



**Redeemed Gospel Church Inc v East African Portland and Cement Co. Ltd & 2 others  
(Environment & Land Case 53 of 2017) [2023] KEELC 17846 (KLR) (29 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17846 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 53 OF 2017**

**A NYUKURI, J  
MAY 29, 2023**

**BETWEEN**

**REDEEMED GOSPEL CHURCH INC ..... PLAINTIFF**

**AND**

**THE EAST AFRICAN PORTLAND AND CEMENT CO. LTD .. 1<sup>ST</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS ..... 2<sup>ND</sup> DEFENDANT**

**THE TOWN CLERK, MAVOKO MUNICIPAL COUNCIL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 5<sup>th</sup> November 2004 and amended on 12<sup>th</sup> November 2019, the Plaintiff sought against East African Portland and Cement Co. Limited (hereinafter referred to as the Defendant) the following orders;
  - a. A declaration that the Plaintiff is the owner of LR. No. 337/1211 situated within Mavoko County Council and cancellation of any or any title the Defendant may have.
  - b. A permanent injunction restraining the Defendant, its agents, servants, employees or otherwise howsoever from entering, trespassing, developing and/or utilizing or carrying out any activities, alienating and or interfering in any way with Plot No. LR No. 337/1211 situated at Mavoko County Council in Machakos District.
  - c. An order for eviction of the Defendant from the said suit land.
  - d. General damages for trespass and all ills stated above.
  - e. Any other relief that this Honourable Court may deem fit and just to grant.
  - f. Costs of this suit.



- g. Interest on (a), (b) and (e) above at court rates.
2. The Plaintiff averred that at all material times they were the registered owner of Plot No. L.R No. 337/1211 situated at Mavoko County Council (suit property). Further that in 1996, they entered into agreement with Eunice M. Anunda and Beatrice Mumbi (hereinafter referred to as Eunice and Beatrice respectively) being an agreement to exchange certain portions of the suit property with Plot Numbers L.R. No. 337/623 and L.R. No. 337/622. That Eunice and Beatrice took possession of the exchanged portions and fenced the same while the Plaintiff fenced their remaining portion of the suit property.
  3. It was further the Plaintiff's case that in March 2002, without the Plaintiff's consent, the Defendant entered the suit property and damaged the fence and beacons surrounding the suit property causing damage and loss to the Plaintiff, Eunice and Beatrice. They stated that Eunice and Beatrice were duly compensated but the Plaintiff was never compensated despite demand. The Plaintiff avers that the Defendant purported to claim the Plaintiff's property on allegation that it is part of L.R No. 373/194, and that the Defendant has no title to the suit land.
  4. The Defendant filed defence dated 12<sup>th</sup> April 2006 which they amended on 11<sup>th</sup> December 2009. They stated that the Plaintiff has no proprietary interest in the suit property. They also stated that the Plaintiff failed to disclose all material facts to the court. They further averred that the Plaintiff in collusion with the Commissioner of Lands and Clerk Mavoko Municipal Council, illegally and fraudulently caused to be replanned the area around the Defendant's Parcel No. 337/195 and hived off the Defendant's land to fraudulently create L.R. No. 373/1211. According to the Defendant, their entry on the suit land is lawful as the same is LR. No. 373/195. The Defendant maintained that the suit land was part of the Defendant's parcel L.R. No. 337/195.
  5. By way of counterclaim, the Defendant introduced and added to these proceedings the Commissioner of Lands and the Clerk Mavoko Municipal Council as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants while the Plaintiff was made the 1<sup>st</sup> Defendant in the counter claim. The Defendant alleged that there were systematic land grabbing schemes orchestrated by unscrupulous officials at the Ministry of Lands and Mavoko Municipal Council resulting in illegal allocations of land in Mavoko Municipality. They stated that their Parcel LR. No. 337/195 measuring 2.898 Hectares was surveyed and authenticated in April 1973 and given land Reference folio (LR) No. 126/121 and computation No. 14928 with its land file being 117792.
  6. The Defendant stated that their title document in respect of Parcel LR No. 126/121 was lost in a suspected theft and that as they sought for a provisional certificate of title, the deed file for the same went missing at the Lands Office and that the entire records went missing. That upon investigation by the Defendant's surveyor, it was realized that LR. No. 126/121 had been subdivided into two parcels being L.R No. 337/1211 measuring 6.489 acres registered in the Defendant's name and another marked F/R No. 410/124. That subsequently, LR. No. 337/1211 was subdivided into three plots being LR. No. 337/2964, LR. No. 337/2965 and LR. No. 337/2966. That on 25<sup>th</sup> April 2002, the remaining plot was subdivided into 7 plots being LR. No. 337/32-02 – 3208 whose ownership details are missing and the Defendant's attempts for assistance from the Commissioner of Lands have not borne fruit. The Defendant blamed the Commissioner of Lands and Clerk Mavoko Municipal Council for the alleged "convenient disappearance" of the deed file for the Defendant's parcel alleging collusion and fraud on the part of the two parties.
  7. Consequently, the Defendant sought the following orders;
    - a. A declaration that the Plaintiff is the bona fide and absolute proprietor of all that parcel of land known as LR. NO. 337/195 and is entitled to a certificate of title thereto;



- b. A declaration that the sub-division of and/or cancellation and/or purported cancellation of title respecting LR. No. 337/195 to third parties is unprocedural, illegal and a nullity ab initio;
  - c. A declaration that the allocation and/or creation of LR. No. 337/1211 by the 2<sup>nd</sup> Defendant was fraudulent and illegal and a nullity ab initio;
  - d. A declaration that the 2<sup>nd</sup> Defendant undertakes a re-survey of LR. No. 337/195 to establish the beacons thereto and to issue a certificate of title thereto to the plaintiff;
  - e. A cancellation of the title to LR No. 337/1211 and any such other sub-divisions as may have been hived off all that Parcel of land known as LR No. 337/195 and/or any entries that would indicate otherwise;
  - f. A declaration that the sub-divisions that resulted into the creation of LR. No. 337/1211 were unlawful and illegal and should be cancelled forthwith;
  - g. General damages against the 1<sup>st</sup> defendant for trespass to land;
  - h. A permanent injunction restraining the 1<sup>st</sup> defendant either by itself, its servants, agents, employees and assigns from transferring, registering, assigning, dealing with, wasting, alienating and/or in any other manner dealing with all those parcels of land known as LR No. 337/195 and LR No. 337/1211 and the sub-divisions and/or intended sub-divisions;
  - i. Any other and/or further relief as this Honourable Court may deem fit and just to grant in the circumstances;
  - j. Costs of this suit.
8. The Commissioner of Lands did not file defence to the counterclaim despite service. Mavoko Municipal Council, the 3<sup>rd</sup> Defendant filed statement of defence dated 24<sup>th</sup> August 2010. They denied the Defendant's counterclaim and stated that receipts of rates from the Defendant do not confer proprietorship interest on them in respect of Parcel LR No. 337/195. They denied particulars of fraud and collusion attributed to them and stated that the counterclaim was frivolous and did not disclose a cause of action against them; and therefore they sought that the same be dismissed with costs.
9. The Plaintiff filed defence to counterclaim dated 19<sup>th</sup> January 2010. They averred that they were allocated Parcel No. 337/1211 by the Commissioner of Lands on 19<sup>th</sup> November 1993. They denied being trespassers on LR No. 337/195 and averred that it is the 1<sup>st</sup> Defendant who had trespassed on their land.
10. When this matter came up for hearing on 9<sup>th</sup> November 2022, the Defendant in the plaint had not filed witness statement for the evidence they intended to present neither had they filed any documents they were to rely upon. This is despite the fact that they filed their defence in 2006. On the other hand, the 3<sup>rd</sup> Defendant's counsel informed court that they had no documents or witness. Therefore, the only testimony presented was that of the Plaintiff.

### **Plaintiff's Evidence**

11. PW1, Stephen Makau Kanyia, a Veterinary Surgeon, testified on 9<sup>th</sup> November 2022 on behalf of the Plaintiff. He adopted his witness statements dated 3<sup>rd</sup> April 2017 and 16<sup>th</sup> September 2019 respectively as his evidence in chief. His testimony was that he was the General Secretary of the Redeemed Gospel Church Inc. and that on 19<sup>th</sup> November 1993, the Plaintiff was granted a plot of land known as LR No. 337/1211 situated in Mavoko Township in Machakos District measuring 2.626 Ha which they took



- possession. He further stated that on 2<sup>nd</sup> October 1996, with intention of developing the suit property, they applied for and were subsequently issued with consent on 17<sup>th</sup> October 1997 to subdivide the suit property and for change of user of the land.
12. It was PW1's testimony that in 1996, they agreed to exchange equal portions of the suit property with Parcels LR. No. 337/623 and LR No. 337/622 owned by Eunice and Beatrice who were respective owners of those parcels. That they took possession of their respective plots and each of the three parties fenced their respective plots on 1<sup>st</sup> March 2002. He stated that on the same day they fenced their plots, the Defendant's agents trespassed onto the Plaintiff's property and that of Eunice with a bull dozer and maliciously brought down the posts forming the fence of the said properties. That the matter was reported at Athi River Police Station on 2<sup>nd</sup> March 2002 and the Defendant promised to desist from further interfering with the Plaintiff's property.
  13. The witness stated that they later learnt that Eunice had been compensated by the Defendant for the destruction of the fence prompting them also to demand compensation, in vain. He further informed court that on 16<sup>th</sup> October 2014, the Defendant unlawfully entered LR 337/1211 Mavoko and constructed a structure thereon. That the Defendant further placed a large heap of sand on the said parcel in preparation for further construction thereon and built a Nissan hut and a big canvas shed which actions indicated their intentions of permanently taking possession of the suit property. The witness further stated that having seen the Defendant's documents, he denied all allegations of fraud, conspiracy and misrepresentation made against the Plaintiff and stated that as a church they were only engaged in preaching. He stated that the Plaintiff only wanted damages paid for all the years the Defendant had trespassed on the Plaintiff's land.
  14. According to PW1, they were offered the suit property on 4<sup>th</sup> February 1992 and in July 1992, the church accepted the offer and paid for the title, conveyancing fees and stamp duty. He maintained that due process was followed by the Ministry and on 19<sup>th</sup> November 1993, the church was issued with a freehold title.
  15. The witness produced documents attached to the Plaintiff's list of documents dated 13<sup>th</sup> March 2008 and the list dated 19<sup>th</sup> September 2019 as P-Exhibits 1 to 35. The Plaintiff produced certificate for registration, copy of title, letter dated 11<sup>th</sup> December 2003 from the 1<sup>st</sup> Defendant's advocates, letter dated 9<sup>th</sup> June 2003 from the Commissioner of Lands, letter dated 9<sup>th</sup> May 2005 from the Surveyor to the Commissioner of Lands, letter dated 20<sup>th</sup> March 2002 by Eunice Muthoni, cheques dated 3<sup>rd</sup> April 2002 issued by the Defendant to Eunice Muthoni, letter dated 15<sup>th</sup> March 2002 from Real Estate Survey, Planning Consultants, minutes of the Plaintiffs' Board dated 29<sup>th</sup> August 1996 and copy of plot exchange agreements between the Plaintiff and Municipal Council to Commissioner of Lands; plot exchange agreements between the Plaintiff and Eunice Muthoni Anunda and Beatrice Mumbi respectively; Plaintiff's minutes of 15<sup>th</sup> February 1996 and 29<sup>th</sup> August 1996; statement to the police; a letter dated 20<sup>th</sup> March 2002 from Eunice Muthoni to the Defendant; a letter dated 15<sup>th</sup> March 2002 from Burpo Agency to the Defendant, copy of cheque dated 3<sup>rd</sup> April 2002 for Kshs. 70,000/-; letter dated 12<sup>th</sup> November 2003; letter dated 11<sup>th</sup> December 2003 from the Defendant's counsel; letter dated 4<sup>th</sup> November 2013 from the Town Planner to Eunice Muthoni and letter dated 21<sup>st</sup> September 2010 from the Plaintiff to the Town Planner.
  16. On cross-examination, the witness stated that he did not have a dispute with the 3<sup>rd</sup> Defendant. He stated that P-Exhibit 32 which was a letter dated 9<sup>th</sup> June 2003 addressed to the Plaintiff followed a complaint filed by the Defendant. He stated that he did not have any specific claim against the Defendant. He stated that the Defendant pulled down the Plaintiff's fence at night and placed building materials on the suit property with intention to develop it. He further stated that between 2004 up



to the time the witness was testifying, the Defendant had not done any development on the land. He maintained that the reason the Plaintiff sought for compensation was because the Defendant compensated Eunice and because the Defendant placed building materials on the suit property.

17. PW1 confirmed that in P-Exhibit 28, Eunice had given a breakdown of the cost in regard to compensation sought. The witness further stated that P-Exhibit 30 was a cheque addressed to Eunice being payment of Kshs. 70,000/- for damage on the two plots. He conceded that the Plaintiff did not make any specific claim for the damaged fence. In re-examination, the witness stated that their plot was different from the Defendant's plot and that the church is entitled to damages in regard to what happened in 2002. That marked the close of the Plaintiff's case.
18. At the close of the Plaintiff's case, counsel for the Defendant informed court that the witness he intended to call was not available, and proceeded to close the Defendant's case. Subsequently, counsel for the 3<sup>rd</sup> Defendant also closed their case without calling any witness.
19. Parties were directed to file written submissions. On record are the Plaintiff's submissions dated 28<sup>th</sup> November 2022 and the 3<sup>rd</sup> Defendant's submissions dated 9<sup>th</sup> February 2023.

### **Plaintiff's Submissions**

20. Counsel for the Plaintiff submitted that the Plaintiff had demonstrated how the suit property was acquired and produced all the necessary documents including the title thereto. Counsel argued that the Plaintiff produced the map showing the boundary of their property and that the Plaintiff's evidence was not rebutted as no evidence was produced by the Defendants. Counsel argued that there is no evidence that parcel LR. No. 337/1211 Mavoko overlaps any other property.
21. On whether the Defendant trespassed on the suit property, counsel argued that the Defendant brought down the Plaintiff's fence and that the cheque for Kshs. 70,000/- shows that Eunice and Beatrice were reimbursed the damages but the Plaintiff was not. Counsel relied on Section 3 of the *Trespass Act* that defined the offence of trespass. Counsel argued that the Defendant did not deny entering the suit property, placing sand thereon and building a Nissan hut and a big canvas shed; and neither did they demonstrate that their acts were lawful or that they owned the suit property. Counsel maintained that the Defendant's claim that the suit property formed part of LR No. 337/195 was not proved.
22. On whether general damages should be awarded to the Plaintiff, counsel submitted that where trespass is proved, a party need not prove that they suffered any specific damage or loss to be awarded damages as they are entitled to nominal damages. To buttress this submission, counsel relied on the case of *Park Towers Limited vs. John Mithamo Njika & 7 Others* [2014] eKLR, *Philip Aluchio v. Chrispinus Ngayo* [2014] eKLR and *Rhoda S. Kiilu v. Jiangxi Water and Hydropower Construction Kenya Limited* [2019] eKLR. Counsel argued that although the Plaintiff did not present any evidence, it was a fact that the Plaintiff was not able to develop the suit property due to the trespass. Counsel argued that the court should take into account the length this matter has been in court, that is eighteen years and make an award of Kshs. 5,000,000/-.
23. Counsel also submitted that the Plaintiff was entitled to costs as they were not guilty of any misconduct.

### **3rd Defendant's Submissions**

24. Counsel for the 3<sup>rd</sup> Defendant submitted that the Defendant had not proved their counter claim as sought against the 3<sup>rd</sup> Defendant. Counsel relied on Section 107 of the *Evidence Act* and the case of *Edward Muriga through Stanley Muriga v. Nathaniel D. Schulter* Civil Appeal No. 23 of 2017, *Motex Knitwear Limited v. Gopitex Knitwear Mills Limited* Nairobi (Milimani) HCCC No. 834 of 2002,



*Janet Kaphiphe Ouma & Another v. Marie Stoppes International (Kenya)* Kisumu HCC No. 68 of 2007 and *Peter Ngigi & Another (Suing as the Legal Representative of the Estate of Joan Wambui Ngigi v. Thomas Ondiki Oduor & Another* [2019] eKLR. It was therefore contended for the 3<sup>rd</sup> Defendant that where a party fails to call evidence in support of their case, as was the case with the Defendant herein, the party's pleadings cannot be taken as evidence as the same remains as statements with no probative value. Counsel argued that as the Defendant failed to give evidence in support of their case, the Plaintiff's evidence on record remained uncontroverted and therefore the Defendant's claim against the 3<sup>rd</sup> Defendant ought to be dismissed.

25. On the question of costs, counsel relied on Section 27 of the *Civil Procedure Act* and the case of *Republic v. Rosemary Wairimu Munene, Exparte Applicant v. Ihururu Dairy Farmers Co-operative Society Ltd*, to argue that the issue of costs is the discretion of the court and that the basic rule is that costs follow the event. Counsel argued that the 3<sup>rd</sup> Defendant had engaged an advocate to defend them and had filed documents in respect of the claim by the Defendant. That they have also attended court and therefore the court ought to grant them costs of the suit to be borne by the Defendant who failed to prove their counterclaim.

### **Analysis and Determination**

26. I have carefully considered the pleadings, evidence and submissions. In my considered view, the issues that arise for determination are;
- a. Whether the Plaintiff demonstrated ownership of Parcel LR. 337/1211 Mavoko.
  - b. Whether the Defendant had trespassed on Parcel No. 337/1211 Mavoko.
  - c. Whether the Plaintiff is entitled to the prayers sought in the amended plaint.
  - d. Whether the Defendant had proved their counterclaim as against the Plaintiff, 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendants.
  - e. Who should bear the costs of the suit.
27. On whether the Plaintiff demonstrated ownership of the suit property, the Plaintiff's witness testified that the suit property was allocated to the Plaintiff in 1992. He stated that subsequently a title was issued upon compliance with the due process. The Plaintiff's produced an allotment letter dated 26<sup>th</sup> June 1992 for allotment of unsurveyed church Plot Athi River. They also produced a letter accepting the allotment, dated 8<sup>th</sup> July 1992 as well as a receipt dated even date for payment of the amount specified in the letter of allotment. They further produced a title for LR. No. 337/1211 which was issued on 19<sup>th</sup> November 1993 in the Plaintiff's name. Although the Defendant pleaded in their defence and counterclaim that the suit property is part of their parcel LR No. 337/195, and that the title of the suit property was issued unlawfully and fraudulently, no evidence was tendered by the Defendant to that effect in support of their pleadings. Therefore the Plaintiff's evidence on record on how they acquired the suit property and that the same is registered in their name was unchallenged. Even in cross-examination, there was no challenge raised in regard to ownership documents held by the Plaintiff. Therefore I hold and find that the Plaintiff has proved that they are the lawful registered proprietors of the suit property. No evidence was presented by the Defendant to show the nexus between their Parcel 337/195 and the suit property, and therefore their pleadings were not supported by evidence.
28. Section 23 of the *Registration of Titles Act* Cap 281 (repealed) upon which the title herein was issued to the Plaintiff's provided that the certificate of title is a conclusive evidence of proprietorship. The import of the above legal provisions was immortalized in Section 26 of the *Land Registration Act* No. 3 of



2012. Therefore the Plaintiff's registration of the suit property vests in them absolute and indefeasible ownership thereof to the exclusion of everyone else including the Defendant.
29. On whether the Plaintiff had proved trespass, the Plaintiff's evidence that the Defendant had placed sand on their property and put up construction thereon was not rebutted. PW1 stated that the Defendant trespassed on the suit property in 2004 but then from 2004 to the time the witness was giving his testimony the Defendant had not done any other thing on the suit property. Trespass is an unlawful entry on another's land without the owner's consent or permission. (See definition of *Trespass in the Black's Law Dictionary* 11<sup>th</sup> Edition). I therefore find that as the suit property herein belonged to the Plaintiff and not the Defendant, the latter's entry thereon amounted to trespass.
30. The Plaintiff sought for damages for Kshs. 5,000,000/- for trespass. PW1 testified that the Defendant brought down their fencing posts. He did not say how many posts were demolished nor give their value. All he stated was that Eunice was compensated Kshs. 70,000/- for a similar infringement. No valuation report was produced to prove what was lost by the Plaintiff as a result of the Defendant's trespass. The Plaintiff's counsel in their submission conceded that no evidence was given on the nature of damages suffered due to the trespass and contended that in such instances, nominal damages would suffice.
31. As regards the measure of damages for trespass, in the case of *Philip Ayaya Aluchio v. Chrispinus Ngayo* [2014] eKLR, the court held as follows;
- The Plaintiff is entitled to general damages of trespass. The issue which arise is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the cost of restoration, whichever is less. See *Hostler v. Green Park Development Co.* 986 S.W. 2d 500 (No. App. 1999).
32. In the case of *Willesden Investment Limited v. Kenya Hotel Properties Limited* HCC No. 367 of 2001, the court held that there is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances of each case.
33. In the instant suit, the Plaintiff stated in their pleadings and evidence that the Defendant had placed sand and constructed a Nissan Hut on their parcel. The Plaintiff did not place any material before court to demonstrate the value of the land before and after trespass. Even the area of the land trespassed upon was not stated. In his evidence, the Plaintiff's witness insisted that because Eunice had been paid Kshs. 70,000/- as compensation, the Plaintiff also ought to have been compensated as well. Having considered all the circumstances obtaining in this case, and there being no specific proof of the value of the Plaintiff's land before and after the trespass, I am of the view that a sum of Kshs. 100,000/- shall be sufficient compensation for damages for trespass on the Plaintiff's parcel of land.
34. As the Defendant had placed their materials on the suit property which does not belong them, it is only fair that the orders of permanent injunction and eviction as sought against them by the Plaintiff are granted.
35. On the other hand, the Defendant having failed to adduce evidence in support of their defence and counterclaim have failed to discharge the burden of proof placed on them under Section 107 of the *Evidence Act*. In the premises, I find and hold that the Defendant have not proved their counterclaim and the same must fail.
36. In the premises, the Defendant's counterclaim be and is hereby dismissed with costs to the Plaintiff and the 3<sup>rd</sup> defendant. Consequently, judgment be and is hereby entered for the Plaintiff as against East African Portland Cement Co. Ltd, the Defendant herein as follows;



- a. A declaration be and is hereby made that the Plaintiff is the owner of the LR. No. 337/1211 situated within Mavoko County Council.
- b. A permanent injunction be and is hereby issued restraining the Defendant, its agents, servants, employees or otherwise howsoever from entering, trespassing, developing and/or utilizing or carrying out any activities, alienating and/or interfering in any way with Plot LR. No. 337/1211 situated at Mavoko County Council in Machakos District.
- c. An order of eviction be and is hereby issued against the Defendant from LR No. 337/1211.
- d. General damages for trespass in the sum of Kshs. 100,000/- is hereby awarded to the Plaintiff as against the Defendant.
- e. The Defendant shall bear the costs of the suit in favour of the Plaintiff and the 3<sup>rd</sup> Defendant.

37. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 29<sup>TH</sup> DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the Presence of;**

**Mr. Musa holding brief for Mr. Kithi for 3<sup>rd</sup> Defendant**

**No appearance for Plaintiff**

**No appearance for other Defendants**

**Josephine – Court Assistant**

