



REPUBLIC OF KENYA



**Thomas v Daniel & another (Environment & Land Case 933 of 2016)
[2022] KEELC 4749 (KLR) (25 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 4749 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 933 OF 2016
JM ONYANGO, J
AUGUST 25, 2022
(FORMERLY HCC NO 277 OF 2012)**

BETWEEN

NYANGERI OBIYE THOMAS PLAINTIFF

AND

YUNUKE NYAKOBOKE DANIEL 1ST DEFENDANT

LAMECK RIOBA SAKAGWA 2ND DEFENDANT

JUDGMENT

Introduction

1. The plaintiff who is the registered owner of land parcel number Central Kitutu/mwabundusi/1052 instituted this suit against the defendants claiming that they had in the year 2012, trespassed onto his land, ploughed it and planted maize and beans and they were in the process of erecting structures thereon. He therefore prayed that the defendants be permanently restrained from interfering with the suit property. He also prayed for general damages for trespass.
2. Upon being served with the plaint and summons to enter appearance, the defendants failed to enter appearance and the plaintiff requested for judgment and the suit was set down for hearing by way of formal proof. The court delivered its *ex parte* judgment in favour of the plaintiff on November 29, 2013.
3. The defendants subsequently applied to set aside the *ex parte* judgment and the same was set aside on April 8, 2016. Thereafter, the defendants filed their defence and counterclaim dated April 20, 2016 in which they denied the defendant's claim. They further claimed that the suit property was their ancestral land where they had been leaving for more than 27 years.



4. In the counterclaim, the defendants claimed that the plaintiff was illegally registered as the owner of the suit property and prayed that his title be cancelled and that the suit property be registered in the defendants' names.
5. The plaintiff filed a reply to the defence and defence to the counterclaim dated October 6, 2016 reiterating his denial of the plaintiff's claim. In the defence to the counterclaim, he stated that the defendants had no claim to the suit property as the same had been sold to one Jones Matara Nyankune who in turn sold it to the plaintiff.
6. The case was set down for hearing on various dates between October 16, 2019 and May 24, 2022 when both parties and their witnesses testified and closed their cases.

Plaintiff's Evidence

7. The plaintiff testified as PW1. He stated that he was the registered proprietor of land parcel number central Kitutu/mwabundusi/1052 having purchased it from one Jones Matara Nyankune *vide* a sale agreement dated November 7, 1997 which he produced as plaintiff's exhibit 1. He informed the court that he was later registered as the owner of the said parcel. He produced the title deed dated November 29, 2011 as plaintiff's exhibit 2(a). He also produced the registry index map for Mwabundusi area as plaintiff's exhibit 3. It was his testimony that after buying the suit property, he took leave from his place of work in Mombasa in order to develop his land but he found that the defendants were in occupation thereof as they had erected structures on a portion of the suit property and were cultivating the remaining portion.
8. Upon cross-examination, he stated that he bought the land in 1997 from Jones Matara who had in turn bought it from Daniel Sakagwa. At the time Jones Matara bought the land it was known as parcel number central Kitutu/mwabundusi/820 and it was subsequently sub-divided into parcels number 1051 and 1052. It was his testimony that the defendants constructed a house thereon in September 2011. He further stated that the defendants were initially staying on parcel number 820 but after the sub-division, they remained on parcel number 1051 and later trespassed onto parcel number 1052.
9. Daniel Sakagwa Simeon testified as PW2. He told the court that he sold land parcel No 1052 to one Jones Matara Nyangune in 1991 in order to pay school fees for his children, one of them being the 2nd defendant. It was his testimony that the said Jones Matara bought him building materials including iron sheets, sand and bricks. He also paid him some money. He used part of the money to pay the contractor who built a house for his family while the balance was used to pay fees for his children. He stated that despite paying fees for his son Lameck, (2nd defendant), he refused to go to school. He explained that the money and building materials were received by his wife (1st defendant).
10. He told the court that Jones later sold the land to the plaintiff but the defendants continued to plough the land. He stated that when he tried to stop the 2nd defendant from ploughing the land he (2nd defendant) assaulted him and knocked out his tooth. He still had a missing tooth and he showed the gap to the court. He stated that the defendants did not complain when the land was sold to Jones and they only started complaining when the plaintiff bought the land. It was his testimony that as the original owner of the land and the head of his family, he wanted his wife and son (defendants) to vacate the suit property.
11. Upon cross-examination he stated that at the time he sold the land to Jones, his wife consented to the sale by receiving the purchase price part of which was in the form of building materials. He however stated that the defendants did not sign the sale agreement between him and Jones. He informed the court that he initially had two parcels of land; one in Nyakoe and land parcel No 1051 but he was now



remaining with parcel 1051. He stated that he wanted his two sons to vacate parcel 1052 and build their houses on parcel 1051. He confirmed that he had the title deed for parcel 1051. He said his first son was willing to demolish the semi-permanent house he had constructed on the plaintiff's land so that he can move to parcel 1051. However, his wife and younger son (1st and 2nd defendants) were not willing to vacate parcel 1052.

12. Veronica Nyakerero Matara testified as PW3. She told the court that she was the widow of the late Jones Matara Nyangune who died in 2003. It was her testimony that before his demise, her late husband bought a piece of land (parcel 1052) from Daniel Sakagwa. The deceased later sold the same parcel of land to Thomas Nyangeri (plaintiff). She later transferred the land to the plaintiff.
13. Thomas Ongeri Orangi, the county surveyor, Kisii county testified as PW4. He stated that according to the documents in his office, land parcel number central Kitutu/mwabundusi/820 was sub-divided into 2 parcels known as parcels 1051 and 1052 and therefore parcel number 820 did not exist anymore. He produced the mutation form for the said sub-division. He stated that before the sub-division, parcel 820 was registered in the name of Daniel Sakagwa Simeon but he was not sure who were registered as the owners of parcels 1051 and 1052.

Defendant's Case

14. The 1st defendant Yunuke Nyakobo Daniel testified as DW1. She stated that she was staying on land parcel number Central Kitutu/mwabundusi/820 where her husband (PW2) had established their matrimonial home in 1975. She claimed that the said parcel of land was their ancestral home which had been given to her husband by his father. She told the court that the parcel was only small enough for their home and that they carried on farming on a different parcel of land.
15. Upon cross-examination, she stated that she was not aware that their land had been sold to Jones Matara Nyangune. She denied that the said Jones Matara Nyangune had constructed the house they were living in. She denied having consented to the sale of their land. She confirmed that her husband moved out of home in 1995. She stated that she was not aware that the plaintiff had a title deed to parcel 1052. She told the court that she was living on the suit property with her two sons and that she did not know the plaintiff.
16. Samson Ongeri Manayara testified as DW2. He stated that PW2 was his younger brother and DW1 was his sister-in-law. He confirmed that DW1 lived on the suit property and he was not aware that PW2 had sold the land where his matrimonial home was. He corroborated DW1's testimony that PW2 moved out of his matrimonial home sometime back but his wife and sons still lived on the suit property.
Upon cross-examination he confirmed that DW1 informed him that her husband had sold their land.
17. Lameck Rioba Sakagwa (2nd defendant) testified as DW3. He stated that DW1 was his mother. It was his further testimony that his father sold the land where they were staying and left home in the 90s. He stated that after his father sold their land, the buyer fenced it and demolished his house. He confirmed that him, his mother and his brother were still staying of the suit property.
18. In cross-examination he stated that the house in which they live was constructed by his mother. He said he was not aware of parcel number 1052 and as far as he was concerned, they were living on parcel number 820. He told the court that he was not aware that his father had sold the land where they were staying. He stated that the parcel that they were occupying measures about 50 feet by 100 feet.
19. After the close of the defendants' case, both parties filed their closing submissions which I have considered.



Issues For Determination

1. Who is the registered owner of LR No Central Kitutu/mwabundusi/1052?
2. Whether the plaintiff is illegally registered as the owner of the suit property.
3. Whether the defendants have trespassed into the suit property.
4. Whether the plaintiff is entitled to the reliefs sought.

Analysis And Determination

20. It is not in dispute that the Plaintiff is the registered proprietor of parcel number Central Kitutu/mwabundusi/1052. He produced a copy of the title deed and certificate of the official search as his exhibits. In his testimony he explained that the said parcel was a sub-division of parcel 820. He told the court that he bought the suit property from one Jones Matara who had in turn bought it from Daniel Sakagwa.
21. Section 22 of the [Land Registration Act](#) 2012 provides that:

“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....”
22. Section 24 of the [Land Registration Act](#) No 3 of 2012 provides as follows:

“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”.
23. Section 25 (1) of the said Act further provides that:

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the 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 any lawful encumbrances, set out in this section”.
24. Even though the defendants raised a counterclaim claiming that the plaintiff was illegally registered as the owner of the suit property, they did not present any evidence to challenge the plaintiff's title. The defendant's submission that the suit property was sold to the plaintiff without the consent of the vendor's wife is without any legal foundation as there was no such requirement at the time of sale in 1999. It is therefore my finding that the plaintiff is the absolute proprietor of the suit property.
25. The plaintiff's case is that the defendants are unlawfully occupying the plaintiff's land and he would like them to be evicted. In their evidence the defendants admitted that they are in occupation of the suit property. In particular, DW3 confirmed that his father had sold the suit property to one Jones Matara who in turn sold it to the plaintiff. It was his testimony that after the land was sold the new owner fenced it though they have continued living on it.
26. Even though the defendants claimed that they are staying on parcel 820, the county surveyor (PW4) confirmed that parcel 820 no longer exists as it was sub-divided into parcels 1051 and 1052.



27. In the case of *Nyangeri Obiye Thomas v Yunuke Sakagwa Nyoiza* ELC Case No 277 of 2018 Okong'o J observed as follows:

“Clerk & Lindsell on Torts 18th edition at paragraph 18-01 defines trespass as follows:

“any unjustifiable intrusion by one person upon land in possession of another.” ...Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”

28. From the evidence on record, it is my finding that the defendants are unlawfully occupying the suit property. This amounts to trespass to land.

29. Regarding the third issue as to whether the plaintiff is entitled to the reliefs sought, the plaintiff seeks three remedies; a permanent injunction restraining the defendants from interfering with the suit property. They also seek general damages.

30. The principles that guide the court in granting an order of injunction are set out in the celebrated case of *Giella v Cassman Brown & Company Limited* 1973 EA 358 as follows:

“First, the applicant must show that he has a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide it will decide the application on a balance of convenience.”

31. From the plaintiff's evidence stated above, it is my finding that he has met the threshold for the grant of an injunction.

32. Turning to the general damages, I rely on the case of *Park Towers Ltd v John Mithamo Njika and 7 others* 2014 eKLR where Mutungi J stated as follows:

“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case”

33. Further, in the case of *Duncan Nderitu Ndegwa v Kenya Power and Lighting Company Limited & another* [2013] eKLR Nyamweya J held that once trespass to land is established, it is actionable per se and indeed no proof of damage is necessary. In the instant case I consider an award of Kshs 100,000 to be adequate compensation for the defendant's infringement of the plaintiff's right to use and enjoy its land.

34. The upshot is that the plaintiff has proved his case on a balance of probabilities. On the other hand the defendants have not proved their counterclaim and the same is hereby dismissed with costs. I therefore enter judgment for the plaintiff and make the following final orders:

- a) A permanent injunction is hereby issued restraining the defendants by themselves, their agents, servants and/or employees from wasting, alienating, damaging, erecting structures and/or trespassing on all that parcel of land known as LR No Central Kitutu/mwabundusi/1052.
- b) The plaintiff is awarded a sum of Kshs 100,000/= general damages for trespass together with interest thereon at court rates from the date hereof until payment in full.



c) The costs of this suit and the counterclaim shall be borne by the defendants.

DATED, SIGNED AND DELIVERED AT KISII THIS 25TH DAY OF AUGUST, 2022.

J.M ONYANGO

JUDGE

