Kimani & 5 others v Munga & another (Environment & Land Case 156 of 2019) [2022] KEELC 100 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KEELC 100 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 156 OF 2019

EK WABWOTO, J

APRIL 28, 2022

BETWEEN

STEPHEN CHEGE KIMANI ..... 1ST PLAINTIFF

PETER MAINA ..... 2ND PLAINTIFF

EVANS WAIGANJO MUONGI ..... 3RD PLAINTIFF

KENNEDY WAINAINA THAIRU ..... 4TH PLAINTIFF

GICHUHI KINYANJUI ..... 5TH PLAINTIFF

PETER KARICHU MWAURA ..... 6TH PLAINTIFF

AND

CLERANCE MUNGA ..... 1ST DEFENDANT

MWAURA NJOROGE ..... 2ND DEFENDANT

JUDGMENT

Introduction

1. The Plaintiffs instituted the instant suit against the Defendants vide a plaint dated 13/05/2019 seeking for the following prayers;

    a. A declaration that the plaintiffs are the lawful owners of Land Parcels Nos. Dagoretti / Riruta /5875, Dagoretti/ Riruta / 5825, Dagoretti / Riruta/ 4388, Dagoretti/ Riruta/ 7159, Dagoretti /Riruta /1172 and Dagoreti / Riruta/ 1830.

    b. A permanent Injunction be and is hereby issued restraining the defendants by themselves, their servants or agents from entering, remaining in. trespassing, constructing a road though or demolishing the developments in land parcel nos. Dagoretti /Riruta/5875, Dagoretti/

Riruta/5825, Dagoretti/Riruta/4388, Dagoretti/Riruta/7159, Dagoretti/Riruta/1172 and Dagoreti/Riruta/1830.

c. Costs of this suit.

2. The Defendant despite being served with all the court process did not participate in the proceedings. They only filed a Notice of Appearance dated 23rd May 2019 that was filed by M/S Gitau Mathu & Associates LLP. No defence and or further documents were filed. In consequence therefore, the matter proceeded for hearing on 10th February 2021 against them as an undefended case.

3. In a nutshell, the Plaintiffs case from the pleadings is that they are the registered proprietors of land parcel nos. Dagoretti/Riruta/5875, Dagoretti/Riruta/5825,Dagoretti/Riruta/4388,Dagoretti/Riruta/7159, Dagoretti/Riruta/1172 and Dagoreti/Riruta/1830 and that on various dates between January and April 2019, the defendants without any colour of right entered and trespassed onto the said properties and those of their neighbours and purported to curve out, excise, subdivide and create a public road passing through the plaintiffs said parcels of land.

4. According to the Plaintiffs, they had acquired an equitable interest in the property and they were entitled to the prayers sought in the Plaint.

Evidence

5. The case proceeded as an undefended case on 10th February 2022. Only the 1st Plaintiff testified as PW1. He testified and adopted his witness statement and bundle of documents dated 13th May 2019. In evidence in chief he reiterated the contents of his witness statement and he also stated that he had authority to testify on behalf of the other Plaintiffs.

6. It was his evidence that the Defendants had marked their buildings for demolition and that the Plaintiffs had even visited Nairobi County Government and Kenya Rural Roads Authority offices to inquire on whether there were any plans for construction of a public road through their properties but the two entities had informed them that there were no such plans.

7. According to them, no official communication had been made and neither had there been any official survey works and mapping done for the alleged road.

8. Owing to the aforementioned concerns, they wrote a letter through their advocates to the Defendants who ignored and persisted with the issuance of the said threats. Being apprehensive that the Defendants will carry out the demolitions they instituted the current suit. He concluded his testimony by urging the court to grant the reliefs sought in their Plaint.

Submissions

9. The Plaintiffs filed their written submissions dated 21st March 2022 through their counsel M/S Ndumu Kimani & Co. Advocates. In the said submissions, counsel identified three issues for determination by the court. These were; whether the plaintiffs were the lawful owners of the cited parcels of the land; whether the defendants have threatened to trespass onto and demolish the developments in and construct a road through the cited parcels of land; whether the plaintiffs are entitled to the prayers sought in the plaint.

10. The Plaintiff's counsel submitted that the Plaintiffs case and evidence were unchallenged since the Defendants had not filed any defence not had they participated in the proceedings.

11. Counsel also referred to sections 24, 25 and 26 of the *Land Registration Act* and submitted that the Plaintiffs were the registered owners of the said properties had proved their case on how the Defendants had entered and threatened to demolish their houses for the purposes of constructing a public road.

12. It was also submitted that survey map sheets that were produced as evidence by the Plaintiffs confirmed that there was no designated public road in the respective Plaintiffs properties. to the required standard. He submitted that there was an agreement which parties were bound. According to the Plaintiff's counsel the Defendant was in breach since he had not handed over vacant possession of the suit property despite receiving the full purchase price.

13. Counsel argued that the various government entities tasked with the responsibility of putting a public road were not aware of any such project and hence the Defendants were acting on their own volition. Counsel concluded his submissions by urging the court to grant the prayers sought in the plaint since the Plaintiffs evidence remained unconverted.

Analysis and Determination

14. Having looked at the pleadings filed herein, the bundle of documents, witness statement and the plaintiffs evidence that was adduced during the hearing and of course the relevant law, I must now decide the suit.

15. The main issue for determination is whether the plaintiffs have proved their case against the Defendants to the required standard to warrant the granting of the prayers sought.

16. Although the suit was undefended, the Plaintiffs have a duty to formally prove their case on a balance of probabilities as is required by law.

17. In the case of *Kirugi and Another Vs 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."

18. Similarly, in the case of *Gichinga Kibutha Vs Caroline Nduku* (2018) eKLR the Court held that;

> " It is not automatic that instances where the evidence is not controverted the Claimants 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."

19. PW1 stated that the Plaintiffs were the registered owner of the suit land. From the documentary evidence vide the copy of the title deeds that were produced as Plaintiffs exhibits, it is evident that all the plaintiffs were registered as the proprietors of the suit properties.

20. The law is very clear on the position of a holder of a title in respect to the land. Section 24(a) of the *Land Registration Act* provides for the interest conferred by registration. It provides;

> " 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."

21. Section 26(1) of the *Land Registration Act* 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."

22. To this extend, the Plaintiffs have proved that they are indeed the registered owner of the suit property and therefore the rightful owners.

23. It was also the Plaintiffs case that that on various dates between January and April 2019, the defendants without any colour of right entered and trespassed onto the said properties and those of their neighbours and purported to curve out, excise, subdivide and create a public road passing through the plaintiffs said parcels of land. On the basis of the same, the Plaintiffs sought for a permanent injunction restraining the Defendants from trespassing, constructing a road and demolishing their properties.

24. In the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR in which the High Court sitting on appeal held that:

> " A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.

A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties..."

25. The issues which therefore arises is whether the Plaintiffs have met the threshold set for the granting of orders of a permanent injunction. In *Mrao Ltd v First American Bank of Kenya and 2 others,* (2003) KLR 125 which was cited with approval in *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others*, (2014) eKLR, the Court of Appeal defined a prima facie case as: -

> " A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".

26. In the instant suit save for merely alleging that the Defendants had trespassed into their land and marking their buildings, there is no evidence indicating any intended threat and neither was any such evidence adduced during the hearing of the suit. The court was not furnished with any photos of the marked buildings that were to be demolished by the Defendants, neither was the court furnished with

any concrete documentary evidence on the alleged threat. The Plaintiffs did not also demonstrate any compelling reasons to warrant the need of the permanent injunctive orders as was sought in the Plaint. The Plaintiffs averments remain as mere apprehensions. In essence, the Plaintiffs have not established any right that required protection by the court and court orders cannot be issued in vain.

27. I am guided by the decision of Ringera J. (as he was then was) in the case of *Showind Industries v Guardian Bank Limited & Another* (2002) 1 EA 284 where the Learned Judge stated as follows: -

> " .....an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant's conduct does not meet the approval of Court of equity or his equity has been defeated by laches"

28. Having considered the evidence, the submissions of both parties, I find that the Plaintiffs have failed to prove their case to the required standard and the suit is therefore dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2022.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Kimani for the Plaintiffs

N/A for the Defendants

Court Assistant; Caroline Nafuna

E. K. WABWOTO

JUDGE