



REPUBLIC OF KENYA



**Mukunya v Kabwana (Environment & Land Case 645 of 2015)  
[2022] KEELC 2772 (KLR) (29 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2772 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 645 OF 2015  
EK WABWOTO, J  
JUNE 29, 2022**

**BETWEEN**

**ISHMAEL KIRIUNGI MUKUNYA ..... PLAINTIFF**

**AND**

**OSCAR KABWANA T/A C.D.D. CONSORTIUM GROUP ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff brought this suit through a Complaint dated 6<sup>th</sup> June 2015. He sought the following verbatim orders against the Defendant;
  - a) A permanent injunction restraining the defendant & their agents, servants, employees and or proxies from evicting, threatening to evict or in any way interfering with the Plaintiffs quiet and peaceful possession of the suit land.
  - b) Any other order this court may deem just and expedite.
  - c) Costs of this suit.
2. The Plaintiff's case was that in the year 1982, he purchased Plot No. 209/8553/A2, situated at Kariobangi North, Nairobi from the Gitathuru Building society which in the year 2000 awarded him with a certificate No 209 to certify that he is the registered owner of the suit property and he had been in possession of the suit property from that time.
3. On 30<sup>th</sup> December 2007, after the general elections that were held, the Defendant together with some rowdy youths illegally evicted the Plaintiff, wrongfully entered and took possession of the suit property and have remained there ever since.
4. It was also the Plaintiff's case that the Defendant burnt down his house, took over his water project business and livestock that included 2 cows, 40 goats, 100 chicken and 115 ducks. The defendant



thereafter commenced construction on the suit property without his consent and being aggrieved, he brought this suit seeking for various orders listed at paragraph 1 of this Judgment.

5. The defendant despite being served never entered any appearance nor filed any defence. Consequently, the suit was heard as an undefended cause on 27/04/2022
6. At the hearing, the Plaintiff testified as PW1. He adopted his witness statement dated 6<sup>th</sup> July 2015. He also produced a list and bundle of documents dated the same day.
7. He also testified and stated that his son was attacked when the defendant's goons raided his property and evicted him on 30<sup>th</sup> December 2007. After his testimony and before the close of his case, the Plaintiff's Counsel made an oral application seeking to amend the prayers sought in the plaint to include the said prayers: -

“An eviction order be and is hereby issued directed to the defendant ordering them to vacate the Plaintiff's parcel of Land known as Plot No. 209/8553/A2 situated at Kariobangi North, Nairobi.”

The said amendment was duly allowed by the court and included as part of the prayers sought by the Plaintiff.

8. The main issues for determination is whether the Plaintiff has proved his case against the Defendant to the required standard.
9. Although the suit was undefended, the Plaintiff has a duty to formally prove his case on a balance of probabilities as is required by law.

In the case of *Kirugi and Another Vs Kabiya & 3 others* (1987) KLR 347 the Court of Appeal held that;

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”

Similarly, in the case of *Gichinga Kibutha Vs Caroline Nduku* (2018) eKLR the Court held that;

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

10. Section 24 of the *Land Registration Act* No 3 of 2012 states that 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. Section 25 of the said Act provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of 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 encumbrances charges or leases shown on the register and the overriding interests as stated in Section 28 of the Act.

Section 26 of the *Land Registration Act*, 2012 provides;

“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 and 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 the ground of fraud or misrepresentation 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.

11. PW1 stated that he was the registered owner of the suit land. From the documentary evidence vide the copy of the documents produced as his exhibits, it is evident that he is indeed the registered owner.
12. The Defendant had no right whatsoever to any entry and forceful occupation of the suit property to the detriment of the Plaintiff. The Defendant's actions were cruel, barbaric and totally uncalled for which should not be condoned in our society.
13. In the absence of any defence and or controverting evidence, this court is satisfied that the Plaintiff has proved his case in so far as the ownership of the suit property is concerned.
14. The courts sits to administer justice. Equity always protects the just rights of the oppressed. Equity always prevents an injustice being perpetrated. Equity sanctifies the administration of justice. In the circumstances, I find that the Plaintiff is entitled to all the rights, interest and privilege that pertain to the land. The Plaintiff is therefore entitled to the prayers sought.

#### **Final orders**

15. From the foregoing analysis, the Plaintiff has proved his case on a balance of probabilities and in this regard, this court makes the following orders;
  - a) An eviction order be and is hereby issued directed to the defendant ordering them to vacate the Plaintiff's parcel of Land known as Plot No. 209/8553/A2 situated at Kariobangi North, Nairobi.
  - b) A permanent injunction be and is hereby issued restraining the Defendant, his servants, agents and employees from interfering with the Plaintiff's quiet and peaceful possession of the suit property.
  - c) The Plaintiff is awarded costs of the suit to be paid by the Defendant.

It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JUNE 2022.**

**E. K. WABWOTO**

**JUDGE**

**In the virtual presence of: -**

Mr. Omondi h/b for Ms. Kahindi for the Plaintiff.

N/A for Defendant.

Court Assistant: - Caroline Nafuna.

**E. K. WABWOTO**

**JUDGE**

