



Kuria & 2 others (Suing as Administrators of the Estate of Geoffrey Kuria - Deceased) v Onunda & another; Muigai & 5 others (Interested Parties) (Environment and Land Case Civil Suit 1204 of 2013) [2023] KEELC 19190 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19190 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1204 OF 2013
MD MWANGI, J
JULY 27, 2023

BETWEEN

JACKSON KAGWIMA KURIA 1ST PLAINTIFF
JOYCE WANGECHI KURIA 2ND PLAINTIFF
JANE MWIHAKI KURIA 3RD PLAINTIFF
SUING AS ADMINISTRATORS OF THE ESTATE OF GEOFFREY KURIA -
DECEASED

AND

MARK ANARIKO ONUNDA 1ST DEFENDANT
JACKSON MACHARIA 2ND DEFENDANT

AND

ABDULLAHI MUIRURI MUIGAI INTERESTED PARTY
RAYMOND MWANGI WAWERU INTERESTED PARTY
KARIUKI NJOROGE INTERESTED PARTY
PETER KARUMBI KEINGATI INTERESTED PARTY
JOSEPH NDUATI NGENDO INTERESTED PARTY
KIAMBU DANDORA FARMERS CO LTD INTERESTED PARTY



JUDGMENT

Background

1. This suit was commenced vide a Plaint dated October 7, 2013 by Geoffrey Kuria, now deceased. He was subsequently substituted with the administrators of his Estate namely Jackson Kagwima Kuria, Joyce Wangechi Kuria & Jane Mwhaki Kuria, the Plaintiffs herein and the Plaint was subsequently amended.
2. The Plaintiffs pray for orders: -
 - a. That there be and is hereby issued a declaration that the Deceased, is the lawful exclusive owner of Plot LR Number 209/9383 situate in Kariobangi Light Industries, off Kangundo Road and that an eviction Order does issue as against the Defendants, their agents, employees and/or servants.
 - b. That as a result of the above continued trespass, intermeddling, destruction and attempted alienation by the Defendants, their agents, employees and/or servants the Plaintiffs pray that a Permanent injunction does issue against the Defendants their agents, servants and/or employees from trespassing into, intermeddling, destruction, attempted alienation, and/or evicting and/or otherwise howsoever from interfering with the said Plot.
 - c. Costs and interest.
3. The Plaintiffs' case is that the deceased Geoffrey Kuria is the registered owner of Plot Number 209/9383 situate in Kariobangi Light Industries, off Kangundo Road (hereinafter referred to as 'the suit property'). The Plaintiffs aver that the Title to the suit property is charged to Barclays Bank, now ABSA Bank. Though the Bank had misplaced the charged Certificate of Title, it has since obtained a replacement of the Certificate of Title.
4. The Plaintiffs aver that the Defendants through their agents have trespassed into the suit property and are illegally occupying the same. The Defendants have put up illegal developments on the suit property without the Plaintiffs' consent intending to alienate the Plot from the Plaintiffs. Consequently, the Plaintiffs' have suffered and continue to suffer irreparably. Attempts to have the Defendants vacate the suit property peacefully have not been successful. The Defendants have continued to threaten the Plaintiffs denying them entry and access to the suit property.
5. The Plaintiffs therefore pray for an eviction order to remove the Defendants from the suit property and a permanent injunction barring them from trespassing into and interfering with the Plaintiffs' quiet possession and occupation of the suit property.
6. The Defendants were served with Summons to enter appearance on the October 10, 2013. This is evident from the Affidavit of Service by Alexander Ochwo Alela deposed on the October 17, 2013. The Defendants neither filed a Memorandum of Appearance nor a Defence to counter the Plaintiff's case.
7. Vide an application dated March 19, 2014, the Interested Parties through the firm of Njiru Boniface & Co Advocates, sought to be joined in the proceedings. The application was allowed by consent on the May 6, 2014. The Interested Parties however never filed any document despite being granted leave to do so.



8. The matter was slated for hearing on the June 12, 2023. Despite service having been effected upon the Defendants and the Interested Parties' counsel, they did not attend court for the hearing.

Evidence Adduced on Behalf of the Plaintiffs

9. Joyce Wangechi Kuria, testified as PW1. She adopted her Witness Statement dated October 26, 2022 as her evidence in chief. She averred that the original Plaintiff, Geoffrey Kuria was their late father. PW1 is one the administrators of his estate. It was her testimony that the Defendants have trespassed onto the suit property. The suit property is located in Dandora within Nairobi County. She exhibited a copy of the title to the suit property. It had been charged in favour of ABSA Bank. The deceased had used it as a security for a loan. It was PW1's testimony that they have been paying rates to Nairobi County Government as evidenced by the statements and invoices produced as exhibits.

Court's Directions

10. The court directed Counsel for the Plaintiff to file written submissions. The submissions are dated June 13, 2023. I have had the opportunity to read the same.

Plaintiff's Submissions

11. The Plaintiffs' submitted that there was no doubt that the deceased owned the suit property and should therefore have unfettered occupation and access thereto. The Grant in favour of the deceased was issued by the then Commissioner of Lands way back on February 1, 1979 for a term of 99 years. The Grant is prima facie proof that the deceased owns the suit property. He had even used the title as a security for a loan with ABSA Bank. They cited Section 26 of the *Land Registration Act*, on the indefeasibility of a Title.
12. The Defendants have no lawful claim over the suit property They are therefore unlawfully, irregularly and wrongfully in occupation of the Plaintiffs' property.

Issues for Determination

13. I have considered the evidence on record, the written submissions and the documents produced by the Plaintiff and I find that there are only two issues for Determination in this matter, i.e. whether the Plaintiffs are the lawful owners of the suit property and if so, whether they are entitled to an order of eviction and a permanent injunction against the Defendants herein.

Analysis and determination

14. Although this suit was undefended, the Plaintiffs have the duty to prove their case on a balance of probabilities as required by the law.
15. In the case of *Kirugi and Another -vs- Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal held that: -

“The burden was always on the plaintiff to prove his case on a balance of probabilities even if the case was heard as a formal proof. Likewise, failure by the defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”



16. Similarly, in the case of *Gichinga Kibutha –vs- Caroline Nduku*, (2018) eKLR, the court held that: -

“It is not automatic that instances where the evidence is not controverted the claimants shall have his way in court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

17. The Plaintiffs are no doubt the Legal Representatives of the Estate of Geoffrey Kuria Kagwima. The Certificate of Confirmation of Grant dated May 15, 2019 was attached to the application for substitution. The Plaintiffs therefore had the legal capacity to take over the suit, prosecute and conclude it before this court.

18. It is evident from the Grant produced as an exhibit in support of the Plaintiff's case that it was issued by the then Commissioner of Lands on February 1, 1979 and was registered in the name of the deceased. The said ownership was confirmed by the Land Registry as shown on the Search produced hereof. It is evident that the deceased had even used the title to the suit property as a security for a loan from ABSA Bank Limited.

19. It is trite law that the registration of a person as the owner of the land and the certificate of title held by such person as a proprietor of a property is prima facie evidence that he/she is the owner of the property.

20. The said provision provides that: -

“The certificate of title issued by the Registrar upon registration, or to a purchase of land upon a transfer shall be taken by all courts as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner 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.”

21. From the evidence presented before the court, I find that the Estate of Geoffrey Kuria is the lawful owner of the suit property, LR No 209/9383.

22. Section 24 of the *Land Registration Act* provides that the interest conferred upon registration as a proprietor of land vests in the person so registered, ‘the absolute ownership of the land together with all the rights and privileges belonging or apparent thereto’.

23. Section 25 of the *Land Registration Act* on the other hand provides for the rights of a proprietor. It provides that: -

“The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided by this Act and shall be held by the proprietor together with all the privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject...

24. The Defendants' entry on the land belonging to the Estate of Geoffrey Kuria, without the authority or permission of the Plaintiff amounts to trespass. Having established that the suit land is the property of



the Estate of Geoffrey Kuria, I find that the plaintiffs are entitled to the protection of the law from the Defendants who have interfered with their rights and privileges as absolute owners of the suit property. It is therefore necessary and proper to issue an order of eviction against the Defendants and restrain them by way of an order of permanent injunction from encroaching, trespassing or interfering with the Plaintiffs' quiet possession and occupation of the suit property.

25. In the end, I find that the Plaintiffs have proved their case against the Defendants on a balance of probabilities. Accordingly, the court finds in favour of the Plaintiffs against the Defendants and makes the following orders: -

- a. A declaration be and is hereby issued that the Estate of Geoffrey Kuria is the lawful and exclusive owner of plot LR No 209/9383 situate in Kariobangi Light Industries, off Kangundo Road.
- b. An eviction order be and is hereby issued directing the Defendants whether by themselves or their agents, servants and or employees to forthwith vacate and remove and or demolish all the structures erected plot LR No 209/9383 situate in Kariobangi Light Industries, off Kangundo Road, in any event within 45 days from the date of this judgement.
- c. A permanent injunction be and is hereby issued restraining the Defendants by themselves, their agents, employees and/or servants from entering onto and/or encroaching, trespassing, intermeddling, and/or interfering with plot LR No 209/9383 situate in Kariobangi Light Industries, off Kangundo Road.
- d. In default of complying with (d) above, the Defendants be forcefully evicted from the suit property and the structures therein be removed.
- e. The plaintiffs are awarded Costs of the suit.

It is so ordered.

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

M.D. MWANGI

JUDGE

