



Kinuthia v David Jomo Muigai (a.k.a Dancan Tour Kiama (Jomoo) (Environment & Land Case 415 of 2019) [2023] KEELC 19169 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19169 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 415 OF 2019
OA ANGOTE, J
JULY 27, 2023**

BETWEEN

RUMBA KINUTHIA PLAINTIFF

AND

**DAVID JOMO MUIGAI (A.K.A DANCAN TOUR KIAMA
(JOMOO) DEFENDANT**

JUDGMENT

Background

1. Vide a Complaint dated 26th December, 2019, the Plaintiff instituted this suit against the Defendant seeking the following reliefs;
 - i. That there be a permanent injunction stopping the Defendant, his servants/agents and any other person or persons claiming through him, to trespass, deal in, sell, alienate, fence, construct on, put any signs on, sub-divide, demarcate, erect beacons or in any other way or manner deal with any of the following pieces or parcels of land owned and/or registered in the name of the Plaintiff. [Nairobi Blocks 136/621, 136/602, 136/1120, 136/624, 136/642, 136/606, 136/640, 136/616, 136/623, 136/603, 136/622, 136/617, 136/619, 136/639 or any of the six plots directly adjoining the above 14 plots to the western end of the suit premises.
 - ii. That the Officer Commanding Ruai Police Station be tasked with effecting Orders No 1 above.
 - iii. That the Defendant be condemned to pay costs of the suit together with interest at Court rates.



- iv. That this Honourable Court issue any further order as it may seem fit under the circumstances.
2. It is the Plaintiff's case that he has at all material times been making plans to develop a private boarding school on the suit properties and has been in talks with strategic partners to kick off the intended project; that notwithstanding the fact that he has titles to the suit plots, upon visiting them in December, 2019, he found a surveyor demarcating and erecting beacons thereon and that he proceeded to Ruai Police Station where he lodged a complaint booked as OB-No 30/21/19.
3. The Plaintiff averred in the Plaint that when he requested for copies of the Title/Lease Certificate, and a copy of the Defendant's Identity Card to facilitate a search, he was referred to the Defendant's Advocate who despite promising to get back to him with the aforesaid details, failed to do so; that he managed to get a copy of the map that was being used to sub-divide his land and that the aforesaid events prompted him to file the present case to safeguard his property.
4. The Defendant entered appearance but did not file a Defence.

Hearing & Evidence

5. The matter proceeded for hearing on 15th June, 2022. The Plaintiff, PW1, adopted his witness statement dated 26th December, 2019 as his evidence in chief and produced the list of documents of an even date as [PEXHB-1]
6. It was his testimony that sometime in the years 1998 and 1999, he purchased 20 plots formerly owned by Embakassi Ranching Company Ltd measuring approximately one-quarter of an acre each; that between 2008 and 2009, he obtained fourteen leasehold titles for the 20 plots which are adjacent to each other being 136/621, 602, 1120, 624, 642, 606, 640, 616, 623, 603, 622, 617, 619, 639 and that the remaining six titles are at an advanced stage of processing.
7. PW1 testified that since obtaining his titles, he has been planning to develop the suit properties and has had discussions with respect to constructing a boarding school thereon and that despite not fencing the plots, he has been making frequent visits to safeguard them from encroachment and/or grabbing.
8. According to the Plaintiff, sometime in December, 2019, he discovered that people were sub-dividing and erecting beacons on the properties; that he reported the matter at the Ruai Police Station and the same was recorded as OB 30/21/19; that upon the advice of the investigating officer, he returned to the properties posing as a buyer and determined that it was the Defendant who was claiming ownership- of the suit land and that he further learned that the Defendant has an alias-Dancun Tour Kiama(Jomoo).
9. PW1 testified that in the process of discussions with the Defendant, he managed to take a photo of the alleged map used by the Defendant to sub-divide the property; that his attempts to get copies of title or identification documents from the Defendant's Advocates proved futile and that the aforesaid events prompted the institution of this suit.
10. The Defendant did not participate in the trial.

Submissions

11. The Plaintiff's Counsel submitted that the Plaintiff gave uncontroverted evidence setting out the Defendant's illegal actions with respect to the suit property and that the Plaintiff is the legal and equitable owner of the suit property pursuant to the provisions of Section 24 of the [Land Registration Act](#) and is entitled to all the rights accruing therefrom.



12. It was submitted by counsel that it is apparent from the evidence adduced that the Defendant was engaged in fraudulent actions in an attempt to deprive the Plaintiff of his property contrary to the provisions of Article 40 of *the Constitution*; that as expressed by the Court in *Motex Knitwear Limited vs Gopitex Knitwear Mills Limited* [2009]eKLR, in the absence of evidence by a party, its pleadings remain mere statements and that the suit herein being undefended, the Court should grant the orders as prayed.

Analysis & Determination

13. Having carefully considered the pleadings, testimony and submissions, the sole issue that arises for determination is whether the Plaintiff is entitled to the orders sought.
14. The Plaintiff instituted this suit seeking inter-alia, permanent injunctive orders restraining the Defendant or any person claiming under him from interfering with the suit properties. It is the Plaintiff's case that he purchased the suit properties being twenty in number from Embakasi Ranching Company Ltd sometime in 1998 and 1999 and that he obtained titles for 14 of out the 20 parcels with the remaining six titles being at advanced stages of processing.
15. According to the Plaintiff, sometimes in December, 2019, he discovered persons on his property and upon further investigation realized that the Defendant was claiming ownership of the suit property and was attempting to dispose them.
16. The Plaintiff adduced in evidence copies of Certificates of Leases for parcels of land known as Nairobi/Block/136- 621, 602, 1120, 624, 642, 606, 616, 623, 603, 622, 617, 619, 639, copy of OB-30/21/12/19 and a copy of the "map" used by the Defendant to sub-divide the property.
17. It is at the onset noted that the Defendant, despite entering appearance neither filed a Defence nor participated in the trial. It therefore follows that the Plaintiff's evidence is uncontroverted and unchallenged.
18. Notwithstanding the above, it is common ground that uncontroverted evidence is not automatic evidence. The burden on the Plaintiff to prove his case remains the same and that burden of proof is in no way lessened because the Defendant did not file a Defence. As expressed by the Court of Appeal in *Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Another* [2014] eKLR;

"It is a firmly settled procedure that even where a defendant has not denied the claim by filing a Defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."
19. The Plaintiff herein claims ownership of the suit properties, and to that end, seeks to prevent interference with the same by the Defendant. The Plaintiff has in this respect adduced Certificates of Leases for the 14 named parcels of land registered on various dates under the provisions of the Registered *Land Act*. The Registered *Land Act*, (now repealed) provided in Section 27 as follows:

"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;



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 and expressed agreements, liabilities and incidents of the lease.”

20. Whereas Section 28 thereof provided as follows:

“The rights of a proprietor, whether acquired on first registration or whether acquired 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.”

21. Section 26(1) of the *Land Registration Act* now provides as follows in this respect:

“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.”

22. It is clear from the foregoing that registration of a person over a suit property gives that person the rights and privileges over the property and is prima facie evidence that the person is the owner of the land. This position can only be challenged as set out under Section 26(1)(a) and (b) of the *Land Registration Act*. In the present circumstances, the Plaintiffs’ registration of the suit plots has not been challenged or controverted. Therefore, this Court finds and holds that the Plaintiff is the legal proprietor of the same.

23. As the proprietor of the listed suit properties, the Plaintiff has exclusive rights thereon, including vacant possession. As to the remaining six parcels allegedly neighbouring the listed parcels of land, no remedy can lie because they have not been distinctly identified. Indeed, there is no evidence of their ownership whether by way of a sale agreement or otherwise.

24. In conclusion, this court finds that the Plaintiff has proved his case on a balance of probabilities in respect of the identified 14 parcels of land and proceeds to make the following determination:

- a. A permanent injunction does hereby issue restraining the Defendant, his servants/agents or any other persons claiming through him from trespassing, dealing in, selling, alienating, fencing, constructing on, placing any signs on, sub-dividing, demarcating, erecting beacons or in any other way or manner dealing with any of the following pieces or parcels of land owned and/or registered in the name of the Plaintiff: Nairobi blocks 136/621, 136/602, 136/1120, 136/624, 136/642, 136/606, 136/640, 136/616, 136/623, 136/603, 136/622, 136/617, 136/619 and 136/639.
- b. That the Officer Commanding Ruai Police Station to enforce the above order.



c. The Defendant shall bear the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF JULY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for all parties

Court Assistant -Tracy

