



**Githinji v Kabocha & another (Environment & Land Case
1 of 2018) [2022] KEELC 3051 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3051 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 1 OF 2018**

JG KEMEI, J

MAY 19, 2022

BETWEEN

JANE WANJIRU GITHINJI PLAINTIFF

AND

MARY NJERI KABOCHA 1ST DEFENDANT

JANE MUMBI KABOCHA 2ND DEFENDANT

JUDGMENT

1. Vide her Complaint dated 30/12/2017 and filed on 5/1/2018 the Plaintiff prayed for the following Orders against the Defendant for;
 - a. A permanent injunction restraining the Defendants from trespassing on the suit property known as Limuru/Kamirithu/T.372.
 - b. An eviction order against the Defendants to vacate the suit property known as Limuru/Kamirithu/T.372.
 - c. Costs of the suit.
 - d. Any other relief that this Honorable Court may deem fit to grant.
2. The Plaintiff's case in summary is that at all material she was in possession and control of the land parcel known as Limuru/Kamirithu/T.372, the suit property. That she filed her claim for adverse possession over the suit land against the Defendants herein in Nairobi ELC No. 201 of 2006 (O.S) that was allowed on 22/9/2017. That despite the said Judgment, the Defendant in blatant disregard have not transferred the suit property to her but have forcibly entered the suit land and commenced construction hence the suit.



3. The suit is opposed by the 1st Defendant's statement of defence dated 2/2/2018. Admitting the Judgment in Nbi ELC No. 201 of 2006, the 1st Defendant argued that it was erroneously arrived at because the Plaintiff was never in full physical possession of the premises. That it is the Defendants who have always been in occupation of the suit land and therefore the Plaintiff is unable to execute that Judgment. She added that they are seeking Review of the Judgment and faulted the Plaintiff for evading the course of justice by seeking eviction herein instead of pursuing it in the main Nairobi file.
4. The suit was set down for hearing on 17/2/2022 in the absence of the Defendants. This is despite the fact that the hearing date was taken by consent of both parties on 10/11/2021.
5. The Plaintiff, Jane Wanjiru Githinji testified as the sole witness in support of her case. She relied on her Witness statement dated 30/12/2017 as evidence in chief and produced the documents listed in the List of Documents of even date as Pexh. 1-2; Judgment in Nbi ELC No. 201 of 2006 and photographs on the constructions on the suit land.
6. The Defence did not call any witness.
7. The Plaintiff filed her submissions dated 23/2/2022 through the firm of Mungai Kalande & Co. Advocates. She recapped the Nairobi Judgment issued in her favour against the Defendants. That immediately after the delivery of that Judgment the Defendants commenced construction thereon to defeat her interests thereto. That her evidence herein remains unchallenged to buttress her legal ownership that is protected under Section 26 of the *Land Registration Act*.
8. The main issue for determination is whether the Plaintiff claim is merited.
9. The Plaintiffs case is that she was adjudged the owner of the suit land vide Judgement of this Court delivered on the 22/9/2022 in ELC 201 of 2006 in which she had sued the same parties over the same parcel of land. That the Court ordered the 3 Defendants to inter alia transfer the suit land to the Plaintiff and in default the Hon Deputy Registrar of the Court was mandated to execute the documents to effectuate the orders.
10. It is her case that despite the above orders the Defendants have refused to transfer the land to her and instead have trespassed onto the land and started constructing on the suit land. She seeks eviction orders alongside mandatory orders of injunction against the Defendants.
11. It is on record that the Defendants failed to defend the case despite being served and the date having been taken by consent of the parties in the presence of Messrs Mungai for the Plaintiff and Messrs Kinuthia for the Defendants on the 10/11/2021.
12. Sections 107 and 108 of the *Evidence Act* Cap 80 provide for burden of proof and who is to prove it that;

“ 107. Burden of proof

- (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden



The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

13. That said it is the law that a party must proof their case even when it is not challenged by the opposite side. The burden of proof therefore lies with the Plaintiff to proof that the Defendants have entered the suit land and trespassed onto the same. If he fails to lead any evidence in support then the claim fails.
14. Section 24 of the Registration of Land Act states that the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privilege belonging or appurtenant thereto. The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of the Court are protected in law. The rights shall be held by the proprietor with the exceptions of the permitted limitations in law such as charges, leases, encumbrances and or such other liabilities rights and interests set out in section 28 of the Land Registration Act.
15. According to the judgement of this Court on record the Plaintiff was adjudged the owner of the land. It is clear from the record that the Plaintiff is yet to execute the orders by way of registration. The Plaintiff laments that the Defendants have refused to execute the transfer of the land in her name. In my view the judgment of the Court was self-executory in that in default of the Defendants the Deputy Registrar was mandated to execute the transfers in her name.
16. According to the aforesaid judgment it is to be noted that the same was delivered on the 22/9/2017 hence it is still in force. The rights of the Parties were determined in finality and as at the time of writing this judgement there was no evidence placed before me to show that the said judgment has been set aside, vacated and or appealed.
17. In Black’s Law Dictionary 8th edition, a continuing trespass is defined as:-

“A trespass in the nature of a permanent invasion on another’s rights, such as a sign that overhangs another’s property.”
18. The authors in Clerk & Lindsell on Torts 16th Edition, paragraph 23 - 01, stated that:-

“Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.”
19. The Plaintiff has led evidence that the Defendants occupation of the property is without her consent and authority. The Defendants on the other hand have not shown that they so occupy or use the land on the basis of any legally recognized right. The Court finds that in the absence of any legal justification to continue occupying the land they remain trespassers.
20. In the end the Plaintiffs claim is allowed.
21. I make no orders as to costs.
22. It is so ordered

DELIVERED, DATED AND SIGNED AT THIKA THIS 19TH DAY OF MAY 2022 VIA MICROSOFT TEAMS.

J G KEMEI
JUDGE

Delivered online in the presence of:



Wekesa holding brief for Mungai for the Plaintiff

Ms. Kinuthia for the 1st Defendant

2nd Defendant – Absent

Court Assistant - Phyllis

