



REPUBLIC OF KENYA



**Omar v Mwakitete & 3 others (Environment and Land Case Civil Suit
65 of 2017) [2022] KEELC 3596 (KLR) (17 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3596 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT 65 OF 2017**

NA MATHEKA, J

MAY 17, 2022

BETWEEN

YUSUF SHEIKH OMAR PLAINTIFF

AND

SALIM KINGI MWAKITETE 1ST DEFENDANT

AHMED HASSAN 2ND DEFENDANT

ABDUSALIM OMAR 3RD DEFENDANT

HITHAM ABDUL AZIZ: 4TH DEFENDANT

JUDGMENT

1 The plaintiff avers that they are the registered owners in common of all that parcel of land known as Mombasa/Block XLV/61 with an approximate area of 0.059AC. that he has been in possession of the suit property. The plaintiff's claim against the defendant is for a permanent injunction to restrain actual and threatened trespass to the land by unlawful interference with the plaintiffs' land. That on or about mid 2016 the defendants entered the plaintiffs' property without the plaintiffs' knowledge and or consent. While at the plaintiff's said property, the defendants are now constructing permanent structures on the suit property. The defendant's do not claim any right or title to the land. The plaintiff avers that the intended entry, demolition, and eviction are in any event unlawful. As a result of the said unlawful entry, the plaintiffs are apprehensive that the defendant remain on the suit property and thereafter claim rights and or defeat the plaintiffs title. That unless the defendant is restrained, the plaintiffs will suffer irreparable loss and damage from the intended unlawful actions that unless restrained by court order, the defendants will proceed with the intended illegal occupation and unlawful construction. The plaintiffs pray for judgment against the defendant for:-

1. Trespass to land and unlawful interference with Private property and otherwise unlawful, illegal, ultra-vires and void.



2. A permanent injunction restraining the defendant by itself, its servants and/or agents from entering into, evicting, demolishing, or in any other way interfering with the plaintiffs' land , quiet possession and enjoyment of Mombasa/Block XLV/61.
 3. Costs.
 4. Any other relief fit and expedient
- 2 The 1st, 2nd, 3rd and 4th defendants deny that they have entered the plaintiff's property and aver that they are administrators of a community centre known as Tijara Gardens built in an adjacent public land in the 1970's with the consent of the then municipal council of Mombasa. The 1st, 2nd, 3rd and 4th defendants state that their claim is a licensee of the adjacent public land now being held by the county government of Mombasa. The 1st, 2nd, 3rd and 4th defendants believe that the plaintiff seeks to mislead this honourable court into evicting them from the adjacent public land which the plaintiff intends to unlawfully acquire. The 1st, 2nd, 3rd and 4th defendants believe this case is one of a dispute to boundary which ought to be resolved by the registrar of Land under section 18 (2) of the [Land Registration Act, 2012](#) and not this court and therefore this court has no jurisdiction to entertain this suit.
- 3 PW1 testified that he is the registered proprietor of parcel of land known as Mombasa/Block XLV/61 together with two other persons not before court. That he has been in possession of the suit property. The plaintiff's claim against the defendant is for a permanent injunction to restrain actual and threatened trespass to the land by unlawful interference with the plaintiffs' land. That on or about mid 2016 the defendants entered the plaintiffs' property without the plaintiffs' knowledge and or consent. The defendants testified that they are members of Tijara Gardens built on public land in 1970s with the consent of municipal council of Mombasa. The defendants believe this case is one of a dispute to boundary which ought to be resolved by the registrar of land under section 18 (2) of the [Land Registration Act, 2012](#) and not this court and therefore this court has no jurisdiction to entertain this suit.
- 4 This court has considered the evidence and the submissions therein. Section 24 of the [Land Registration Act 2012](#) no 3 of 2012 provides as follows:
- The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
- 5 Section 25 (1) of the said Act further provides that:
- the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.”
- 6 Additionally, Section 26 of the same Act provides that:
- The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except



- a) on grounds of fraud, or misrepresentation to which 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.”

7 It is my finding the plaintiff and two other persons are the absolute proprietor of the suit property. Consequently, they are entitled to protection of the said title as provided for under the [Land Registration Act](#) no 3 of 2012. However, the plaintiff has not produced any authority to act for the other proprietors of the suit land, that is, Abdulkadir Haji Esmail Haji and Mohammed Iqbal Musani as indicated in the title deed and search certificate produced as exhibits. Be that as it may, the plaintiff alleged that the defendants have trespassed on his part of the property. It is trite that he who alleges must prove. This principle is clearly captured in section 107 (1) of the [Evidence Act](#) (chapter 80 of the Laws of Kenya), which provides:

107.

- (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.

8 Similarly in sections 109 and 112 of the Act provides as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

9 With regard to the first issue, [Clerk & Lindsell on Torts](#) 18th Edition at paragraph 18-01 defines trespass as follows:

Any unjustifiable intrusion by one person upon land in possession of another.”Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”

10 Section 3 of the [Trespass Act](#) further provides that,

(1)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.(2)Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”

11 From the evidence before Court the Plaintiff states that the Defendants have put up a building on his property and produced a photo as an exhibit hence the trespass is continuous. Continuous trespass is defined in the [Black's Law Dictionary](#) 8th edition as,

A trespass in the nature of a permanent invasion on another's property.”



12 In the case of *Eliud Njoroge Gachiri vs Stephen Kamau Nganga* ELC NO 121 of 2017 the court held as follows;

However in a case of continuing trespass, a trespass consists of a series acts done on consecutive days that are of the same nature and that are renewed or continued from day to day so that the acts are aggregate form one indivisible harm.”

13 Further in the case of *John Kiragu Kimani vs Rural Electrification Authority* (2018) eKLR the court held that:

Following that evidence, it is clear from the record that no consent, authority or permission of the Plaintiff was ever sought and/or obtained. No notice was given to him of the impending project as contemplated by section 46 of the *Energy Act*. The irresistible conclusion is that the Defendant is guilty of trespass.”

14 However, no evidence of this encroachment was produced. There is no surveyors report to confirm the trespass. This court cannot determine the boundaries of the said suit property. From the evidence adduced before me and guided by the law and authorities mentioned above I find that the plaintiff has failed to establish his case on a balance of probabilities and I dismiss it with costs to the defendants. Parties are advised to have this matter resolved by the land registrar under section 18 (2) of the *Land Registration Act*, 2012.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 17TH DAY OF MAY 2022.

N A MATHEKA

JUDGE

