



**Mutungi v Mbarak (Environment & Land Case 307 of 2016)  
[2022] KEELC 3705 (KLR) (9 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3705 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 307 OF 2016**

**JO OLOLA, J**

**JUNE 9, 2022**

**BETWEEN**

**FRANCIS G MUTUNGI ..... PLAINTIFF**

**AND**

**HASSAN MWAIHA MBARAK ..... DEFENDANT**

**JUDGMENT**

**Background**

1. By the Plaint dated and filed herein on 15<sup>th</sup> November, 2016, Francis G. Mutungi (the Plaintiff) prays for Judgment against Hassan Mwaiha Mbarak (the Defendant) for:
  - (a) Orders of injunction restraining the Defendant by himself, servants or agents or any other person acting under them from entering, trespassing, alienating and or interfering with the Plaintiff's subject suit premises herein;
  - (b) General damages;
  - (c) Costs and incidentals of this suit; and
  - (d) Any other or further relief as (by) the nature of this suit, the Court may deem fit to grant.
2. Those prayers arise from the Plaintiff's contention that at all times material, he was the legal owner of all that parcel of land measuring 40 ft by 160 ft near Malindi Airport next to Italian Pasta which he purchased from one Leakey Osuru Kanyonzo on 11<sup>th</sup> August, 2011. The Plaintiff avers that on 22<sup>nd</sup> February, 2016, he discovered that the Defendant had commenced construction works on the property. Despite notice issued to the Defendant to stop the construction, the Defendant had failed, refused and/or neglected to do so and hence this suit.



3. But in his Statement of Defence dated and filed herein on 23<sup>rd</sup> November 2016, the Defendant denies that the Plaintiff is the owner of the suit property. On the contrary, the Defendant asserts that he is the owner thereof and entitled to its exclusive possession and ownership having bought the same on 11<sup>th</sup> July, 2009 from the first original owner.
4. The Defendant avers that shortly after purchasing the land, he fenced it off with a barbed wire and the Plaintiff did not raise any claim thereon. On 16<sup>th</sup> February 2016, he started construction of a foundation thereon as the owner and not a trespasser as contended by the Plaintiff. The Defendant contends therefore that the Plaintiff is not entitled to the Orders sought herein and urges the Court to dismiss the suit with costs.

### **The Plaintiff's Case**

5. The Plaintiff testified as the sole witness in his case. Testifying as PW1, he told the Court he had purchased the property on 11<sup>th</sup> August 2011 from one Leakey Osuru Kayonzo at a consideration of Kshs.350,000/-. PW1 told the Court before he purchased the property, he managed to get a document showing that the said Leakey had in turn purchased the land from one Dorcas Obambo on 6<sup>th</sup> May, 2011.
6. PW1 further told the Court that the said Dorcas had also purchased the property earlier on 22<sup>nd</sup> January, 2005 from one Cornelius Mwangege Kafuli.
7. PW1 testified that on 22<sup>nd</sup> January 2016, he discovered that the Defendant had moved into the suit premises and started construction thereon. When the Area Assistant Chief ordered him to stop the construction, the Defendant refused to stop the same.
8. On cross-examination, PW1 told the Court he could not recall the exact name of the person who sold the land to him as it was a long time back. Upon being shown his documents however, he told the Court the land was sold to him on 11<sup>th</sup> August, 2011 by Leakey Osuru Kayonzo.
9. PW1 further testified that while the sale agreement depicted the land to be 40 x 160 feet, they did not carry out any measurements or survey the land.

### **The Defence Case**

10. On his part, the Defendant called two witnesses who testified in support of his case.
11. DW1 – Mbarak Hassan Mwaiha is the Defendant himself and a resident of Kaloleni. He told the Court he bought a portion of an unregistered parcel of land situated at Kwa Chocha village in Malindi and measuring 50 x 50 feet at a consideration of Kshs.160,000/- on 11<sup>th</sup> July, 2009.
12. DW1 testified that after purchasing the plot of land he fenced it with a wire fence which got rusted and he again fenced the land in 2013.  
  
DW1 told the court for all that time, no one interfered with or claimed the land. On or about 16<sup>th</sup> February 2016, he commenced the building of a foundation thereon and it was then that the Plaintiff appeared and laid claim to the land.
13. On cross-examination, DW1 told the Court he fenced off the land before bringing a Surveyor who then measured the exact size and the boundaries. The fence was however no longer there.



14. DW 2 – Bernard Nyang’a Zewe is a retired teacher and a resident of Kwa Chocha. DW2 told the Court he is the one who sold the suit land to the Defendant on 11<sup>th</sup> July 2009. DW2 told the Court he inherited the plot from his father Mzee Katana Nyang’a.
15. DW2 testified that while he neither knew the Plaintiff nor Leakey Osuru who was said to have sold the land to the Plaintiff, he knew Cornelius Mwangenge who is purported to have sold the land to those who sold it to the Plaintiff. The said Cornelius owns a neighbouring plot and could therefore not have sold the suit land which belonged to DW2.
16. On cross-examination, DW2 told the Court their family land is 10 acres and that they have since sold various portions thereof. The family had never sold the same piece of land twice.

### **Analysis And Determination**

16. I have carefully perused and considered the pleadings filed herein by the parties, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the rival submissions and authorities as placed before me by the Learned Advocates acting for the parties.
17. By this suit filed on 15<sup>th</sup> November 2016, the Plaintiff prays for an order of permanent injunction to issue against the Defendant restraining him, his servants and/or agents from entering, trespassing, alienating and/or interfering with the parcel of land described as measuring 40 x 160 feet and situated near Malindi Airport next to what is described as Italian Pasta. He also prays for general damages and costs of the suit.
18. The Plaintiff’s case is that he bought the said parcel of land on 11<sup>th</sup> August, 2011 from one Leakey Osuru Kayonzo at a consideration of KShs.350,000/-. In support of that proposition, the Plaintiff produced an agreement of sale between himself and the said vendor which describes the property and its condition at Paragraph 1 and 5 thereof thus:
  - “ 1. That the transferor is the beneficial owner title (sic) of a parcel of land situated at or near Malindi Airport next to Italian Pasta and is desirous of selling 40 x 160 feet to the purchaser who has agreed to purchase at a value of Kenya Shillings Three Hundred and Fifty Thousands (Kshs.350,000) (sic); and
  5. That the purchaser having physically inspected the plot aforesaid and being satisfied as to its condition h(as) voluntarily agreed to enter into this agreement.”
19. It was apparent that after the said purchase, the Plaintiff did not take physical possession of the land. He told the Court that on 22<sup>nd</sup> February 2016, he visited the land after being tipped off that someone was constructing on his land. It was then he discovered that the Defendant had indeed commenced construction on the land.
20. The Defendant on his part maintained that he had on 11<sup>th</sup> July 2009 purchased an unregistered parcel of land situated at Kwa Chocha Village in Malindi measuring 50 x 50 feet. He told the court he acquired the land from Bernard Nyang’a Zewe (DW2) at a consideration of Kshs.160,000/-. The Defendant also produced a copy of the Agreement of Sale as Defence Exhibit 1.
21. It was the Defendant’s case that soon after purchasing the property, he fenced it off with a barbed wire. The fence however got rusted and collapsed upon which in the year 2013, the Defendant put in a new fence. He told the Court that during that time, no one else claimed the land or interfered therewith.



He told the Court that it was only when he commenced construction on the land in February, 2016 that the Plaintiff turned up and started claiming the land.

22. In support of his case, the Defendant called as his witness the said Bernard Nyang'a Zewe (DW2) who sold the land to himself. DW2 told the Court his family had owned the land at Kwa Chocha since the time he was born some 63 years back. DW2 told the Court in the year 2005 and 2007 some people had laid claim to their family land but after arbitration by the area Provincial Administration Officers, it was ruled in their favour and the land had remained with the family.
23. The Defendant produced in evidence copies of the decision made. A perusal thereof reveals that prior to the Defendant's purchase of the land some individuals had indeed raised a claim on the land against DW2's family. In cross examination DW2 told the Court he knew Cornelius Mwangenge who was said to have sold land to those who sold it to the Plaintiff. It was his case that Cornelius owned a different parcel of land.
24. As it were the parcel of land was described differently in terms of size by both parties. While the Plaintiff told the Court that his parcel of land measured 40 x 160 feet, it was apparent that the unregistered land to which the Defendant laid claim was much smaller being 50 x 50 feet in size.
25. During cross-examination at the trial, the Plaintiff told the Court the land was vacant when he bought it but they neither measured the size nor did they survey the same to ascertain the measurements. The Plaintiff did not call Leakey Osuru Kayonzo who is said to have sold him the land as a witness. Nor did he call those said to have owned the land before selling to Leakey.
26. There was indeed no evidence adduced by the Plaintiff to show that the alleged predecessors in the ownership of the land had either been in physical occupation or possession of the land.
27. Given that the parcels of land claimed by both the Plaintiff and the Defendant were different in size, it was unclear to the Court in the absence of a Survey Report whether these were one and the same plot or if one had encroached on a portion of the other.
28. In a matter such as this where the land is unregistered and/or unsurveyed, and where the portions of land appear to contain contradictory and/or different measurements, it was incumbent upon the Plaintiff to go a step further and provide cogent evidence upon which the Court can rely to arrive at a conclusion that the parcels of land in contention are either one and the same or amount to an encroachment of certain portions of the land in dispute.
29. That has not been done and the material placed before me herein does not allow me to arrive at any such conclusion. It follows that I am not persuaded that the Plaintiff has proved his case on a balance of probabilities.
30. Accordingly the Plaintiff's suit is dismissed with costs to the Defendant.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 9<sup>TH</sup> DAY OF JUNE, 2022.**

**In the presence of:**

No appearance for the Plaintiff

No appearance for the Defendant

Court assistant - Kendi

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**J. O. Olola**



**JUDGE**

