



REPUBLIC OF KENYA



KENYA LAW
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**Mwaura v Kamau & another (Environment & Land Case
198 of 2015) [2022] KEELC 2212 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELC 2212 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 198 OF 2015**

JA MOGENI, J

APRIL 28, 2022

BETWEEN

KENNETH KARIUKI MWAURA PLAINTIFF

AND

GEORGE MATHERI KAMAU 1ST RESPONDENT

NAIROBI CITY COUNTY 2ND RESPONDENT

JUDGMENT

1. Vide an Originating Summon filed on 09/03/2015 and dated 05/23/2015 the Plaintiff, brought this suit against the Defendants seeking for the following orders:-
 1. That an order be issued directing the 1st Respondent to move all his property from the Road Reserve next to Plot No. Dagoreti-Riruta L/R No. 2389 and give vacant possession.
 2. That an order be and is hereby issues against the 2nd Respondent directing them to stop with immediate effect issuing Business permit/licenses to one George Matheri Kamau, the 1st Respondent herein to carry out and operate business from the Road Reserve next to plot No. Dagoreti-Riruta L/R No. 2389.
 3. That the 2nd Respondent be ordered to remove and/or evict the 1st Respondent from carrying out business on the Road Reserve next to Plot No. Dagoreti-Riruta L/R No. 2389
 4. That the Respondents be ordered to jointly pay costs of this summons.

BACKGROUND

2. The plaintiff first instituted this case in the Business Premises Rent Tribunal in Nairobi BPRT Case No. 586/2011. The case was heard and a judgment entered against the 1st defendant. The tenancy was terminated and the tenant ordered to vacate the suit premises and hand over vacant possession



on 6/11/2011. The plaintiff later filed this suit by way of originating summons to seek the orders enumerated above. The plaintiff's claim as shown in the originating summons dated 09/03/2015 is for an order of eviction directing the 1st Respondent to move his property from the road reserve and give vacant possession to the plaintiff. The plaintiff is also seeking an order directing the 2nd defendant to stop issuing business permits/licenses to the 1st defendant who is carrying out business on the road reserve that is blocking his access to the suit property. Further that the 2nd defendant should be ordered to remove/or evict the 1st Respondent from carrying out business on the Road Reserve next to the suit property.

3. The plaintiff averred that on or about December 2011, the 1st Respondent who was the tenant on the suit property Plot No. Dagoretti-Riruta LR No. 2389 moved out of the said property after he was ordered by the Business Premises Rent Tribunal. He then settled on the road reserve which is in front of and next to the suit property hence blocking free access to the suit property. He then started operating a car wash and a garage despite the fact that the business was blocking access to the suit property posing serious security risk. The plaintiff contends that the 2nd Respondent has continued to issue licences and business permits to the 1st Respondent despite being a road reserve. He avers that he wrote to the 2nd Respondent on 15/10/2013 to have the 1st Respondent evicted and/or removed from the road reserved. He contends that the 2nd Respondent vide their letter dated 19/11/2013 through its department of City Inspectorate accused him of having dumped the said goods on the road reserve and threatened to sue him.
4. The suit is undefended neither the 1st nor the 2nd Respondents entered appearance nor filed any defence. The 2nd defendant was however represented in court by Counsel Waceke though they did not bring any witness since they never filed a defence to the suit.

PLAINTIFFS CASE

5. During the hearing of this case, the plaintiff gave viva- voce evidence because he did not file any witness statement and he relied on the pleadings filed. In his oral testimony he stated that the 1st Respondent was his tenant for 7 years and then he defaulted in payment of rent. He testified that he filed a suit at the tribunal and got an order which he served upon him and he complied and moved out of the premises.
6. He testified that the 1st Respondent moved out his things and put them on the road reserve and he refused to remove them and he is now carrying out business on the road reserve. Further that vide a letter dated 19/08/2013 (PfExh1) at the 1st Respondent wrote a letter and stated that he demolished and removed his properties but he was never paid what he was owed.
7. He further stated that he noted that the 1st Respondent had a business permit and when he inquired from the 2nd Respondent they did not assist him instead they responded and threatened the plaintiff vide the letter dated 19/11/2013.(PfExh2) He stated that the actions of the 1st Respondent has cost him business and also in case of a fire an emergency vehicle will not be able to access his premises due to the blockage caused by 1st Respondent's occupation of a reserve road. During cross-examination by the advocate of the 2nd Respondent Ms Waceke, the Plaintiff testified that he had not attached copies of the business permits that the 2nd Respondent gave to the 1st Respondent. He stated that he engaged the 1st Respondent and when he refused to move he then engaged the 2nd Respondent. He testified that the 2nd Respondent through a letter dated 19/11/2013 wrote to him asking him to remove the blockage of the reserve road yet he is not the one who has blocked the road.
8. During re-examination, the plaintiff testified that the business permits are not in his name and that he is not the one who dumped properties outside Plot No. Dagoretti-Riruta L/R No. 2389.



9. The plaintiff's evidence was uncontroverted because the respondents did not file any documents neither did they appear in court except for the advocate of the 2nd Respondent who however did not file any pleadings and therefore did not bring any witness.
10. After this testimony the Counsel for the Plaintiff Ms Waitiki closed her case. The Counsel for the 2nd Defendant also closed their case.

ANALYSIS AND DETERMINATION

11. I have considered the evidence adduced by the plaintiff. He did not call any witnesses. The claim by the plaintiff is that the defendant has blocked an access road and that he cannot access his land parcel No Plot No. Dagoreti-Riruta L/R No. 2389. The plaintiff testified on oath how he wrote a letter to the 2nd Respondent seeking their intervention to have the 1st Respondent moved from the road reserve and from a position of blocking the access of the plaintiff's property. Upon receiving the letter from the 2nd Respondents he instructed his lawyers who issued a Notice of Intention to sue the 1st and 2nd Respondents demanding that they remove the things that were blocking access to the plaintiffs' property but the 1st Respondent refused and/or neglected to do so.
12. I find that the plaintiff has given candid and credible evidence in support of the claim herein which is uncontroverted since both respondents did not file any response to rebut his testimony. His testimony has not been challenged by the respondents in any respect. Even though the suit is undefended, I am under an obligation to ensure that the right legal processes are followed. This is not a case where the end justifies the means, in a case such as this the means and the end are both critical. Both the process and the outcome have to be clinically sound. Section 3(2) of the *Evidence Act* provides:

“3(2). A fact is proved when after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists.”

Sarkar on Evidence (10th edn) pages 21 and 26 states

“.....Facts fall into two classes, those which can and those which cannot be perceived by the senses. Examples of facts which cannot be perceived by the senses are intention, fraud, good faith and knowledge. Facts can be directly perceived either with or without the intervention of senses. Anything which is the subject of perception or consciousness is a fact. The definition of fact (in the *Evidence Act*) does not restrict a fact to something which can be exhibited as a material object. The word proof seems properly to mean anything which serves, either immediately or mediately, to convince the mind of the truth or falsehood of a fact or proposition. Absolute certainty amounting to demonstrations is seldom to be had in the affairs of life and we are frequently obliged to rely on degrees of probability which fall very short of it indeed. Practical good sense and prudence consists mainly in judging aright whether in each particular case the degree of probability is so high as to justify one in regarding it as certainty and acting accordingly. If we waited for absolute certainty we would never act at all. In like manner all that a judge need look for is such a high degree of probability that a prudent man in any other transaction where the consequences of a mistake were equally important would act on the assumption that the thing was true. The *Evidence Act* adopts the requirements of a prudent man as an appropriate concrete standard by which to measure proof. Absolute certainty is not required. The definitions are mere embodiments of a sound rule of common sense.”



13. Therefore, the degree of probability is what I will rely on in making my disposition given that the case is undefended. Proceeding by the sound rule of common sense as articulated by Sarkar (*supra*) I am somehow justified in regarding the plaintiff's testimony as certainty that what he has alleged is a fact on the ground.
14. I am also aware that the plaintiff has brought this suit in his capacity as one of the administrators of the Estate of the late Peter Kariuki Mwaura. In paragraph 1 of the supporting affidavit sworn on the 5/03/2015, the plaintiff states that he is one of the administrators of the Estate of the late Peter Kariuki Mwaura. He annexed a certificate of confirmation of grant which shows that the said grant was issued to Naomi Ng'endo Kariuki, Madeline Wanjiku Kariuki, Kenneth Mwaura Kariuki and Emily Njeri Kariuki. Although the suit is undefended I have an obligation to ensure proper legal processes and proper law is litigated. Whereas there have been decisions that hold that a single administrator cannot litigate on behalf of other administrators without authority, there are decisions that hold that this action of a single administrator is not fatal to a cause of action.
15. In the suit at hand, the administrator is not meddling so to speak in the estate of the deceased he is seeking to ensure the estate is operating optimally. Going by the prayers sought by the applicant, such prayers include an order be issued directing the 1st Respondent to move all his property from the Road Reserve next to Plot No. Dagoreti-Riruta L/R No. 2389 and give vacant possession. In my view are substantial prayers that go the root of the dispute between the parties which is the dispute in respect to title of a deceased person.
16. In this case I am persuaded to fall back to Article 159 of *the Constitution*. The entrenchment of the Article 159 principle of substantial justice is testimony of the greater moment that our justice system regards the due administration of justice without over reliance on the format or process prescribed for its delivery. The constitutional principle is an upgrading of previous statutory underpinning by statute under the sections 1A, 1B and 3A of the *Civil Procedure Act*, and the *Judicature Act* section 3 (2) in terms that:

“The High Court, the Court of Appeal and all subordinate courts shall decide all such cases... according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

In Article 159, the makers of *the Constitution* of Kenya 2010 expressly provided for the supremacy of the principle of substantial justice over provisions on procedure whether these appear in statute or rules made thereunder.
17. Allow me to digress before rendering my disposal orders and address the 2nd Respondent. Now, the work of ensuring that road reserves are kept free from encroachment is the work of both the County and National Governments. The former it is the road reserves for County Roads classified as D, E, F, G and unclassified and the latter it is the road reserve for National Trunk Roads, classified as A, B and C. In this case the plaintiff is simply asking the County Government to ensure that this road reserve is not occupied in a manner that endangers the lives of other citizens in case of an emergency. When citizens occupy road reserves they become a danger not only to themselves but to other Kenyans especially in times of emergencies when these spaces cannot be easily accessed to save lives.
18. I wonder what it will ever take for Kenyans who have been given a job and responsibility to ever introspectively sit and internalize what they have to do in their public duty. I am saddened by the very defensive approach taken by the 2nd Respondent in this case. Here is a person who is pointing out to the 2nd Respondent the danger that is lurking in the event the road reserve continues being blocked and instead of taking corrective action, as it should, the defendant is now blaming the plaintiff. The



plaintiff is not the one doing business on a road reserve! You cannot therefore blame the plaintiff for blocking access to his own piece of land when he is saying to you that you need to act before it is too late. It is time that public servants undertaking public duties especially those touching on matters of public good and safety took their work seriously. This is not what I saw in this case from the letter dated 19/11/2013 I saw a public servant who does not care about his job and gives no thought to what danger could arise in his “don’t care” approach to his critical job assignment. The plaintiff was raising issues from the year 2013. He filed this suit in the year 2015. How long if I may ask does it take for the County Government to act on a serious issue as this whose failure to act can lead to catastrophic consequences in the event of a natural disaster? Worse still the 2nd Respondent did not think it was necessary to even come to court to explain itself or at worst defend its actions.

19. May I remind the 2nd Respondent of the provisions of Section 116 of the [County Government Act](#) on the principles of public service delivery. It provides as follows:

116. Principles of public services delivery in the county

- (1) A county government and its agencies shall have an obligation to deliver services within its designated area of jurisdiction.
- (2) A county shall deliver services while observing the principles of equity, efficiency, accessibility, non-discrimination, transparency, accountability, sharing of data and information, and subsidiarity.

20. I am convinced and I am not impressed by the action on the 2nd Respondent defendant. People of Nairobi, nay, the people of Kenya deserve better.

Disposal Orders

21. Given the foregoing, I hereby enter judgment for the plaintiff against the 1st and 2nd Respondents as prayed in the Originating Summons and order as follows:

1. That an order be and is hereby issued directing the 1st Respondent to move all his property from the Road Reserve next to Plot No. Dagoreti-Riruta L/R No. 2389 and give vacant possession
2. That an order be and is hereby issues against the 2nd Respondent directing them to stop with immediate effect issuing Business permit/licenses to one George Matheri Kamau, the 1st Respondent herein to carry out and operate business from the Road Reserve next to plot No. Dagoreti-Riruta L/R No. 2389.
3. That the 2nd Respondent be and is hereby ordered to remove and/or evict the 1st Respondent from carrying out business on the Road Reserve next to Plot No. Dagoreti-Riruta L/R No. 2389
4. That the Officer Commanding Dagoreti Police Station be and is hereby ordered to assist in the eviction to ensure law and order.
5. That the Respondents be and are hereby ordered to jointly pay costs of this suit.

It is so ordered.

DATED AND DELIVERED THIS 28TH DAY OF APRIL 2022.

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MOGENI J



JUDGE

In the Presence of

Ms. Moraa h/b for Ms. Waitiki for the Plaintiff

N/A for 1st Defendant

N/A for 2nd Defendant

Vincent Owuor.....Court Assistant

