



Muiruri v Kamae Re-Settlement Project & another (Environment & Land Case 673 of 2017) [2023] KEELC 18240 (KLR) (22 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18240 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 673 OF 2017**

OA ANGOTE, J

JUNE 22, 2023

BETWEEN

SALOME GATHONI MUIRURI PLAINTIFF

AND

KAMAE RE-SETTLEMENT PROJECT 1ST DEFENDANT

EZEKIEL RUHENI MAINA 2ND DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit by way of a Complaint dated 24th October 2017, in which she sought for the following orders:
 - a. A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit property.
 - b. A declaration that the 2nd Defendant, whether by himself or his agents or howsoever, is wrongfully in occupation of the suit property and is accordingly a trespasser of the same.
 - c. A declaration that the 2nd Defendant, whether by himself or his servants or agents or otherwise howsoever, is entitled to remain on the suit property.
 - d. A permanent injunction restraining the Defendants, whether by themselves or their servants or agents or otherwise howsoever, from remaining on or continuing in occupation of the suit property or selling the same.
 - e. An order that the 2nd Defendant immediately vacates the suit property.
 - f. General damages for trespass.



- g. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.
 - h. Any such other or further relief as this Honourable Court may deem fit.
- 2. The Plaintiff averred in the Plaint that she purchased Kamae Re-settlement Project Phase 2, Plot Number 329 (the suit property) on 11th September 2003 and was issued with a Certificate of Title with an official receipt and that when she went to start development on the suit property, she found the 2nd Defendant on the land.
- 3. It was averred by the Plaintiff that the 2nd Defendant claimed ownership and had started developing the suit property without her consent and that despite the Plaintiff's concerted efforts to compel the Defendants to revert ownership of suit property to her through the provincial administration, the 2nd Defendant continues to wrongfully occupy the suit property.
- 4. The Plaintiff particularized the details of loss and damage as including deprivation of the use and quiet enjoyment of the suit property; the 2nd Defendant misusing the suit property including erecting permanent structures on the suit property at her detriment and special damages for moving up and down in an effort to obtain redress from the relevant administrative offices.
- 5. The 2nd Defendant opposed this suit vide a Statement of Defence in which he averred that the suit property, Plot No. 329, belongs to him having purchased it from Ann Mbala who was the first owner through an allotment from the 1st Defendant. The 2nd Defendant averred that he was issued with an ownership certificate No. 249 on 15th December 2008 and that together with his family, he has lived and made developments of permanent and semi-permanent nature on the suit property since 2005 and has continued being in occupation of the suit property without interference.
- 6. The 2nd Defendant averred that the Plaintiff obtained ownership documents of the suit property by way of fraud, misrepresentation and through a corrupt scheme and that the 1st Defendant has acknowledged that the 2nd Defendant is the bona fide owner of plot number 329. In the Counter claim, the 2nd Defendant has sought for the following reliefs:
 - a. A declaration that the 2nd Defendant is the rightful owner of Plot No. 329 of Kamae Re-settlement Project Phase 2.
 - b. A declaration that the plaintiff has acquired her ownership through fraud, misrepresentation, illegally or through a corrupt scheme thus her ownership ought to be impeached.
 - c. A permanent injunction restraining the plaintiff, her servants, agents and workmen from transferring, disposing off, alienating, wasting or in any manner interfering with plot No. 329 of Kamae Resettlement project phase.
 - d. General damages for trespass, costs and interests of this suit.

Hearing and Evidence

- 7. PW1, the Plaintiff, adopted her written statement filed on 24th October 2017. In her statement, she averred that on 11th September 2003, she purchased the suit property from the 1st Defendant; that she was issued with a certificate of ownership and an official receipt as proof of ownership and that she returned to her property only to find it occupied and with a development underway.



8. It was the evidence of PW1 that she sought redress from the Scheme's officials in vain; that she approached the provincial administration but was taken in circles and that she has reason to believe that her property was grabbed. PW1 informed the court that her certificate was the first in time.
9. In cross-examination, PW1 testified that she has a receipt from Savannah Surveyors; that she received the certificate of ownership from Paul Muiruri, a councillor and official of the Kamae Project; that she did not know how to read but realized that her certificate was signed by the MP, DO and a surveyor and that she could not confirm whether the MP or the DO owned land in Kamae.
10. PW1 also produced a bundle of documents, PEXB1, which included an ownership certificate of Kamae Re-settlement Project Phase 2, Plot Number 329, an official receipt from Savannah Land Surveyors for Kamae Re-settlement Project Phase 2, Plot Number 329 and an allotment card.
11. DW1, the 2nd Defendant, relied on his written statement dated 8th November 2021. He stated that he purchased the suit land from Ann Mbala on 14th September 2004 at a consideration of Kshs. 55,000/- and signed a sale agreement of the same date and that he was issued an ownership certificate on 15th December 2008 and a letter from the 1st Defendant dated 6th June 2014 indicating he was a bona fide member.
12. DW1 also produced in evidence a register of members of the 1st Defendant, which included his name. He averred that he has been living on the suit property with his family for more than 15 years and has made developments thereto. DW1 testified that Alex Bunyie issued him a certificate of ownership which was signed by the treasurer and chairman and that the Plaintiff came to the suit property with the Chief and that when the Chief went through the register, he confirmed that he is the owner of the land.
13. During cross-examination, DW1 testified that he was issued with the certificate in 2008; that Ann Mbala had a certificate in her name but when the land was transferred, he was issued a fresh certificate; that he confirmed that the name of Ann Mbala was in the register and that the chairman who signed his certificate in 2008 has since deceased.
14. DW1 produced in evidence a bundle of documents, DEXB1, which included the ownership certificate for Plot No. 329; the ballot issued by Kamae Resettlement Scheme; the sale agreement dated 14th September 2004; Kamae Resettlement Scheme letter dated 6th June 2017 and a register of members of Kamae Resettlement Scheme.
15. DW2, George Mwaura, informed the court that he was the Secretary of Kamae Settlement Scheme. He stated that the 2nd Defendant is the owner of Plot No. 329, Kamae Settlement Scheme. It was the evidence of DW2 that the register shows that the 2nd Defendant is the owner of the suit property and that Ann Mbala was the first allottee of the suit land and a member of the 1st Defendant.
16. According to DW2, Ann Mbala transferred the suit land to the 2nd Defendant, as indicated on the register 'TR' meaning transfer. DW2 averred that the scheme does not recognize the Plaintiff's claim and that the Plaintiff's name does not appear on the register.
17. DW2 further testified that the signatures in the 2nd Defendant's certificates are not signed by their officials; that the 2nd Defendant's certificate was signed by the 1st Defendant's officials and the stamp on it belongs to the 1st Defendant and that the letter dated 6th June 2016, confirms the land is in the 1st Defendant's name.



18. DW3, Julius Ng'anga, the 1st Defendant's Chairman relied on his statement dated 8th November 2021. He testified that the 2nd Defendant is a member of the 1st Defendant's project and is listed as member number 34 holding ownership certificate number 249 in the register of members.
19. It was the evidence of DW3 that before the transfer, the plot belonged to Ann Mbala, who was a member of the Scheme; that the certificate of ownership dated 15th December 2008 was signed by the deceased Chairman, and that the Plaintiff's certificate does not emanate from their offices. It was his evidence that he authored a letter dated 6th June 2014 confirming that the land belongs to the 2nd Defendant.
20. In Cross-examination, DW3 testified that the Scheme had government land; that they registered the land as a group; that they do not have a certificate of title for the land but the land was surveyed in 2023 and that he had been the Chairman of the Scheme since 2013.

Submissions

21. Counsel for the Plaintiff submitted that the Plaintiff is the owner of the suit property and that the 2nd Defendant entered the suit property without the Plaintiff's consent and commenced construction. Counsel further submitted that the 2nd Defendant has illegally trespassed into the suit property and has permanent houses on the land without the Plaintiff's consent and that the Plaintiff has consequently suffered loss and has not been able to enjoy quiet possession of her property.
22. Counsel relied on the provisions of Section 3(1) of the *Trespass Act*; the definition of trespass in *Clerk & Lindsell on Torts* 18th Edition at paragraph 18-01 and on numerous cases including *Rhoda S. Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited* [2019] eKLR, *Philip Ayaya Aluchio v Crispinus Ngayo* [2014] eKLR and *Richard Barongo Opanga v Sabina Kerubo Ogori & 3 Others* [2021] eKLR.
23. Counsel for the 2nd Defendant submitted that the Plaintiff had a duty under Section 107 of the *Evidence Act* to prove the claim in her Plaint; that the Plaintiff's case had a myriad of discrepancies and that although she claims to have bought the suit from the 1st Defendant, the receipt was issued by Savannah Land Surveyors.
24. It was submitted that the certificate of ownership was signed by the MP Kasarani, DO Kasarani and a surveyor, none of whom were called as witnesses; that the Plaintiff was not a shareholder of the 1st Defendant and that she failed to produce a sale agreement or any evidence to show that she purchased the suit property from the 1st Defendant.
25. Counsel submitted that the Plaintiff failed to discharge her evidential burden under the law. Counsel relied on the decisions in *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR and *Kenya National Highway Authority v Shalien Masood Mughal & 5 Others* [2017] eKLR, which required the Plaintiff to go beyond the certificate of title as proof of ownership.
26. Counsel submitted that the 2nd Defendant, on his part, had proved the root of title and adduced evidence to show how he acquired the suit plot, including a certificate of ownership, the sale agreement, and a letter issued by the 1st Defendant.
27. Counsel further submitted that the Plaintiff had confirmed through her testimony in court that she entered the suit property and started developing it and that the court therefore ought to award the 2nd Defendant general damages of Kshs. 2,000,000 to factor in the repeated trespass of the Plaintiff.



Counsel relied on Section 3 of the Trespass Act and the Court of Appeal case of Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited [2017] eKLR.

Analysis and Determination

28. Upon consideration of the Plaintiff, the Defence, the evidence and submissions, the issues for determination before this court are as follows:
- a. Whether the Plaintiff or the 2nd Defendant is the rightful owner of the suit land.
 - b. The orders that the court should issue.
29. The central dispute between the parties is the question of ownership of the suit property, Kamae Re-settlement Project Phase 2, Plot Number 329. The Plaintiff avers that she acquired the suit property on 11th September 2003 and was issued with a certificate of title with an official receipt.
30. On the other hand, the 2nd Defendant averred that he purchased the suit property on 14th September 2004 from Ann Mbala who was the first owner through an allotment from the 1st Defendant, and that he was issued with an ownership certificate No. 249 on 15th December 2008 by the 1st Defendant.
31. It is not disputed that the 2nd Defendant and his family have been in occupation of the suit land and have since erected semi-permanent and permanent structures on the land. The Plaintiff has consequently urged this court to find that the 2nd Defendant has trespassed onto her property and has sought for damages. The 2nd Defendant also asserts that the Plaintiff trespassed onto the suit land.
32. The right to own and acquire property in Kenya is anchored under Article 40(1) of the Constitution of Kenya. The said Article provides as follows;
- “(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
- (a) of any description; and
 - (b) in any part of Kenya.”
33. It is trite that a certificate of title is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. Section 26 of the Land Registration Act sets out the principle of indefeasibility of title as follows:
- “(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”



34. In this case, neither the Plaintiff nor the 2nd Defendant have title to the property. They have however adduced ownership certificates to the suit property which they claim were issued to them by the 1st Defendant, which is a settlement scheme.

35. In ascertaining between the parties' claims as to who is the rightful owner of the suit land, this court must interrogate the root of title and the documentary evidence presented by the parties. This position was articulated in *Caroline Awinja Ochieng & another v Jane Anne Mbithe Gitau & 2 Others* [2015] eKLR as follows:

“In determining the above issue, it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.

The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’: per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.

The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.”

36. It is trite that the person who alleges must prove. Section 107 of the *Evidence Act*, 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.”

37. The suit property is part of Kamae Resettlement Scheme. From the testimony of DW3, who is the current Chairman of the Scheme, the 1st Defendant was allocated public land by the government; that the scheme was registered as a group and that the scheme has not been issued with a title although the land was surveyed and plots allocated to members.

38. The allocation of plots in Kamae Settlement Scheme is linked to membership in the scheme and their acquisition of shares. According to the evidence before this court, the members have been allocated the subdivided plots within the scheme and ownership certificates issued as proof of ownership.

39. In order to prove ownership of a plot in the scheme, it was imperative for the parties to adduce an ownership certificate, receipts of payment, a ballot and a register of members with their name included.



40. In buttressing her claim of ownership, the Plaintiff adduced in evidence ownership certificate for the suit land, a receipt from Savannah Land Surveyors and a ballot of the suit land. This court however notes that the ownership certificate was signed by the Chairman as well as the Member of Parliament (MP) and District Officer (DO) Kasarani and a Surveyor as opposed to the officials of the Scheme.
41. As aptly submitted by DW2, the 1st Defendant's ownership certificates are signed by officials of the 1st Defendant. It is thereby querulous that the Plaintiff's certificate would be executed by non-officials of the 1st Defendant, namely, the MP Kasarani, DO Kasarani and a Surveyor.
42. In order to discharge the burden of proof, it was imperative for the Plaintiff to present oral testimony of the persons who executed the certificate of ownership to prove her case or even the testimony of officials from Kamae Re-settlement Project. She failed to do so and could not confirm whether the MP and the DO who signed the certificate of ownership owned any land at Kamae.
43. While the Plaintiff also presented a receipt for the land, the receipt was not issued by the 1st Defendant, rather it was issued by a surveyor, Savannah Land Surveyors. In addition, this receipt was not for the purchase of the plot, but for survey fees.
44. In the absence of a register of members indicating that the Plaintiff is a member of the 1st Defendant and in the absence of evidence of proof of payment to the 1st Defendant for the land, this court finds that the Plaintiff has failed to discharge her burden of proof and has not established the root of her title.
45. The 2nd Defendant, on his part, has adduced an ownership certificate signed by the Scheme's Chairman and Treasurer, a ballot issued by the 1st Defendant, a Sale Agreement dated 14th September 2004, a letter from the 1st Defendant confirming his ownership of the suit property and a register of members of Kamae Resettlement Scheme in which he is listed as Member 34.
46. The 2nd Defendant presented the testimonies of two witnesses who are the officials of the 1st Defendant, DW2 and DW3. These two witnesses confirmed the validity of the ownership certificate issued by the 1st Defendant to the 2nd Defendant. On the other hand, they testified that the Plaintiff's certificate of ownership did not originate from them and that the Plaintiff's name did not appear in their register of members.
47. This court, therefore, is persuaded by the 2nd Defendant's evidence and finds that he has established the validity of his ownership over the suit land. The 2nd Defendant has sought that this court find that the Plaintiff committed trespass and should pay damages for the same. Section 3 (1) of the [Trespass Act](#) provides that:
- “ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
48. [Clerk & Lindsell on Torts](#) 18th Edition at paragraph 18-01 defines trespass as follows:
- “ Any unjustifiable intrusion by one person upon land in possession of another...Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession.”
49. This court has already established that the 2nd Defendant is not only in possession of the suit land, but also has a lawful title to it. Further, the Plaintiff, by her own admission, deponed in court that she has been to the suit property multiple times in the company of the Chief. Indeed, any intrusion on a proprietor's land constitutes trespass against which such proprietor requires protection from the law.



50. It is clear that the 2nd Defendant has proved his case and is therefore entitled to the orders he has sought. Trespass is actionable per se and this court finds that the Plaintiff trespassed on the 2nd Defendant's land.
51. Considering the nature of the trespass and the fact that the Plaintiff is vulnerable, being an illiterate elderly woman who was evidently the victim of fraud, and in view of the fact that the 2nd Defendant has always been in possession of the suit property, I will not award the 2nd Defendant any damages for trespass.
52. The upshot of the above analysis is that this court finds in favour of the 2nd Defendant and issues the following orders:
- a. A declaration be and is hereby issued that the 2nd Defendant is the rightful owner of Plot No. 329 of Kamae Re-settlement Project Phase 2.
 - b. A permanent injunction be and is hereby issued restraining the Plaintiff, her servants, agents and or workmen from trespassing, transferring, disposing off, alienating, wasting or in any manner interfering with plot No. 329 of Kamae Resettlement project phase.
 - c. The Plaintiff to pay the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 22ND DAY OF JUNE, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Munene for Plaintiff

Mr. Kuria for 2nd Defendant

Court Assistant - Tracy

