



REPUBLIC OF KENYA



**Kungu v Safaricom Limited (Environment and Land Miscellaneous Application
17 of 2023) [2023] KEELC 21258 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21258 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT OL KALOU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 17 OF 2023
YM ANGIMA, J
OCTOBER 26, 2023**

BETWEEN

DAVID MUHANGI KUNGU PLAINTIFF

AND

SAFARICOM LIMITED DEFENDANT

JUDGMENT

A. Plaintiff's Case

1. By a plaint dated 26.03.2019 the Plaintiff sought the following reliefs against the Defendant:
 - a. General damages for trespass and malicious damage to property in the sum of Kshs. 65,000,000/=.
 - b. Costs of the suit.
 - c. Interest on costs.
2. The Plaintiff pleaded that he was the proprietor of all the parcel of land known as 446 Karati Settlement Scheme – Koinange Township (Plot No. 446). It was further pleaded that sometime in October, 2006 the Defendant had through its agents or employees invaded his said parcel of land and wrongfully erected a BTS Mast thereon without his consent or authority. He contended that the Defendant's said action was unlawful and as a consequence he had suffered loss and damage hence the suit.

B. Respondent's Response

3. The Defendant filed a statement of defence dated 14.10.2022 denying the Plaintiff's claim in its entirety. It was pleaded that the suit property was the subject of Milimani ELC Case No. 893 of 2015 (the Milimani Case) in which it was established that a portion of the suit property was allocated to squatters by the Government of Kenya and that one such portion was Plot No. 200 on which the



Defendant had erected a BTS Mast. It was further pleaded that the Defendant had entered into a lease agreement dated 16.04.2022 with the owner and that it had continued to pay the agreed contractual rent to the lessor.

4. The Defendant further pleaded that before entering into the said lease agreement it undertook due diligence by making necessary inquiries from relevant government agencies and the National Land Commission which confirmed the identity of the owner of the plot in issue. The Defendant consequently denied the Plaintiff's claim in its entirety and prayed for its dismissal with costs.

C. Evidence at the Trial

(a) Plaintiff's Evidence

5. At the trial hereof, the Plaintiff testified on his own behalf as the sole witness. He adopted the contents of his witness statement dated 26.03.2019 as his evidence in-chief. He also produced the documents in his list of documents as exhibits. His evidence was to the effect that he was the owner of Plot No. 446 measuring about 49.5 ha and that the Defendant was wrongfully utilizing about half an acre of his land.
6. During cross-examination by the Defendant's advocate, the Plaintiff conceded that he was aware that the Milimani Case was determined and that he was aware that the government was supposed to compensate him for the land it allocated to squatters. However, he maintained that Plot. No. 200 was not among the plots allocated to squatters.

(b) Defendant's Evidence

7. The Defendant similarly called one witness who testified on its behalf. It called Fredrick Ochieng' Oketch who was a Land Valuer by profession. He adopted his witness statement dated 14.10.2022 as his evidence in-chief and produced the 9 documents in the Defendant's list of documents as exhibits. It was his testimony that the Defendant had leased Plot No. 200 which fell within the larger Plot No. 446 where it erected a tele-communication mast. It was further his evidence that it was the government which was ordered in the Milimani Case to compensate the Plaintiff for the land which was allocated to squatters.
8. It was the Defendant's evidence that it obtained relevant ownership details on Plot No. 200 before entering into a lease agreement with the lessor. The Defendant's witness produced copies of 3 letters from government offices which indicated that Plot No. 200 was allocated to one John Kinyanjui Njihia. The Defendant was thus of the view that the Plaintiff ought to have followed up with the Government of Kenya for compensation as ordered in the Milimani Case.

D. Issues for Determination

9. The court has noted that the parties did not file an agreed statement of issues for determination. The Plaintiff filed a list dated 02.08.2022 containing 7 issues whereas the Defendant filed a list dated 14.10.2022 containing 2 issues. In the premises, the court shall proceed to frame the issues for determination as provided for in law.
10. Under Order 15 rule 2 of the *Civil Procedure Rules*, 2010 the court may frame issues from any of the following:
 - a. The allegation contained in the pleadings.
 - b. The allegations made on oath by or on behalf of the parties.
 - c. The contents of documents produced by the parties.



11. The court has considered the pleadings, documents and evidence on record and is of the opinion that the following are the key issues for determination herein:
 - a. Whether the Plaintiff is the owner of all that parcel of land known as 446 Karati Settlement Scheme.
 - b. Whether Plot No. 200 on which the Defendant has erected a BTS Mast falls within Parcel 446.
 - c. Whether the Defendant entered Plot No. 200 without lawful authority or justification.
 - d. Whether the plaintiff has proved his case against the Defendant.
 - e. Whether the Plaintiff is entitled to the reliefs sought in the suit.
 - f. Who shall bear costs of the suit.

E. Analysis and Determination

(a) Whether the Plaintiff is the owner of all that parcel of land known as 446 Karati Settlement Scheme

12. Although the Defendant initially denied the Plaintiff's ownership of Plot No. 446 in its defence, it eventually conceded the Plaintiff's ownership vide its replying affidavit of 11.02.2022 and at the trial. It is evident from the material on record especially the judgment in Milimani ELC No. 893 of 2015 – *David Mubangi Kungu –vs- Hon. Attorney General & Another* that the Plaintiff was the owner of Plot No. 446 part of which had been allocated to squatters by the Government of Kenya hence the reason why the Plaintiff had filed the suit. Accordingly, this issue is answered in the positive.

(b) Whether Plot No. 200 on which the Defendant has erected a BTS Mast falls within Parcel 446

13. The evidence shows that the Plaintiff was non-committal on whether or not Plot No. 200 fell within the larger Plot No. 446. He was content to maintain that the Defendant's BTS Mast fell within Parcel 446 rather than on Plot No. 200 in specific. The material on record shows that the Defendant leased Plot No. 200 from one John Kinyanjui Njihia and that when he passed on his widow was incorporated in the lease as the administrator. There are at least 3 letters from government offices confirming that John Kinyanjui Njihia was the allottee of Plot No. 200.
14. The material on record shows that when the Defendant took possession of the disputed Plot the Plaintiff issued a demand letter accusing the Defendant of trespass. Thereafter, several letters were exchanged between the Plaintiff and the Defendant on the matter. The court finds no logical reason why the Defendant would lease Plot No. 200 and erect its Mast on a totally different plot. It must be the case that Plot No. 200 falls within the larger Plot No. 446. During cross-examination of the Plaintiff at the trial, he suggested that Plot No. 200 may fall within Parcel 446 but that it was not one of the plots which were allocated to squatters. The court does not agree with the Plaintiff that Plot No. 200 was not one of those allocated by the government to squatters unless, of course, he demonstrates that he is the one who allocated Plot No. 200 to John Kinyanjui whom government records showed was the owner. The court is thus satisfied that Plot No. 200 falls within Plot No. 446 and that it was one of the plots which was allocated by the government.

(c) Whether the Defendant entered Plot No. 200 without any lawful authority or justification

15. The Plaintiff contended that the Defendant's entry into Plot No. 200 was without his consent and authority hence unlawful. The Plaintiff considered the Defendant's entry and erection of a tele-



communication must as a form of trespass. The Defendant on its part contended that it leased the disputed plot from the legitimate allottee, John Kinyanjui whom government agencies confirmed to be the owner. Although the Defendant conceded that Plot No. 200 was initially part and parcel of the larger Parcel 446, it contended that the issue was conclusively resolved in the Milimani case whereby the government was ordered to compensate the Plaintiff for the land it had allocated to squatters.

16. Although the Plaintiff acknowledged knowledge of the decision in the Milimani case that it was the government to compensate him for the portion of Plot No. 446 he had lost to squatters, he contended that the government had not yet compensated him as decreed. He conceded during cross-examination that he was aware that the Defendant was not claiming ownership of Plot No. 200 but was merely leasing it from the allottee thereof. It is strange that the Plaintiff did not sue the administrator of the estate of John Kinyanjui Njihia for compensation for loss of Plot 200.
17. Be that as it may, the court is of the opinion that the Plaintiff has no valid cause of action against the Defendant in view of the judgment and decree of the court in the Milimani case. In the said case it was held, inter alia, that:

“ 50. That the Defendants are directed to ascertain the portion of the suit property on which they have resettled squatters and issue a title deed to the Plaintiff for the remainder of the land which he currently occupies...

51. The Defendants are directed to compensate the Plaintiff for the portion of the suit property allocated to squatters. The Plaintiff will have the costs of the suit.”

18. The court is thus of the opinion that the Defendant’s entry, use and occupation of Plot No. 200 does not constitute trespass as known to law. The Plaintiff’s consent or permission was not required since the Plaintiff was no longer the legitimate owner thereof. The material on record shows that the Defendant had lawfully leased it from the person who was allocated the plot by the Government of Kenya. The Plaintiff’s remedy for deprivation of his property and its allocation to squatters was clearly pronounced by the court in the Milimani case. His remedy lies in compensation by the government and not the individual allottees or their lessees.

(d) Whether the Plaintiff has proved his case against the Defendant

19. The court has already found that the Plaintiff is no longer the legitimate owner of Plot No. 200. The said plot although initially part of parcel of the Plaintiff’s Plot No. 446, was allocated to squatters by the Government of Kenya. The Plaintiff’s remedy for such loss of property was held to be payment of compensation by the government in the Milimani case. Consequently, the Plaintiff has no valid cause of action against the Defendant who is a lessee of Plot No. 200. As a result, the court finds and holds that the Plaintiff has failed to prove his claim against the Defendant on a balance of probabilities as required by law.

e. Whether the Plaintiff is entitled to the reliefs sought in the suit

20. The court has already found that the Plaintiff has no valid or legitimate cause of action against the Defendant. The court has also found that the Plaintiff has failed to prove his claim against the Defendant to the required standard. It would, therefore, follow that the Plaintiff is not entitled to the reliefs sought in the suit.



f. Who shall bear costs of the suit

21. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to 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. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. There is no good reason why the successful party should be deprived of costs of the suit. Accordingly, the Defendant shall be awarded costs of the suit.

F. Conclusion and Disposal Order

22. The upshot of the foregoing is that the court finds and holds that the Plaintiff has failed to prove his claim against the Defendant to the required standard. Consequently, the Plaintiff’s suit is hereby dismissed with costs to the Defendant.

It is so decided.

JUDGMENT DATED AND SIGNED AT OL KALOU THIS 26TH DAY OF OCTOBER, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

N/ for the Plaintiff

Ms. Lilian Opondo for the Defendant

C/A - Nyagah

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Y. M. ANGIMA

JUDGE

