



REPUBLIC OF KENYA



KENYA LAW
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**Kinyua v Wanga (Environment & Land Case 75 of 2012)
[2022] KEELC 3583 (KLR) (11 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3583 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 75 OF 2012**

**MAO ODENY, J
MAY 11, 2022**

BETWEEN

HENRY KINYUA PLAINTIFF

AND

FABIANO WANYAMA WANGA DEFENDANT

JUDGMENT

1. By a plaint dated April 13, 2012 the plaintiff herein sued the defendant seeking the following orders:
 - a) A declaration that the portion of land herein belongs to the plaintiff and the plaintiff has the sole right to be and to remain in possession and occupation of the suit land.
 - b) A permanent order of injunction restraining the defendant together with his agents or servants from trespassing, alienating or in any other way dealing or interfering with the portion of land/suit property.
 - c) The defendant do demolish the fence and remove any of his property on the portion of land.
 - d) The defendant to pay the plaintiff damages for unlawfully and without any reasonable cause dealing with the plaintiff's portion of land.
 - e) Costs of the suit.
2. The defendant filed a defence and counterclaim dated July 3, 2012 where he denied the plaintiff's claim and prayed for judgment to be entered against the plaintiff for :
 - a) Declaration that the defendant is the owner of plot no 346B.
 - b) Permanent injunction restraining the plaintiff, his agents, servants and or any other person acting on his behalf from encroaching and/or interfering in any manner with the defendant's plot no 346B.



3. On November 23, 2021 this matter came up for hearing but only the defendant was present. The court gave another hearing date for January 31, 2022 with an order that a hearing notice be issued which was served and an affidavit of service filed in court.
4. On January 31, 2022 the defendant attended court but the plaintiff did not show up to prosecute his case. The defendant urged the court to dismiss the plaintiff's case for non-attendance and place the matter for hearing of his counterclaim.

Defendant's case

5. The defendant relied on the contents of his defence, counterclaim and a replying affidavit where he stated that the plaintiff has encroached on his plot no 346 B. He further stated that he has a title to the suit land Plot No 346B Vipingo whose new number is Kilifi Vipingo Scheme 1929 and produced the documents in his list of documents as exhibits.
6. He urged the court to grant the orders as prayed in the counterclaim with costs.

Analysis and determination

7. The plaintiff's case was dismissed for non-attendance on January 31, 2022 and therefore the defendant proceeded with his counterclaim which was undefended.

Order 12, rule 3(1) of the *Civil Procedure Rules* stipulates thus:

“(1) If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.”

8. This was the second time that the plaintiff did not attend court to prosecute his case.
9. It was the defendant's case that he is the registered owner of the suit land of which he produced a title deed. It is also not disputed that the defendant is the rightful owner of the suit land known as plot no 346B Vipingo which has a new title known as Kilifi Vipingo Scheme 1929.
10. The defendant prays for a declaration that the suit land belongs to him and a permanent injunction against the plaintiff restraining him from interfering with his suit land.

Section 24 (a) of the *Land Registration Act* states that:

“subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....”

11. In the case of *Willy Kipsongok Morogo V Albert K. Morogo* (2017) eKLR the Court held as follows:

“the evidence on record shows that the suit parcel of land is registered in the names of the plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.”

12. I find that the defendant has proved his case against the plaintiff and therefore his counterclaim is allowed as prayed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF MAY 2022.



M A ODENY

JUDGE

NB: In view of the Public Order no 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

