



Idow Trading Co Limited v Jimale & 2 others (Environment & Land Case 63 of 2008) [2023] KEELC 20357 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20357 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 63 OF 2008
LN MBUGUA, J
SEPTEMBER 28, 2023**

BETWEEN

IDOW TRADING CO LIMITED PLAINTIFF

AND

MOHAMMED JIMALE 1ST DEFENDANT

OSMAN ALI MOHAMMED 2ND DEFENDANT

CITY COUNCIL OF NAIROBI 3RD DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by a plaint dated February 4, 2008 and amended on May 29, 2012 bringing on board the 3rd defendant. It contends that it is the registered owner of the property known as LR No 36/1/1034, which the 1st and 2nd Defendants have trespassed upon. The Plaintiff prays for judgement against the Defendants for;
 - a. A permanent injunction do issue restraining the 1st and 2nd Defendants by themselves, their servants and/or agents from trespassing and/or continuing to occupy the parcel of land known as LR No36/1/1034-Eastleigh, Nairobi.
 - b. An order that all illegal structures built by each of the 1st and 2nd Defendants, their servants and/or agents be demolished at the cost of each of them.
 - c. A declaration that the parcel of land known as LR No 36/1/1034-Eastleigh, Nairobi belongs to the Plaintiff.
 - d. An order of eviction against the 1st and 2nd Defendants, their servants and /or agents from the suit property.
 - e. General damages for trespass against the 1st and 2nd Defendants.



- f. Cost of this suit.
- g. Interest at court's rates.
2. The 1st defendant was served via an affidavit of service filed in court on July 8, 2008 but he did not enter appearance or file a defence.
3. The 2nd Defendant denies the Plaintiffs claim vide his statement of defence dated March 18, 2013 where he claims the suit land vide a temporary occupational license granted by the 3rd Defendant in 1997.
4. The 3rd Defendant denies the claims levelled against it vide its amended statement of defence dated September 13, 2012 and amended on October 31, 2019. In their initial pleading, they recognize the plaintiff as the owner of the suit land, while in the amended defence, they recognize the 2nd defendant as the owner of that land.
5. This suit has marked time in court for 15 years, and at the end of it all, only one witness testified. PW1, Ibrahim Adan Issack, the director of the plaintiff first took to the witness stand on February 2, 2016 but was stood down. He resumed his testimony afresh on September 26, 2018 where he produced his witness statement dated June 25, 2012 as his evidence. He also produced the documents in his bundle dated June 25, 2012 as P. Exhibit 1-21.
6. The testimony of PW1 is the that Plaintiff was allocated the suit property by the 3rd Defendant and a title was processed in its name and registered on July 1, 2002. However, the 2nd Defendant is illegally occupying the suit plot allegedly on the basis of a temporary occupational Licence which was cancelled.
7. Upon cross-examination by counsel for the 3rd defendant, PW1 stated that the Plaintiff was allocated the suit land in 1998 while the 2nd Defendant was given a temporary occupational certificate on September 29, 1997 before the Plaintiff had been allocated the suit land but the TOL was subsequently terminated. He further stated that he has not developed the suit land.
8. The 2nd and 3rd Defendants did not avail any witnesses.
9. None of the parties filed submissions as per the timelines given by the court, hence any submissions filed contrary to the court's orders are hereby disregarded; See Supreme Court of Kenya decision in *Dande & 3 others v Director of Public Prosecutions & 2 others* (Petition 4 (E005) of 2022) [2022] KESC 23 (KLR) (Civ) (19 May 2022) (Ruling).

Determination

10. The question for determination is; Who is the rightful proprietor of the property known as LR No 36/1/1034.
11. PW1 led evidence that the property was allocated to the plaintiff by the 3rd Defendant vide a letter of allotment dated September 29, 1998. The said document is to be found at page 15 of the plaintiff's bundle. The allotment letter provided that the allottee was required to pay ksh. ksh.44,000/= being stand premium and ground rent within 30 days of the letter.
12. PW1 exhibited a receipt dated September 29, 1998 issued by the 3rd Defendant indicating that the Plaintiff had paid the required sums. The Plaintiff was also issued with a beacon certificate dated November 5, 2001 and a lease in its favour was registered on July 1, 2002. PW1 further produced rates demands issued to the Plaintiff.
13. PW1 also produced a temporary occupation Licence issued to the 2nd Defendant on September 29, 1997 and a termination notice terminating the said Licence.



14. The Plaintiff's evidence was not controverted. Courts have held that a Licence does not create an interest in land as was held in *Faraj Maharus V J.B Martin Glass Industries & 3 others* [2005] eKLR. Therefore, the 2nd Defendant's claim on the suit land fails on the basis that the rights and interests acquired by the plaintiff through the allotment letter matured and crystallized into rights of proprietorship and they deserve to be protected by this court.
15. The Plaintiff has proved that the 2nd Defendant has trespassed onto its property. Way back on July 13, 2010, the court delivered a ruling restraining the 1st and 2nd defendants from occupying the suit property, but according to the plaintiff, this order was not complied with. A perusal of the record indicates that even an application was filed by the plaintiff relating to contempt of court orders, still the two defendants did not bulge.
16. The Plaintiff's claim that the 2nd Defendant erected temporary structures on the suit property in addition to using the said piece of land as a garage for their motor vehicles. That evidence again was not controverted. The Plaintiff is therefore entitled to damages for trespass.
17. In *Park Towers Ltd v John Mithamo Njika* [2014] eKLR, the Court held that: -

“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.”
18. I find that an award of Sh 8 million is fair and reasonable as damages.
19. I note that the 3rd defendant is a defunct entity. No amendments were made to bring on board the proper party. I will say no more on that issue.
20. In the final analysis, I find that the plaintiff has proved its case on a balance of probabilities and I proceed to give the following orders;
 - i. An order is hereby issued declaring that the parcel LR No 36/1/1034 - Eastleigh, Nairobi belongs to the Plaintiff.
 - ii. An order is hereby issued for the eviction of the 1st and 2nd Defendants, their servants and/or agents from the suit property, of which the said defendants are given a grace period of 30 days to peacefully vacate the suit premises, otherwise the plaintiff will be at liberty to demolish any structures situated on the suit property.
 - iii. General damages for trespass are hereby awarded to the plaintiff against the 1st and 2nd Defendants jointly and severally to the tune of Ksh 8 million.
 - iv. The 1st and 2nd defendants are hereby condemned to pay costs of the suit plus interests at courts rates from the date of delivery of this judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Anzala for plaintiff



Mrs. Wambugu for 2nd Defendant

Macharia for 3rd Defendant

Court Assistant: Eddel

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