



**Gitau v Board of Management Uhuru Primary School (Environment & Land
Case 582 of 2013) [2023] KEELC 20185 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20185 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 582 OF 2013
LA OMOLLO, J
SEPTEMBER 27, 2023**

BETWEEN

PETER NJUGUNA GITAU PLAINTIFF

AND

THE BOARD OF MANAGEMENT UHURU PRIMARY SCHOOL DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff commenced this suit *vide* the Plaint dated November 6, 2013 and filed on the same day.
2. He avers that he is the registered owner of LR No 22026 Grant No IR 77995 situated West of Nakuru Municipality measuring approximately 0.3686 Ha.
3. He also avers that on September 12, 2013 he sent his workers to the suit property, which is adjacent to the Defendant, to fence it so that he could commence drilling a water borehole and that the chairman of the Board of Management of the Defendant violently confronted the workers and stopped them.
4. He further avers that the Defendant's actions are illegal and unlawful as they have denied him the right to use the suit property.
5. The Plaintiff prays for judgement against the Defendant for;
 - a. A declaration that parcel of land LR 22026 grant No I.R 77995 situate west of Nakuru Municipality Nakuru District measuring 0.3686 hectares is rightfully owned by the Plaintiff and the Defendant is a trespasser on the said land and the Plaintiff is entitled to quiet enjoyment and possession of the same.
 - b. A permanent injunction do issue restraining the Defendant and its official and agents from entering, cultivating, trespassing into the Plaintiff's parcel of land known as LR 22026



grant No IR 77995 situate West of Nakuru Municipality Nakuru District measuring 0.3686 Hectares or interfering in any way with the Plaintiff's quiet enjoyment of the said parcel of land.

- c. Costs of the suit.
6. The Defendant filed its Statement of Defence and counterclaim on March 22, 2019.
7. In its statement of Defence, the Defendant denies the averments in the Plaint.
8. The Defendant in its counterclaim states that the Plaintiff's purported ownership of the suit property is a sham and was not obtained legally.
9. The Defendant also states that the suit property was surveyed and set aside for a public school and the same was not available for sale or allocation.
10. The Defendant further states that it is the Plaintiff who encroached on its property and that if he owns the property then it was obtained illegally and fraudulently.
11. The Defendant sets out particulars of fraud, illegality and trespass and seeks judgement against the Plaintiff in the following terms;
 - a. An order of permanent injunction against the Defendant in the counterclaim from his continued use and/or ownership of any part of the suit parcel that was set aside for the school.
 - b. A declaration that lands parcel LR No 22026 belongs to the Plaintiff.
 - c. An order that the Defendant do surrender the title issued to the Defendant in respect to LR No 22026 to the Chief Land Registrar immediately for cancellation.
- d. Any other relief the court deems fit to grant.

The Plaintiff's Evidence.

12. Peter Njuguna Gitau testified as PW1. His witness statement dated November 6, 2013 was adopted as part of his evidence.
13. He testified that the suit property is LR 22026 which measures approximately 0.3686 Ha and registered in his name. He produced the grant of the suit property as Exhibit P1.
14. He also testified that the suit property borders Uhuru Primary School adding that when he sent his men to fence it in the year 2013, the Chairman of the Board of the Defendant stopped them.
15. He further testified that he has never had any dispute with the Defendant since he acquired the suit property.
16. It was his evidence that the school has not been in occupation of the land and neither does it undertake any activities on it.
17. He testified that he had seen the survey report which was pursuant to the consent order of September, 2021.
18. He also testified that the suit property is Plot No C on the Development Plan rep. R7/95/52.
19. He further testified that there were several plots 'D', 'E' & 'B' and existing houses in between the plots.
20. It was his evidence that the school is on the chunk of land known as LR 7385/2.



21. It was also his evidence that there is a dotted line adjacent to the property separating the plot and the school. He also drew the attention of the court to the findings and conclusion of the report.
22. In his witness statement he states that he acquired the suit property in the year 1997.
23. Upon cross examination he confirmed that he was given the parcel of land by the Government of Kenya.
24. When referred to Exhibit P1 he confirmed that he was required to make the payment of Kshs 11,200 and that he made the said payment but did not have the receipt in court.
25. He also stated that the land belonging to the school was never surveyed and that he was not aware that a survey had been done in the year 2001.
26. When referred to the report by the surveyor, he admitted that conclusion No 1 was to the effect that the suit property was planned within LR 7305/2.
27. He also admitted that the report by the surveyor is not false and that the land that he was claiming did not belong to the school but belonged to the government.
28. He further admitted that the land was set aside and given a different LR Number on allocation.
29. He reiterated that his property is within LR No 7385/2 and that there was no encroachment by him. He stated that the school stopped the fencing and that that is what forms the basis of his claim.
30. Upon re-examination, he stated that the school is not in occupation of his land.
31. He also stated that the school claimed that his property was part of the school land and that they stopped him from fencing it.
32. He further stated that there is FR No 52/80 attached to the Surveyor's report which indicated that the school's land and his land are as a result of the sub-division of LR No 7385/2.
33. He stated that his land was 46 acres and the school was claiming 14 acres out of the 46 acres.
34. Peter Juma Wanyama the regional surveyor in charge of Rift Valley testified as PW2.
35. He testified that he had a report dated January 28, 2022 which he produced as Exhibit P2.
36. He also testified that there was a court order that required them to visit LR 22026 and the parcel of land belonging to Uhuru Primary School so as to ascertain whether LR 22026 had encroached onto the school land.
37. It was his testimony that they visited the suit property on October 1, 2021 and that he made a report.
38. PW2 explained that in the making of the report they had a survey plan for LR 22026 and another survey plan also covering the school.
39. It was his evidence that their finding was that LR 22026 that is owned by the Plaintiff and the land belonging to the Defendant was within LR 7385/2.
40. It was also his evidence that there was no survey plan that shows the extent of the land of the school and in view of that, he could not tell whether LR 22026 had encroached on the school land.
41. It was his further evidence that according to the Part Development Plan, the Plaintiff had been allocated LR 22026.



42. PW2 stated that that he had attached three maps to his report. He explained that Survey Plan 302/14 shows where LR 22026 was located while Survey Plan 52/80 shows where the school and the other properties are located.
43. He testified that the FR numbers are cross referenced and that there were other surveys within the said block.
44. PW2 explained that Part Development Plan R7/97/52 was a proposal for allocation of land. It was his evidence that after this proposal, the Commissioner of Land then issued Letters of Allotment.
45. It was also his evidence that LR 22026 was planned as Plot C on the Part Development Plan. It was further his evidence that after this a number was allocated as seen on the Survey Plan 302/14.
46. PW2 reiterated that it was the school that had not surveyed its land.
47. Upon cross examination, he admitted that the survey plan was approved.
48. He also admitted that the copy was not clear but it was signed by the Director of Survey.
49. He confirmed that his conclusion, according to his report, is that LR 22026 was planned within 7385/2. The school was also within 7385/2 together with other private properties.
50. He also confirmed that neither the Plaintiff nor the Defendant were present during the survey and explained that their presence was not necessary because there were fixed boundaries that their survey machines could read.
51. He admitted that in order to determine the extent of encroachment, both properties had to be surveyed and that without the school land being surveyed, he could not tell whether there was any encroachment.
52. The Plaintiff's case was then closed.
53. The Defendant also closed its case without calling any witnesses.

Issues For Determination .

54. The Plaintiff filed his submissions on March 21, 2023 while the Defendant filed its submissions on March 15, 2023.
55. The Plaintiff in his submissions sets out the summary of his case and that of the Defendant. He identifies the following issues for determination;
 - a. Whether the Plaintiff is the absolute owner and has exclusive possession.
 - b. Whether the Defendant has interest on the Land.
 - c. Whether the Defendant's actions amount to trespass.
 - d. Whether the Plaintiff is entitled to a permanent injunction order against the Defendant.
56. On the first issue, the Plaintiff submits that he is the registered owner of the suit property and that he produced a grant issued in the year 1997 which supports his claim of ownership.
57. The Plaintiff also submits that PW2 testified that the suit property belonged to him and that the Defendant's land is yet to be surveyed.



58. The Plaintiff relies on Section 24(a) of the *Land Registration Act* in support of his submission that he has proved that the suit property belongs to him.
59. On the second issue, the Plaintiff submits that the Defendant has no interest in the suit property.
60. On the third issue, the Plaintiff relies on Section 3(1) of the *Trespass Act*, Cap 294 and submits that the Defendant has no right to enter the suit property.
61. On the fourth issue, the Plaintiff sets out the evidence of the surveyor who testified as PW2 and seeks that a permanent injunction be issued against the Defendant to enable him enjoy quiet possession of the suit property.
62. The Plaintiff also relies on Section 27 of the *Civil Procedure Act* and prays that his claim be allowed as set out in the plaint.
63. The Defendant in its submissions identifies the following issues for determination;
 - a. Whether the Defendant has encroached into the Plaintiff's land.
 - b. Who is to bear the costs of this suit.
64. On the first issue, the Defendant submits that it has not encroached onto the Plaintiff's land.
65. The Defendant also submits that as per the Surveyor's report, the Defendant's property has no boundary. The surveyor therefore concluded that it was not possible to determine the extent of any encroachment of the suit land into the Defendant's land.
66. The Defendant relies on the case of *Azzuri Limited vs Pink Properties Limited* [2017] eKLR and submits that since the Plaintiff has failed to prove trespass, he ought to bear costs of the suit.

Analysis And Determination.

67. After considering the pleadings, the evidence adduced, the documents relied on and the rival submissions filed in this suit, it is my considered view that the following issues arise for determination;
 - a. Whether the Defendant trespassed onto LR 22026 grant No I.R 77995.
 - b. Whether the Plaintiff should be granted the orders sought in the Plaint.
 - c. Whether the Defendant should be granted orders sought in its Statement of Defence and Counterclaim.
 - d. Who should bear the costs of this suit.

A. Whether the Defendant trespassed onto LR 22026 grant No I.R 77995.

68. The Plaintiff's case is that he is the owner of land parcel No LR 22026 grant No IR 77995. This, I must state, is not in dispute.
69. It is also his case that on September 12, 2013 he sent some people to fence off the land but they were stopped by the chairman of the board of management of the Defendant.
70. It is further the Plaintiff's case that the actions of the Defendant were illegal and denied him the right to use his property and that they amounted to trespass.
71. In support of his case, the Plaintiff produced a copy of Grant IR number 77995 LR No 22026 measuring 0.3686 Ha that is dated December 19, 1997.



72. The Plaintiff also produced a report dated January 28, 2022 made by PR J Wanyama Regional Surveyor Rift Valley Region.

73. In the said report, the Regional Surveyor states that he visited the suit properties and made the following findings;

“Survey Plan F/R No 302/14 contains parcel LR No 22026 that belongs to the Plaintiff. The Plan was approved by the Director of Surveys on June 21, 1996.

Uhuru Primary School land is part of the larger LR No 7385/2 which is contained on Survey Plan F/R No 52/80 (marked A2).

A scrutiny of Survey Plan F/R No 52/80 and specifically parcel LR No 7385/2 depicted thereon reveals that there are various surveys that have been undertaken within this parcel, one of which is that for parcel LR No 22026 that is in this suit.”

74. The Regional Surveyor then made the following conclusion in his report;

“From the Part Development Plan (marked A3) it can be deduced that parcel LR No 22026 was one of the Plots that had been planned within LR No 7385/2 and subsequently allocated. On this plan there are five proposed residential plots namely A, B, C, D & E, parcel LR No 22026 was formerly plot ‘C’.

Since there is no specific Survey Plan for Uhuru Primary School, it is not possible to determine the extent of any encroachment of Parcel No 22026 onto the school land’ (Emphasis is mine)

75. The Defendant on the other hand filed a Statement of Defence and Counterclaim but elected to close its case without calling any witnesses.

76. It is the Defendant’s case that the Plaintiff trespassed onto its property while it is also the Plaintiff’s case that the Defendant trespassed onto his property.

77. Section 3 (1) of the *Trespass Act*, Cap 294 provides that:

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

78. The Court in *Michael Gaiko Ngure & another Vs Peter Njoroge Kinyanjui* [2022] eKLR held as follows;

“ 56. In the case of *Charles Ogejo Ochieng Vs Geoffrey Okumu*, (1995) eKLR the Court held that trespass is an injury to a possessory right and therefore the proper Plaintiff in an action for trespass to land is the person who has title to it or a person who is deemed to have been in possession at the time of trespass, similarly in the case of *Okorie & others Vs Udom & Others*, (1960) 5 FSC 16) the Nigerian Court stated that where there is a claim for trespass coupled with injunction, it is incumbent upon the judge to consider the question of title to the land and exclusive possession of it. In the same judgment, the Nigerian Court stated that a person cannot trespass on his own property. In *Amakor vs Obiejuna*, (1974) SC 67, at 75 the same Court also held that trespass to land



in law constitutes the slightest disturbance to possession of land by a person who cannot show a better title or right to possession; and that a Court of law is under a duty to pronounce on the validity or otherwise of documents of title tendered in evidence by the parties in arriving at a decision.”

79. The report by the Regional Surveyor Rift Valley Region is important and forms the basis for resolution of this dispute.
80. The Regional Surveyor’s findings have already been set out in the foregoing paragraphs and they are to the effect that the Plaintiff’s property LR No 22026 was planned within LR No 7385/2.
81. The Regional Surveyor further found out that the Defendant’s parcel of land was part of the larger LR No 7385/2.
82. The Regional Surveyor also found that that there was no specific survey plan for the Defendant and it was therefore not possible to determine the extent of any encroachment on LR No 22026 onto the school’s land.
83. Other than alleging that the Chairman of the Board of Management of the Defendant had stopped his workers from fencing his property, the Plaintiff did not produce any evidence in support of the allegations of trespass.
84. Taking into consideration the Regional Surveyor’s report, it is my view that the Plaintiff has not proved the fact of trespass against the Defendant.

B. Whether the Plaintiff should be granted the orders sought in the Plaintiff.

85. The Plaintiff, in his Plaintiff, seeks a declaration that he rightfully owns LR No 22026 and also seeks orders of permanent injunction restraining the Defendant from entering the suit property.
86. It is not disputed that the Plaintiff is the registered owner of the suit property.
87. It is evident from the evidence adduced that the Plaintiff’s property is within the LR No 7385/2 where the Defendant’s land is also located.
88. No evidence has been tendered on the extent of the defendant’s parcel and as things remain it is not possible for this court to determine encroachment or trespass. The Plaintiff and the Defendant ought to have sought the services of a surveyor to demarcate the boundaries of their respective parcels of land as allocated to them.

C. Whether the Defendant should be granted orders sought in its Statement of Defence and Counterclaim.

89. As pointed out before, counsel for the Defendant participated in the hearing of the Plaintiff’s case but elected to close its case without calling any evidence.
90. The Defendant in its counterclaim sought the following orders;
 - a. An order of permanent injunction against the Defendant in the counterclaim from his continued use and/or ownership of any part of the suit parcel that was set aside for the school.
 - b. A declaration that lands parcel LR No 22026 belongs to the Plaintiff.
 - c. An order that the Defendant do surrender the title issued to the Defendant in respect to LR No 22026 to the Chief Land Registrar immediately for cancellation.



d. Any other relief the court deems fit to grant.

I have understood the word Defendant to mean Defendant in the Counterclaim and Plaintiff to mean the Defendant herein who is the Plaintiff in the Counterclaim.

91. The Regional Surveyor in his report found that there was no specific survey plan for the Defendant and it was therefore not possible to determine the extent of any encroachment by the Plaintiff on the school's land.
92. Based on the said finding and the failure by the Defendant to adduce any evidence in support of its counterclaim, the counterclaim fails.

D. Who should bear costs of this suit

93. The general rule is that costs follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act*. (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.
94. Both the Plaintiff and the Defendant have failed to discharge their burden of proof. Neither party is entitled to costs.

Disposition.

95. In the result, I find that both the plaintiff and defendant have failed to prove their claims of trespass and/or encroachment as against each other. Consequently, the suit and counterclaim are hereby dismissed with no order as to costs.
96. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 27TH DAY OF SEPTEMBER, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

Miss Bosibori for Ndubi for the Plaintiff

Ag for Defendant. Absent

Court Assistant; Ms. Monica Wanjohi.

