



**Kithuku v Mukuku (Environment & Land Case 28 of 2019)
[2023] KEELC 17818 (KLR) (17 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17818 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 28 OF 2019**

TW MURIGI, J

MAY 17, 2023

BETWEEN

JOSEPH KITHUKU PLAINTIFF

AND

KAVII MUKUKU DEFENDANT

JUDGMENT

1. By a plaint dated April 11, 2019 and amended on November 12, 2020, the plaintiff seeks judgment against the defendant for:-
 1. A mandatory injunction compelling the defendant to stop trespassing into and to remove the illegal fence he has put up on the Plaintiff's portion of the parcel of land known as Nzuuni/kyuasini/724 situated within Kyuasini Market Ukia Location in Makueni County and cease all his activities thereon.
 2. In the alternative, an order do issue for the demolition of the fence placed by the Defendant on the Plaintiff's parcel of land and eviction therefrom.
 3. Mesne profits from the date the trespass started till the date the Defendant shall remove the illegal fence and vacate from the property or till he shall be evicted therefrom.
 4. Costs of the suit with interest.
2. The Defendant opposed the suit vide his Statement of Defence dated June 11, 2019 and further amended on January 24, 2022. He urged the court to dismiss the Plaintiff's suit with costs.

The Plaintiff's Case

3. The Plaintiff called three witness in support of his case.



4. The Plaintiff testified as PW1. He adopted his statement as his evidence in chief and produced the documents in the list of documents dated 11th August, 2019 in support of his case.
5. The Plaintiff testified that he is the legal, beneficial and bona fide owner of three plots measuring 15 by 30ft, 6 by 15ft and 47 by 62 ft known as Nzuuni/Kywasini/724 situated within Ukia Location in Makueni County. It was his testimony that he purchased a portion of the suit property from the family of Mrs. Muvoye in the year 2003 and later purchased another portion in the year 2005.
6. That at the time of the purchase, Mrs. Muoye informed him that the suit property was registered in the name of her husband's brother (the Defendant herein) because her husband was away in Nairobi when the survey was conducted.
7. That when the survey was being conducted, the survey team leader directed that the suit property be registered in the name of the Defendant pending the availability of her late husband. It was his testimony that Mrs Muvoye's family had equally sold a portion of the suit property to Peter Wambua Munyae who in turn sold it to him in the year 2007.
8. He testified that on 5th December, 2018 the Defendant trespassed onto his portion of the suit property and erected an illegal temporary fence thereon. He stated that the Defendant has refused to vacate from his portion of the suit property.
9. He further testified that after he acquired his portion of the suit property, he constructed a toilet which the Defendant demolished. He contended that the Defendant will not vacate from his portion of the suit property unless he is compelled by an order of this Court.
10. He testified that the Defendant did not interfere with his portion of the suit property during the lifetime of Mrs. Muvoye. It was his testimony that the late Kimilu Mutuku sold plots comprised in the suit property to ABC Church, Peter Wambua and to some other people.
11. In cross examination he testified that he purchased the suit property from Mrs Muvoye and her children. He reiterated that Mrs Muvoye informed him that the land was registered in the name of the Defendant because her husband was away in Nairobi when the survey was conducted. He testified that he has not filed a suit against the estate of the deceased. He urged the Court to grant the orders sought in the Plaintiff.
12. On re-examination, he testified that the family of Mrs. Muvoye had not interfered with his ownership over the suit property.
13. PW2 William Nzuki testified that the suit property originally belonged to his father Nzuki Mbindyo. He went on to state that his father sold the suit property to the late Kimilu Mutuku so that he could pay for his school fees. He stated that he was aware that the late Kimilu Mutuku had sold some portions of the suit property to ABC Church, Mr. Kavita and to Martin Nzusyo.
14. That upon his demise, his wife and son Muendo Kimilu sold portions of the suit property to the Plaintiff in the year 2003 and 2005. He stated that his father did not sell the suit property to the Defendant herein.
15. He informed the Court that the suit property was surveyed in the year 1974 after his father had sold the same to the late Kimilu Mutuku. It was his testimony that after the Plaintiff purchased his portion of the suit property, he constructed a toilet thereon. It was his testimony that the Defendant had trespassed onto the Plaintiff's portions of the suit property.



16. On cross examination, he testified that his father sold a portion of his land to the late Kimilu Mutuku before the survey was conducted.
17. PW3 Mutua Mutuku testified that the Defendant is his brother while the late Kimilu Mutuku was their elder brother. It was his testimony that the late Kimilu Mutuku purchased the suit property from Nzuki Mbindyo before land in the area was adjudicated and surveyed. He told the Court that the suit property was registered in the name of the Defendant because the late Kimilu Mutuku was away in Nairobi when the survey was conducted.
18. He stated that the title for the suit property was processed in the name of the Defendant on the understanding that he would transfer the same to the late Kimilu Mutuku. It was his testimony that the late Kimilu Mutuku did not sell his land to the Defendant.
19. He stated that he witnessed the agreement for sale of the suit property between the Plaintiff and his late brother's wife. He went on to state that after the Plaintiff acquired the suit property, he built a toilet which was later demolished by the Defendant on the grounds that it was constructed on his land. It was his evidence that his late brother had sold portions of the suit property to ABC Church, Mr. Kavita and Martin Nzusyo and retained the remainder of the land.
20. That upon his demise, his wife and son sold to the Plaintiff two portions of the suit property. It was his evidence that the Defendant had trespassed onto the Plaintiff's portion of the suit property and erected a fence around it.
21. In cross examination, he testified that Kimilu Mutuku passed away in the year 2013. He reiterated that the suit property was registered in the name of the Defendant because Kimilu Mutuku was away in Nairobi when the survey was conducted.
22. It was his testimony that the late Kimilu Mutuku was in the process of registering the suit property in his name when he fell sick and passed away. He further testified that the Defendant declined to honour summons to appear before the clan over the dispute concerning the suit property.
23. On re-examination, he testified that his land was registered in the name of Ndiii Kimilu since he was not at home when the adjudication and survey process was conducted.
24. PW4 Ndive Kimilu testified that he was the Chairman of the Land Adjudication and Survey Committee for Ukia Location. It was his testimony that during the adjudication process they would register the land in the name of a family member if the owner of land was absent.
25. It was his testimony that during the adjudication of the suit property, the late Kimilu Mutuku's land was registered in the name of the Defendant because he was absent and on the understanding that the records would be changed once Kimilu Mutuku availed himself. He went on to state that the Defendant did not transfer the land to Kimilu Mutuku.
26. He testified that the suit property belongs to the late Kimilu Mutuku even though it is registered in the name of the Defendant. He further testified that he was the one who directed that the suit property to be registered in the name of the Defendant since the late Kimilu Mutuku was in Nairobi when the survey was conducted. That the late Kimilu Mutuku passed away shortly after he returned back.

The Defence Case

27. The Defendant testified as the sole witness in support of his case.



28. The Defendant adopted his statement as his evidence in chief and produced the documents in his list of documents dated 17th March, 2022 in support of his case.
29. It was his testimony that he is the registered owner of the suit property having purchased the same from his late brother Kimilu Mutuku. It was his testimony that he gave his elder brother a cow valued at Kshs 60,000/-, Kshs 1000/= and 10 goats valued at Kshs 50,000/- to pay bride price for his wife. That on 27th August, 1978 his late brother paid him back by gifting him the suit property.
30. He admitted that he purchased a portion of the suit property from his sister in law. He equally admitted that his late brother had purchased the suit property from Nzuki Mbindyo. It was his testimony that family members and the local administration had confirmed that he is the owner of the suit property.
31. In cross examination he testified that he was aware that the Plaintiff had constructed a toilet on the suit property. It was his testimony that the late Kimilu Mutuku purchased the suit property and sold to him a portion and the other portion to ABC Church. He admitted that the late Kimilu Mutuku was away in Nairobi in the year 1978.
32. It was his testimony that Kimilu Mutuku gifted him the land because he gave him a cow, Kshs 1000/= and 10 goats to pay dowry for his wife in the year 1957. It was his evidence that they recorded an agreement in 1978 after he purchased the suit property.
33. He admitted that he was summoned by the chief after his late brother's children lodged a complaint that the suit property belongs to them. It was his evidence that Kimilu Mutuku gifted him the suit property because he assisted him to pay dowry for his wife.
34. After the close of the hearing, the parties herein filed their respective written submissions.

The Plaintiff's Submissions

35. The Plaintiff filed his submissions on 16th November, 2022. On his behalf, Counsel contended that the Plaintiff's evidence and that of his witnesses was not challenged by the Defendant.
36. That the Defendant did not prove on a balance of probabilities that the suit land was gifted to him by his deceased brother as alleged nor was his evidence corroborated. Counsel argued that the agreement produced by the Defendant to support his claim to the suit land was not properly executed nor was it witnessed.
37. Counsel submitted that on the evidence that was adduced, the Court ought to find that the Defendant is registered as the owner of the suit property known as Ukia/Nzuuni/724 in trust for his late brother, Kimilu Mukuku. Counsel also urged the Court to make a finding that the Plaintiff is the legal, beneficial and rightful owner of the claimed portion of the suit property having purchased it from the family of the rightful owner, Kimilu Mukuku. Counsel submitted that the Plaintiff had established his claim on a balance of probabilities as pleaded in the amended Plaint dated 12/11/2020.

The Defendant's Submissions

38. The Defendant filed his submissions on November 24, 2022. On his behalf, Counsel identified the following issues for the court's determination:-
 - i) Who owns the suit land?
 - ii) Do the exhibits produced by the Plaintiff hold water?



- iii) Does the Defendant hold the land in trust for his late brother?
 - iv) Is the Plaintiff entitled to the prayers in the Plaintiff?
39. On the first issue, Counsel argued that no evidence was availed to show that the suit property was ever registered in the name of Kimilu Mukuku (Deceased). That in the absence of such evidence, the Court is bound by the [Land Registration Act, 2012](#) to consider the Defendant's Title document as prima facie and conclusive evidence of ownership to the suit property.
40. That the Defendant's Title deed was not challenged in the manner stipulated under section 26 of the [Land Registration Act, 2012](#).
41. On the second issue, Counsel submitted that the agreement produced by the Plaintiff dated 5/10/2003 is statute barred in accordance with the [Limitation of Actions Act](#). That under section 4 (1) of the [Limitation of Actions Act](#), the limitation period for an action to enforce a land sale contract is six years. It was also argued that the Plaintiff failed to obtain consent from the Land Control Board as required under section 6 of the [Land Control Act](#) when completing his transaction for the suit property. As such, Counsel argued that the Plaintiff's transaction for the suit property as claimed is null and void. Again, Counsel argued that the purported vendors of the suit property had no capacity to sell the land to the Plaintiff.
42. On the third issue, Counsel contended that the Plaintiff had introduced the issue of the Defendant holding the suit property in trust in his submissions. That the pleadings do not address that issue and neither was the Court invited to make a determination on the said issue. Counsel submitted that parties are bound by their pleadings and therefore evidence which is at variance with the pleadings is for rejection.
43. On the last issue, Counsel contended that the Plaintiff had not established the existence of special circumstances which warrant a mandatory injunction being granted. That the Defendant had further demonstrated that the suit property is his with the production of a title deed. Counsel further submitted that the Plaintiff had failed to prove trespass to land on the Defendant's part. As such, it was argued that the Plaintiff is not entitled to mesne profits as claimed.
44. Counsel for the Defendant urged the Court to dismiss the Plaintiff's suit with costs. None of the authorities cited in the submissions were availed and the same have been disregarded.
45. In a rejoinder to the Defendant's submissions, Counsel for the Plaintiff filed a second set of submissions on 3rd February, 2023. Counsel reiterated that the Defendant's agreement with his deceased brother, Kimilu Mukuku, dated 28/08/1976 was not properly executed and witnessed as per the requirements of the law.
46. Counsel further contended that the Defendant obtained the Title deed for the suit property illegally and through misrepresentation of material facts. Counsel urged the Court to order cancellation of the Title deed under the provisions of Section 26 of the [Land Registration Act, 2012](#). It was submitted that the Plaintiff's suit is merited and that the prayers sought in the amended Plaintiff ought to be granted.

Analysis and Determination

47. Having considered the pleadings, the evidence on record and the respective submissions, the issue that arises for determination is whether the Plaintiff is entitled to the orders sought.
48. The Plaintiff is seeking for a mandatory injunction to compel the Defendant to stop trespassing onto his portion of the suit property as well as to remove the illegal fence erected thereon.



49. The circumstances under which the Court would grant a Mandatory Injunction was stated out by the Court of Appeal in the Case of *Malier Unissa Karim -Vs- Edward Oluoch Odumbe* (2015) eKLR as follows:-
- i. “The test for granting a Mandatory Injunction is different from that enunciated in the “Giella -Versus- Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “Kenya Breweries Ltd -Vs- Washington Okeyo (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-
 - ii. “A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a march on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application.”
50. This Court is called upon to establish the history of the suit property. PW3 testified that the suit property originally belonged to his father Mr Nzuki. He testified that the late Kimilu Mutuku purchased the suit property before adjudication and survey of the area was done.
51. It was the testimony of PW2, PW3 and PW4 that the late Kimilu Mutuku purchased the suit property from Nzuki Mbindyo before the adjudication and survey process in the area was conducted.
52. The Defendant admitted in his evidence that his late brother had purchased the suit property. From the evidence on record, it is crystal clear that the late Kimilu Mutuku purchased the suit property from Nzuki Mbindyo before the adjudication and survey process of the area was done.
53. Having found that the late Kimilu Mutuku purchased the suit property from Nzuki Mbindyo, this court is called upon to determine who is the registered owner of the suit property.
54. It is not in dispute that the Defendant is the registered owner of the suit property. The Plaintiff testified that Mrs. Muvoye informed him that the suit property was registered in the name of the Defendant as her husband was away in Nairobi when the survey was conducted. This was confirmed by PW2, PW3 and PW4. PW4 testified that he was the Chairman of the Land Adjudication and Survey Committee for Ukia Location.
55. It was his testimony that he was the one who directed the suit property to be registered in the name of the Defendant as the owner (the late Kimilu Mutuku) was in Nairobi on the understanding that the records would be changed once he availed himself.
56. From the evidence on record it is crystal clear that the late Kimilu Mutuku was away when the survey of the suit property was being conducted. It is also clear that during the survey and demarcation process, a family member would be registered if the owner of a parcel of land was absent.
57. From the evidence on record it is clear that the Defendant was registered on behalf of the late Kimilu Mutuku on the understanding that the records would be changed once he availed himself.
58. The Plaintiff is claiming a portion of the suit property on the grounds that he purchased the same in the year 2003. In this regard he produced an agreement for sale dated 05/10/2003. He testified that he purchased another portion from Mrs Muvoye and family in the year 2005. He produced an



- agreement for sale dated 21/11/2005. Both agreements were executed the Plaintiff on one hand and Mrs Muvoye Kimilu and her son Muendo Kimilu on the other hand. PW3 confirmed that he witnessed the agreement for sale between the parties.
59. He further testified that he purchased a portion from Peter Wambua Munyae who had purchased the same from Mrs. Muvoye. In this regard, he produced the agreement for sale dated 11/11/2007 between himself and Peter Wambua Munyae . PW3 testified that his father sold the suit property to the late Kimilu Mutuku who in turn sold portions of the same to ABC Church, Mr. Kavita and Martin Nzusyo.
 60. He further testified that upon his demise, his wife and son Muendo Kimilu sold portions of the suit property to the Plaintiff in the year 2003 and 2005. PW2 and PW4 confirmed that Kimilu’s wife sold portions of the suit property to the Plaintiff.
 61. It is also clear that the late Kimilu Mutuku sold several portions to ABC Church, Mr. Kavita and Martin Nzusyo before his demise. Upon his demise, the deceased’s wife and son sold portions of the suit property to the Plaintiff in the year 2003 and 2005.
 62. From the evidence on record, the Plaintiff has demonstrated that he purchased portions of the suit property from the family of Mrs. Muvoye in the year 2003 and 2005. This court finds and holds that the Plaintiff has established a prima facie case that he purchased portions of the suit property.
 63. The Defendant testified that he is the registered owner of the suit property. In this regard he produced a certificate of title(DEX1) and a green card(DEX2) for the suit property.
 64. According to the green card (DEX2) the Defendant was registered as the owner of the suit property on 06/05/2002 while the certificate of title was issued on 29th of April, 2018. It was his testimony that his brother gifted him the suit property because he assisted him to pay dowry for his wife.
 65. In this regard he produced an agreement in Kikamba language between himself and the late Kimilu Mutuku(DEX3). The agreement produced is not in English or Kiswahili and I have not seen a translation thereof. I will thereof disregard it all together.
 66. From the evidence on record it is clear that the suit property was registered in the name of the Defendant on the understanding that the records would be changed once the late Kimilu Mututku availed himself. According to the evidence of PW3 and PW4, they are Defendant’s brothers. They testified that the Plaintiff purchased the portion of the suit property from their late brother’s wife and son.
 67. It was their testimony that the Defendant had trespassed onto the Plaintiff’s portion of the suit property and erected an illegal fence thereon. Black’s Law Dictionary 10th Edition defines trespass to land as follows;

“ A person’s unlawful entry on another’s land that is visibly enclosed.”
 68. In the case of *Municipal Council of Eldoret Vs Titus Gatitu Njau* (2020) eKLR the Court of Appeal cited the case of *M’Mukanya Vs M’Mbijiwe* (1984) KLR 761 where the ingredients of tort of trespass were stated as follows;

“trespass is a violation of the right to possession and a Plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership see Thomson Vs Ward (1953) 2 QB 153.”



69. The Court of Appeal in the case of *M'Mukanya Vs M'Mbijiwe* (1984) KLR 761 set out the ingredients of the tort of trespass as follows;
- “Trespass is the violation of the right to possession and a Plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership.”
70. The Defendant did not rebut the Plaintiff's evidence that he had trespassed onto his portion of his suit property and erected a fence thereon. It is crystal clear that the Plaintiff has established a prima facie case that he purchased portions of the suit property from Mrs. Muvoye and her son. It is evident that he also purchased a portion of the suit property from Peter Wambua.
71. It is the Plaintiff's case that he built a permanent toilet which was later demolished by the Defendant. Even though the Plaintiff is not the registered owner of the suit property, he has proved on a balance of probabilities that he purchased a portion of the same from the late Mrs Muvoye and family and from Peter Wambua Munyae.
72. By erecting a fence around the Plaintiff's portion of the suit property was tantamount to trespassing onto the Plaintiff's portion of the land evicting the Plaintiff.
73. The demolition in my view was illegal as the Plaintiff is the owner of the portion of the suit property.
74. This court finds and holds that the Plaintiff is the is the beneficial owner of his portion of the suit property and is therefore entitled to a mandatory injunction to compel the Defendant to stop trespassing onto his portion of the suit property..

Whether the plaintiff is entitled to mesne profits

75. The Plaintiff sought for mesne profits from the date of the trespass till the date the Defendant shall remove the illegal fence from the suit property. Section 2 of the *Civil Procedure Act* defines mesne profits as follows:-
- a. “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.”
76. It was the Plaintiff's testimony that after he acquired the suit property, he constructed a permanent toilet which was later demolished by the Defendant.
77. The Court has considered the pleadings and the evidence on record. Mesne profits are in the category of special damages. They must be specifically pleaded and proved. The Plaintiff did not set out the particulars of mesne profits in his Claim. He did not furnish the Court with any evidence on the period the Defendant has been on the suit property and the loss he has suffered. I therefore find that he is not entitled to mesne profits.
78. In the end, I find that the Plaintiff has proved his case on a balance of probabilities.
79. Consequently, I enter judgment for the Plaintiff against the Defendant in the following terms;
1. A mandatory injunction be and is hereby issued compelling the defendant to stop trespassing into the Plaintiff's portion of land parcel No. Nzuuni/Kyuasini/724 and to remove the illegal fence thereon.
 2. The Plaintiff is awarded costs of the suit.



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HON. T. MURIGI

JUDGE

JUDGMENT SIGNED, DATED AND DELIVERED IN OPEN COURT THIS 17TH DAY OF MAY, 2023.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi

Ms Chelangat holding brief for Mr. Nzavi for the Plaintiff.

Mr. Kioko for the Defendant.

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