



**Kipkemboi & another v Thika Girls High School & another (Environment & Land Case 78 of 2018) [2023] KEELC 20458 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20458 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 78 OF 2018**

**BM EBOSO, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**DAVID KIPKEMBOI ..... 1<sup>ST</sup> PLAINTIFF**

**FRANCIS NDERITU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**THIKA GIRLS HIGH SCHOOL ..... 1<sup>ST</sup> DEFENDANT**

**ELIZABETH MUTHONI HUSSEIN ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. The dispute in this suit revolves around the question of the 1st defendant's occupation of a parcel of land which the plaintiffs contend was surveyed as Land Reference Number 24875 and is comprised in Title Number IR 180266. The plaintiffs contend that they own the land and that the 1st defendant trespassed onto the land and is illegally on the land as a trespasser. On its part, the 1st defendant contends that it leased and subsequently purchased the land from the 2nd defendant. One of the issues to be determined in the suit is whether the 1st defendant is a trespasser on the land. Another key issue to be determined is whether the 1st defendant is entitled to damages from the 2nd defendant.

**Plaintiffs' Case**

2. The two plaintiffs initiated the suit against the 1st defendant through a plaint dated 6/3/2018. Their case was that they were the registered proprietors of Land Reference Number 24875, located within Thika Municipality. They contended that the 1st defendant illegally encroached on the said land and erected iron sheet classrooms on it. They added that the 1st defendant reneged on a subsequent offer to purchase the land. Consequently, they sought, among other reliefs, orders of eviction and permanent injunction against the 1st defendant.



### **1st Defendant's Case**

3. The 1st defendant responded to the claim through a statement of defence dated 23/6/2021 in which it averred that on 20/10/2014, through its principal director, one Gladys Achieng Omuyeka, it entered into a lease-cum-sale agreement with the 2nd defendant who held herself as the proprietor of the suit property pursuant to a letter of allotment dated 28/6/2011. The 1st defendant added that pursuant to the said lease-cum-sale agreement, they were to occupy the property as lessees for a period of three months at a rent of “about Kshs 90,000.” It was their case that after 6 months, “the sale agreement began for a consideration of Kshs 6,000,000”. They contended that they took possession of the land on the above basis.
4. The 1st defendant subsequently brought an application seeking leave to issue a third party notice to Elizabeth Muthoni Hussein on the ground that she sold to them the suit property at Kshs 6,000,000. The court considered the application and disposed it through an order joining Elizabeth Muthoni Hussein as a 2nd defendant. The court directed the plaintiff to amend the plaint accordingly. In addition, the court granted the 1st defendant leave to bring a counterclaim against the said Elizabeth Muthoni Hussein.
5. Through the amended defence and counterclaim dated 5/7/2022, the 1st defendant reiterated its case as summarized above. By way of counterclaim, the 1st defendant sought compensation from the 2nd defendant [Elizabeth Muthoni Hussein] in relation to all the amounts “spent to lease the suit property” and “all the amounts incurred in constructing the classrooms thereon and other incidentals thereto pursuant to a valuation report at the time of judgment.”

### **Plaintiff's Evidence**

6. David Kipkemboi testified as PW1. He stated that he was authorized by the 2nd plaintiff to testify on behalf of the two plaintiffs. He adopted his witness statement dated 6/3/2018 and his further witness statement dated 11/5/2022 as part of his sworn evidence-in-chief. He produced eleven exhibits contained in the bundle of documents dated 6/3/2018 and the supplementary bundle of documents dated 11/5/2022.
7. PW1 testified that Francis Nderitu [the 2nd plaintiff] and himself were the registered proprietors of the suit property. He added that they held the original certificate of title registered on 5/8/2016 and the original lease dated 27/7/2016. PW1 stated that the 1st defendant trespassed onto the suit land in 2017. He further testified that the 1st defendant once approached him and the 2nd plaintiff seeking to buy the suit property from them. He added that at the time, the 1st defendant acknowledged that the plaintiffs were the registered proprietors of the suit property. PW1 further stated that a sale agreement was prepared but the 1st defendant failed to execute it. He added that he did not know the 2nd defendant. He urged the court to grant the reliefs sought in the plaint.
8. During cross-examination, PW1 testified that the suit property measured three acres and confirmed that the 1st defendant only occupied a portion of it. He added that the 1st defendant was not in occupation when he first visited the suit property in 2016. He stated that the 1st defendant entered the suit property in 2017. PW1 further stated that there were no other claimants over the suit property and that he was neither aware of third parties who had built on the suit property claiming to be owners nor was he aware that the said third parties had destroyed the 1st defendant's structures. He contended that that they had negotiated with the 1st defendant for the purchase of the entire three-acre portion.



## Defence Evidence

9. Gladys Achieng Omuyeka testified as DW1. She adopted her witness statement dated 23/6/2021 as part of her sworn evidence-in-chief. She produced seven exhibits contained in her bundle of documents dated 23/6/2021. She stated that she was the principal of the 1st defendant. She testified that the 1st defendant entered the suit property in October 2014 pursuant to a lease agreement with the 2nd defendant. The 1st defendant immediately began construction of temporary structures on the land. She added that sometime in 2018, upon discovering that the plaintiffs held a title to the suit property, they entered into negotiations with them with a view to purchasing the land. She contended that the 1st defendant approached the 2nd defendant to verify the plaintiffs' claim of ownership of the suit property and it was at that point that the 2nd defendant confessed that she did not hold a title to the suit property.
10. DW1 testified that the 1st defendant was in the process of raising the purchase price for the suit property when their gate and fence were pulled down by Thika Workers Union and Thika Christian Teachers Fellowship who claimed ownership of the suit property. DW1 added that they thereafter approached the plaintiffs and requested to purchase the half acre portion they were occupying. The plaintiffs responded by serving the 1st defendant with court summons relating to this suit.
11. During cross-examination, DW1 stated that prior to signing the lease agreement with the 2nd defendant, the 1st defendant approached the Land Registry to procure an official search but were unsuccessful because they discovered that the 2nd defendant's title had not been registered. DW1 added that similarly, before entering into negotiations with the plaintiffs, they conducted a search which indicated that one Peter Kenneth was the registered proprietor of the suit property. However, DW1 did not provide a copy of the said search. DW1 admitted that the 1st defendant continued to admit students in the school on the suit property contrary to the orders given by Gacheru J on 16/11/2018.

## Plaintiffs' Submissions

12. The plaintiffs filed written submissions on 25/04/2023 through M/s Kipyator Kibet & Associates Advocates. They deciphered the following as the key issues that fell for determination in the suit: (i) Whether the plaintiffs are the bonafide title holders of the suit property; (ii) Whether the 1st defendant has any right over the suit property, and if not, whether an order for eviction should issue; (iii) Whether the defendants should be permanently restrained from interfering with the plaintiffs' quiet possession and against trespass on Land Reference Number 24875 Thika Municipality; and (iv) Who is entitled to the costs of the suit.
13. Counsel submitted that the plaintiffs had produced a copy of the lease dated 27/7/2016 and a certificate of title dated 5/7/2016, confirming that they were registered as lessees of the Government of Kenya for 99 years with effect from 1/3/1999. Counsel submitted that the plaintiffs produced documentary evidence to prove ownership of the suit property. Counsel added that the 1st defendant acknowledged the plaintiffs as the proprietors of the suit property impliedly by conduct by entering into negotiations for sale of the suit property with the plaintiffs' and expressly through its pleadings. Counsel relied on Sections 25(1) and Section 26(1) of the [Land Registration Act](#). Counsel also referred to the ruling of Gacheru J dated 16/11/2018 where she stated thus:

“There is no doubt that the Plaintiff/Applicants are the registered proprietors of the suit property wherein they were registered as such on 5/8/2016.”



14. Counsel urged this court to hold that the plaintiffs are the bonafide title holders of the suit property.
15. On whether the 1st defendant has any right over the suit property and whether an eviction order should issue, counsel submitted that the 1st defendant could only be described as a trespasser given that it had no right over the suit property. Counsel relied on the definition of a “trespasser” as outlined in the case of *Joseph Kipchirchir Koech v Philip Cheruiyot Sang* [2018]eKLR where the court quoted the *Black’s Law Dictionary* 8th Edition. Counsel submitted that trespass to land was actionable per se, hence the plaintiffs should be awarded damages sought in the plaint. Counsel relied on the case of *Park Towers Limited v John Mithamo Njika & 7 Others* [2014] to buttress this point. Counsel further submitted that the 1st defendant could not be termed as a bonafide purchaser for value without notice given that there was no evidence showing that the 2nd defendant was registered as owner of the suit property. Counsel urged the court to find that the 1st defendant had no rights over the suit property and should therefore vacate the land.
16. On whether the defendants should be permanently restrained from interfering with the plaintiffs’ quiet possession and against trespass on the suit property, counsel submitted that the plaintiffs had established, by way of evidence, that they were the bonafide registered proprietors of the suit property, hence their title was protected by the land laws and *the Constitution* of Kenya. Counsel urged the court to find that the 1st defendant should be permanently restrained from interfering with the plaintiffs’ quiet possession of the suit property.
17. On costs, counsel relied on Section 27 (1) of the *Civil Procedure Act* and urged the court to award costs to the plaintiffs.

### **1st Defendant’s Submissions**

18. The 1st defendant filed its submissions on 16/05/2023 through M/s Kanyi Kiruchi & Company Advocates. They deciphered the following as the main issues that fell for determination in the suit: (i) Whether the plaintiffs had established their case on a balance of probability; (ii) Whether the 1st defendant’s counterclaim was merited; and (iii) Who was entitled to the costs of the suit.
19. On whether the plaintiffs had established their case on a balance of probability, counsel submitted that it was true that the plaintiffs held a title relating to the suit property, adding that the 1st defendant occupied about one acre of the suit property. Counsel added that the plaintiffs and the 1st defendant had negotiated an agreement for the sale of the suit property to the 1st defendant at a consideration of Kshs 20,000,000 but the transaction aborted because third parties claiming to hold titles invaded the suit property and fenced it off leaving only the one-acre portion occupied by the 1st defendant. Counsel added that the plaintiffs failed to have the said third parties removed from the suit property, hence the agreement for sale of the suit property between the parties was frustrated. Counsel urged the court to find that it was the plaintiffs who breached the agreement between the parties.
20. On whether the 1st defendant’s counterclaim was merited, the 1st defendant’s counsel submitted that the 2nd defendant represented herself as the owner of the suit property by presenting a letter of allotment as proof of ownership. Counsel added that the 2nd defendant leased the suit property to the 1st defendant and subsequently the lease culminated in a sale of the suit property to the 1st defendant, pursuant to which payment of purchase price commenced. Counsel added that the plaintiffs came waving title to the suit property after the 1st defendant had taken possession and commenced construction on the land. Counsel urged the court to hold that the actions of the 2nd defendant were fraudulent.



21. On costs, counsel relied on the principle that costs follow the event and urged the court to hold the 2nd defendant liable for payment of costs in the counterclaim.

### **Analysis and Determination**

22. I have considered the parties' pleadings, evidence and submissions in this suit. I have also considered the legal frameworks and jurisprudence that is relevant to the key issues that fall for determination in the suit. The 2nd defendant did not enter appearance in the suit. She did not file a defence. Consequently, the counterclaim against them is undefended. Secondly, parties did not agree on a common statement of issues.
23. Taking into account the pleadings, evidence and submissions that were tendered in the suit, the following are the key issues that fall for determination in the suit: (i) Whether the alleged lease- cum-sale agreement between the two defendants was lawful; (ii) Whether the 1st defendant is a trespasser on the suit property; (iii) Whether the plaintiff is entitled to the reliefs sought in the amended plaint; (iv) Whether the 1st defendant is entitled to the reliefs sought in the counterclaim; (v) What order should be made in relation to costs of this suit. I will dispose the five issues sequentially in the above order.
24. The first issue is whether the lease-cum-sale agreement between the two defendants was lawful. The plaintiffs led evidence indicating that, at all material times, they held a title registered as IR No 180266 relating to the suit property. They produced the title as evidence of ownership of the suit property. On their part, the 1st defendant attributed their entry into the suit property to a lease cum sale agreement between them and the 2nd defendant. The 2nd defendant did not step forward to tell the court the basis upon which she purported to lease and at the same time sell the suit property to the 1st defendant.
25. It was the evidence of DW1 that when the 1st defendant confronted the 2nd defendant with the information that the plaintiffs were demanding their exit from the suit property, the 2nd defendant did not step forward to defend her interest in the suit property. She instead confessed that she had no title to the suit property and advised the 1st defendant to engage the plaintiffs and sign a sale agreement with the plaintiffs. It is clear from the above evidence that the 2nd defendant had no legitimate interest in the suit property capable of being passed to the 1st defendant by way of lease or sale. Put differently, the 2nd defendant had no legitimate interest in the suit land capable of forming the basis of a lawful lease or sale agreement. Consequently, the purported lease-cum-sale agreement was entirely illegal.
26. Is the 1st defendant a trespasser on the suit land? It emerged from the evidence of PW1 that when it came to the attention of the plaintiffs that the 1st defendant had entered the suit property, they demanded the 1st defendant's exit. DW1 testified that on approaching the 2nd defendant, she confessed that she did not have a title to the suit property and she advised the 1st defendant to enter into a sale agreement with the plaintiffs. Despite the 1st defendant knowing that they had been duped by the 2nd defendant, they elected to illegally remain on the suit property.
27. That is not all. Despite this court [Gacheru J] ordering the 1st defendant to stop admitting new students to be housed on the suit property, they continued to do so. In my view, continued occupation of the suit property by the 1st defendant without the consent of the plaintiffs after the 1st defendant was made aware that they had been conned by the 2nd defendant was clear trespass. That is my finding on the second issue.
28. The third issue is whether the plaintiff is entitled to the reliefs sought in the amended plaint. As between the plaintiffs and the defendants, the plaintiffs have placed before this court evidence indicating that they are the proprietors of the suit land. Their title has not been impeached. Under Article 40 of [\*the Constitution\*](#) and Sections 24, 25 and 26 of the [\*Land Registration Act\*](#), the plaintiffs' title, unless



impeached as by law provided, is protected. Put differently, in the absence of an impeachment of the plaintiffs' title, they are entitled to the protection of the law. Accordingly, in the absence of any impeachment, and as between the plaintiffs and the two defendants, the plaintiffs are entitled to prayers (a), (b), (c) and (d) of the amended plaint.

29. On the prayer for mesne profits [damages for trespass], the plaintiffs did not tender evidence relating to the open market value of the suit property. I will in the circumstances award the plaintiffs nominal damages of Kshs 1,500,000 for the trespass, against the two defendants jointly and severally.
30. On the question as to whether or not the 1st defendant is entitled to sums in compensation as prayed in the counterclaim, the court notes that the reliefs are special damages claims. The law required the 1st defendant to specifically plead them and itemize them in the body of the counterclaim. Further, the law required the 1st defendant to specify the quantum in the reliefs part of the plaint. The court does not know how much the 1st defendant spent on leasing the suit property. The court does not know how much was spent on construction and other incidentals. Only the 1st defendant knows. Consequently, the plea for compensation will fail on the above ground.
31. On costs, there are no special circumstances to warrant a departure from the general rule in Section 27 of the Civil Procedure Act.

### **Disposal Order**

32. In the end, the primary suit by the plaintiffs and the counterclaim by the 1st defendant are disposed as follows:
  - a. The primary suit by the plaintiff is allowed in terms of prayers (a), (b), (c), (d) and (e).
  - b. The plaintiffs are awarded nominal damages (mesne profits) for trespass in the sum of Kshs1,500,000 against both defendants.
  - c. The counterclaim of the 1st defendant against the 2nd defendant is declined on the ground that it was neither specifically pleaded nor proved as required under the law.
  - d. The two defendants shall bear the plaintiff's costs of this suit.
  - e. As against the 1st defendant, execution of the decree will be stayed up to 31/12/2023 to facilitate seamless administration of the national examinations in the school [if applicable] and to enable the 1st defendant relocate from the suit property peacefully.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 28TH DAY OF SEPTEMBER 2022.**

**B M EBOSO**

**JUDGE**

