



**Mugu & another v Njoroge; Kasarani Re-Settlement Project (Interested Party) (Environment & Land Case 132 of 2017) [2023] KEELC 21222 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21222 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 132 OF 2017  
MD MWANGI, J  
OCTOBER 31, 2023**

**BETWEEN**

**JOSEPH MUTURI MUGU ..... 1<sup>ST</sup> PLAINTIFF**

**BENSON WACHIRA MUTHIGA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOSEPH PETER NJOROGE ..... DEFENDANT**

**AND**

**KASARANI RE-SETTLEMENT PROJECT ..... INTERESTED PARTY**

**JUDGMENT**

**Background:**

1. The Plaintiffs jointly filed this case against the Defendant by way of a Plaint dated 23<sup>rd</sup> February, 2017.
2. The 1<sup>st</sup> Plaintiff describes himself as the legal registered owner of Plot No. 339 situated at Kasarani Resettlement Project after purchasing the same from the 2<sup>nd</sup> Plaintiff. The 2<sup>nd</sup> Plaintiff had been allocated the plot by the Kasarani Re-settlement Project, which was named in the suit as an Interested Party.
3. The Plaintiffs' claim against the Defendant is for trespass. They accuse the Defendant of trespassing into the 1<sup>st</sup> Plaintiff's Plot number 339. They consequently pray for orders of:
  - a. A Permanent injunction- do issue against the Defendant whether by himself, his employees, servants or agents or any of them restraining them from continuing trespassing on the Plaintiff land No. 339 situated at Kasarani Re-settlement Project.
  - b. An order declaring that the 1<sup>st</sup> Plaintiff is the legal owner of Land No. 339 situated at Kasarani Re-settlement Project.



- c. The Officer Commanding the nearest Police Station does supervise and ensure that this court Order is implemented for purposes of maintaining law and order to protect the properties of the Plaintiff.
  - d. General damages for trespass.
  - e. Costs of this suit be provided for.
4. The suit was filed alongside the Plaintiffs' list of documents comprising of a copy of the certificate of Ownership of Land No. 339 and copy of the Sale agreement between the 2<sup>nd</sup> Plaintiff and the 1<sup>st</sup> Plaintiff. The Plaintiffs too attached their two witness statements. The verifying affidavit purportedly accompanying the Plaint was however not signed.
  5. The 1<sup>st</sup> Plaintiff, Joseph Muturi Mugu in his witness statement reiterated that he is the owner of Land No. 339 at Kasarani Re-settlement Project after purchasing it from the 2<sup>nd</sup> Plaintiff on 26<sup>th</sup> October, 2016. The Defendant had without any basis encroached and trespassed into the said property necessitating the filing of this suit.
  6. The 2<sup>nd</sup> Plaintiff on his part stated that he was a member of Kasarani Re-settlement Project who allocated him the Land No. 339 and issued him with a Certificate of Ownership. He confirmed selling the Land to the 1<sup>st</sup> Plaintiff. The Defendant however, without any colour of right had trespassed into the 1<sup>st</sup> Plaintiff's land making it difficult for the 1<sup>st</sup> Plaintiff to develop it.

#### **Response by the Defendant**

7. In his response, the Defendant in his statement of Defence and Counter-Claim dated 14<sup>th</sup> April, 2021, amended on 9<sup>th</sup> May, 2022 denied the Plaintiff's claim against him. The Defendant asserted that he was the owner of plot number 304 at Kasarani Resettlement Scheme. He accused the Plaintiffs of trespassing into his plot sometimes in January, 2020 and demolishing the structures he had built thereon.
8. It was the Defendant's claim that the Plaintiffs had illegally entered and remained in his plot and prevented him from developing it. He counter-claimed for a permanent injunction against the Plaintiffs to stop them from interfering with his use and enjoyment of the plot No. 304. He further prayed for a declaration that he is the owner of the Land No. 304, Kasarani Jua Kali Resettlement Scheme, Kasarani in Nairobi County that was subsequently registered as No. Nairobi/Block 226/Kasarani Jua Kali S.S./217. He too prayed for the costs of the suit and Counter-Claim. Neither the Defendant's original statement of Defence and Counter-claim nor the amended statement of Defence and Counter-claim was accompanied by a verifying affidavit.
9. The Defendant too had filed a witness statement and a list of documents. In his witness statement dated 29<sup>th</sup> April, 2021, the Defendant stated that he was allocated plot No. 304 by Kasarani Settlement Project on 8<sup>th</sup> January, 2005. He made the necessary payments, balloted for it and was even issued an allotment letter by the Nairobi City County. He insisted that his plot was No. 304 while the Plaintiffs were claiming Plot No. 339.
10. The Defendant asserted that the Plaintiffs trespassed into his plot and demolished the structures he had erected on the land. The Plaintiffs have illegally remained in the plot preventing him from developing it as he intended to.



11. The Defendant stated that he took possession of the Plot No. 304 in the year 2007 and which was originally 438. He had been in possession since then and had even built a Caretaker's house, a permanent stone fence and planted avocados on the plot.

### **Issues for Determination.**

12. The suit proceeded to full hearing. Both Plaintiffs testified in their case affirming their pleadings and witness statements. The Defendant too testified as a witness in his case. He reiterated the averments in his pleadings and witness statement.
13. The Court directed parties to file written submissions on the conclusion of the hearing. Both parties complied and the court has had occasion to read through the said submissions.
14. The Plaintiffs in their submissions have raised a critical issue that warrants consideration before the court goes into the merits of the case.
15. The Plaintiffs submitted at length on the fact that the Defendant's Counter-Claim was not accompanied by a verifying affidavit as required by Law. They pointed out that throughout the proceedings, the Defendant did not seek leave to file a verifying affidavit.
16. The Plaintiffs referred to order 7 rule 5 of the Civil Procedure rules and submitted that a Counter-Claim is equivalent to a Plaint and cannot stand on its own without the verifying Affidavit and must therefore be struck out for non-compliance with Order 4 rule 1 (2) of the Civil Procedure Rules. The Plaintiffs strongly argued that the failure by the Defendant to file a verifying affidavit cannot be remedied by Article 159 of the Constitution nor the Oxygen Principles under the Civil Procedure Act. The Counter-claim cannot therefore be rescued and must be struck out. They submitted that the Court can even strike out the Counter-Claim on its own motion or upon being moved by a party to the proceedings.
17. I find if appropriate to consider that issue first. That is, whether the Defendant's Counter-Claim should be struck out for failure to be accompanied by a verifying affidavit.

### **Determination**

18. The Plaintiffs relied on the decision in the case of Kenya Women Microfinance Ltd v Martha Wangari Kamau [2021] eKLR where learned Judge Chacha Mwita upheld the decision of the Magistrate's Court striking out a Counter-claim on the basis that it was not accompanied by a verifying affidavit of the Defendant.
19. The Court in the above case noted that Order 4 Rule 2 provides that the Plaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments in the Plaint. The Court further observed that Sub-rule (3) and (4) apply *mutatis mutandis* to Counter-claims.
20. Justice Chacha opined that the rule was introduced to curb the tendency of parties filing multiple suits in different courts without the knowledge of Respondents and that is why Order 4 Rule 6 allows the Court on its own motion or on an application by a party to strike out a Plaint or defence for non-compliance.
21. The Defendant in the case before the trial court, just like in the case did not seek leave of the Court to file a verifying affidavit to remedy the anomaly before the Court rendered its final decision. The Judge observed that Article 159 of the Constitution would not come to the aid of the Appellant.
22. The Judge stated that Article 159 is not the solution to all procedural faults that parties find themselves in. The Judge made reference to the decisions in the Court of Appeal in the cases of Nicholas Kiptoo



*Arap Korir Salat v IEBC & others* [2013] eKLR and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*.

23. I am persuaded by the reasoning of the High Court in the above cited case.
  24. I therefore proceed to strike out the Defendant's Counter-Claim for non-compliance with order 4 Rule 2 of the *Civil Procedure Rules*.
  25. There is an English saying that,  

“ what is good for the goose is good for the gander.”
  26. As I pointed out at the beginning of this judgement, the Plaintiff's suit filed in Court on 24<sup>th</sup> February, 2017 was accompanied by a verifying affidavit that was however, neither signed nor thumb printed by the plaintiff.
  27. Addressing itself to the effect of an unsigned affidavit, the Supreme Court of Kenya in Civil Application No. 26 of 2018 *Gideon Sitelu Konchellah v. Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR observed that such an affidavit is of no legal value to the matter before the court and that, it is deemed that there is no affidavit on record. It is therefore correct to say that the Plaint filed by the Plaintiffs is not supported by a verifying affidavit for all intents and purposes.
  28. For the same reason that I have struck out the Defendant's Counter-Claim, I too must strike out the Plaintiffs' Plaint dated 23<sup>rd</sup> February, 2017.
  29. This is a decision that I have really agonized over. However, striking out does not lock out the parties from filing suit again. In the circumstances, it is the most appropriate decision in the circumstances of this case.
  30. Having arrived at this decision, I need not go into the merits of the case.
  31. Each party shall bear its own costs.
- It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31<sup>ST</sup> DAY OF OCTOBER, 2023.**

**M. D. MWANGI**

**JUDGE**

In the virtual presence of:

No appearance for the parties

Court Assistant: Yvette

**M. D. MWANGI**

**JUDGE**

