



Wambugu & another v Muhamed & 3 others (Environment & Land Case 142 of 2019) [2023] KEELC 18669 (KLR) (15 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18669 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 142 OF 2019**

**LL NAIKUNI, J
JUNE 15, 2023**

BETWEEN

DAVID NDIANGUI WAMBUGU 1ST PLAINTIFF

**PAUL MUGECHA (SUING AS THE LEGAL ADMINISTRATOR OF THE
ESTATE OF BISHOP BAPTIST MUGECHA) 2ND PLAINTIFF**

AND

REHEMA MUHAMED 1ST DEFENDANT

MUHAMMAD OMAR 2ND DEFENDANT

PAUL TSUMA 3RD DEFENDANT

KOMBO NYIRO 4TH DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgement of this Honorable Court pertains to the suit that was instituted by Mr. David Ndiangu Wambugu and Mr. Paul Mugecha (suing as the legal administrator of the estate Bishop Baptist Mugecha) the 1st and 2nd Plaintiffs herein against the 1st, 2nd, 3rd and 4th Defendants herein through a Plaint dated 31st July, 2019 brought to Court under a Certificate of Urgency and Notice of Motion application dated even date. They filed it on the same day.
2. On 10th July, 2020 through a 7 Paragraphed Affidavit of Service prepared under the provision of Order 5 Rules 15 (1) of the Civil Procedure, Rules, 2010 sworn by Mr. Terrence Omondi a duly appointed Court Process Server of the High Court sworn on and filed on even date indicated that the 1st, 2nd, 3rd & 4th Defendants were duly served with all the pleadings filed by the Plaintiff herein.



3. Despite of service of summons and a hearing notice, the 1st, 2nd, 3rd and 4th Defendants never entered appearance nor filed any Defence as required under the provisions of Order 6, 7 and 11 of the Civil Procedure Rules, 2010. Pursuant to this, on 13th July, 2020, the Honorable Court being satisfied that the service was proper, it directed that the matter proceeds on for formal proof accordingly.
4. On 25th January, 2022 the matter came up for formal proof hearing. Mr. Odhiambo Advocate was present for the Plaintiffs. The matter proceeded on in earnest and was concluded the same date.

II. The Plaintiff's case

5. From the pleadings, at all material times, the 1st and 2nd Plaintiffs the legal and absolute registered owners to all that parcel of land known as Land Reference Numbers MN/VI/4749 contained in Grant Number CR. 56244 measuring approximately 3.970 HA and delineated on Land Survey Plan Numbers 327652 (Hereinafter referred to as "The Suit Land"). It is at Changamwe.
6. The Plaintiffs averred that via a letter dated 25th June, 19192, they wrote to the then Commissioner of lands requesting a parcel of land encompassed in the development plan the purposes of carrying out business therein after they had spotted and found the same to be vacant government land. The then Government of Kenya offered a grant of the parcel of the land that was then edged red on an attached Plan number 123. CT.9.92 subject the Plaintiff's formal written acceptance of the conditions and payment of the charges prescribed in the Letter of Allotment. Upon the payment of the prescribed fee of a sum of Kenya Shillings Two Fifty Three Thousand Four Hundred (Kshs. 253, 400.00/=) outlined in the Letter of Allotment, the Government of Kenya registered the Plaintiffs as the legal proprietors of the suit property. Hence the Plaintiffs became the lawful owners to the said property. They hold the original title documents.
7. Following the purchase of the property, the Plaintiffs were granted vacant possession of the suit property after which they undertook to fence it for purposes of marking the boundaries and carrying out of their business. Sine then, the Plaintiffs had been enjoying quite possession over the said suit property until they retired and moved to Nyeri where they had their families.
8. On or about May and early June, 2019, the Defendants herein only known to them by their first names, amongst other squatters without any justifiable reasons invaded the suit property and occupied it. They maliciously damaged the fence. With each passing day the number of squatters would continue increasing. They are very combative and have been sub – dividing the land and selling to others and erecting illegal structures thereon. Their acts of trespassing had been depriving the Plaintiffs of their proprietary rights.
9. At the same times back, the Government of Kenya had earmarked two acres out the suit land for purposes of constructing the Standard Gauge Railways (SGR). This could not happen due to the acts of the trespass by the Defendants. The Plaintiffs had tried all means including using the Chief's offices and the police to evict the Defendants from the suit land without success as they have always been defiant and violent. It for all these reasons that the Plaintiffs decided to institute this suit. They prayed that Judgement be entered against the Defendants jointly and severally for:-
 - a. Declaration that the Defendants are trespassers on the suit premises.
 - b. An order for eviction from the suit property.
 - c. An order do attach for Assistance of the Officer in-Charge, Changamwe Police Station and the Officer Commanding Police Division (OCPD) Mombasa, to supervise and provide security during the eviction process.



- d. Vacant possession of the suit property.
- e. A Permanent injunction restraining the Defendants whether by themselves, servants, agents, employees, relatives, or any other person from remaining on or continuing to be in occupation of the suit properties.
- f. Costs of the suit.

II. The testimony by the Plaintiffs.

Examination in Chief of PW – 1 by Mr. Odhiambo Advocate

10. PW - 1 was sworn and testified in English. He stated that he was called David Ndianguui Wambugu. He was the holder of the national identity card bearing numbers 5552351. He stated that he was the Plaintiff in this matter. He lived in Nyeri, Muthuaire sub location. He was the owner of the suit property. The suit property was Land Reference numbers MN/VI/4749 Grant No. CR 56244 measuring approximately 3.970 hectares. He produced the Grant and which was marked as Plaintiff Exhibit - 2 which was issued on 1st January, 1993.
11. His testimony was that vide a letter dated 25th June 1992 which they wrote to the then Commissioner of Land requested a parcel of land (see Paragraph 3 of Plaintiff Exhibit No. 3) and a Letter of allotment dated 19th January, 1993, the Government of Kenya then offered the Late Bishop Butisa John Mugeca and himself a Grant of the Parcel of land all marked as Plaintiff Exhibit No. 4. On 8th October, 2020 they conducted an official search and it confirmed then that the land was there. The search was marked as Plaintiff Exhibit No 5. He came to court because the land had been invaded by trespassers and squatters. They had prevented them to access the land or carry out any activities on it. There were about 50 person who trespassed. They had built temporary and semi – permanent structures on the land (referred to the contents of Paragraphs 9, 10, 11 and 12 of the Plaint.
12. There were a set of Photographs marked as Plaintiff Exhibit 5 (a), (b) and (c). They had been there for over 10 years. They started in small number which kept on growing from the year 2000. Most of them did not live on the land. Bishop Mugesha passed on in the year 2000. In the year 2015, the Government announced that for those parcels that had been taken away for compulsory acquisition for the construction of the SGR present a survey report for purposes of compensation. It was then that he discovered his land had been invaded by the Defendants.
13. He testified that from there on he reported the matter to the Police based at the Changamwe Police Station. A formal complaint was recorded in OB/21/12/07/19 reported at 0955 hrs. Nonetheless, the police refused to assist. They saw a notice published in the Kenya Gazette indicating that the Government had taken 0.5 hectares of land but he had not been compensated as yet. On the second time they were informed that the Government had taken 1.3 hectares though still awaiting compensation from the Government. He asked to be compensated a sum of Kenya Shillings Fifty Million (Kshs. 50,000,000/-). Despite of this they had never been paid. There existed no dispute between then and the squatters.
14. Mr. Paul Mugecha was the son to the late Bishop Butisa John Mugeca – the 2nd Plaintiff. He had Grant Letters of Administration nor Ad litem. He should be treated as a witness with regard on safeguarding their interest and preserving of the suit land. The Defendants were the people on the land. He used a friend who was on the ground and conducted an intensive investigation whereby they were able to arrive at these names.



15. He told the Court that by this time there were only structures in existence. The Defendants were fully aware of this suit being owned by the Plaintiffs. This was because they had previously been engaged in land cases with them before the Commissioner of land. In all these cases, they had always failed to prove ownership of the suit land. Further, the Defendants had been served twice with the pleadings and there existed an affidavit of service marked as Plaintiff Exhibit 6. He was in court for orders as sought in the Plaint as prayed. He wished to have his statements adopted as evidence. PW – 1 relied and produced the following five (5) exhibits and marked as Plaintiff Exhibits 1 to 5 (a), (b) & (c) respectively from the Lists of documents dated 31st July, 2019. These were:-
- a. A copy of the application Letter to the Commissioner for Lands dated 25th June, 1992;
 - b. A copy of the Letter of Allotment dated 19th January, 1993;
 - c. A copy of the Title document;
 - d. A copy of postal search dated 1st February, 2019;
 - e. A set of three (3) coloured photographs.

II. Submissions

16. On 25th January, 2022, immediately after the closure of the Plaintiff's case, the Honorable Court directed the Advocate for the Plaintiff to file written submissions in support of this suit. Thereafter, on 31st October, 2022 the Plaintiff having fully complied and the Honorable Court reserved a date for delivery of Judgement accordingly.

A. The Written Submission by the Plaintiff

17. On 16th February, 2022, the Learned Counsel for the Plaintiffs, the Law firm of Messrs. Derrick Odhiambo Advocates, filed their written submissions dated 15th February, 2022 in support of the Plaintiff's suit. The Learned Counsel submitted that the suit is by the Plaintiffs who are the beneficial owners of the whole parcel of land known as L.R number MN/VI/4649 contained in grant number 327652 hence they hold the original title documents for the same.
18. The Plaintiffs' claim against the 1st, 2nd, 3rd & 4th Defendants was that the Defendants invaded the Plaintiffs land as squatters. They were wasting away the land. They had constructed several makeshifts and semi-permanent housing structures and also invited other squatters to occupy the suit land. They had also caused the sub – division of the land and selling to other unsuspecting squatters.
19. In his submissions, the Learned Counsel relied on the following three (3) issues. Firstly, whether the Plaintiff effected service upon the Defendants. The Learned Counsel submitted that this matter commenced afresh before this Honorable Court on 31st July 2019 through a Notice of Motion dated 4th December 2019. Later on, the matter was fixed for several Mentions to confirm whether the Plaintiffs had effected service upon the Defendants and whether they entered appearance being on particular dates of 31st July, 2019, 17th October, 2019, 23rd October, 2019, 4th December, 2019, 18th February, 2020, 9th March, 2020, 13th July, 2020, 6th October, 2020, 3rd December, 2020, 5th July, 2021 and 28th October, 2021. Finally, the Court directed that there be a formal proof hearing to be conducted on 25th January, 2022. In all the above dates, the Plaintiffs were put on task by the Presiding Judge to show evidence of service and demonstrate whether he knew the Defendants.
20. The Plaintiff in viva voce evidence said he knew most of the Defendants' in person. The Learned Counsel submitted on matters of facts that the Plaintiffs were able to demonstrate that they were able



to serve the Defendants through filing of an Affidavits of Service. According to the evidence of PW – 1, he demonstrated how he effected service including personal service of the Defendants while at the suit property at Miritini Maganda SGR village area. PW - 1 also informed the Court that he had litigated with the Defendants at Changamwe Police over the same suit property as evidenced from the OB NO. 21/12/07/19 reported at 09:05hrs. Further, they had also had the same land dispute heard before the Kenya National Land Alliance Tribunal which bore no fruit hence his decision to invoke the Jurisdiction of this Honorable Court. PW - 1 also informed the court that he stopped visiting the suit property when the Defendants turned hostile against him. The Learned Counsel submitted that the Defendants were aware of this suit and elected not to defend thus wavering their own rights to be heard.

21. Secondly, on whether the Plaintiff had proven his case. The Learned Counsel averred that the Plaintiff was a senior citizen of 87 years. He testified under oath and proved his case by demonstrating how he acquired the suit property in the year 1993 by way of letter of application to the Commissioner of Land dated 25th June 1992. He stated that later on he was issued with a Letter of Allotment dated 19th January, 1993 whereby he paid the government requisite fee. He was later on awarded with a Certificate of Title and he assumed vacant possession and ownership of the suit property immediately.
22. The Learned Counsel contended that the Plaintiff also presented a Certificate of Postal Official to prove that he was the proprietor. Additionally, he produced maps of the suit property and photographic evidence of the property and the illegal structures thereon. To him, all the above stated evidence were specifically produced to prove by way of original documents and national identity card of Plaintiff. Therefore, the Learned Counsel held that from the facts and evidence had been proved. Thus, he submitted that ownership of the suit premises was not in dispute and the pleaded encroachments and trespass by the Defendants was an affront to Plaintiff's right to enjoy his property.
23. Finally, on whether the Plaintiff was entitled to the orders sought, the Learned Counsel submitted that this matter was a case of law, facts and evidence. To him, the Plaintiff had proved that he had met the threshold to be awarded all the prayers as pleaded in the Plaint. The Plaintiff was entitled to the orders sought on account that he had proved absolute ownership and was holding ownership instruments, Undisputedly, the Plaintiffs were the registered owners of the suit property and to entertain the Defendants further was tantamount to be sustaining an illegality. Thus, taking that the case was undefended, the Plaintiffs prayed they be granted all the prayers as pleaded.

III. Analysis and Determination

24. I have carefully read and analyzed all the pleadings herein, both the oral and all the documentary evidence adduced in court, the written submission, the cited authorities made by the Plaintiffs and the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
25. In order to arrive at an informed, just and fair decision, this Honorable Court has framed the following four (4) salient issues for determination. These were:-
 - a. Whether service of Summons to Enter Appearance and hearing notices were properly effected upon the Defendant warranting for formal proof hearing.
 - b. Whether the Plaintiffs have proved their case.
 - c. Whether the Plaintiffs were entitled to relief sought from the filed pleadings.
 - d. Who meets the costs of the suit?



Whether service of Summons to Enter Appearance and hearing notices were properly effected upon the Defendant warranting for formal proof hearing.

26. Under this sub heading, the issue of the service of the Summons to Enter appearance is pertinent in the given circumstances surrounding this case. For that reason, the Honorable Court wishes to address the matter more critically. From the evidence adduced herein, I have taken great cognizance of the fact that despite of the fact that the Defendants were properly served with notices and were all along aware of this matter, they never entered appearance. Clearly, I reiterate that from the above evidence on service, the issue of proper and effect service upon the Defendants is not in any doubt. It follows that the formal proof conducted by Court was by all means inevitable. Resultant, the Court has had to deal on the issue of the legal ownership of the suit property.
27. The provision of Section 24 of the *Land Registration Act*, No. 3 of 2012 provides that subject thereto:-
- a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of lease
28. Further, the provisions of Section 25 of the *Land Registration Act* states as follows:-
- “(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an Order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:—
- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.
29. While the provision of Section 26 states 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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”.

30. The provision of Section 107 of the *Evidence Act* Cap 80 of the laws of Kenya states that:-

“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”.

31. Therefore, the onus is on the Plaintiffs to tender evidence proving the facts he alleges on a balance of Probability. To begin with its on the issue of the legal and proprietorship of the suit property. The Plaintiffs herein have produced evidence which stands unchallenged that he acquired the suit property in the year 1993 by way of letter of application to the Commissioner of Land dated 25th June 1992, later he was issued with letter of allotment dated 19th January,1993 he paid the government requisite fee, was issued with letter of allotments on 19th January 1993 and was later awarded with certificate of title and the assumed vacant possession and ownership immediately.

Whether the Plaintiffs have proved their case, and IF SO, Whether the Plaintiffs were entitled to relief sought from the filed pleadings.

32. In view of the foregoing provisions of Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of 2012, the Certificate of the title held by the Plaintiffs to the suit property would only be challenged successfully on allegations of fraud, mistake or omission whereby the Plaintiffs were a party to the fraud.

33. Secondly, it is trite law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue. Therefore in the circumstances this Court is inclined to find that the Plaintiffs are the legal and absolute registered owners of the suit property with indefeasible title, interest and rights vested on them to the suit property by law. Besides, the title has not been challenged by the Defendant’s and or any evidence to the contrary presented.

34. Furthermore, On whether the Defendants are trespassing, this Court having found the 1st Plaintiff the legal proprietor of the suit property, it is apparent that the Defendants’ occupation of the land amounts to trespass. Trespass is defined under the provision of Section 3 (1) of *Trespass Act* Cap 294 as follows:-

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on or cultivates or grazes stock or permits stock to be on private land without the consent of the occupier therefore shall be guilty of an offence”

From the book “Clark & Lindsell on Torts 12th edition” Paragraph 113, defines trespass as follows

“trespass to land consists in any unjustifiable infusion by one person or property upon land in the possession of another”



Thus trespass is an intrusion by a person into the land of another, especially wrongful entry on another's real property who is in possession and ownership. While 'Continuous trespass' is trespass in the nature of permanent invasion on another's rights, such as a sign that overhangs another's property".

In the case of "Lutaaya – Versus- Sterling Civil Engineering (Supra) the court stated as follows regarding the tort of trespass to land:-

"Trespass to land occurs when a person makes unauthorized entry upon land and thereby interferes or portends to thereby, therefore with another's lawful possession of that land. Needless to say, the tort of trespass to land is committed not against the land but against the person who is in actual or constructive possession of the land. As common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass. Thus the owner of unencumbered land has such capacity to sue, but a land owner who grants a lease of his land does not have capacity to sue because he pa..... with possession of land"... where trespass is continuous, the person with the right to suesubject to the law on limitation of action exercise the right immediately after the trespass commences or any time during its continuous or after it has ended.

Further according to Clerk & Lindsell on Torts, 19th Edition the writer states at Paragraphs 9 - 13:-

"Proof of ownership is Prima Facie of possession, unless there is evidence that another person is in possession but if there is a dispute as to which of the two persons are in possession the presumption is that the person holding title to land is in possession."

35. It is now well established that trespass to land is actionable per se (without proof of any damage). See the case of Park Towers Limited – Versus - John Mithamo Njika & 7 others (2014) eKLR where J.M Mutungi J. stated:-

"I agree with the Learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case.....".

36. Therefore, from the inferences and the facts adduced herein, I discern that there exists trespass meted by the Defendants herein and hence they are all liable to boot. The Defendants should be made to bear the general damages arising from the action of trespass thereof.

Who will bear the Costs of the suit.

37. It is now well established that the issue of costs is at the discretion of the Court. Costs means the award that a party is granted at the conclusion of any legal action and/or proceedings in any litigation. The proviso of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By events it means the result or outcome of the legal action. See the cases of "Rosemary Wambui Mnene – Versus – Ihururu Dairy Co – operatives Societies Limited (2014) eKLR and Kenya Sugar Board – Versus – Ndungu Gathini (2016) eKLR.

38. In the instant case, the 1st and 2nd Plaintiffs herein have been able to establish that they have a prima facie case. From the adduced documentary and oral evidence, it is abundantly clear that they are the absolute and legal registered owners of the suit land and that the 1st, 2nd, 3rd and 4th Defendants are



merely trespassers onto the suit land. For these reasons therefore, the Plaintiffs are entitled to the costs of the suit hereof.

IV. Conclusion and Disposition

39. Ultimately, after taking into consideration the natural justice, Conscience and Equity, the Honorable Court is satisfied that it ought to exercise its discretion in favour of the Plaintiffs on the preponderance of probabilities. Therefore, the suit for the Plaintiffs succeeds. For avoidance of doubt, I specifically proceed to make the following orders:-
- a. THAT Judgement be and is hereby entered in favour of the 1st and 2nd Plaintiffs as against the 1st, 2nd, 3rd and 4th Defendants jointly and severally.**
 - b. THAT a declaration be and is hereby made that the 1st, 2nd, 3rd and 4th Defendants herein are trespassers on the suit premises.**
 - c. THAT an order for eviction within the next ninety (90) days from the date of delivery of this Judgement pursuant to the provision of Section 152 E of the Land Act, No. 6 of 2012 do hereby issue as against the 1st, 2nd, 3rd & 4th Defendants from the suit property.
 - d. THAT an order do hereby issue for Assistance of the Officer in-Charge, Changamwe Police Station and the Officer Commanding Police Division (OCPD) Mombasa, to supervise and provide security during the eviction process.
 - e. THAT an order hereby do issue for the vacant possession of the suit property by the 1st & 2nd Plaintiffs within the next 30 days of this Judgment.
 - f. THAT an order do and is hereby issued of a Permanent injunction restraining the 1st, 2nd, 3rd & 4th Defendants whether by themselves, servants, agents, employees, relatives, or any other person from remaining on or continuing to be in occupation of the suit properties.
 - g. THAT an order made that the 1st and 2nd Plaintiffs be awarded a sum of Kenya Shillings One Million (Kshs. 1, 000, 000.00) as nominal damages for the breach of trespass caused by the Defendants onto the land belonging to the Plaintiffs.
 - h. THAT Costs of the suit to be awarded to the 1st and 2nd Plaintiffs to be borne by the 1st, 2nd, 3rd & 4th Defendants jointly and severally.

IT IS SO ORDERED ACCORDINGLY.

JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS15THDAY OFJUNE.....2023.

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HON. JUSTICE L. L. NAIKUNI (JUDGE)
ENVIRONMENT AND LAND COURT AT
MOMBASA

Judgement delivered in the presence of:-

- a. Ms. Yumna the Court Assistant.
- b. No appearance for the 1st & 2nd Plaintiffs.
- c. No appearance for the 1st, 2nd, 3rd & 4th Defendants

