



**Kimiti v Muchiri & another (Environment & Land Case 855 of 2012)  
[2023] KEELC 21745 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21745 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 855 OF 2012  
MD MWANGI, J  
NOVEMBER 23, 2023**

**BETWEEN**

**NIXON MWAI KIMITI ..... PLAINTIFF**

**AND**

**LYDIA WAITHERA MUCHIRI ..... 1<sup>ST</sup> DEFENDANT**

**KARIUKI WAITHERA AKA KARIS ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. By a Plaint dated 20 November 2012, the Plaintiff seeks the following reliefs:
  - a. A permanent injunction restraining the Defendants, their agents and/ or servants from trespassing on the suit property by entering therein and/ or in any other manner whatsoever interfering with the Plaintiff's quiet and peaceful possession thereof, harassing or intimidating the Plaintiff in any manner whatsoever.
  - b. General damages for trespass.
  - c. Any other order as the Court may deem appropriate.
2. The Plaintiff's case is that he is the registered owner/allottee of Plots Nos. 218 and 219 Mutarakwa road, Jua Kali, Kariobangi South within Nairobi County. The Plaintiff avers that the Defendants have on numerous occasions engaged him in vexatious disputes involving the local administration in respect of Plot 218, which adjoins Plot No. 219.
3. He states that the Defendants trespassed into his Plots, destroyed his property therein and commenced illegal construction on two occasions. The Plaintiff reported the said invasion to the area chief who



instructed the Police Officers to evict the Defendants from the premises on both occasions. He avers that he resumed construction on the plots but has had to hire sufficient security to prevent further invasions by the Defendants.

4. The Plaintiff asserts that he has suffered damages due to the said invasions and the endless cycle of vexatious disputes. That is what necessitated the filing of the Plaintiff.
5. From the court record, on 29th November, 2012, the Defendants instructed the firm of Kurauka & Co. Advocates who filed a Notice of Appointment. The 1<sup>st</sup> Defendant apparently passed on sometimes in February 2012. On numerous occasions, the Defendant's counsel sought leave to file the 2nd Defendant's pleadings and documents. Despite leave being granted, the 2nd Defendant never complied. The Advocate at one point filed an application to cease from acting for the 2nd Defendant, he however withdrew the said application.
6. The latest application by the 2nd Defendant's Counsel to cease from acting is dated 4th April, 2022, the court directed that the application be served by way of substituted service by advertisement in one of the dailies. Counsel did not comply despite being granted ample time to do so. On 20th June, 2023, the court marked the application as dispensed with and certified the matter ready for hearing.
7. Counsel for the 2nd Defendant on numerous occasions also sought court's indulgence to confirm the status of the suit properties in view of the issuance of titles after the plots were surveyed. Counsel however never filed a search despite having sought leave since 2011. On the hearing date, the court declined to indulge the 2nd Defendant's counsel time allegedly to confirm the status of the suit properties having afforded him adequate time previously.

#### **Evidence adduced by the Plaintiff**

8. The Plaintiff, Nixon Mwai Kimiti testified as PW1 in support of his case. He adopted his Witness Statement dated the 20th November, 2012 and the Further Statement dated 22nd April, 2023 as his evidence in-chief. The Plaintiff also produced documents in his List of documents dated 20th November, 2012. The documents were produced as exhibits and marked as PE 1-7 in the order in which they are listed.
9. PW 1 testified that he is in possession of the two plots being 218 and 219 and has developed them. He stated that the said plots have now been registered as LR No. Nairobi Block 169/ 1018 and Nairobi Block 169/9993 respectively. He is now the registered proprietor of the suit properties.
10. A copy of the title for Nairobi/Block 169/1018 was produced as an exhibit in court. He informed the court that he had returned the other title for rectification upon realizing his National Identification Card was captured erroneously. He therefore seeks orders of permanent injunction against the Defendants to stop them from interfering with his properties.

#### **Court's directions**

11. The court directed the Plaintiff to file written submissions. The Plaintiff complied and filed his submissions dated 23rd October, 2023. The Court has had a chance to read through the submissions and shall consider them in its decision.

#### **Issues for Determination**

12. The following issues emerge for determination: -
  - i) Whether the Plaintiff is the registered proprietor of the suit property(s);



- ii) Whether the Defendants have trespassed onto the suit properties;
- iii) Whether the Plaintiff is entitled to the reliefs sought.

### **Analysis and determination**

#### **A. Whether the Plaintiff is the registered proprietor of the suit property**

13. Although the suit was undefended, the Plaintiff still had a duty to prove his case on a balance of probabilities as is required by the law.
14. In the case of *Kirugi and Another v Kabiya & 3 others* (1987) KLR 347 the Court of Appeal held that:

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”
15. Similarly, in the case of *Gichinga Kibutha v Caroline Nduku* (2018) eKLR the Court held that:

“It is not automatic that instances where the evidence is not controverted the Claimant shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”
16. The Plaintiff testified that he is the registered owner of the suit properties. From his statements adopted herein, the Plaintiff avers that he purchased Plots Number 218 and 219- Mutarakwa Road Jua Kali, Kariobangi South from their previous owners, Mary Wanjiru and Charles Kibathi respectively. He produced Letters of Allotment and Beacon Certificates in the names of the previous owners, an area map confirming the location of the property, a Letter dated 25th June, 2012 from the then City Council of Nairobi confirming ownership of the plots by the previous owners and the subsequent transfer to him (the Plaintiff).
17. It was his testimony that the said plots have since been formally registered and titles issued. The Plot Numbers, 218 and 219 are now registered as LR No. Nairobi Block 169/1018 and Nairobi Block 169/9993 respectively. The Plaintiff is the registered proprietor thereof. He showed and adduced in court a copy of the title for Nairobi/ Block 169/1018. He informed the court that he returned the other title for rectification upon realizing that the National Identification Card indicated therein was erroneous.
18. The law is clear on the position of a holder of a title in respect to land. Section 24(a) of the *Land Registration Act* provides that:

“Subject to this act the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or apparent thereto.”
19. Section 25 (1) of the said *Act* further provides that:

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and



appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.”

20. Section 26(1) of the [Land Registration Act](#) on the other hand provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except:

- a) On the ground of fraud or misrepresentation to which the person is proved to be a party or:
- b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

21. The Plaintiff has proved that he indeed is the registered owner of the suit properties and therefore, the rightful owner having acquired them lawfully from their previous owners.

22. The Defendant has not demonstrated any lawful claim to the suit properties whatsoever. The plaintiff is therefore entitled to protection of the said titles as provided for under the [Land Registration Act](#) No. 3 of 2012. Additionally, Article 40 of the [Constitution](#) guarantees the property rights of every person. It further provides under Article 40(3) that:

“No person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property”

**b. Whether the Defendant has trespassed onto the suit properties;**

23. The Plaintiff testified that the defendant invaded the suit properties twice disrupting the construction he had begun and for a time prevented him from carrying out any meaningful development. The Plaintiff produced a letter from the City Planning Department of the then City Council of Nairobi to support his claim. The Plaintiff also adduced a letter from the Provincial Commissioner Nairobi Area confirming that he reported a case of criminal gangs interfering with his plots No.218 and 219. The Letter from the Chairman of Kariobangi South Elders too shows that the Plaintiff complained of unlawful eviction by the Defendant herein.

24. In the case of Nyangeri Obiye Thomas –vs- Yunuke Sakagwa Nyoiza ELC Case No.277 of 2018, Okong’o J observed as follows:

“[Clerk & Lindsell on Torts 18<sup>th</sup> Edition at paragraph 18-01](#) defines trespass as follows:

“Any unjustifiable intrusion by one person upon land in possession of another.’  
.... Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession.”

25. From the evidence on record, it is my finding that the Plaintiff has proved that the defendant has interfered with his quiet and peaceful possession of the suit properties. This amounts to trespass to land.



**c. Whether the Plaintiff is entitled to the reliefs sought.**

26. Regarding the third issue as to whether the Plaintiff is entitled to the reliefs sought, the Plaintiff seeks a permanent injunction against the Defendant. Having established that he is the proprietor of the suit properties, the plaintiff is entitled to a permanent injunction against the defendant.
27. The plaintiff also sought for general damages for trespass from the defendant. The plaintiff has proved on a balance of probabilities that the defendant trespassed on part of his parcels of land and is therefore entitled to general damages. The question that arises is: what is the measure of general damages? This question was answered by E. Obaga J in the case of *Philip Ayaya Aluchio vs Crispinus Ngayo* [2014] eKLR where he held as follows:
- “The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less See *Hostler v Green Park Development Co.* 986 S. W 2d 500 (No. App. 1999).”
28. In the case of *Willesden Investments Limited vs. Kenya Hotel properties limited* NBI H.C.C. NO. 367 of 2000 the court stated that:
- “There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case.”
29. In the instant suit, the Plaintiff prays for a sum of Kshs.3,000,000/= on the basis that the invasion by the Defendant prevented him from constructing a house he had commenced. The Plaintiff has had to live in a rented house during the pendency of the suit despite being a person living with disabilities and a former employee of the British Army. The Plaintiff did not adduce evidence to support this claim to help the court in arriving at a reasonable figure for general damages.
30. In the circumstances the court can only award nominal damages. The court finds that an award of Kshs.500,000/= as the nominal award of general damages will suffice. The same shall attract interest at court rates from the date of this judgement until payment in full.
31. The upshot is that the Plaintiff has proved his case on a balance of probabilities. I therefore enter judgment for the Plaintiff against the Defendant and make the following final orders:
- a. A permanent injunction be and is hereby issued restraining the Defendants, their agents and/ or servants from trespassing into the suit property Plots Nos. 218 and 219 Mutarakwa road, Jua Kali, Kariobangi South within Nairobi County also known as LR No. Nairobi Block 169/ 1018 and Nairobi Block 169/9993 respectively, by entering therein and/ or in any other manner whatsoever interfering with the Plaintiff’s quiet and peaceful possession thereof, harassing or intimidating the Plaintiff in any manner whatsoever.
  - b. The Defendant to pay the Plaintiff Kshs.500,000/= as general damages for trespass with interest at court rates from the date of this judgement until payment in full.
  - c. The plaintiff is awarded the costs of the suit.

It is so ordered

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2023.**



**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

Mr. Onyango for the Plaintiff

No appearance by the Defendants

Court Assistant: Yvette

**M.D. MWANGI**

**JUDGE**

