



REPUBLIC OF KENYA



**Chesterton Properties Limited v Musili & 17 others (Civil Suit
65 of 2013) [2023] KEELC 21667 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21667 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 65 OF 2013
SM KIBUNJA, J
NOVEMBER 22, 2023**

BETWEEN

CHESTERTON PROPERTIES LIMITED PLAINTIFF

AND

ANASTASIA MUSILI 1ST DEFENDANT
LUCAS MASAI 2ND DEFENDANT
IRENE WEKESA 3RD DEFENDANT
MORRIS WEKESA 4TH DEFENDANT
FREDRICK NYAREGI 5TH DEFENDANT
ERICK MAGUCHA 6TH DEFENDANT
LENGSHON MANYALI 7TH DEFENDANT
MAMA MWADALI 8TH DEFENDANT
ALEX OMUYEGA 9TH DEFENDANT
ERICK ONDIEKI 10TH DEFENDANT
DAVID JUMA 11TH DEFENDANT
NYAKONGO 12TH DEFENDANT
NYAMBANE 13TH DEFENDANT
ABDUL MWANGI 14TH DEFENDANT
JIMMY MWAZO 15TH DEFENDANT
HAKIM JOHN 16TH DEFENDANT
MANGALE KOMBO 17TH DEFENDANT



JUDGMENT

1. The plaintiff instituted this suit *vide* the Plaint dated the April 18, 2013. It is the plaintiff's case that it became the registered proprietor of Plot No 7/V/MN Changamwe Kibarani, the suit property, on the November 11, 2010. The plaintiff averred that the defendants have trespassed and illegally constructed temporary structures on the suit property. The defendants were said to be subdividing portions of the suit property and selling to other squatters. The plaintiff further averred that the defendants have refused to vacate or engage the plaintiff in meaningful negotiations for settlement to enable the plaintiff to move into the suit property, and hence this suit. The plaintiff disclosed to the court that there is another suit against the 2nd and 3rd defendants and others being Mombasa HCCC No 226 of 2010 *Chesterton Properties Limited v Samsom Muturia and 99 others*. The plaintiff prays for judgment against the defendants for:
 - a. An order of eviction.
 - b. The provincial administration to provide security for order in (a) above in the execution of the court order.
 - c. A permanent injunction to restrain the defendants by themselves, their servants, agents and/or otherwise from trespassing Plot No 7 Section V Mainland North, Changamwe Kibarani.
 - d. Costs of the suit.
2. The defendant opposed the plaintiff's claim through their statement of defence dated the June 24, 2022, in which they *inter alia* denied trespassing onto the suit property, insisting that they have been residing on plot No MN/V/1984 for more than 12 years. That the plaintiff should have joined them in High Court Civil Case No 226 of 2010 involving the 2nd, & 3rd defendants and others, and this suit is therefore *subjudice* and or *res judicata*. That the 1st, 3rd, & 5th defendants resides on plot Nos MN/V/1074, 1614 and 1984 respectively, while the other defendants reside on plot No 7/V/MN and the orders the plaintiff seeks against them should not be issued. They maintained that the plaintiff cannot seek to evict the defendants who are not in occupation of the suit property and urged the court to dismiss the plaintiff's case with costs.
3. During the hearing, the plaintiff called Bob Eduard Lisa Weyn, its shareholder and director. He testified that since the plaintiff bought the suit premises in 2009, it has not been able to take possession because of the squatter issue. He stated that in 2010, the plaintiff filed suit against the 2nd and 3rd defendants together with over 100 squatters seeking for their eviction. He maintained that the defendants herein were outside the suit property when that suit was filed the suit in 2010, but hence the need to file this suit when they moved into the suit property later. On cross-examination, he stated that the plaintiff bought the land with squatters on it as indicated in the sale agreement. That the plaintiff later instituted HCCC No 226 of 2010 against 138 of the squatters, including the 2nd and 3rd defendants herein, seeking for their eviction. That after a survey to establish the suit property's boundaries was done, some of the squatters the plaintiff had filed a suit against were found to be outside the plaintiff's land. He admitted that though he had sued 18 defendants herein he did not know them personally, but he maintained that they are on the plaintiff's land. He disclosed that he got the names of the defendants from an employee of the plaintiff they had asked to investigate the matter, but the employee has since died. He agreed that a surveyor report indicating where each of the 18 defendants was residing would



have assisted in confirming who was actually on the suit property. That he could not tell when each of the defendants entered on the suit land. That the plaintiff's effort to get a surveyor onto the suit property to do a report has been unsuccessful as the defendants denied the surveyor access. That he relied on the google maps and GPS to confirm that the defendants' houses are situated on the plaintiff's land.

4. The defendants called David Juma, Phillip Myakango and Alex Omwega, the 11th, 12th and 9th defendants who testified as DW1 to DW3 respectively. DW1 testified that he went to the suit land in 1992 and that the only other defendants on the said land are DW2 and DW3. That the other defendants are on other neighbouring lands and that the plaintiff's suit should be dismissed with costs. During cross examination, DW1 stated that he moved into the suit property in 1992 under the authority of the then area MP Sharif Nassir and settled therein from Kongowea. That he got to know that the land was registered in the name of the plaintiff when PW1 came there with an eviction order in 2009. That he has built a four bedroomed semi-permanent house on the land but could not tell the size of the portion of the land under his occupation. That among the defendants only DW2, DW3 and himself are on the suit land as the other defendants are on other parcels. That on the suit land are about 250 households. He denied being a trespasser and maintained that he had never been evicted from the suit property, and that the plaintiff who found him there should not evict him. DW2 testified that he settled on the suit property in 1990 after relocating from Mombasa Railway houses. That he went to the land initially to farm, but latter settled there on encouragement of the area Member of Parliament. That he was not a trespasser on the land because he settled there with the authority of the MP. That he would not have any objection if the plaintiff showed him genuine documents of ownership of the land. He admitted that one of his houses was demolished vide the orders issued in HCCC No 226 of 2010 but was left with one which he uses to date. That there are many other people on the suit land. DW3 testified that he is not the 9th defendant and he does not know that person. That he knows all the defendants but only DW1 and DW2 are on the suit land. That he went to the suit land in 1993 and found DW1 and DW2 already there. That the land was then bushy and he did not think it belonged to anybody and that he does not know its owner. That he went to the land after his aunt got sick and asked him and his elder brother to take care of it. That he has not been sued by the plaintiff in any of its cases.
5. The learned counsel for the plaintiff and the defendants filed their Submissions dated the August 29, 2023 and September 8, 2023 respectively which the court has considered.
6. The following are the issues for the determinations by the court:
 - a. Whether the plaintiff is the registered proprietor of Plot No 7/V/MN Changamwe Kibarani.
 - b. Whether the defendants have trespassed onto the suit property and if so, from when.
 - c. Whether the plaintiff is entitled to the reliefs sought.
 - d. Who pays the costs of the suit?
7. The court has carefully considered the pleadings by the parties, evidence tendered by PW1, DW1 to DW3, Submissions by the learned counsel, superior courts decisions cited and come the following findings:
 - a. The evidence presented by the plaintiff, including the copy of the certificate of ownership, provisional certificate and certificate of official search has confirmed that it is the registered proprietor of the land known as Plot No 7/V/MN since November 11, 2010. The title has not been challenged by the defendants at all and hence the court hereby makes a finding that the



plaintiff is the registered proprietor of the suit property. Section 26 (1) of the [Land Registration Act](#) No 3 of 2012, provides that:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.”

The document of title produced by the plaintiff is indefeasible evidence of the plaintiff's ownership of land. The plaintiff is conferred with all the rights and privileges accruing to the suit property as provided in sections 24 and 25 of the [Land Registration Act](#), including the right to possession, to a quiet and peaceful occupation and right to use of their property.

- b. Having settled the issue of the ownership of the suit property, the next issue for determination is whether the defendants trespassed onto the plaintiff's suit property. The plaintiff in the plaint pleaded that the defendants have invaded the suit property and constructed illegal structures thereon. Trespass as defined in section 3 (1) of the [Trespass Act](#), chapter 294 of Laws of Kenya, which 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.”

To demonstrate that the defendants have trespassed on its land, the plaintiff had to provide sufficient evidence in proof of the defendants' alleged entry, occupation and use of the suit property. The Plaintiff did not disclose when the defendants are alleged to have entered onto the land. In his testimony, PW1 confirmed that there were squatters on the suit property by the time the plaintiff bought it. The title that the plaintiff acquired was therefore subject to those squatters' overriding interest in terms of section 30 of the [Registered Land Act](#) chapter 300 of Laws of Kenya, repealed, and section 28 of the [Land Registered Act](#) No 3 of 2012. PW1 further agreed that he could not specify the portion of the suit property occupied by any of the defendants. As a matter of fact, he stated that he did not know the defendants and that their names as the people on the suit land was given to him by one of the plaintiff's employees who has since died. The information he had received from the said late employee is mere hearsay evidence that is incapable on its own to be the basis of a finding in favour of the plaintiff.

- c. The Statement of Defence filed by the defendants clearly indicated that the defendants were not on the suit property but other parcels in the neighbourhood. The defendants who testified as DW1 to DW3 defended their presence on the suit property indicating that the plaintiff bought the land in dispute when they were already in possession, and having been in occupation of their undefined portions for over 12 years. Their evidence is however not in consonance with their averments in the filed defence, where they stated that they were on other parcels and not the suit land.



- d. The evidence on record, shows that there are squatters on the suit property. Their number is uncertain as it has not been documented. DW1 to DW3 admitted in evidence that out of the 18 defendants, only David Juma, Alex Omenga and Phillip Nyakango were in physical occupation of portions of the suit property. Each of the three witnesses claimed that the rest of the defendants occupied other different parcels of land adjacent to the suit property. DW1 in particular stated that he could not tell how many people were on the suit property, and that there could be about 250 households residing on the 16-acre piece of land. In the case of *William Kamunge Gakui v Eustace Gitonga Gakui* [2016] eKLR the Court of Appeal held that;

“Our re-evaluation of the evidence on record shows that the respondent is not in physical possession or occupation of the suit property. Even the appellant is not in physical possession of the suit property. In the case of *M'Mukanya -v- M'Mbiiwe*, (1984) KLR 761, the ingredients of the tort of trespass were revisited and restated. It was stated that trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See *Thompson- v- Ward*, (1953) 2 QB 153). In the instant case the appellant has dangled his certificate of title to prove that he is not only the owner of the suit property but he is entitled to exclusive possession thereof. Trespass to land is a tort against possession and there must be an entry on the suit property by the tortfeasor. The evidence on record does not show that the respondent had entered the suit property. The record does not show that the respondent is cultivating or tilling the land. We find that the action of entry, cultivation or tilling was not proved by the appellant on a balance of probability.”

When cross-examined by the court, PW1 stated that he had tried to get a surveyor to visit the land and ascertain the occupation on the ground but they were not allowed in. The plaintiff tried to paint a picture of hostile squatters on the suit land who could not allow the owner of the land in. The plaintiff has not demonstrated to the court through evidence that it indeed tried to access the suit land and were denied entry. The plaintiff could have presented to the court a demand letter to the defendants or evidence of a police report having been made of the hostility suffered or any evidence that would establish a denial of entry. Without evidence of the defendants' entry and occupation of the suit property after the plaintiff became the registered proprietor, the court cannot conclude that the 18 defendants herein are trespassers thereon, especially when the evidence available confirms that the plaintiff acquired the suit property with squatters already there.

- e. The plaintiff did not carry out a survey nor did it present before the court a survey report that would have ascertained the occupation on the suit property. During his cross-examination, PW1 agreed with counsel for the defendants that a surveyor's report would have indicated where each of the 18 defendants was residing so as to know who was actually on the suit land. Remembering that PW1 stated that he could not tell where each of the defendants was residing on the suit property, the court comes to the finding that from the totality of the evidence presented, the plaintiff has failed to prove the defendants' occupation of the suit property.
- f. The plaintiff has therefore failed to establish any cause of action against the defendants to the level expected by the law. For a cause of action to arise, there must be acts or omissions by the offending party which the aggrieved party can complain about. Indeed, there are squatters on the suit property, but the court cannot be expected to assume that the defendants are among



the persons squatting on the suit property, without evidence of the time of their entry. The plaintiff has failed to prove the wrong committed by the defendants and as such the court cannot give the orders sought.

- g. The plaintiff having failed to prove its case against the defendants is obliged under section 7 of the *Civil Procedure Act* chapter 21 of Laws of Kenya to pay the defendants' costs.
8. That having come to the foregoing determinations, the court finds and orders as follows:
- a. That the plaintiff has failed to prove to the standard required of a balance of probabilities that the defendants have trespassed onto Plot No 7/V/MN, the suit property, and is not entitled to the reliefs sought in the plaint.
 - b. That the plaintiff's suit is therefore dismissed with costs to the defendants.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 22ND DAY OF NOVEMBER 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiff : M/s Umara.

Defendants: Mr. Jengo

