



Harnsul (Being the legal representative of the Estate of Harrison Njoroge Munjiru, Deceased) v Jane Mukundi (Environment & Land Case E017 of 2021) [2022] KEELC 2693 (KLR) (30 June 2022) (Judgment)

Neutral citation: [2022] KEELC 2693 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E017 OF 2021**

JG KEMEL, J

JUNE 30, 2022

BETWEEN

FRANCIS HARNsul (BEING THE LEGAL REPRESENTATIVE OF THE ESTATE OF HARRISON NJOROGE MUNJIRU, DECEASED) PLAINTIFF

AND

JANE MUKUNDI DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit against the Defendant vide a Plaint dated 5/2/2021 and prayed for Judgment against the Defendant for;
 - a. A Decree and Order of vacant possession to the Plaintiff of the suit property being Title No. Sigona/154.
 - b. A Decree and Order of eviction of the Defendant, by herself, servants, agents or persons acting on her behalf from the suit property being Title No. Sigona/154.
 - c. A Decree and Order of Permanent Injunction restraining the Defendant, jointly and severally by herself, her servants and/or agents from further entering into, trespassing upon, constructing and/or in any way interfering with the Plaintiff's use and occupation of the suit property Title No. Sigona/154.
 - d. General damages for trespass.
 - e. Mesne profits for the period of the Defendant's trespass on the Plaintiff's property.
 - f. Costs of the suit.



2. The Plaintiff's case is that he is the legal representative of the estate of the late Harrison Njoroge Munjiru who was the registered proprietor of the parcel of land formerly known as Title No. Sigona/47 that measured about 3 acres. That during his lifetime, the late Harrison vide a sale agreement dated 18/6/1979 sold two acres of Title No. Sigona/47 to the late Simon Mukundi Muthondu, the Defendant herein. That it was an express term of the sale agreement that the parcel of land would be subdivided into two parcels of land namely Title No. Sigona/154 (the suit land) and Title No. Sigona/155 measuring one and two acres respectively. That the vendor would then transfer Title No. Sigona/155 to the Defendant. That however the Defendant fraudulently extended the boundaries of Sigona/155 thereby forcefully and illegally trespassing and occupying the suit land and enumerated particulars of fraud and misrepresentation. That efforts including family meetings, local administration and District surveyor interventions to have the Defendant relocate her fence have been futile. That the Defendant objected to a joint survey and site visit by the District Surveyor to establish the correct boundaries hence the suit.
3. The Defendant entered appearance through the firm of Isaiah Kandie & Co. Advocates and filed her statement of defence dated 10/3/2021. She denied the alleged sale agreement between her late husband, the late Simon Mukundi Muthondu and the Plaintiff or late Harrison Njoroge Munjiru. She contended that she was not aware of any subdivision of the parcel No. Sigona 47 into the two parcels; Sigona 154 and Sigona 155. She further denied any allegations of fraud on her part; that she has not trespassed on the suit land but maintained she is the registered owner of Sigona 155 that is not related in anyway with Sigona 154. She pleaded that the suit is statute barred having been filed over 42 years after the alleged cause of action arose. That the attempts to involve the District Surveyor is a malicious afterthought meant to interfere with her quiet and peaceful enjoyment of her land. Moreover, in the alternative, which her occupation on part of the suit land for the said period and without the Plaintiff complaining, then she is in adverse possession of that portion. The Defendant also claimed that the one acre of land she is accused of occupying is after all Kenya Power & Lighting Company Limited's wayleave that borders her land. She urged the Court to dismiss the Plaintiff's suit with costs.
4. The suit was set down for hearing on 14/3/2022. Despite the Defendant's knowledge and failure to attend Court on the hearing day, the Plaintiff case was heard ex parte with one witness testifying.
5. Racheal Njoki Ndungu, the Plaintiff's niece and granddaughter of the late Harrison Njoroge testified as PW1. She relied on her witness statement dated 5/2/2021 and List of Documents of even date and produced the documents therein as Pex.1-7. Her testimony was a recap of the averments in the Plaintiff with the annexures FH1 – FH10 (sic) thereto. She told the Court that she was aware of the facts of the case and that the Defendant occupied parcel 254. That before approaching this Court, the parties attempted an out of Court settlement that included a joint survey on the land but the Defendant's son wrote a letter stopping the survey. That the joint survey was ordered by the Registrar of Lands.
6. That was end of the Plaintiff's case. Directions were taken for parties to file their final submissions by 14/4/2021; none of the parties complied.
7. It is trite that he who alleges must prove. Sections 107 and 108 of the Evidence Act Cap 80 provide for burden of proof and who is to prove it that;

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“ 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.”

8. The Plaintiff according to para.1 of the Plaint, filed this suit in his capacity as legal representative of the Estate of the late Harrison Njoroge Munjiru. No evidence was tendered in Court to prove this assertion by way of grant of letters of administration. This is despite para. 2 of PW1’s witness statement otherwise headed ‘Witness Affidavit’ alluding to FH1, the Grant made in Thika Succ. Cause No. 7 of 1985, in the matter of the Estate of Harrison Njoroge Munjiro (Deceased). No such grant was produced in Court as exhibit and it does not appear in the Plaintiff’s List of documents dated 5/2/2022.
9. It is trite that only a party who has been issued with grant of letters of administration has capacity to represent the estate of a deceased person as set out under Section 82 of the *Law of Succession Act*. In *Virginia Edith Wambui Otieno v Joash Ochieng Ougo & another* [1987] eKLR the Court of Appeal held that:

“But an administrator is not entitled to bring action as administrator before he has taken out letters of administration. If he does, the action is incompetent at the date of its inception.”
10. Further PW1 testified in Court that she had been appointed by the Plaintiff to testify on his behalf by way of a letter or power of attorney. No evidence was adduced to demonstrate such appointment to the Court. PW1 informed the Court that the Defendant occupies parcel 254 whereas in the Plaint it was pleaded that the Defendant occupied the plot known as Sigona 155. The evidence adduced in Court was at variance with the pleadings. There is no proof of proprietorship of the suit land.
11. I am of the view that the Plaintiff’s failure to prove his legal capacity in this suit, goes to the root of his case and therefore the suit is for striking out.
12. I proceed to do so.
13. Final orders and disposal.
 - a. For the reasons given above this suit is struck out.
 - b. I make no orders as to costs.
14. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 30TH DAY OF JUNE 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mr. Njengo for the Plaintiff Plaintiff/Applicant



Defendant - Absent

Court Assistant – Phyllis Mwangi

