



**Ndirangu v Macharia (Environment & Land Case 203 of 2014)  
[2022] KEELC 12648 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 12648 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 203 OF 2014**

**JO OLOLA, J  
MAY 12, 2022**

**BETWEEN**

**GLADYS WACHERA NDIRANGU ..... PLAINTIFF**

**AND**

**FRANCIS KIAGAYU MACHARIA ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. The plaintiff herein instituted this suit seeking an order of eviction against the defendant from the parcel of land known as Gakawa/Githima/Block1/Burguret/854 (hereinafter referred to as the suit land). The plaintiff also seeks general damages for trespass.
2. The suit is premised on the grounds that the plaintiff is the registered proprietor of the suit land; that the defendant entered the suit land without the plaintiff's authority and began cultivating thereon and that attempts to get the defendant to vacate the suit land have been futile.
3. It is the plaintiff's case that the suit property was purchased by her husband, Charles Ndirangu Macharia (deceased) and herself from Burguret Arimi Company Limited in 1980's.
4. Explaining that by the time her husband passed on in 1985, survey works had been carried out and the suit land allocated to her deceased husband and herself, the plaintiff states that her deceased husband and herself began developing the suit land by building a worker's house, a foundation for the family home, fencing and planting trees thereon.
5. The plaintiff laments that upon demise of her husband in 1985, the defendant entered the worker's house and took charge of the suit land without her consent. The plaintiff further laments that her attempts to enter the suit land have been resisted by the defendant.



6. Explaining that she has on several occasions sought help from the area chief to get the defendant to vacate the suit land but without success, the defendant urges the court to grant her the orders sought.
7. With regard to her claim for damages for trespass to land, the plaintiff states that the defendant has been cultivating the suit land and illegally deriving benefits therefrom.
8. In reply and opposition to the plaintiff's suit, the defendant filed a statement of defence (on November 7, 2014) in which he contends that the registration of the plaintiff as the proprietor of the suit property is subject of a trust in his favour and in favour of his brothers; that the plaintiff's husband had been authorized by family members to process the title to the suit land before he passed on in 1985; that the developments in the suit land were effected by him and his brothers for their mother and that the plaintiff has never been in use and occupation of the house in the suit land.
9. Concerning the workers house in the suit land, the defendant contends that it was built by him and his brothers for his use as the caretaker of the suit land. For that reason, he did not require the permission of the plaintiff to occupy it.
10. With regard to his use of the suit land, the defendant states that he has been cultivating the suit land as of right hence no case of trespass can lie against him.

## **Evidence**

### **The Plaintiff's case.**

11. When the matter came up for hearing, the plaintiff informed the court that the defendant is a brother to her deceased husband; that the suit land belonged to her husband who died in 1985 and is now registered in her name; that her husband had bought the suit land from Burguret Arimi Company Limited and was issued with a clearance certificate. She produced the clearance certificate, dated July 5, 1988 as Pexbt 1. She was also issued with a title deed in respect of the suit property. She produced the title deed as Pexbt 2.
12. The plaintiff informed the court that they took possession of the suit land in 1980 and erected a house for workers therein. They engaged three workers.
13. In 1985, her husband started building a family house therein. Explaining that her husband died in that year, the plaintiff informed the court that the foundation still stands.
14. The plaintiff further informed the court that after her husband passed on, the defendant chased her away from the suit land and sold the building materials.
15. The plaintiff informed the court that although her husband is buried in the suit land, she has never set foot in it since that time.
16. The plaintiff further informed the court that through the police and the area chief, she has tried to get the defendant to vacate the suit land without success. To prove those facts, the plaintiff produced letters written by the area chief to the defendant dated March 20, 1990 and March 15, 1991 as Pexbt 3 and 4. She also produced a schedule of assets and a letter given to her by the Public Trustee concerning the estate of her deceased husband as Pexbt 5 and 6.
17. Terming the defendant's contention that the suit land is family land false, the plaintiff stated that if the land was family land, she would not have been given a clearance certificate and a title deed.
18. The plaintiff acknowledged that her father-in-law is buried in the suit land but stated that he was buried there with her permission.



19. In cross examination, the plaintiff stated that she brought the suit herein on her own behalf and the title to the suit land is in her name.
20. She stated that she obtained a clearance certificate which was in her husband's name after the death of her husband, who was a shareholder of Burguret Arimi Company Limited and had been allocated the suit land by the company.
21. She admitted that when she obtained title to the suit land the defendant was living in the suit land.
22. She maintained that she took the dispute concerning the property to the area chief.
23. Although she has never lived in the suit property, she stated that they were cultivating it.
24. Maintaining that the suit land is not family land, the plaintiff informed the court that during succession proceedings, the family did not raise any objection when the suit land was listed as one of her husband's assets.
25. Concerning the reason as to why her father-in-law is buried in the suit land, the plaintiff maintained that she donated a site for his burial because he had land in Rift Valley which was to far.

**The Defendant's case.**

26. The defendant who testified as DW1, relied on his statement recorded and signed on November 6, 2014 after the same was adopted as his evidence in chief. He also relied on a document containing the minutes for a meeting held on May 12, 1985. He produced the document as Dexbt 1.
27. In cross examination, he maintained that the suit land was bought by himself and his brothers, the deceased included.
28. He stated that as a family, they contributed money to purchase the land.
29. He admitted that the plaintiff's deceased husband was younger than him, three times, but stated that the plaintiff husband was registered as the owner of the suit land because he was the one most trusted in the family.
30. He acknowledged that there is a foundation in the house but insisted that the foundation was for their mother's house.
31. He maintained that the site house was built by himself and his brothers and denied the plaintiff's contention that he chased workers from the farm house.
32. He stated that he did not continue building the house in the land because he had no money. The plaintiff also started claiming that the suit land belonged to her.
33. He denied having received any letter from the chief asking him to vacate the suit land.
34. He admitted that he is the only one who lives in the suit land and that none of the other family members have laid a claim on it.
35. He stated that he was not aware whether the plaintiff had obtained letters from the public trustee.
36. He informed the court that the minutes he produced as Dexbt 1 were written after the plaintiff's husband died but before he was buried.
37. He stated that the members listed in the document are members of the clan.



38. He stated that although his name and that of his mother do not feature in the document Dexbt 1, they were present in the meeting where the minutes were taken but the plaintiff and her children were not present in the meeting.
39. In re-examination he stated that the house they were building with his brothers for their mother was never completed because his brothers did not have money after the plaintiff's husband died.
40. As to why the other family members have not laid a claim to the suit land, he stated that it is because he was the only one sued in this case.

### **Analysis and Determination.**

41. At close of hearing, parties filed submissions which I have read and considered and I find the issues arising from the pleadings and the submissions to be:-
  - i. Whether the defendant can rely on the defence of time bar when he had not pleaded it?
  - ii. Whether the suit land is subject of a trust in favour of the defendant and his brothers, the plaintiff's husband included?
  - iii. Whether the plaintiff has made up a case for being granted the orders sought, or any of them?
  - iv. What order(s) should the court make?
42. In respect of the 1<sup>st</sup> issue, reference is made to the evidence adduced in this case showing that the cause of action against the defendant arose more than 12 years before this suit was instituted and based on section 7 of the *Limitations of Actions Act*, cap 22 Laws of Kenya, which limits the time within which a suit for recovery of land may be instituted to twelve years from the time the cause of action first accrued and submitted that the plaintiff's case is time barred.
43. Concerning the issue, on behalf of the plaintiff it is submitted that the wrongful actions of the defendant amount to continuous tort for which a new cause of action arises as long as the tort persists.
44. In dealing with this issue, I begin by pointing out that the defendant in his pleadings did not plead the issue of time bar as a ground of attack of the plaintiff's case.
45. Although the issue of time bar is both an issue of fact and law, the defendant cannot be allowed to rely on that issue to defeat the plaintiff's case. This so because, allowing him to rely on that ground when it was not pleaded would be tantamount to allowing him to unprocedurally/unlawfully depart from his pleadings.
46. Such an action would be in contravention of Order 2 rule 4 of the *Civil Procedure Rules* which requires a defendant in an action for recovery of land to plead specifically every ground of defence on which he relies on like any relevant statute of limitation of actions.
47. As to whether the suit land is subject to any trust in favour of the defendant and his brothers, reference is made to the averments contained in the defendant's statement of defence to the effect that the registration of the plaintiff as the proprietor of the suit property is subject of a trust in favour of the defendant and his brothers and to the oral testimony of the defendant that his brothers and he contributed money and gave it to the plaintiff's deceased husband and submitted that that the defendant proved that the suit property is subject of a trust in favour of his brothers and himself, the plaintiff's husband included.



48. Concerning this issue, on behalf of the plaintiff, it is submitted that registration of the plaintiff as proprietor of the suit land is absolute. The defendant is said to have failed to raise a counter-claim based on the pleaded trust and on that reason contended that his claim cannot be adjudicated upon.
49. With regard to this question, I begin by pointing out that the issue of trust is expressly pleaded in paragraph 2 of the defendant's statement of defence and implied in many other paragraphs in the defendant's statement of defence.
50. The only issue arising therefrom is whether the defendant proved to the required standard, on a balance of probabilities, that the suit property is subject of a trust in his favour and in favour of his brothers, the plaintiff's husband included.
51. Concerning this issue, I have carefully considered the oral evidence given by the defendant concerning his contention that the suit property is subject of a trust in his favour and in favour of his brothers. I have also carefully considered the evidence offered by the plaintiff in support of her contention that the suit property belonged to her deceased husband and was not family land.
52. I find the account offered by the plaintiff concerning ownership of the suit land to be more believable than the account offered by the defendant. If indeed the property was family land, as claimed by the defendant, it is my considered view that the other beneficiaries of the estate would be staking a claim on it. They would have even come to court and testified in support of the position advanced by the defendant.
53. I also find the defendant's claim that the foundation in the suit land is for a house they were constructing for their mother to be untrue. If that was the case, the defendant and his brothers would have at least continued with the project. The explanation offered to the effect that they stopped the development after the plaintiff's husband passed on, can only support the conclusion that the project belonged to the deceased. If the defendant and his brothers contributed in acquisition of the suit land, I am sure the defendant would have produced evidence of such contribution or at least stated the amount each family member contributed.
54. In the absence of such evidence and taking into account the defendant's own testimony to the effect that his family did not consider him a trustworthy person, this court has no difficulty in finding his testimony concerning acquisition of the suit property to be untrue and unbelievable.
55. I also find the document produced by the defendant and marked Dexbt 1, to be devoid of any evidential value as far as the issues raised in this suit are concerned. That is so because, it is neither proof that the suit land was not acquired by the plaintiff's husband nor is it proof that the defendant or his brothers participated in acquisition of the suit land.
56. As to whether the plaintiff has made up a case for being granted the orders sought, from the totality of the evidence adduced in this case, I have no difficulty in finding that the defendant's occupation and use of the suit land was all along unlawful as it was not with the permission of the owner or on account of any other lawful reason.
57. Having so found, I find that the plaintiff has made up a case for issuance of an eviction order against the defendant.
58. With regard to the claim for damages for trespass to land, I do find this case as a good case for award of damages for trespass to land.



59. Noting the long period the plaintiff has wrongly being kept away from use and occupation of the suit property and the trouble she has been subjected to by the defendant, I assess damages payable to her at Kshs 500,000/=. I also award costs of the suit to the plaintiff.
60. The damages awarded shall attract interest at court's rate from the date of delivery of this judgment to the date of payment in full.
61. Orders accordingly.

**DATED AND SIGNED AT ITEN THIS 25<sup>TH</sup> DAY OF APRIL, 2022.**

**L. N. WAITHAKA**

**JUDGE**

**READ, DELIVERED AND SIGNED AT NYERI THIS 12<sup>TH</sup> DAY OF MAY, 2022.**

**J. O Olola**

**JUDGE**

