



**Rungaruro v Ndung’u & 5 others (Environment & Land Case
846 of 2016) [2022] KEELC 2236 (KLR) (27 April 2022) (Judgment)**

Neutral citation: [2022] KEELC 2236 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 846 OF 2016**

LN MBUGUA, J

APRIL 27, 2022

BETWEEN

PATRICK NJOROGE RUNGARURO PLAINTIFF

AND

PATRICK NDUNG’U 1ST DEFENDANT

DAVID KARIUKI 2ND DEFENDANT

GAKUYO REAL ESTATE LTD 3RD DEFENDANT

PETER PAUL MBURU NDURURI 4TH DEFENDANT

CHIEF LAND REGISTRAR, NAIROBI 5TH DEFENDANT

DIRECTOR OF SURVEY 6TH DEFENDANT

JUDGMENT

1. This suit was commenced through a plaint dated 22nd July 2016 where the plaintiff was seeking a permanent injunction against the 1st defendant as well as an order directing the said defendant to demolish illegal structures constructed on land parcel no. I.R.68026 S.W OF THIKA MUNICIPALITY (the suit land). Vide an application dated 16.8.2016, one Peter Paul Mburu Ndururi sought to be joined in these proceedings of which the application was allowed on 15.3.2017. He is the 4th defendant. It is not clear as to how the rest of the parties were brought on board or whether leave was sought for the plaintiff to file the further amended plaint dated 23rd January 2019. The new parties (save the 4th defendant) did not file any pleadings either.
2. The 4th Defendant filed his defence and counter claim dated 11th March 2019 in which he opposed the Plaintiff’s claim stating that he was the registered owner of LR No. 13537/248 IR No. 68026 as from 22nd December 1995 and that he had been in possession of the suit land since then. The 4th defendant has sought for the following orders in his capacity as a plaintiff in the counter claim;



- i. A declaration that the Plaintiff in the Counterclaim is the registered owner of IR No. 68026, LR No. 13537/248.
 - ii. The subdivision by the Plaintiff in the counterclaim is lawful.
 - iii. A declaration that the Defendant in the Counterclaim, his servants, employees, and or agents are guilty of trespass.
 - iv. A permanent injunction restraining the Defendant in the counterclaim his servants, employees, and or agents from entering, trespassing or in any way interfering with the Plaintiff's use of the land.
 - v. A declaration that the Plaintiff in the counterclaim is entitled to general damages and aggravated damages for trespass and assessment of the same.
 - vi. Special damages.
 - vii. Costs of the suit and interest.
3. It is noted that the plaintiff in the main suit did not file any defence to the counterclaim.
 4. When the matter came up for hearing on 16th February 2022, the plaintiff withdrew his suit in terms of his Notice of Withdrawal of the suit dated 8.2.2022. The counterclaim of the 4th defendant proceeded as a formal proof.

Case for the 4th Defendant

5. The 4th Defendant, Peter Paul Mburu Ndururi testified as PW1 whereby he adopted his statement dated 11th March 2019 as his evidence. He also produced the 24 documents in his list dated 11.3.2019 as his exhibits 1-24. PW1 avers that he was the registered owner of title IR 68026 LR No. 13537/248 which was originally LR No. 13537/45/15 as from 22nd December 1995. As per the land survey plan no.137390, he subdivided the land into 28 plots which he embarked on selling to willing buyers including the 2nd and 3rd defendants.
6. On 10th December 1996 His request for change of user and subdivision was approved, and the surrender was registered as IR 68026/2 on 30th April 1997 vide presentation day book no. 1925. He also surrendered part of his land as a public access road during the construction of the Thika Super Highway.
7. He added that the Plaintiff in the main suit obtained a certified copy of the Deed Plan by false pretences in a bid to defraud him, thus on 27th June 2014 he wrote to the Director of Survey requesting that the certified copy of the Deed Plan be cancelled. The 4th Defendant contends that he had never entered in any sale of land agreement with the plaintiff. He further states that any certificate of title in the name of the Plaintiff is fictitious null and void.
8. It was submitted for the 4th defendant that judgment should be entered in his favour as there was no defence on record neither evidence controverting their claim. He contends that he is entitled to general and aggravated damages for trespass assessed at Kshs. 1,000,000. He made reference to the case of *[John Chumia Nganga v Attorney General & Another](#)* [2019] eKLR.

Determination

9. This court having considered the pleadings, the evidence, and submissions, frames the issue for determination as follows: Whether the counter claim of the 4th defendant is merited.



10. PW1, the 4th Defendant has availed Defendant Exhibit 1 which is a certificate of title for LR No 13537/45 (original number) in the names of Paul Mburu Ndururi, Vincent Miringu, Pilisach Wangechi Mwangi, Rufus Tiras Ng'ang'a and Fredrick Kinyanjui Ng'ang'a wherein entry 16 reads "Transfer to Peter Paul Mburu Ndururi 1.601 Ha LR 13537/248. Term: Free Hold for Kshs. 320,000 ..." dated 22nd December 1995. His exhibit 2 is a Certificate of Title in the name of Peter Paul Mburu Ndururi for LR No 13537/248 with two entries, whereby the second entry shows Surrender to the Government of the Republic of Kenya in consideration of the approval of a subdivision scheme dated 30th April 1997.
11. The 4th Defendant's Exhibit 9 is a letter from the City Council of Thika dated 13th October 2005 granting approval for sub division as per plan, change of user from agricultural to petrol station and commercial pegged on conditions set out. He also got the requisite approvals from the National Environment Management Authority (NEMA) ,(see exhibit 10) and on 23rd January 2007, an Environmental Impact Assessment Licence was issued for the construction of a petrol station as shown on Defendant Exhibit 12.
12. The aforementioned documents do confirm that the 4th defendant is the lawfull registered owner of the suit parcel in terms of the provisions of Section 24 of the [Land Registration Act](#). The said title has not in any way been challenged as provided for under Section 26 of the same Act.
13. The Court of Appeal in [Arthi Highway Developers Limited v West End Butchery Limited & 6 others](#) [2015] eKLR held:

"The law is typically stated in the case of Dr. Joseph Arap Ngok v. Justice Moiyo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997 where this Court categorically declared that:-

"Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act..." (Emphasis added).
14. From the foregoing analysis, no evidence has been put forward to invalidate the 4th Defendant's claim of ownership to the suit property. I therefore find that the 4th Defendant has proven his claim of ownership of the said land.
15. Section 22(2) of the [Land Registration Act](#) stipulates that;
 - (2) Upon the application of a proprietor of a parcel for the division of that parcel into two or more parcels, and authentication of the cadastral map, the Registrar shall effect the division by closing the register relating to the parcel and opening new registers in respect of the new parcels resulting from the division, and recording in the new registers all subsisting entries appearing in the closed register...
16. From the documents availed by the 4th defendant it is not clear if the process of subdivision was completed by closing the register; see letter of 22.7.2015 from Kiambu County government, letter of 15.8.2016 from the Lands Ministry. I will therefore desist from making a pronouncement on the issue of subdivision in absence of any clear indication from the Land Registrar that the process of subdivision has been carried out lawfully.



17. The 4th Defendant claims that the Plaintiff was guilty of trespass and for causing him mental anguish and loss of business. In this regard, Section 3(1) of the Trespass Act provides:

“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.”

18. The Court of Appeal in Simiyu vs Sinino[1985] eKLR stated that:

“...the action of trespass has always been a remedy affording compensation for injury to a chattel in the plaintiff’s possession. The sole question is whether the defendant has directly interfered with the plaintiff’s possession...”

19. Making reference to the above and noting that Section 107 of the Evidence Act provides that he who alleges must prove, this court is not satisfied that the 4th Defendant has proved the claim of trespass against the Plaintiff as no evidence was adduced to support the averment.

20. The 4th Defendant is also seeking damages for mental anguish and loss of business against the plaintiff. Without belabouring on jurisprudence on damages, it has been stated time and again and also referenced in the Court of Appeal case of PME & another v PNE [2019] eKLR that:

“35. In David Bagine v Martin Bundi, Civil Appeal No. 283 of 1996, this Court expressed that:

“Special damages in addition to being pleaded must be proved; it is not enough to write down the particulars and so to speak, throw them at the head of the court, saying, this is what I have lost. I ask you to give me these damages...”

21. Taking cognizance that trespass was not proved, then this court has no basis to assess and grant general and or special damages.

22. The final orders are granted as follows:

- i. The 4th Defendant is declared to be the legal registered owner of Land Parcel No. I.R. 68026, LR No. 13537/248.
- ii. The plaintiff is condemned to pay costs of the suit (both the main suit and the counterclaim) to 4th Defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mrs. Mbaabu for the 4th Defendant (Plaintiff) in the Counter-claim

Court Assistant: Eddel

