



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kisha v Odera (Environment and Land Case Civil Suit 265 of 2018)  
[2022] KEELC 3515 (KLR) (23 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3515 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 265 OF 2018**

**MD MWANGI, J**

**MAY 23, 2022**

**BETWEEN**

**ESTHER KAHEGA KISHA ..... PLAINTIFF**

**AND**

**CAROLINE ALUOCH ODERA ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff in this case, Esther Kahega Kisha is the duly registered owner of the property known as L R no Nairobi/Block 111/355 situated at Komarock Estate within Nairobi city county (hereinafter referred to as the suit property). Her claim is that the defendant herein, Caroline Aluoch Odera, in September 2006, unlawfully entered and took possession of the suit property and has since then illegally remained in possession thereby depriving her use and enjoyment of the said property. All efforts by the plaintiff to remove the defendant from the suit property have been unsuccessful necessitating the filing of this suit.
2. The plaintiff prays for amongst other orders a declaration that she is entitled to exclusive and unimpeded possession and occupation of the suit property, an eviction order and an order of permanent injunction and general and aggravated damages against the defendant.
3. The defendant in her statement of Defence denies the plaintiff's allegations in their entirety. She denies trespassing into the plaintiff's property at any one time. She categorically avers that she is, and has always been in occupation of the property known as Block 111/1493 which is entirely different from the plaintiff's property. In fact, the defendant states that she has never even met the plaintiff let alone confront her as alleged in the Plaint. The Defendant prays for the dismissal of the plaintiff's suit against her.
4. I do note from the record of the court that the plaintiff did not reply to the defendant's statement of defence.



5. The case proceeded to hearing with each party testifying in their respective cases.

#### **The plaintiff's case.**

6. The plaintiff testified in her case, adopting her witness statement filed alongside her Complaint as part of her evidence in chief.
7. Her evidence was that she is the registered owner of the suit property which is situated at Komarock Estate in Nairobi. She bought it through a mortgage advanced by the Housing Finance of Kenya Ltd.
8. The plaintiff stated that sometimes in the year 2015, there was a fire incident in her house (the suit property). Thereafter, an inquiry was instituted to determine the cause of the fire that took a bit too long. During that time the plaintiff's house remained vacant.
9. The plaintiff in the year 2016 after conclusion of the enquiry, sought authority from the Nairobi city county government to repair the house. In October 2016, she went to her house with a mason, and found a lady who was not known to her in occupation of the house. She alleged that she was a tenant. The plaintiff asked the occupant for the number of the landlord and that is how the name of the defendant became known to her.
10. Apparently, the plaintiff established that the occupant was the daughter of the defendant. She got this information in the year 2020, when the occupant was arrested and charged with the offence of forcible detainer. The plaintiff had lodged a complaint with the police.
11. During cross-examination, the plaintiff confirmed that she had never met the defendant in person prior to that day in court. She was clear that the defendant is not the one in occupation of her house. Further the plaintiff confirmed that the complaint she had lodged with the police was against the lady in actual occupation of her house. That lady had even been charged with a criminal case at Makadara law courts and it was still going on.

#### **The defendant's case**

12. The defendant adopted her witness statement dated June 25, 2019 as part of her evidence on chief. Her testimony was that she lives in Komarock Estate Sector 1, plot no 111/1493 since the year 2007. She does not know about the plaintiff's plot no Nairobi/Block 111/355.
13. The defendant lives with her 2 children. Her first born daughter by the name Genofeba Anyango Ojow does not however live with her. She is married and lives with her family in Komarock too though the defendant stated that she does not exactly know the plot number, where her daughter lives.
14. The defendant testified that she became aware that her daughter Genofeba, had been charged with a criminal case in Makadara Law courts following a complaint by the plaintiff for allegedly forcefully occupying her house.
15. In cross-examination, the defendant actually confirmed that she has since learnt that her daughter Genofeba Anyango Ojow, stays in the plaintiff's house and that is why she was charged with a criminal offence at Makadara Law courts. She stated that she learnt about it when she was summoned at the CID's offices at Kayole.
16. At the CID's office, Genofeba said that she had been given the house by the Nairobi city county government. The defendant stated that she did not know when and how exactly her daughter had entered into the plaintiff's house.



### **Court's directions**

17. Upon completion of the hearing of the case, the court directed the parties to file written submissions beginning with the plaintiff. The plaintiff was to file and serve her submissions in 14 days. The defendant was to file her submissions in 14 days after service by the plaintiff. The court had however directed the defendant to file her submissions anyway even if she did she was not served by the plaintiff on the 14<sup>th</sup> day.
18. The plaintiff did not actually file her submissions. The defendant however filed hers. The court has had the opportunity to peruse the said submissions.

### **Issues for determination**

19. From a perusal of the pleadings of the parties, the court is of the opinion that the issues for determination in this matter are:-
  - A. Whether the plaintiff has proved the allegations of wrongful entry and unlawful possession of the suit property against the defendant.
  - B. Whether the plaintiff is entitled to the orders sought.

### **Analysis and determination.**

#### **A. Whether the plaintiff has proved the allegations of wrongful entry and unlawful possession of the suit property against the defendant.**

20. From the evidence adduced before the court, it is crystal clear that the defendant is not and has never been in possession of the plaintiff's property, the suit property. The plaintiff herself, apparently knows who is in possession of her property. I say so because, the Plaintiff in her own words, lodged a complaint against the occupant with the police. The occupant was arrested and charged with the offence of forcible detainer at the Makadara Law courts. The plaintiff is the complainant in that case which was still going on.
21. Even though the occupant is the daughter of the defendant, it does not make the defendant liable for her actions. This occupant is an adult female of sound mind, who as the defendant stated in her testimony is married and has her own family. She is responsible and liable for her own actions and omissions.
22. The plaintiff's allegation therefore that the defendant wrongfully entered and has unlawfully remained in possession of the suit property falls flat on its face. The plaintiff has not proved that allegation as against the defendant.
23. Section 107 of the *Evidence Act*, cap 80 Laws of Kenya is categorical that:

“ whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
24. The burden of proof was on the plaintiff. She has not discharged that burden. The court therefore finds that she has not proved the allegations of wrongful entry and unlawful possession against the defendant.



**B. Whether the plaintiff is entitled to the orders sought.**

25. The plaintiff's case was premised on the allegations of wrongful entry and unlawful possession of the suit property. Having failed to prove the said allegations, the plaintiff's case collapses like a house of cards in its entirety.
26. It is apparently clear that the plaintiff sued the wrong person as a defendant. He is therefore not entitled to any of the orders sought on her Plaint.
27. Accordingly, the plaintiff's case is hereby dismissed with costs to the defendant.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF MAY 2022.**

**M D MWANGI**

**JUDGE**

**In the virtual presence of:-**

**Ms Opola h/b for Ms Nduta for the plaintiff**

**Ms Ochieng' h/b for Ms Abong'o for the defendant**

Court Assistant: Hilda

**M.D MWANGI**

**JUDGE**

