submitted that the 4<sup>th</sup> Defendant is not liable to pay mesne profit as it has neither been in possession nor occupation of the suit property.
31. On who should bear the cost of the suit, Counsel submitted that in line with Section 27 of the [Civil Procedure Act](#), costs are awarded to a successful party. Counsel submitted that the 4<sup>th</sup> Defendant is not liable to pay costs as it fully defended its case against the 1<sup>st</sup> Defendant.
32. Counsel contended that the 1<sup>st</sup> Defendant has proved on a balance of probabilities that she is the bona fide owner of the suit property.



## Analysis And Determination

33. Having considered the pleadings, the evidence on record and the rival submissions, I find that the following issues arise for determination:-
- i. Who is the bona fide owner of the suit property.
  - ii. Whether the 1<sup>st</sup> Defendant is entitled to mesne profits.
  - iii. Who should bear the costs of the suit.
34. Although the evidence of Plaintiff in the Counter Claim was not challenged by the 1<sup>st</sup> Defendant in the Counter Claim, she must prove her case to the required standards. In so finding, I am persuaded by the holding in the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR where the Court held that;
- “It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

### Who is The Bona Fide Owner of The Suit Property

35. The Plaintiff in the Counter Claim testified that she is the bona fide owner of the suit property. It was her testimony that she was allocated the suit property by the Ministry of Lands on 1<sup>st</sup> of May, 1999. That upon allocation, she paid the requisite fees and took possession of the suit property.
36. The 4<sup>th</sup> Defendant submitted that as per the letter of allotment dated 01/05/1999, the Plaintiff is the *bona fide* owner of the suit property. That in addition to the letter of allotment, the National Land Commission vide a letter dated 29<sup>th</sup> October, 2013, confirmed that the suit property was allocated to the 1<sup>st</sup> Defendant. In this regard she produced a letter of allotment dated 01/05/1999 for Plot No A3 – MKN/78/98/04 issued by the Commissioner of Lands(Exhibit 1), payment receipt for Plot No A3 – MKN/78/98/04(Exhibit 2), a letter dated 23<sup>rd</sup> of November by the Commissioner of Lands confirming that she was allocated the suit property(Exhibit 7) and a letter dated 29<sup>th</sup> October, 2013 by the National Land Commission confirming that she was allocated Plot No A(Exhibit 10).
37. It was her testimony that after she discovered that someone was constructing on her plot she reported the matter to the Ministry of Lands which in turn directed the Town clerk to write to the Plaintiff to stop constructing on the suit property.
38. She produced a letter issued by the Town Council of Wote dated November 14, 2012 addressed to the Plaintiff instructing her to stop to stop all the developments on the suit plot until the conflict is resolved (Exhibit8). She further testified that the Ministry of Lands confirmed that the Plaintiff’s letter of allotment was fraudulent.
39. According to the letter of allotment dated 1/5/199 (Exhibit1) the Ministry of Lands allocated the suit property to the Plaintiff who has since fulfilled the conditions therein. The National land commission as well as the Commissioner of Lands, confirmed that the suit property was allocated to the 1<sup>st</sup> Defendant.
40. The 4<sup>th</sup> Defendant in its pleadings and submissions confirmed that the 1<sup>st</sup> Defendant is the bona fide owner of the suit property. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants admitted that the 1<sup>st</sup> Defendant is the bona fide owner of the suit property. It is clear from the evidence on record that the 1<sup>st</sup> Defendant’s evidence on



ownership of the suit property was not challenged. I find that the Plaintiff in the Counter claim has proved on a balance of probabilities that she is the bona fide owner of the suit property.

### **Whether The 1st Defendant is Entitled To Mense Profits.**

41. Section 2 of the *Civil Procedure Act* defines mense profits as follows:-

“Means profits in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”

42. It was the 1<sup>st</sup> Defendant’s testimony that after the Plaintiff took possession of the suit property, she constructed rental houses and started receiving income therefrom. She further testified that the Plaintiff failed to comply with the Court orders which directed that the rental income from the suit property be deposited in Court. The 1<sup>st</sup> Defendant submitted that she is entitled to damages for loss of use of the suit property. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the 1<sup>st</sup> Defendant is not entitled to mense profits since they are not in occupation of the suit property.

43. The Court has considered the pleadings and the evidence on record. Mense profits are in the category of special damages. They must be specifically pleaded and proved. The 1<sup>st</sup> Defendant did not set out the particulars of mense profits in her Counter Claim. She did not furnish the Court with any evidence on the period the Plaintiff has been on the suit property and the loss she has suffered. I therefore find that she is not entitled to mesne profits.

### **Who Should Bear The Costs Of The Suit**

44. The general rule is that costs shall follow the event in line with the provisions of Section 27 of the *Civil Procedure Act*. A successful party should be awarded costs of the action unless for good reason. I find no good reason why the 1<sup>st</sup> Defendant should not be awarded costs by the Plaintiff.

45. In the end I find that the Plaintiff in the Counter claim has proved her case against the 1<sup>st</sup> Defendant in the Counter Claim on a balance of probabilities. The upshot of the foregoing is that the 1<sup>st</sup> Defendant’s Counter Claim is allowed in the following terms:-

1. A declaration be and is hereby issued that the Plaintiff in the Counter Claim is the bonafide allottee of Land Parcel Number Plot No A3-MKN/78/98/04 and any other subsequent allotment is null and void.
2. An Eviction order be and is hereby issued against the 1<sup>st</sup> Defendant in the Counter Claim from parcel of land known as Plot No A3-MKN/78/98/04 and demolition of the structures thereon.
3. An order of permanent injunction be and is hereby issued restraining the 1<sup>st</sup> Defendant in the Counter Claim by herself, her agents and/or servants from leasing, selling, conveying and/or interfering with the Plaintiff’s legal, equitable interests and/or rights of quiet ownership, possession, occupation and enjoyment of land parcel number Plot No A3-MKN/78/98/04.
4. An order be and is hereby issued directing forthwith issuance of title documents for land parcel number Plot No A3-MKN/78/98/04 to the Plaintiff in the Counter Claim upon revocation of any other certificate of lease and/or proprietorship documents which may have been issued to any other party other than the Plaintiff in the Counter Claim as the proprietor of that land.



5. The 1<sup>st</sup> Defendant in the Counter Claim shall meet the costs of the suit.

**JUDGMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS COURT THIS  
15<sup>TH</sup> DAY OF MARCH, 2023.**

.....

**HON. T. MURIGI**

**JUDGE**

**IN THE PRESENCE OF: -**

**Court Assistant – Mr. Kwemboi.**

**Mrs. Nyaata for the 1<sup>st</sup> Defendant.**

**Ms Kaloki for the 2<sup>nd</sup> Defendant.**

