



REPUBLIC OF KENYA



**Ndung'u v Charagu (Environment & Land Case E332 of 2022)
[2023] KEELC 22500 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22500 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E332 OF 2022
EK WABWOTO, J
DECEMBER 18, 2023**

BETWEEN

BENJAMIN MWANGI NDUNG'U PLAINTIFF

AND

FRANCIS KIIRU CHARAGU DEFENDANT

RULING

1. By a Notice of motion dated 2nd August 2023 brought under Order 36 Rule 1 of the *Civil Procedure Rules* 2010 and Sections 3 and 3A of the *Civil Procedure*, the Applicant sought the following orders:
 - i. That this Honourable Court be pleased to enter judgement in favour of the Plaintiff/Applicant in default of the Defendant/Respondent filing a defence.
 - ii. That the inhibition registered against the suit property by the Defendant/Respondent be lifted.
 - iii. That the costs of this Application be borne by the Defendant.
2. The application was accompanied by a Supporting affidavit sworn by Benjamin Mwangi Ndung'u outlining the following grounds:
 - a. That the Plaintiff was the registered owner of Nairobi/Block 105/179 situated in Ruai which was transferred to him as a gift by his grandmother, NJOKI KAIRII in 2009.
 - b. That in 2010, the Defendant wrongfully trespassed upon the premises by occupying the suit premises and despite several demands to vacate the premises the Defendant failed and/or refused to do so.



- c. To frustrate the Plaintiff, the Defendant filed ELC CASE No. 192 of 2011 and registered an inhibition against the Plaintiff's title deed on 3rd September 2013 and continued illegally occupying the suit premise.
 - d. The parties came to an agreement before the Chief of Ruai location upon escalation of the dispute where the Defendant agreed to vacate the Plaintiff's property on or before 31st May 2019 but he did not.
 - e. The Defendant has deprived the Plaintiff of the use and enjoyment of the said land and continues to be a trespasser.
3. Pursuant to the directions issued by this court on 27th September 2023, the application was canvassed by way of written submissions. The Plaintiff/Applicant filed written submissions dated 2nd November 2023 in which it was submitted that under Section 3(1) of the *Trespass Act*, the Defendant qualified to be trespasser whose actions put the Plaintiff at a severe disadvantage. In opposition to the claim of adverse possession, it was argued that the Defendant had not enjoyed quiet possession since the dispute over the land ensued for an extended period of time up until when an agreement was entered into
 4. The Defendant opposed the application vide a Replying Affidavit dated 26th September 2023 in which it was outlined that:
 - a. Although the suit premises is in the name of the Plaintiff, the Plaintiff has never lived and/or taken possession of the premises.
 - b. The premise had previously been in the name of Abigael Njoki Kiarie and by the time of transfer, her claim to the title had been extinguished by claim of adverse possession
 - c. There was an evidence of a filed Defence and Counterclaim and therefore the Defendant ought to be granted an opportunity to defend the suit.
 5. Having considered the application, it is evident that a defense has been filed and therefore the Court cannot enter judgment as prayed in the application. The only issue for determination herein is whether the application seeking an order for the removal of the existing inhibitions is merited?
 6. Section 70 of the *Land Registration Act* provides that an inhibition shall not be cancelled except on the expiration of the time stated in the inhibition or by a consequent order of the court. In this case, the duration of the inhibition is uncertain. Furthermore, the matter is evidently a greatly contested in which all parties should be allowed to ventilate their positions at trial.
 7. In view of the foregoing, I hereby find that the Notice of Motion application dated 2nd August 2023 is unmerited and the same is hereby dismissed with an order that each party to bear own costs of the application.
 8. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF DECEMBER 2023.

E. K. WABWOTO

JUDGE

In the presence of: -

Ms. Kiiru for the Plaintiff/Applicant.



Mr. Gaita for the Defendant/Respondent

