



REPUBLIC OF KENYA



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**Mulwa v Mbui (Environment & Land Case 33 of 2018)
[2022] KEELC 3867 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3867 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 33 OF 2018**

**TW MURIGI, J
JULY 27, 2022**

BETWEEN

PASCAL K MULWA PLAINTIFF

AND

JACKSON NZUNGU MBUI DEFENDANT

JUDGMENT

1. By a plaint dated 23rd of February 2018, the plaintiff sought for judgment against the defendant for the following orders: -
 - 1) Issuance of an eviction order compelling the defendant herein to vacate the suit premises with immediate effect.
 - 2) Issuance of a temporary injunction restraining the respondent whether by himself, his agents and/or servants from trespassing on, wasting, transferring/disposing, constructing on, alienating or otherwise interfering or dealing with the plaintiff's property No. 41 Makutano Market in Makueni County.
 - 3) Cost of the suit.
 - 4.) Damages for illegal occupation of the suit property herein.
 - 5) Any other relief that this court may deem fit and just to grant.
2. The defendant filed a statement of defence and counter claim dated June 18, 2018. The defendant denied that the plaintiff was the owner of the suit property. In his Counter claim, the defendant averred that he was the legal representative and administrator of the Martha Muthini Nzungu alias Martha M Nzungu the owner of Plot No. 41 Makutano and sought for the following orders in his counter claim: -



- i) A permanent injunction to issue against the Plaintiff by himself, his agents and/or servants from entering onto and/or encroaching on and/or grazing on and/or in any other manner interfering with plot No. 41 Makutano Market.
- ii) An order barring the Plaintiff whether by himself, his agents and/or servants from entering onto and/or encroaching and/or remaining on and continuing illegal interference and possession of Plot No. 41 Makutano Market.
- iii) An order declaring that Plot No. 41 Makutano Market is the property of the Estate of the late Martha Muthini Nzungu alias Martha M Nzungu.
- iv) General damages for trespass.
- v) Cost of the suit and Counter Claim.

The Plaintiff's Case

3. The plaintiff adopted his statement as his evidence in chief. He produced in his list of documents dated 23/04/2018 and the supplementary list of documents dated 28/6/2019. The Plaintiff testified that, he acquired Plot Number 41 Makutano Market Masongaleni ward in Kibwezi within Makueni County in 2000. It was his testimony that the whole market was surveyed by Mr. Ndungu who was the County surveyor and at that time he was the chairman of the County Council. That later on, the defendant started claiming that he was the owner of plot No 41 Makutano Market. He further testified that the County Government issued a notice to Mbui and others to vacate from his plot within two weeks but they declined to do so. He stated that the defendant's allotment letter dated November 20, 2012 was located in Kikumbulyo. In his statement the Plaintiff stated that the defendant had encroached and refused to vacate from his plot. He went on to state that he was the registered owner of the suit plot and that he had been paying the relevant taxes to the County Government.
4. In cross examination he stated that although his plaint indicated that he purchased the plot in 2005, he acquired the plot in 2000 from Makueni County Council after applying for the same. It is his evidence that he did not purchase the plot but the same was allocated to him by the County Council. He stated that he was the chairman of the County Council from 1998/1999 when the plot was surveyed up to 2001. He went on to state that after the beacons were erected he did not develop the plot. He stated that he used to pay rates for the plot and that the Council even wrote to him to clear the rates of Kshs. 23,000/-.
5. He stated that although he did not have the letter of acceptance, he used to pay rates for the plot through the deductions from his salary.
6. In re-examination he stated that after the Makueni County Council allocated the plot to him in 2001, he was issued with an allotment letter and that he paid for the plot.
7. PW1 Francis Muthoka adopted his statement dated 03/07/2018 as his evidence in chief. It was his testimony that he was the chairman of Makutano Market from 1997 to 2000. He went on to state that the Plaintiff was the owner of Plot No. 41. It was his testimony that in 2012, he warned the Defendant when he started to erect a structure on Plot No. 41. He stated that the plots in Masongaleni and Kikumbulyo were different.
8. In cross examination, he stated that Martha Nzungu who was a sister to the defendant had at one time rented a shop in the market. It was his testimony that he knew all the business people in Makutano Market and that Plot No. 41 belongs to the Plaintiff.



9. PW2 David Wambua Kitinga adopted his statement dated 03/07/2018 as his evidence in chief. It was his testimony that he has been the chairman of Makutano Market since 2015. He stated that according to the Plot list for Makutano Market, Plot No. 41 belongs to the Plaintiff. He went on to state that in 2015, the Defendant informed him that Plot No. 41 belongs to his sister and that he wanted to change its ownership into his name.
10. He stated that he accompanied him to the revenue office where the revenue clerk declined to alter the ownership of Plot No. 41. He stated that the defendant had built a stall on Plot No. 41.
11. In cross examination, he stated that Plaintiff had attended two meetings held for plot owners. It was his testimony that although the plaintiff had asked the defendant to remove their stall from his plot, the same was eventually demolished after the Sub County Administrator ordered for its demolition.
12. PW3 Benson Mutuku the Chief Geographic Information Systems and Planning Officer in the County Government informed the Court that the plot No. 41 Makutano measuring 60 feet by 100 feet is registered in the name of the plaintiff. He informed the court that the details in the plaintiff's letter of allotment for Plot No. 41 issued by Makueni County Council marked as exhibit 4 matched with the records held by the County Government. He produced a letter dated 30/06/2017 from Government of Makueni County which confirmed that the plaintiff is the registered owner of Plot No 41 Makutano. He testified that the letter of allotment issued to Martha Nzungu was with respect to Plot No. 41 measuring 50 by 100 feet was situated at Kikumbulyo Market in Kikumbulyo location. He stated that the two plots were different because they were in two different administrative sections. He further stated that they did not have records for Plot No. 41 Makutano in Kikumbulyo location.
13. In cross examination he stated that although they border each other, Masongaleni is in Kibwezi East while Kikumbulyo is in Kibwezi West though in 2001 the two were in the same location. He stated that in 2017 plot No. 41 had arrears and the Plaintiff made payments.
14. It was his testimony that the allotment letter issued to the defendant had minutes of the committee and the full council minutes number, though there was no receipt number or the Makueni County Council reference number. He stated that the difference between the allotment letters was that one was issued by County Council of Makueni while the other was issued by Makueni County Council.
15. It was his testimony that their office issued an enforcement notice with respect to the illegal structure on the suit plot.
16. In re-examination he stated that the enforcement notice indicated that Plot No. 41 was allocated to the Plaintiff.

The Defence Case

17. The defendant Jackson Mbui Nzungu adopted his statement dated 21/11/2018 as his evidence in chief.
18. The Defendant informed the Court that his deceased sister Martha Muthini Nzungu was the owner of Plot No. 41 Makutano Market. He produced the limited grant of letters of administration and the letter of allotment dated 20th of November 2012 as exhibit 1 and 2 respectively. It was his testimony that after the plot was allocated to his sister in 1996 she went ahead and paid for it and thereafter constructed a two room building where she conducted her business. In that regard, he produced a receipt of Kshs 2400/- issued by Makueni County Council as exhibit 3. It was his testimony that during his sister's lifetime, he did not see anyone claiming ownership over the plot. That in April 2017 the Plaintiff informed him that he was the owner of the plot and that he later received a demand letter



from Muia V M Advocate informing him as much He further stated that on 06/10/2017 the Plaintiff demolished the structure on the suit plot. He urged the Court to restrain the Plaintiff from interfering with his plot.

19. In cross examination, he stated that he was the legal representative of the Estate of his late sister. It was his testimony that although he indicated in his letter dated 19/09/2017 that the plot was allocated in 1999, the plot was allocated to his sister in 1997.
20. He stated that he paid the rates and the receipts indicated that it was for plot No. 41 Kikumbulyo location. He admitted that his plot was in Kikumbulyo while the Plaintiff's plot was in Masongaleni which are two different locations. He further stated that he was not in agreement with the evidence of the County Government Official that their letter of allotment was not from the County Government of Makueni or that it was only the Plaintiffs letter of allotment that was reflected in the County Governments records. The Defendant contends that his letter of allotment is genuine.
21. In re-examination he stated that he took out the limited grant for the purposes of this case since the Plaintiff was interfering with his late sister's property. He stated that the suit plot was allocated to his sister in 1997 was located in Masongaleni in Kikumbulyo. He went on to state that he did a demand letter with regards to malicious damage to property.
22. Upon conclusion of trial, both parties filed their respective submissions.

Plaintiff's Submissions

23. The Plaintiffs submissions were filed on 23rd of December 2021 and later highlighted on 9th of June 2022.
24. Counsel for the Plaintiff identified the following issues for the Court's determination: -
 - i. Whether the Plaintiff has satisfied the Court as to his ownership of the suit property.
 - ii. Whether the Defendant has satisfied the Court as to his ownership of the suit property.
 - iii. Which party from the evidence adduced has satisfied the Court that it is the true and rightful owner of the suit property.
 - iv. Which party can be said to be the trespasser on the suit property.
 - v. Has any party suffered loss and damages.
 - vi. Is any of the parties entitled to costs and compensation for the loss and damage.
25. As regards the issue whether the Plaintiff has proved that he is the owner of the suit property, Counsel submitted that the Plaintiff had demonstrated that he was the owner of the plot which was also confirmed by PW3 who stated that the County Government records indicate that the Plaintiff is the owner of Plot No. 41. In addition, Counsel submitted that PW3 had confirmed that the County Government did not have records indicating that the Defendant or his deceased sister were the owners of Plot No. 41 Makutano Market.
26. As regards to the issue whether the Defendant had proved his ownership over the suit property, Counsel submitted that the Defendants documents were suspect and questionable as PW3 who was the custodian of records stated that they did not exist in their records. Counsel went on to submit that the Defendant could not explain whether the plot was allocated to his sister in 1997 or in 1999 and that he was at pains to explain how the allotment letter was obtained in 2012.



27. He stated that the Plaintiff had satisfied the Court that he was the rightful owner of plot No. 41 Makutano Market.
28. As regards the issue as to which party can be said to be the trespasser of the suit property, Counsel submitted that from the evidence on record it was clear that the Plaintiff was the rightful owner of the suit property. Counsel went on to submit that the Defendant was a trespasser of the suit property and despite the structure being demolished, he did nothing to vindicate his ownership to the plot until he was sued and he filed a counter claim.
29. As regards the issue as to which party has suffered loss and damage Counsel submitted that the Plaintiff has suffered due to the forceful occupation of his property by the Defendant. In that regard, Counsel urged the Court to award the Plaintiff a sum of Kshs. 300,000/-.
30. Counsel submitted that the Plaintiff had complied with all the conditions set out in the allotment letter and had been paying rates. He urged Court to grant Plaintiff the orders sought in the Plaint. To buttress his submissions, reliance was placed on the case of *Philemon L Wambua Vs Gaitano Lusita Mukofu & 2 Others* (2019) eKLR.

The Defendant's Submissions

31. The Defendant's submissions were filed on 2nd of March 2022.
32. Counsel for the defendant identified the following issues for the court's determination: -
 - i. Whether the defendant trespassed on Plot No 41 Makutano Market without authority from the Plaintiff.
 - ii. Who is the owner of Plot No. 41 Makutano Market.
 - iii. Whether the plaintiff destroyed the structures on Plot No. 41 Makutano Market.
 - iv. Whether the order of permanent injunction restraining the defendant from dealing with the suit property should be granted.
 - v. Whether the plaintiff is entitled to damages for trespass.
 - vi. Costs.
33. As regards the issue whether the defendant had trespassed on the plaintiff property, counsel submitted that the onus is on the plaintiff to prove that he is the owner of the suit property. Counsel contends that the plaintiff's letter of allotment does not have a reference number for the committee minutes that awarded him the plot. Counsel argued that there was no document confirming that the plaintiff had honoured the conditions set out in the letter of allotment. Counsel stated that the payment of Kshs. 1,000/- was not enough to confirm ownership of the plot.
34. Counsel further submitted that the plot was allocated to the Defendant's deceased sister in 1999 during demarcation by the County Council whereupon she made the initial payment of rent and conservancy fees with respect to the plot which is located in Masongaleni location. Counsel submitted that the Defendant had occupied the plot from 2002 to 2017 and maintains that even if she did not own the property, she became the owner by virtue of adverse possession as she has been enjoying the plot for 12 years without any issue. Counsel cited the case of *Peter Okoth Vs Ambrose Ochido & another* (2021) eKLR in support of her submissions.
35. Counsel went on to submit that the plaintiff having worked for the County Council had all the necessary means of manipulating the system in his favour. Counsel argued that since there was no



evidence that the plaintiff had accepted the offer, the plot was re-allocated to Martha Nzungu due to the non-compliance on the part of the plaintiff. Counsel argued that even if she did not comply immediately, the lapse of his offer was waived by the County Government when it accepted the demanded payment on 31/11/2002.

36. Counsel submitted that the defendant's allotment letter had minutes that confirmed the allotment and hence the defendant was the rightful owner. Counsel maintains that Masongaleni and Kikumbulyo locations were one in one location before the creation of the County Government.
37. Counsel further submitted that the plaintiff through his agents demolished the structures on the suit property in a bid to disinherit the defendant. Counsel went on to submit that a permanent injunction should issue as the property was owned by the deceased estate and the defendant has proved that the plaintiff trespassed on the property.
38. Counsel further submitted that since the defendant had proved that the suit property belongs to the estate of his deceased sister the act of demolishing the structures amounts to trespass and the defendant is entitled to damages.
39. On the issue of costs, Counsel submitted that the plaintiff had not proved his case on a balance of probabilities hence the suit should be dismissed with costs to the defendant.

Analysis and Determination

40. Having considered the pleadings, documentary evidence on record and the submissions by the parties I find that the issues for determination are;
 1. Who is the rightful owner of plot No. 41 Makutano Market.
 2. Is the plaintiff entitled to the reliefs sought in the Plaintiff.
 3. Whether the Defendant is entitled to the reliefs sought in the Counter Claim.
 4. Who should bear the costs of the suit.
41. It is the plaintiff's case that the County Council of Makueni allocated the suit plot to him in 2000. That upon allocation he was issued with a letter of allotment and he proceeded to erect beacons on the plot. In that regard he produced a letter of allotment from Makueni County Council as exhibit 4 and a receipt of payment as exhibit 5. The plaintiff called PW1, who stated that he was the chairman of Makutano Market from 1997 up to 2000 and PW2 who stated that he was the current chairman of Makutano Market. PW1 and PW2 confirmed in their evidence that the plaintiff was the owner of the plot No 41 Makutano Market. PW2 further testified that according to the plot list for Makutano Market, the Plaintiff was the owner of plot No 41 Makutano Market.
42. The defendant on the other hand stated that he filed this suit on behalf of the Estate of his late sister Martha M. Nzungu. He produced the limited grant of letters of administration ad litem as exhibit 1. The defendant stated that the County Council of Makueni allocated plot No 41 to his late sister Martha Muthini Nzungu. That upon allotment she paid the requisite fees of Kshs. 2,400/-. In that regard he produced the letter of allotment from the County Council of Makueni dated 20th of November 2012 as defence Exhibit 2 and the receipt as Exhibit 1 and a property rates data form as exhibit 8.
43. From the documentary evidence produced, I note that the plaintiff's letter of allotment dated 12th of April 2001 (exhibit 4) was issued by the County Council of Makueni with respect to Plot No. 41 at Makutano Market in Masongaleni while the deceased (Martha Muthini Nzungu) letter of allotment



dated 30th November 2012 was issued by County Council of Makueni in to respect to Plot no 41 at Makutano Kikumbulyo.

44. The plaintiff called PW3 who testified that Masongaleni and Kikumbulyo were in two different locations. It was the testimony of PW1 that the plots in Masongaleni and Kikumbulyo were in different locations. The defendant on his part stated that the two were in the same location up to the time when the County Government was created.
45. It is not in dispute that both parties are laying claim over the same property. PW3 testified that he was the custodian of all the documents in the County Government of Makueni. He stated that according to their records, the plaintiff letter of allotment matched with the records held in their registry. He went on to state that they did not have any records with regards to the defendants letter of allotment or the details of the plot.
46. PW1 and PW2, the past and the current chairman of Makutano Market, testified that the Plaintiff was the owner of Plot number 41 Makutano Market. PW3 having confirmed that the details in the plaintiff's letter of allotment tally with the records in their custody, I find that the plaintiff has proved that he is the owner of Plot No. 41 Makutano Market. The defendant in re-examination stated that he was not in agreement with the evidence of PW3. The defendant did not call any evidence to rebut the testimony of PW3 on the authenticity and legality of the Plaintiff's letter of allotment and particularly, that it did not exist in the records of the issuing authority. He merely stated was that he was not in agreement with the evidence of PW3 without challenging the same. The court is satisfied on the material placed before it that the plaintiff is the owner of Plot No. 41 Makutano Market.
47. The plaintiff sought for damages for illegal occupation of his plot It is not in dispute that the structure erected by the defendant was demolished by the Sub County Administrator Kibwezi West pursuant to the enforcement notice issued to the Defendant on the 5th of August 2017. The Defendant in his evidence confirmed that the stall was demolished by the Plaintiff and even sought for damages for the same. From the foregoing I find that the Defendant is no longer in occupation of the suit plot. From the foregoing, I decline to award damages for unlawful occupation.
48. Having considered the material and evidence placed before me I find and hold that the plaintiff has proved his case against the defendant on a balance of probabilities. The defendant has however not proved his counter claim against the plaintiff and the same is dismissed.
49. In light of the above findings I hereby enter judgment for the plaintiff against the defendant in the following terms: -
 - a) An eviction order be and is hereby issued compelling the defendant to vacate the suit premises with immediate effect.
 - b) The plaintiff is awarded costs of the suit.

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HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27TH DAY OF JULY, 2022.

IN THE PRESENCE OF: --

Court Assistant – Mr. Kwemboi.



Munyasya for the Plaintiff.

Ms Ongong'a for the Defendant.

