



**Nuri & 2 others v China Dalian International Group (Environment & Land
Case 15 of 2017) [2022] KEELC 3535 (KLR) (26 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3535 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 15 OF 2017**

NA MATHEKA, J

JULY 26, 2022

BETWEEN

ANDREW MUGANDI NURI 1ST PLAINTIFF

PATRICK MNYAKA CHAMBEYU 2ND PLAINTIFF

NYOTA MUGANDI CHAMUSUHUNI 3RD PLAINTIFF

AND

CHINA DALIAN INTERNATIONAL GROUP DEFENDANT

JUDGMENT

1. The plaintiffs aver that they are the owners of land known as LR Number unsurveyed Plot Deri/Mwangoloto in Kinango District herein referred to as the suit property. That in an effort to have the suit registered in their name of the Plaintiffs herein filed a case in the Environment and Land Case Number 157 of 2013 at Mombasa praying that the court to declare that they are the rightful owners of the suit property which case has progressed and the plaintiffs will soon be closing their case. The defendant herein is engaged in the construction of the Mombasa Nairobi Highway. On or about the January 14, 2017 the defendant herein without any colour of right and/or authority trespassed onto the suit property and has been committing acts of trespass thereon. Particulars of trespass are cutting down bushes on the suit property; Excavating soil and rocks on the suit property; and carrying the excavated soil and rocks out of the suit property. The plaintiffs aver that the defendant's acts amounts to a violation the Constitutional right to protection and sanctity of the private property and unless the defendant is stopped by this honourable court, will continue to infringe on the plaintiffs' rights. The plaintiffs aver that unless the defendant is restrained by this honourable court from excavating soil and stones from the suit Land their property rights and interest in the suit property will stand to lose and suffer environmental harm. That as a result of the defendant's acts of trespass, the plaintiffs have suffered substantial loss on their property and the damages occasioned by the said trespass amount to an estimated cost of Kshs. 4,500,000/= . That due to excavation carried out the plaintiffs land now



looks like a quarry site and there can be meaningful use of the suit land unless the suit property is rehabilitated. The plaintiffs pray for judgment against the defendant for:-

1. A permanent injunction restraining the defendant either by itself, its employees, servants and agents from trespassing into entering onto the suit property thereby committing acts of waste, alienating and/or interfering with the plaintiffs' quiet and peaceful occupation of L.R. Number unsurveyed Plot Deri/Mwangoloto in Kinango District;
 2. An Order for special damages for Kshs. 4,500,000.00/=
 3. An order for general damages compelling the defendant to pay the plaintiffs for unlawfully degrading the suit property;
 4. Costs of and incidental to this suit; and
 5. Further or other relief as may be just and expedient in the circumstances of the case.
2. The defendant avers that they entered into a lease agreement with the true owners of the suit property for three (3) acres for the period of two years commencing January 2, 2017 to January 2, 2019, for the sum of Kshs. 35,000/- per acre, for purposes excavating soil for road construction and for the storage and operation of its plant and machines. That the aforementioned lessees covenanted to take full responsibility and compensate the defendant fully in the event the defendant found any of the information provided by the lessor inaccurate, including the ownership of the leased portion and the defendant will, at the opportune time, be commencing third party proceedings as against the said lessors. That the issue of ownership of the suit property is, therefore, undetermined and remains unclear until such time that this honourable court will make a final determination on the ownership. That there was no trespass as the defendant had leased the three (3) acres from the true owners and although there was excavation of soil, none was carried away from the suit property as the defendant was served with an order of temporary injunction, whose terms prohibited its servants or agents from entering the property or carrying out any of the work it had entered the lease to carry out. The defendant prays that the plaintiffs' suit be wholly dismissed with costs to the defendant.
3. This court has considered the evidence and submissions therein. PW1 the 1st Plaintiff testified that land known as LR Number unsurveyed Plot Deri/Mwangoloto in Kinango District is owned by them as a family. The defendant herein is engaged in the construction of the Mombasa Nairobi Highway. On or about the 14th day of January, 2017 the defendant herein without any colour of right and/or authority trespassed onto the suit property and has been committing acts of trespass thereon. That in an effort to have the suit registered in their name of the plaintiffs herein filed a case in the Environment and Land Case Number 157 of 2013 at Mombasa praying that the court to declare that they are the rightful owners of the suit property which case has progressed and the plaintiffs will soon be closing their case. PW2 the valuer produced the valuation report confirming that the extent of damage and compensation is estimated at Kshs. 4,500,000/=.
4. DW1 testified that they entered into a lease agreement with the true owners of the suit property for three (3) acres for the period of two years commencing January 2, 2017 to January 2, 2019, for the sum of Kshs. 35,000/- per acre, for purposes excavating soil for road construction and for the storage and operation of its plant and machines. That an ownership dispute arose in the Environment and Land Case Number 157 of 2013 and they received an order of injunction and they immediately ceased operations and none of the excavated materials left the site. That the land had no title and after their due diligence through the chief they established the true owners and entered into the lease agreement DEx1. I find that the issue for determination first and foremost is whether the Plaintiffs have established



legal ownership of the suit property land known as LR Number unsurveyed Plot Deri/Mwangoloto in Kinango District. Section 107 of the *Evidence Act* cap 80 of the laws of Kenya states that;

"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".

5. There is no documentary evidence has been adduced to prove ownership. Indeed it is admitted that there is an ongoing dispute in Environment and Land Case Number 157 of 2013 with third parties on the issue of ownership. I find that this suit is premature if at all as the court cannot at this point establish the plaintiffs' interest on the suit property. PW1 stated it was family land so who are the other family members? I find that the plaintiffs have failed to prove their case on a balance of probabilities and I dismiss it with costs.
6. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF JULY 2022.

N.A. MATHEKA

JUDGE

