



**Kaboi v Wamburu (Environment & Land Case 35 of 2016)
[2022] KEELC 2545 (KLR) (11 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2545 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 35 OF 2016**

**A NYUKURI, J
MAY 11, 2022**

BETWEEN

ANDREW MANGUU KABOI PLAINTIFF

AND

WELLINGTON KIHATO WAMBURU DEFENDANT

JUDGMENT

Introduction

1. Vide a Complaint dated 26th May, 2016, the Plaintiff averred that at all material times he was the registered owner of the whole of the parcel of land known as Plot Number Mithini C16 located at Muka Mukuu Farmers Co-operative Society Limited (suit property). That on 10th August 2015, the Defendant unlawfully encroached on the suit property and engaged in wanton destruction of the Plaintiff's trees thereby altering the Plaintiff's land. He further stated that the Defendant had put up structures on and occupied the suit property whereof the Plaintiff was denied full enjoyment of the same. He further averred that his pleas to have the Defendant stop the unlawful occupation of his land have been in vain.
2. Therefore, the Plaintiff sought for the following orders:
 - a) A declaration that the Plaintiff is the sole and/or bonafide owner of the whole parcel of land known as Plot Number Mithini C 16 located at Muka Mukuu Farmers' Co-operative Society Limited.
 - b) That eviction orders do issue to evict the Defendant whether by themselves their agents, servants, employees, workers and/or otherwise whosoever from Plot Number Mithini C 16 located at Muka Mukuu Farmers' Co-operative Society Limited.
 - c) A mandatory and perpetual injunction restraining the Defendant either by himself, his agents, employees, servants and/or otherwise howsoever from entering and in any manner occupying,



trespassing, destroying coffee trees and/or in any other way interfering with the Plaintiff's Plot Number Mithini C16 located at Muka Mukuu Farmers' Co-operative Society Limited.

- d) General Damages for trespass and unlawful occupation.
 - e) Costs and interest of the suit.
 - f) Any such other or further relief that this Honourable Court may deem fit and just to grant.
3. By a Memorandum of appearance dated 2nd March 2017, and filed on 3rd March 2017, the firm of Ruiru Njoroge & Associates entered appearance for the Defendant. Subsequently on 18th September 2019, the said firm filed the Defendant's list of witnesses and list of documents. No Defence was filed.
 4. On 17th July 2019, this matter came up for pretrial directions before the Deputy Registrar of this court, when the defendant sought for more time to comply with Order 11 of the Civil Procedure Rules. On 18th September 2019, when the matter was again mentioned for pretrial conference both counsel confirmed the matter as ready for hearing. As the Defendant was yet to comply, the Deputy Registrar confirmed the matter ready for hearing and directed the Defendant to file their documents by Close of Business that day. Subsequently the matter came up for hearing on 25th February 2021, and both counsel confirmed that they were ready to proceed. At hearing, the Plaintiff testified as the only witness.

Plaintiff's Case

5. PW1, Andrew Manguu Kaboi who is the Plaintiff herein adopted his witness statement filed on 26th May 2016 as his evidence in chief. He stated that he was the lawful owner of plot number Mithini C16 which he had owned since 1997 and had all the relevant ownership documents. He further testified that on 10th August 2015, the Defendant unlawfully encroached on his land and began destroying trees and constructing thereon. That this prompted him to complain to Muka Mukuu Farmers Co-operative Society Limited and the latter issued him with the letter dated 24th March 2016 confirming that he was the owner of the suit property.
6. It was his further testimony that the Defendant placed construction materials on the suit property and a request for him to desist from his actions fell on deaf ears. He further stated that he lived out of the country and it is his brother who was taking care of the land. He also stated that the land previously belonged to Raphael Kamba and that they exchanged the land with the said Raphael Kamba. He produced documents filed on 26th May 2016 as P-Exhibits 1-4 in the following order; the letter dated 22nd October 2015 from Mukaa Mukuu Farmers Co-operative Society Limited (hereinafter referred to as the Cooperative Society), as P-Exhibit 1, Letter dated 24th March 2016 from the Co-operative Society as P-Exhibit 2, Demand letter dated 1st April 2016 as P-Exhibit 3 and Photographs as P-Exhibit 4.
7. On cross examination, he stated that the land originally belonged to the Cooperative society and that he was not a member of the Cooperative society. He reiterated that he exchanged the land with one Raphael Kamba Kithumbi and referred to the letters dated 22nd October 2015 and 24th March 2016 and stated that it is the Defendant who committed fraud. He confirmed that the said letters were signed by a Mr. Kitavi who was an employee of the Cooperative Society and that the later was arrested for fraud and was subsequently charged in court. He confirmed that the letter dated 24th March 2013 was not addressed to the Defendant, but emphasized that he owned the land since 1997 where he had planted trees.
8. In Re-examination, PW1 stated that it was Julius Nyerere Sila who purported to sell his land to the Defendant, and Mr. Kitavi's only role was as a manager and was tasked with signing the documents, yet he was the one arrested. That marked the close of the Plaintiff's case.



9. When the Defendant took the stand, counsel for the Plaintiff objected to him giving evidence on ground that he had not filed defence. And on that ground, the defendant was not allowed by court to testify. Defence Counsel's application to file defence out of time was declined by court and parties ordered to file submissions.
10. Although on 17th March 2022, parties were given seven days to file submissions none of them filed any submissions.

Analysis and Findings

11. I have carefully considered the pleadings, the Plaintiff's evidence and submissions. The issues for determination are; -
 - i) Whether the Plaintiff is the bonafide owner of the suit property.
 - ii) Whether the court should grant the orders sought against the Defendant.
12. It is a settled principle of law that he who alleges must prove, and the burden of proof of a claim in a civil dispute rests with the Plaintiff. Section 107 of the *evidence Act* provides as follows;
 - (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.
13. In the instant case the Plaintiff's claim is uncontroverted as the Defendant failed not just to testify in defence, but also to file defence against the Plaintiff's claim. Even where the Plaintiff's evidence is uncontroverted, he/she/they must prove their claim on a balance of probability, and the court will not take their word without scrutiny of their evidence, just because their evidence is unchallenged.
14. In the case of *Interchemie EA limited v Nakuru Veterinary Centre Limited* Nairobi (Milimani) HCCC No. 165B of 2000, the court held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the Plaintiff stands uncontroverted. But in *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & Another* [2016] eKLR, the court held that even where the evidence is uncontroverted, the court should not take it as truthful without interrogation just because it is uncontroverted. The Plaintiff must prove its case upon a balance of probability whether the evidence is challenged or not.
15. For a party to succeed on a balance of probability, it means they must have any win above 50%. In the case of *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the Court of Appeal held as follows;

Denning J in *Miller v Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had the following to say;

That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the Tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal, it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties... are equally (un) convincing,



the party bearing the burden of proof will lose, because the requisite standard will not have been attained.

16. The plaintiff's uncontroverted case is that he is the owner of the suit property which he exchanged with one Raphael Kamba Kithumbi, who was a member of Muka Mukuu Farmers Cooperative Society Limited. The Plaintiff relied on two letters dated 22nd October 2015 and 24th March 2016 and signed by one M. Kitavi, the Administration manager of the Cooperative Society Ltd. I have had occasion to look at the two letters. In the letter dated 22nd October 2015, the same shows that plot No. Mithini 16B belongs to Andrew Manguu Kaboi under share No. 397 as per the records of Muka Mukuu Farmers Cooperative Society Limited. As regards the letter of 24th March 2016, it shows that Andrew Manguu Kaboi was the owner of plot No. Mithini C 16 from share No. 1090. The same also states that the records of the society show that Raphael Kamba Kithumbi was allocated plot Mithini C 16 on 19th August 1996 and transferred the same to Andrew Manguu Kaboi on 17th November 2007. As the Plaintiff's evidence was uncontroverted since the defence did not offer any evidence at hearing, having failed to file a defence to challenge the Plaintiff's claim, I am satisfied that the Plaintiff has proved on a balance of probability, that he is the owner of the suit property.
17. The Plaintiff has sought for orders that he be declared as the bonafide owner of the suit property as well as for orders of eviction against the Defendant. He has also sought for a mandatory and perpetual injunction to restrain the defendant from interfering with the suit property together with a prayer for damages for trespass. The Plaintiff stated in his testimony that the Defendant had deposited sand, ballast and construction blocks on the suit property with intention to construct thereon. He produced photographs to prove that allegation. As the Plaintiff has proved that he is the owner of the suit property, he is entitled to quiet enjoyment thereof.
18. It is my considered view that having proved ownership of the suit property, the Plaintiff is entitled to have protection of the law as provided for in Article 40 of *the Constitution* of Kenya 2010. In my view he is entitled to declaratory orders sought as well as orders of eviction and perpetual injunction against the Defendant.
19. As regards the prayer for damages for trespass, it is a settled legal principle that damages ought not only be pleaded, they must also be proved. No evidence was led on the nature of damages suffered due to the Defendant's trespass on the suit property. In that regard therefore, the prayer for damages is declined.
20. In conclusion, I find that the Plaintiff has proved his case against the Defendant on a balance of probability and I enter judgment for the Plaintiff for the following orders;
 - a) A declaration be and is hereby made that the Plaintiff is the sole and/or bona fide owner of the whole parcel of land known as Plot Number Mithini C 16 located at Muka Mukuu Farmers Co-operative Society Limited.
 - b) That the Defendant whether by himself, his agents, servants, employees, workers and/or otherwise whosoever is ordered to vacate Plot Number Mithini C 16 located at Muka Mukuu Farmers Co-operative Society Limited within 90 days of this judgment, in default, eviction orders to issue.
 - c) A perpetual injunction be and is hereby issued restraining the Defendant either by himself, his agents, employees, servants and/or otherwise howsoever from entering and in any manner occupying, trespassing, destroying coffee trees and/or in any other way interfering with the Plaintiff's Plot Number Mithini C 16 located at Muka Mukuu Farmers Co-operative Society Limited.



d) Costs of the suit are awarded to the Plaintiff.

21. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 11TH DAY OF MAY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Ruiru for the Defendant

No appearance for the Plaintiff

Ms Josephine Misigo – Court Assistant

