



Trustees, Kenya Ports Authority Pension Scheme v Nairobi City Council & another (Environment and Land Case Civil Suit 932 of 2016) [2023] KEELC 17455 (KLR) (18 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17455 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 932 OF 2016**

**OA ANGOTE, J
MAY 18, 2023**

BETWEEN

TRUSTEES, KENYA PORTS AUTHORITY PENSION SCHEME PLAINTIFF

AND

NAIROBI CITY COUNCIL 1ST DEFENDANT

DIANA KAPEEN (MCA) SOUTH C WARD 2ND DEFENDANT

JUDGMENT

Background

1. Vide an Amended Complaint dated 28th September, 2016, the Plaintiff seeks the following reliefs as against the Defendants jointly and severally;
 1. Prohibitory Injunction against the Defendants be issued either against themselves, servants and/or authorized agents from in any way encroaching, trespassing, carrying out construction on the suit portion of the land.
 2. Mandatory injunction be issued restraining the Defendants agents/employees/contractors from trespassing into the suit properties and/or constructing any structures without a clear and lawful order which involves a notice of the Plaintiff.
 3. General Damages for trespass.
 4. Declaration that the license issued by the 1st Defendant is unlawful, illegal and contrary to the law.
 5. Cost of this suit.
 6. Any other relief this Honourable Court deems fit.



2. It is the Plaintiff's case that it is the duly registered owner of the land known as Land Registration No 209/104/77, 78 and 79, Bellevue Estate (hereinafter the suit property) and that two portions of land, that is LR No 209/10477/2 and 209/10216/2, were amalgamated on the ground creating an access road junction to the Plaintiff's Bellevue Estate located along Mombasa Road.
3. It was averred in the Plaint that although the amalgamation was successful, the same is yet to be registered at the Survey of Kenya and that it was later realized that the area that was set aside as an access to the Estate has services including sewer lines, water pipes and also served as a water drainage and could therefore not be used as an access road into the estate.
4. According to the Plaintiff, on 13th July, 2016, the Plaintiff's Property Manager received information from the caretaker of the estate that there was ongoing construction of structures at the said junction undertaken without due notice and upon inquiry, was informed that the said construction had been authorized by the Defendants.
5. It is the Plaintiff's case that on 16th July, 2016, surveyors went on the site and re-established the beacons of the suit property and confirmed that the Defendants were trespassing on the suit property; that on 18th July, 2016, the Plaintiff's Property Manager visited the site and met the County Inspectorate who informed her that the Plaintiff should file an objection with the Chief Land Valuer as he was the one who had issued a licence to the 2nd Defendant and that on 27th July, 2016, the Property Manager received a letter from the 2nd Defendant, indicating that a Temporary Occupation Licence dated 27th April, 2016 issued to the 2nd Defendant had been terminated.
6. It was averred in the Plaint that the area map clearly confirms that the road junction was created as a result of a tarmacked road surrounding the estate and that no portion of land was ever allocated to the Defendants for purposes of making any development and in particular, construction of kiosks.
7. According to the Plaintiffs, despite being issued with the letter by the 1st Defendant, the 2nd Defendant's agents continue to encroach on the property insisting that it is public property; that the estate is fully fledged with its own shopping centre and does not require additional structures and that despite demand, the Defendants have failed and neglected to settle the claim.
8. In its Defence, the 1st Defendant denied the assertions set out in the Plaint and stated that the suit property is a road reserve managed by the 1st Defendant; that at no point was there amalgamation of the properties as alleged by the Plaintiff and that the 1st Defendant issued a Temporary Occupation Licence to local traders to enable them formalize and modernize their kiosks.
9. It was averred by the 1st Defendant that it is not obligated to consult anyone when approving and issuing Temporary Occupation Licenses; that if indeed the Temporary Occupation Licenses were cancelled, the same was on account of non disclosure of all relevant documents and that it is for this reason that the cancellation was revoked vide a letter of 28th July, 2016.
10. The 2nd Defendant filed a Defence to the Amended Plaint in which she stated that she is not in a position to affirm whether the Plaintiff is the proprietor of the suit property; that she never ordered any person to carry out any works on the suit property and that for over 15 years, there had been informal shanty kiosks erected on the disputed land by small traders and youths within the area, thus compromising the area security.
11. The 2nd Defendant averred that as a member of the County Assembly, she was approached by the area residents requesting to be allowed to modernize the kiosks with a view of beautifying the area and reducing security concerns and that in response, she advised them to apply for a Temporary



Occupation Licence from the County Government to formalize their occupation and modernize the kiosks, which they did through a company known as Possible Limited.

12. The 2nd Defendant's case is that the resident's application was considered and the Temporary Occupation License dated 27th April, 2016 issued to them; that sometime in July, while the modernization was ongoing, a company by the name Lustman Co Ltd approached the County Government and misled it that the modernization of kiosks was encroaching on land owned by the Plaintiff and that a joint survey revealed that the modernization project did not encroach on the land owned by the Plaintiff.
13. The 2nd Defendant pleaded in the Defence that the action by the Plaintiff to try and frustrate the modernization of the kiosks is malicious and in bad faith as the kiosks are in any event far from LR 209/10447 and 209/10216/2 and that the kiosks are erected on a road reserve with the permission of the County Government which collects rent therefrom.

Hearing & Evidence

14. PW1, a licensed land surveyor, informed the court that he was retained by the Plaintiff to carry out a survey and establish the beacons of LR No 209/10216 and 209/10477 which he did. PW 1 stated that the suit properties are in South C, off Mombasa Road and that he established from the records of ownership that the suit properties are owned by the Plaintiff.
15. It was the evidence of the surveyor that the two plots were amalgamated by the owner of the suit property to create an access road which has a dead end; that it was later realized that where the proposed access road was supposed to be was a wayleave; that the proposed new road is on plan number F.R 382/10 and that whereas the exercise was abandoned, they had already created a turn off to the Estate which they did not rectify.
16. According to PW1, makeshift stalls were built on the created turn off; that the stalls are partially on the Plaintiff's land; that the stalls are branded with the emblem of the 1st Defendant; that he is aware of the correspondence by the 1st Defendant giving permission for the construction of the stalls and that the stalls are partly on the Plaintiff's land and public land.
17. PW2 stated that she manages the Plaintiff's properties being LR No 209/10477/2 and 209/1021612 in Bellevue Nairobi; that in 2016, the Caretaker called her and informed her that there were people developing the suit properties, which information she passed on to the Plaintiff, the 1st Defendant and the Police; that people were encroaching on the suit property and were clearing the key apple fence that was in place and that when asked, they said that the 1st Defendant had issued them with a Temporary Occupation Licenses, which the 1st Defendant thereafter cancelled.
18. On cross-examination, PW1 stated that she is not a trustee of the Plaintiff; that the titles of the properties are still distinct; that it is the Caretaker who informed her that the materials on the site belonged to the 2nd Defendant, whom she had never met in person and that a Temporary Occupation License cannot be given on private land or a road. According to PW2, the Council realized that it had made a mistake and cancelled the Temporary Occupation License.
19. The Defendants did not participate at trial.

Submissions

20. The Plaintiff's advocate submitted that through the evidence of PW1, it was confirmed that the kiosks are partially erected on the Plaintiff's land; that despite alleging that the area is a road reserve, no



evidence has been adduced in that respect and that in contrast to the case of [Jane Nanguda Kabwere v Evans Mutiso Mutunga](#) [2012] eKLR, there is no boundary dispute herein.

21. Counsel submitted that the letter allegedly filed before Court for the cancellation of the Temporary Occupation License is suspect as the same is unsigned and the second one is clearly a copy of the first with the signature superimposed on it; that the 2nd Defendant is attempting to run away from responsibilities whereas it is clear that she was part of the whole process with correspondence on the revocation and cancellation of the revocation of the Temporary Occupation License being copied to her and that the Plaintiff has proven its case on a balance of probabilities and is entitled to the orders sought.
22. The 1st Defendant's counsel submitted that the Verifying Affidavit attached to the Plaintiff shows that the same was sworn by Vincent Wakayanda as the Chairman and one of the Trustees of the Plaintiff duly authorized to swear the same and that nonetheless, there is no resolution authorizing the filing of the suit.
23. It was submitted that as a pension scheme established pursuant to the [Trustees \(perpetual succession\) Act](#), Cap 164, the Plaintiff is a body corporate and requires a resolution before instituting a suit and that no resolution having been adduced, the suit is incompetent and should be struck out. Counsel cited the cases of [Philomena Ndanga Karanja & 2 Others v Edward Kamau Maina](#) [2015] eKLR, [Affordable Homes Africa Limited v Ian Henderson & 2 others](#) HCC 524 of 2004 and [Thome Farmers Company Limited v Farm of Faith Investors Ltd](#) [2019] eKLR.
24. It was submitted that by the 1st Defendant's advocate that the Plaintiff as named does not have the capacity to institute a suit which should be in the names of the current registered trustees. Reliance in this regard was placed on the case of [Grace Mwenda Munjuri v Trustees of the Agricultural Society of Kenya](#) [2014] eKLR. Counsel also cited the case of [Desai v Patel t/a Sandpipers construction and Civil Engineering Services and 13 Others](#) [2001] eKLR and [Kippngeno Rono v Kaporos Tea Factory Limited & 2 Others](#) [2021]eKLR.
25. It was submitted that the Plaintiff is not entitled to any of the injunctive orders sought having failed to prove ownership of the suit property; that whereas survey maps were produced in evidence, the same do not amount to title documents; that the Plaintiff did not prove amalgamation of the two properties as alleged and that having failed to prove ownership and amalgamation, there is no basis upon which the Plaintiff can allege trespass on the suit properties.
26. The Plaintiff's advocate filed further submissions in which he submitted that new issues cannot be raised in submissions as established in the case of [Eye Company \(K\) Limited v Erastus Rotich t/a Vision Express](#) [2021] eKLR. Counsel further cited the case of [Obare Mochache Walter v Samuel Apoko Onkwani & 2 Others](#) [2018] eKLR where the Court emphasized that a party is not permitted to make a case outside the pleadings and affidavits.
27. It was submitted that the requirement for a corporation to provide a resolution when filing a matter is a requirement of Order 4 Rule 1(4) of the [Civil Procedure Rules](#); that companies are guided by the [Companies Act](#) 2015 which does not provide that a resolution is necessary for the filing of a suit and that as expressed in [Lesrima Simeon Saimanga v Independent and Electoral Boundaries Commission & 2 Others](#) [2018] eKLR, subsidiary rules cannot override an Act of Parliament and in this instance, the provisions of the [Civil Procedure Rules](#) cannot override the provisions of the [Companies Act](#).



Analysis & Determination

28. Having carefully considered the pleadings, the evidence and submissions herein, the issues that arise for determination are;
- a. Whether the suit is competent?
 - b. Whether the Plaintiff has established its case on a balance of probabilities?
29. The 1st Defendant has impugned the proceedings on two fronts. Firstly, that no resolution has been adduced to show that any authority was given to institute the suit, which renders the suit incompetent and secondly, that the party mounting the suit as the Plaintiff is improperly before the court.
30. It is a general principle of law that Courts should in determining cases be guided by the pleadings. However, in *Odd Jobs v Mubia* [1970] EA 476, it was held that the court can base its decision on an unpleaded issue if the parties had left the issue to the court for determination.
31. The Court of Appeal in the case of *Ann Wairimu Wanjobi v James Wambiru Mukabi* [2021] eKLR stated that the *Odd Jobs (supra)* case remains good law and that in limited circumstances, where an unpleaded issue is crucial to the matters in issue, the court may determine a suit on the unpleaded issue, provided that both parties have clearly addressed the issue in their evidence or submissions, and left the matter for the determination of the court. However, such determination will not extend to determining or awarding a relief that was not specifically sought in the pleadings.
32. In *Livestock Research Organization v Okoko & Another* (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling), the Court while dealing with a similar question held as follows:
- “...the question of board authorization is a matter of law on capacity or locus standi of parties that institute proceedings before the court. A matter of law is not a matter that must be pleaded and a court of law can on its own motion determine such issue of law even where parties have not pleaded it. This is so because the court is deemed to know the law. In *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR the Court of Appeal stated:
- “23. The High Court is presumed to know the law. That is why the *Constitution* has conferred on the High Court in Article 165(3)(a) unlimited original jurisdiction in Civil and Criminal matters and in Article 20 (3)(a) jurisdiction to develop the law and in Article 20 (3) (b) the mandate to interpret the Bill of Rights. It was expected that counsel, in getting up on the brief would come up with the law and authorities including the Treaty and the case-law. But he failed to do so. It was the duty of the Court to have before it the relevant law and to apply it correctly...”
- It is therefore my finding that the trial court did not err in entertaining the issue of the plaintiff/appellant herein not having filed authority for institution of suit.”
33. It is apparent from the foregoing that the question of locus is an exemption to the general rule, and as such, can be determined even when unpleaded.
34. The effect of the failure to file a resolution authorizing the institution of a suit has been the subject of debate. Two positions exist on this issue. There is the school that is of the view that failing to file a resolution defeats the suit and renders it incompetent. In *Falcon Global Logistics Co. Limited v*



Management Committee of Eldama Ravine Boarding Primary School [2018] eKLR, the court held as follows:

“In the current suit there is no evidence that there was such resolution sought and obtained from the company to authorize the filing of this suit. This is not a technicality as it goes to the core of company management. A director of a company cannot wake up and decide to file a suit without such resolution. This issue was raised during cross examination but the plaintiff did not see it prudent to rectify the anomaly by seeking ratification of what had happened without authority.

The court is alive of the provisions of section 1A and 1B of the *Civil Procedure Act* the provisions of Article 159 (2) (d) of the *Constitution* that justice shall be administered without undue regard to procedural technicalities. Courts should also not compromise procedures laid down for the smooth adjudication of matters in an adversarial system to bend backwards to accommodate parties who have no regard for procedures. Having said that I find that the suit by the plaintiff is incompetent before the court.”

35. The other school posits that substantive justice must be paid heed to, especially where a suit is filed for the benefit of the company. This was exemplified in *Bhatti Panel Beaters Limited v Surjit Singh Dhiman & another* [2019] eKLR as follows:

“The issue of resolution seems to have featured only during cross-examination of the appellant director. No objection to the suit had been raised nor particulars sought to enable same to be procured and produced.

The institution of the suit without resolution herein did not defeat suit which was for the benefit of the company. This court observes that the pw1 was the company director who negotiated the transaction for the company and was also spear heading recovery of the company debt. Justice and fairness thus demand that the company be allowed to recover its debt without being hindered by technicalities. Article 159 (2) (d) dictates that substantial justice should not be defeated by procedural technicalities like the one employed herein by trial court to defeat appellant’s bona-fide claim.”

36. Both decisions are post the promulgation of the *Constitution*. Equally, both decisions are persuasive and not binding.

37. The Court of Appeal held in extenso in *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015] eKLR as follows:

“The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; *Bugerere Coffee Growers Ltd v Sebaduka & Anor* (1970) 1 EA 147. The court in that case held:-

“When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors’ meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action.”



To their credit, the appellant's Advocates have cited another authority from the Supreme Court of Uganda decided in April 2002, confirming that the principle enunciated in the Bugerere case has since been overruled by the Uganda Supreme court. The authority is *Tatu Naiga & Emporium v Virjee Brothers Ltd* Civil Appeal No 8 of 2000.

The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the Bugerere case was no longer good law as it had been overturned in the case of *United Assurance Co. Ltd v Attorney General*: SCCA No 1 of 1998. The latter case restated the law as follows:-

“... it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”

The decision has since been applied in Kenyan courts, for example, in *Fubeco China Fushun v Naiposha Company Limited & 11 others* [2014] eKLR.

For the above reasons we find no merit in the procedural challenge and accordingly reject that ground of appeal.”

38. Whereas the Court of Appeal in *Wanyiri Kiboro v Konabauthi Limited* [2017] eKLR stated:

“It was his further submission that the plaint was not accompanied by a verifying affidavit and that there was no authority from the respondent company for the institution of the suit... The second issue seems to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; *Bugerere Coffee Growers Ltd v Sebaduka & Anor* (1970) 1... However, the principle enunciated in the Bugerere case has since been overruled by the Uganda Supreme court in the case of *Tatu Naiga & Emporium v Virjee Brothers Ltd* Civil Appeal No 8 of 2000 where the Court endorsed the decision of the Court of Appeal that the decision in the Bugerere case was no longer good law as it had been overturned in the case of *United Assurance Co. Ltd v Attorney General*: SCCA No 1 of 1998. The decision has since been applied in Kenyan courts, for example, in *Fubeco China Fushun v Naiposha Company Limited & 11 others* [2014] eKLR. In the end, we find no merit in this appeal.”

39. In *Makupa Transit Shade Limited & Another v Kenya Ports Authority & another* [2015] eKLR, the Court of Appeal held that:

“In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorized by it. It was therefore sufficient for the deponents to state that “they were duly authorized.” It was then up to the appellants to demonstrate by evidence that they were not so authorized.”

40. And after analysing several decisions, the court in *Bethany Vineyards Limited & Another v Equity Bank Limited & 2 Others* [2020] eKLR held as follows:

“It does become apparent that there no requirement for a company to present a resolution of a company indicating that a company has authorized the filing of a suit or has authorized the swearing of an affidavit on its behalf nor, for that matter, confirming it has authorized



an advocate to represent it. It suffices for the deponent to state that he has authority to do such act. The answer to the first issue therefore is to the effect that the plaintiffs' suit does not fail because of lack of the Resolution of the 1st plaintiff."

41. The Court is of a similar persuasion with the binding decisions of the Court of Appeal. The 1st Defendant has not adduced any contrary evidence to challenge the institution of the suit by the Plaintiff. There is no evidence to show that the Plaintiff did not authorise the filing of the suit. The mere absence of the resolutions does not therefore render the suit incompetent. The objection is therefore dismissed.

42. The second objection was that there is no proper Plaintiff before the court. The 1st Defendant has challenged the capacity of the Plaintiff to institute the suit and that the institution of the suit is contrary to the provisions of the Trustees Act. According to the 1st Defendant, the Plaintiff as named does not have the capacity to institute a suit which should be in the names of the current registered trustees.

43. It is trite that the presence of proper parties in a suit is sine quo non the jurisdiction of the court. This position was fortified by the court in *Apex Finance International Limited & another v Kenya Anti-Corruption Commission* [2012] eKLR citing with approval the Nigerian Supreme Court case of *Goodwill & Trust Investment Ltd & Another v Will & Bush Ltd* SC.266/2005 (25.03.2011) where the court held:

"it is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed. The parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court, the court lacks jurisdiction to hear the suit, and where the court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned."

44. And in *Julieta Marigu Njagi v Virginia Njoki Mwangi & another* [2022] eKLR the court held:

"Locus standi is therefore the right to appear and be heard before a court. The issue of Locus Standi therefore raises a point of law and is one capable of disposing of the suit without determining it on its merit. If a party lacks capacity to appear before the court, then the court lacks jurisdiction to entertain such a party or even the pleadings filed by the said party."

45. The Plaintiff has described itself as follows:

"The Plaintiff is a Pension Scheme duly established in accordance with the provisions of the Trustees Act."

46. By its own description, the Plaintiff has identified itself as an unincorporated body, registered under the Trustees Act. In addition, there is no document provided to show that the Plaintiff is an incorporated trust and thus a corporate entity capable of suing and being sued in its corporate name. In *Kibiu & 3 others v Trust; Waweru & 4 others (Interested Party)* (Environment & Land Case 1112 of 2013) [2022] KEELC 2416 (KLR) (5 May 2022) (Judgment) this Court held as follows:

"The Defendant and the Interested Parties assert that the Trust having not been incorporated, it remains an unincorporated entity which lacks capacity to sue, without including all the Trustees, while the Plaintiffs maintain that they are the executive members of the Trust duly authorized by the Board of Trustees to institute the suit...The implication of an



unincorporated Trust is that it can only own property, enter into contracts or do any other thing in the name of its trustees but not in its own name. An unincorporated Trust does not have a separate legal existence from its trustees. With respect to institution of suits, an unincorporated Trust can only institute a suit through its trustees and/or recognized officials. Indeed, that is the position that the court took in the case of *Erick Lumosi Asiligwa & another v Peter Felix Baumartner* (2011) eKLR...”

47. That being the case, it follows that the Plaintiff could not institute this suit in its own name. The suit is therefore incompetent for having been brought by a non-suited body. This position is more fortified by the fact that none of the witnesses who testified were the Plaintiff’s trustees. The Court will nonetheless proceed to consider the merits of the suit for purposes of completion.
48. The Plaintiff has instituted this case seeking for a prohibitory and mandatory injunction against the Defendants restraining them from interfering with the suit property and a declaration that the Temporary Occupation License issued by the 1st Defendant was unlawful, illegal and contrary to law and general damages for trespass.
49. Whereas all the Defendants entered appearance and filed their respective Defences, no testimonies were rendered on their behalf. It therefore follows that the Defences on record remain mere allegations and the Plaintiff’s evidence is uncontroverted and unchallenged. In the same vein, the 1st Defendant’s counter-claim fails for want of prosecution.
50. The above notwithstanding, it is now settled that uncontroverted evidence is not automatic evidence. The burden on the Plaintiff to prove their case remains the same and that burden of proof is in no way lessened because the Defendants did not adduce any evidence. As expressed by the Court of Appeal in [*Charterhouse Bank Limited \(Under Statutory Management\) v Frank N. Kamau*](#) [2016] eKLR:
- “The suggestion, however, implicit...that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff’s case is proved on a balance of probabilities cannot possibly be correct...”
51. Indeed, it is trite that he who alleges must prove. This is set out under Section 107(1)(2) of the [*Evidence Act*](#) which provides as follows:
- “(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.”
52. And Sections 109 and 112 of the same [*Act*](#) provides as follows:
- “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.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”



53. It is the Plaintiff's case that it is the lawful owner of the suit property known as LR 209 No 209/104/77, 78 and 79 (Bellevue Estate); that two portions of land, that is LR No 209/10477/2 and 209/10216/2 were amalgamated on the ground creating an access road junction to the Plaintiff's Bellevue Estate located along Mombasa Road and that sometime in 2013, the Defendants and/or their agents encroached on the access junction and erected kiosks thereon.
54. The Plaintiff's claim herein is essentially founded on the tort of trespass. The first hurdle in a claim for trespass is proof of ownership of property. Ownership of property is proved by way of title, or other supporting documents like a letter of allotment or reservation maps.
55. No certificate of title was adduced as evidence. In the absence of a title, it is not possible to ascertain the ownership of the suit property. Not even a search was provided to assist the court in determining the ownership of the suit property. In *Noah Onyango Amwayo v Sylvanus O Otumba & another* [2013] eKLR the Court of Appeal stated as follows:

“It is therefore plain, from the above provisions, that what in reality constitutes a title to land under the Registered *Land Act* is the register. A title deed is only a prima facie evidence of the matters shown therein but the land or lease are subject to all entries in the register. In the case before us, the appellant testified at the trial before the High Court that he had misplaced his title deed in respect of the disputed land. He however produced the green card and a certificate of official search in respect of the same parcel of land. The two documents, in our view, constituted what we may refer to as extracts of title and were better evidence of his title than a title deed would have been, because they contained all the entries on the register in respect of the disputed title and carried current information relating to the parcel of land.”

56. The reasoning of this court in *Kinyua Nunu v Virginia Wamurua Kinyua & Another* [2008] eKLR is relevant herein. The Court stated as follows:

“My finding first and foremost is that it is not the duty of the court to direct the parties to bring to court any documents in support of their case- or to dictate to the parties the nature of the evidence they should adduce in court nor is it the duty of the court to give gratuitous advice to the parties on how to conduct their matter. The learned trial Magistrate did not therefore err at all in not demanding that the appellant produce the documents of title in court. It is also correct to say that it is the duty of a plaintiff to prove his case on a balance of probability even where a suit is not defended. That onus is on the plaintiff and it is not lessened by the fact that the suit is not defended. The learned trial magistrate considered the evidence before him and he arrived at the only decision any competent tribunal or court could have arrived at with that kind of evidence. I cannot find fault with that Judgment.”

57. In the absence of any document which the law recognizes as proof of ownership of land, the court is unable to determine the ownership of the suit property. This therefore means that the court cannot issue the prohibitory and mandatory injunctions sought by the Plaintiff.
58. Regarding the claim for trespass, the Plaintiff could still maintain it notwithstanding the fact that there was no ownership document availed. Trespass is an action that can be brought by an occupier of land, not necessarily the owner thereof. The Court of Appeal in *Samuel Mwangi v Jeremiah M'itobu* [2012] eKLR stated as follows:

“There are, therefore, concurrent findings of facts by the two courts below that the appellant was in lawful occupation of the suit land. These facts are also accepted by the respondent.



However, his argument simply is that mere occupation of land does not entitle the appellant to evict another person. That “other” person in this case is neither the owner of the suit land, nor anyone claiming the right to occupation. He is, in fact, the respondent, a trespasser for all intents and purposes. The learned Judge of the High Court erred in his conclusion that only an “owner” of land had the right to sue in trespass. That is clearly not so. As Winfield and Jolowicz state in their book “*Tort*” (12th Edition @ p. 361):

“Possession in fact confers no actual right of property, but a possessor may nevertheless maintain trespass against anyone who interferes who cannot himself show that he has the right to recover possession immediately. A stranger cannot rely in his defence upon another person’s right to possess (the “*jus tertii*”) unless he can prove that he acted with that person’s authority. Even wrongful possession, such as that acquired by a squatter, will, in principle, be protected except against the owner of the land or someone acting lawfully on his behalf.”

59. As the Plaintiff’s possession (and not ownership) of the suit property was not contested, the Plaintiff could have succeeded in a claim for trespass as the occupier of the suit property, if it had proved trespass by the Defendants.
60. However, the Plaintiff has not proved any wrong that was committed by the Defendants. It is trite that a remedy cannot issue in the absence of a wrong. Courts do not give orders in vain. Whereas the survey report states that there are kiosks erected on the hedge of the KPA Scheme Estate boundary encroaching on the service lines, there is no evidence that it is the Defendants who trespassed on the suit property. The claim for trespass has therefore not been proved.
61. The prayer for a declaration of illegality of the license equally fails. According to the Plaintiff’s own evidence and testimony, this license was revoked vide the letter of 27th July 2016. This evidence was not controverted. The impugned license having been revoked, this court will be issuing orders in vain.
62. For those reasons, it is the finding of the Court that the Plaintiff has failed to establish its case on a balance of probabilities. That being the case, the Plaintiff’s suit is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF MAY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Walubengo for Plaintiff

Ms Katana for Mr. Kithi for 1st Defendant

Mr. Kimathi holding brief for Agwara for 2nd Defendant

Court Assistant - Tracy

