



Pello & another (Suing as Legal Representatives of the Estate of the Late Lankoi Ole Pello Saisai) v County Government of Kajiado (Environment & Land Case 154 of 2018) [2023] KEELC 20889 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20889 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 154 OF 2018
LC KOMINGOI, J
OCTOBER 19, 2023**

BETWEEN

GIDEON OIBOO PELLO 1ST PLAINTIFF

JOSEPH TURERE PELLO 2ND PLAINTIFF

**SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE
LANKOI OLE PELLO SAISAI**

AND

COUNTY GOVERNMENT OF KAJIADO DEFENDANT

JUDGMENT

1. By a plaint dated October 8, 2018 and Amended on March 30, 2022 the plaintiffs claim that their father Lankoi Ole Pello Saisai was the owner of LR No. Kajiado/Dalalekutuk/30. However, on September 12, 2018, the defendant trespassed on it, hived off around twelve (12) hectares, cut down trees and put up an illegal boundary without their consent. The same was meant to dispossess them off their rightfully acquired land. They had thus suffered loss and damage due to the said trespass because they could not develop the land. They seek;
 - i. A declaration that the encroachment by the defendant on the plaintiffs' parcel of land is illegal and null and void (sic).
 - ii. A permanent injunction against the defendant either by themselves, their agents, servants and/or employees from encroaching, trespassing, alienating and/or interfering with the Plaintiffs land.
 - iii. General damages for loss of their parcel of land and interest thereon.



- iv. Any other relief that this honourable court may deem fit to grant.
2. The defendant entered appearance and filed a statement of defence dated July 1, 2019.

Evidence of the Plaintiff's

3. The 2nd plaintiff Joseph Turere Pello testifying as PW1 adopted his witness statement as his part of evidence in chief and produced two documents as exhibits marked as P. Exhibit 1 and 2.
4. On Cross-examination he stated that the defendant had taken twelve (12) hectares of the suit property although he did not adduce any evidence such as a survey report to prove the acreage taken. He indicated that their land touched Mashuru- Kajiado Road and is adjacent to AIC Girls Primary school and OlKejuado High School. He acknowledged that they had received a letter from the Land Registrar Kajiado over a complaint by OlKejuado High School but they did not raise the issue of the trespass with the elders before instituting the instant suit. He indicated that their complaint was not in relation with Mashuru – Kajiado road pointing out that the defendant cut down the trees on the suit property to construct the road. He stated that he was sure it was the Defendant's work because he saw the County Surveyors on the ground although they are not parties to this suit.
5. The defendant did not call any witnesses.
6. At the close of the oral testimonies, parties tendered final written submissions.

The Plaintiff's Submissions

7. Counsel for the plaintiffs submitted that the plaintiffs had proved their case on a balance of probabilities because they had produced photographs of the parcel of land that showed the section of the land that had been encroached and cleared by the defendant to pave way for a road. He went on to submit that the plaintiffs had asked the defendant to stop the encroachment which was also evidence of the trespass.

The Defendant's submissions

8. Counsel for the defendant submitted that the plaintiffs had not discharged their burden of proof as per section 107 of the *Evidence Act* and outlined in *Hellen Wangari Wangechi v Carumera Muthini Gathua* [2005] eKLR on grounds that: they did not adduce any evidence showing that the Defendant was involved in the alleged encroachment; they did not adduce any evidence of the alleged 12 Hectare encroached; the alleged boundary was also not identified and neither was any report made to the District Land Registrar over the alleged boundary encroachment. As such the suit ought be dismissed with costs.

Analysis and Determination

9. I have considered the pleadings, the evidence on record, rival submissions and the cited authorities. The issues for determination are:
 - i. Whether the Plaintiffs have proved their case on a balance of probability that the defendant encroached on LR No. Kjd/Dalalekutuk/30 and if so, are they entitled to the orders sought?
 - ii. Who should bear costs of this suit?.



10. As I delve into the issues for determination it is imperative to point out an adage principle of law which is the bedrock of litigation that he who alleges must prove and the proof in civil matters should be on a balance of probability. sections 107, 108 and 109 of the Evidence Act provides as follows:

107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

11. The Court of Appeal in Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank [2004] eKLR pronounced itself on the issue of a balance of probability as follows:

“We have carefully considered the judgement of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

12. The plaintiffs seek to reclaim a twelve (12) hectare portion of land out of LR No. Kajiado/Dalalekutuk/30 that the Defendant has apparently encroached, trespassed and cut down trees. PW1, admitted the absence of conclusive evidence or a professional surveyor's report substantiating the alleged trespass upon the aforementioned portion of land. The court concurs with the defendant's counsel in questioning the methodology employed by the Plaintiffs in arriving at the twelve (12) hectare portion alleged to have been encroached. Beyond merely asserting the size of the land in question, the plaintiffs have failed to furnish any additional evidentiary support.

13. In their bid to substantiate their claim, the plaintiffs presented evidence consisting primarily of photographs which have been scrutinized by court. Regrettably, these photographs fail to conclusively establish the veracity of the plaintiffs' claims. While the images depict land with trees and some felled trees, they fall short of providing irrefutable evidence of their ownership. Notably, the plaintiffs neither filed a formal complaint with the Land Registrar in Kajiado, nor notified the elders in the community regarding this purported encroachment. They instead opted to file this suit.

14. The evidence provided, fails to establish the veracity of the facts and allegations levied against the defendant in any conceivable manner. As such, the claim and orders sought fail in totality.



15. I find that the plaintiffs have failed to prove their case as against the defendants on a balance of probabilities. The suit is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED THIS VIRTUALLY AT KAJIADO THIS 19TH DAY OF OCTOBER 2023.

L. KOMINGOI

JUDGE.

