



**Njuguna v Moracha (Environment & Land Case 181 of 2018)
[2022] KEELC 12809 (KLR) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12809 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 181 OF 2018
OA ANGOTE, J
SEPTEMBER 30, 2022**

BETWEEN

RUTH WAMUCA NJUGUNA PLAINTIFF

AND

RICHARD MORARA MORACHA DEFENDANT

JUDGMENT

1. In the Plaint dated 1 April 7, 2018, the Plaintiff has sought for the following orders:
 - a. A permanent injunction be issued restraining the defendant by himself, agents, servants, employees or otherwise howsoever from entering, occupying, erecting structures, selling, transferring, alienating, or in any way dealing with or interfering with the proprietary rights, interests and possession enjoyed by the plaintiff over all that property known as Plots No. S127, currently under registration as Land Title Number Nairobi/ Block 105/5107 and S128 currently under registration as Land Title Number Nairobi/ Block 105/5108, within the land originally owned by Embakasi Ranching Company Limited and situate along Utawala Area of the Eastern Bypass, Embakasi, within Nairobi County.
 - b. A mandatory injunction compelling the defendant to remove all the illegal construction/ development erected on the plaintiff's property known as Plots No. S127, currently under registration as Land Title Number Nairobi/ Block 105/5107 and S128 currently under registration as Land Title Number Nairobi/ Block 105/5108, within the land originally owned by Embakasi Ranching Company Limited and situate along Utawala Area of the Eastern Bypass, Embakasi, within Nairobi County.
 - c. Damages for trespass.
 - d. Costs of this suit.



- e. Any other relief the Honourable court may deem fit and expedite to grant.
2. The plaintiff's case is that she is the rightful and beneficial owner of Plots No. S127, currently registered as parcel number Nairobi/ Block 105/5107 and S128 currently registered as land parcel number Nairobi/ Block 105/5108, within the land originally owned by Embakasi Ranching Company Limited and situate along Utawala Area of the Eastern Bypass, Embakasi, within Nairobi County (the suit property).
 3. The plaintiff averred in the Plaint that she bought the two adjoining plots from their previous owners, Lucy Wakanyi Kimani, Mary Mweru Mburu and Jasan Kahungura Mburu vide a Sale Agreement dated November 3, 2014 for Kshs. 5,000,000 and that on November 20, 2014, Embakasi Ranching Company Limited issued her with share certificates number 2388 and 2363, conferring her membership to the company and absolute proprietorship of the suit properties.
 4. It was averred by the plaintiff in the Plaint that she thereafter took possession of the suit land; that despite making a follow up, the Company did not issue her with the titles, stating that they were being processed and that she travelled out of the country in October 2017 and came back in February 2018 and visited the suit properties on March 1, 2018.
 5. According to the plaintiff, when she visited the suit properties, she found a development project of a four-storey building erected on one of the plots and a stone perimeter wall all-around the suit properties and that there were no construction workers on site neither was there a project site signage as required by the Nairobi County Building By-laws and Codes.
 6. She averred that the Embakasi Ranching Company Limited was not aware of the person carrying out the development; that the company also confirmed that the suit land was lawfully hers through a letter dated March 20, 2018 and that she thereafter wrote two letters to the Nairobi City County dated March 1, 2018 and March 8, 2018, in which she relayed the details of the developer of the illegal project and sought a stop order of the construction.
 7. The plaintiff asserted that on March 12, 2018, the Nairobi City County issued an Enforcement Notice pursuant to section 38 of the *Physical Planning Act* No. 6 of 1966, directing the unknown developer to stop further development of the project and to remove such development on the suit properties within 14-days and that this was on the basis of the City County's determination that the construction by the Defendant on the suit properties was illegal, and without any permission from the County Government and in breach of the *Physical Planning Act* as well as the County Government By laws.
 8. According to the plaintiff, despite service of the Enforcement Notice, the defendant ignored the orders therein and proceeded with the illegal construction on the suit property, necessitating this suit and that she thereafter registered a caution on the suit properties.
 9. The defendant, in her Statement of Defence dated February 11, 2019, denied the plaintiff's averments. The defendant averred that according to the plaintiff's supporting documents, she made payments towards Nairobi/Block 105/5707 and Nairobi/Block 105/5708, which are distinct from Nairobi/Block 105/5107 and Nairobi/Block 105/5108 (the suit properties) and that it was necessary for Embakasi Ranching Company to be enjoined as a party to the suit.
 10. According to the defendant, he is not in possession of the suit property ; that he has not put up illegal developments on the said land and that from the information he has received from the Ranching Company, the owner of the suit properties is a Mr. Daniel Guto Moracha, who is the rightful party to this suit, rather than himself.



Hearing & Evidence

11. The matter proceeded for hearing on April 26, 2022. The plaintiff, PW1, adopted the testimony in her witness statement which she swore on April 17, 2018. In her Statement, PW1 reiterated her case as set out in her Complaint, which I have already summarised above.
12. The plaintiff, PW1, produced in evidence a bundle of documents which included demand letters, a sale agreement dated November 3, 2014, an acknowledgement of receipt of money dated November 21, 2014, copies of share transfer documents for plots S127 and S128, a copy of application for the registration of caution, copies of receipts of payment of property rates, a copy of the enforcement notice dated March 12, 2018, a letter from the Embakasi Ranching Company Limited dated March 20, 2018 and photographs of constructions on the suit property.
13. In her oral testimony, PW1 stated that she has the original titles for Nairobi/ Block 105/5107 and Nairobi/Block 105/5108. She also testified that the defendant has built on both plots. The plaintiff sought for Kshs 6,000,000 in damages on the basis that she would have earned Kshs. 100,000 every month if she were to rent the land, and that the defendant has been on the land for five years, since 2017.
14. The defendant did not testify in this matter.

The Plaintiff's Submissions

15. In the submissions filed on June 13, 2022, counsel for the Plaintiff set out the reliefs the plaintiff has sought in her Complaint as well as the brief facts in this matter as captured in the Complaint. Counsel submitted that the defendant has trespassed on the suit properties and has constructed an illegal development, despite the land being the legal and rightful property of the plaintiff.
16. It was submitted that the suit properties were developed without the approval of the County Government, the National Environment Management Authority, or any other State agency responsible for construction of residential premises, making the property a danger to the public.
17. Counsel submitted that after diligently following up with the Company, the plaintiff was issued with the original titles to the suit properties in early 2022; that despite this court issuing status quo orders stopping further construction, the defendant declined to comply with the same and proceeded with the construction at night and that the facts as set out by the plaintiff have not been contested by the defendant.
18. It was submitted by the plaintiff's counsel that while the defendant has alleged that he was carrying out construction for his brother, Daniel Guto Moracha, he had failed to provide proof on how his brother acquired the land and that the defendant presented an illegal plot ownership certificate which does not relate to the suit properties.
19. Counsel submitted that the plaintiff has clearly demonstrated that she is the rightful and beneficial owner of the suit properties through documentary evidence.
20. Counsel relied on section 26(1) of the [Land Registration Act](#) which provides that a Certificate of Title issued by the Registrar upon registration 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. Counsel relied on the case of [Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & another](#) (2013) eKLR, where the court held that a title can only be challenged where it was obtained by fraud or misrepresentation to which the person is proved to be a party or where such title was acquired illegally, unprocedurally or through a corrupt scheme.



21. Counsel further argued that the defendant trespassed on the plaintiff's land by entering the suit premises and developed an illegal storey structure with no approvals whatsoever. This, it was submitted, is contrary to the plaintiff's right to property as set out in article 40 of *the Constitution*.
22. It was submitted that the defendant should be obligated to pay damages to the plaintiff for the trespass. Reliance was placed on the discussion on damages in *Halsbury Law of England* 4th Edition Vol 45 at para 26, 1503 as well as *Samco Holdings Ltd t/a Eka Hotel v Patrick Nyamweya* [2022] eKLR where the court stated that trespass is actionable per se, meaning that once it is established that trespass occurred, the person against whom the trespass was committed is entitled to damages.

Analysis and Determination

23. Upon consideration of the pleadings, submissions and the testimony of the witness herein, the following issues arise for determination:
 - i. Whether the plaintiff is the lawful proprietor of all that land known as Land Title Number Nairobi/ Block 105/5107 and Land Title Number Nairobi/ Block 105/5108 situate along Utawala Area of the Eastern Bypass, Embakasi within Nairobi County and if so,
 - ii. Whether the defendant has trespassed onto the property
 - iii. Whether the plaintiff is entitled to the reliefs sought in the Plaintiff.
24. The plaintiff's case is that she bought the two suit properties, being Plots No. S127, currently registered as Land Title Number Nairobi/ Block 105/5107 and S128 currently registered as Land Title Number Nairobi/ Block 105/5108, within the land originally owned by Embakasi Ranching Company Limited from its previous owners, Lucy Wakanyi Kimani, Mary Mweru Mburu and Jasan Kahungura Mburu vide a sale agreement dated November 3, 2014 for a consideration of Kshs 5, 000,000/-.
25. At the time of purchase, the plaintiff contends that Plots Nos S127 and S128, were under the management of Embakasi Ranching Company Limited, and that she consequently had to obtain approval for the transaction from the said company, whereafter she was issued with share certificates numbers 2388 and 2363.
26. In support of her case, the plaintiff adduced in evidence copies of the sale agreement, receipts of payment for the suit land, share certificates issued by Embakasi Ranching Company Limited and copies of receipts of payment of property rates. During hearing and in her submissions, the plaintiff alleged that she has since been issued with the titles for parcel of land known as Nairobi/ Block 105/5107 and Land Title Number Nairobi/ Block 105/5108. She however failed to tender evidence of such titles to this Court.
27. The plaintiff asserts that sometime between October 2017 and February 2018, the defendant trespassed onto the suit properties and commenced a development comprising a four-storey building erected on one of the plots and a stone perimeter wall all-around the suit property.
28. It is the plaintiff's case that the development was constructed illegally because it was put up without any permission from the County Government in breach of the *Physical Planning Act* as well as the County Government Bylaws. In support of this, she produced in evidence photographs of the defendant's constructions on the suit properties.
29. According to the Statement of Defence of the defendant, he is not in possession of the suit properties and that his developments are on distinct parcels of land, and that the developments are by one Daniel Guto Moracha, and not himself.



30. The law on proof of ownership of land is set out in section 26 of the [Land Registration Act](#) which provides as follows:

“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.”

31. The court in [Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & another](#) (2013) eKLR highlighted the two instances in which a title may be challenged: where there are allegations of fraud or misrepresentation or allegations that title has been acquired illegally, unprocedurally or through a corrupt scheme. The court stated as follows:

“As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

32. In this matter, the defendant has not raised any allegation of fraud or illegal acquisition of title to the suit properties by the plaintiff. While the plaintiff indicated in her oral testimony that she is in possession of titles to the suit property, being Title Number Nairobi/Block 105/5107 and Title Number Nairobi/Block 105/5108, she failed to tender these titles. This court therefore has no basis to find that she is in possession of such certificates of title.

33. This court is however persuaded by the reasoning of the court in [Caroline Awinja Ochieng & another v Jane Anne Mbithe Gitau & 2 others](#) [2015] eKLR, that ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history:

“...tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.

The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are



basically ‘the essential indicia of title to unregistered land’: per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.

The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.”

34. In this case, while the defendant has asserted that the owner of the suit property is Daniel Guto Moracha, he failed to submit any evidence of such ownership. The plaintiff on her part, has submitted sufficient documents to lead this court to the conclusion that she is the lawful owner of the suit land.
35. Indeed, the plaintiff tendered in evidence documents from Embakasi Ranching Company Limited recognising her as the owner of the suit properties. That being the case, it is the finding of this court that the plaintiff has discharged the burden of proving that she acquired the subject land lawfully.
36. Trespass is defined in the 10th Edition of *Black Law’s Dictionary* as:

“an unlawful act committed against the person before property of another; especially wrongful entry on another’s real property.”
37. The offence of trespass is criminalised under section 3 of the *Trespass Act* as follows:

“Any person who without reasonable excuse enters, is or remains upon or erects any structure ... private land without the consent of the occupier thereof shall be guilty of an offence.”
38. Similarly, the court in *Rhoda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited* [2019] eKLR defined trespass as an intrusion by a person into the land of another who is in possession and ownership.
39. It is trite law that trespass is actionable per se, meaning that once trespass is established to have occurred, the person against whom such trespass is proved is entitled to damages. This position was upheld by the Court of Appeal in *Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited* [2017] eKLR where it was held as follows:

“Trespass is proved as in this case, the affected party such as the respondent need not prove that it suffered any damages or loss as a result so as to be awarded damages. The court is under the circumstances bound to award damages, of course, depending on the facts of each case.”
40. Damages is defined in *Livingstone v Rawyards Coal Co* (1880) 5 App Cases 25, as:

“that sum of money which will put the injured party in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation.”
41. In *Halsbury Law of England* 4th Edition Vol. 45 at para 26, 1503, damages with respect to trespass is discussed as follows:
 - (a) If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.



- (b) If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- (c) Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.”
42. It is not in dispute that a structure has been constructed on the plaintiff's property without her consent. The plaintiff produced in evidence photographic proof of the structure, which is a four-storey building and a perimeter wall. The Plaintiff also proved that since she discovered the constructions on the suit property in 2018, she dutifully endeavoured to seek relief from the lawful authorities. The Plaintiff produced in evidence the two letters she sent to the Nairobi City Council dated March 1, 2018 and March 8, 2018, in which she relayed the details of the developer of the illegal project and sought a stop order of the construction.
43. After receipt of the letters dated March 1, 2018 and March 8, 2018, the County Government of Nairobi issued to the Defendant an Enforcement Notice dated March 12, 2018, pursuant to section 38 of the *Physical Planning Act* No. 6 of 1996 (repealed), directing the unknown developers to stop further development of the project and to remove such development on the suit property within a 14-days with effect from March 27, 2018. This notice however went unheeded, leading to the filing of this suit.
44. This evidence by the Plaintiff was uncontroverted as the defendant failed to appear and defend his case during the hearing. That being the case, it is the finding of this court that indeed the defendant has trespassed on the suit property, and has constructed thereon a storey building without the plaintiff's permission. Trespass being actionable per se, the plaintiff is entitled to damages for trespass.
45. The plaintiff in her submissions has quantified the damages at Kshs. 5,700,000. This sum, according to the plaintiff, is based on the income she would have obtained if she had rented out the land at the rate of Kshs. 100,000 per month in the four years and 9 months in which the defendant has denied her the use of her property. This is a reasonable estimation and this court is obliged to grant an award of damages of Kshs. 5,700,000.
46. For these reasons, the Plaint dated April 17, 2018 is allowed as follows:
- a. A permanent injunction be and is hereby issued restraining the defendant by himself, agents, servants, employees or otherwise howsoever from entering, occupying, erecting structures, selling, transferring, alienating, or in any way dealing with or interfering with the proprietary rights, interests and possession enjoyed by the plaintiff over all that property known as Plots No. S127, currently under registration as Land Title Number Nairobi/ Block 105/5107 and S128 currently under registration as Land Title Number Nairobi/ Block 105/5108, within the land originally owned by Embakasi Ranching Company Limited and situate along Utawala Area of the Eastern Bypass, Embakasi, within Nairobi County.
 - b. A mandatory injunction be and is hereby issued compelling the defendant to remove all the illegal construction/ development erected on the Plaintiff's property known as Plots No. S127, currently under registration as Land Title Number Nairobi/ Block 105/5107 and S128 currently under registration as Land Title Number Nairobi/ Block 105/5108, within the land originally owned by Embakasi Ranching Company Limited and situate along Utawala Area of the Eastern Bypass, Embakasi, within Nairobi County.
 - c. Judgement be and is hereby entered for the plaintiff against the defendant in the sum of Kshs. 5,700,000 being damages for trespass.



- d. An order be and is hereby given directing the defendant to deliver vacant possession of the suit property to the plaintiff forthwith failure to which eviction orders to issue.
- e. The defendant to pay the costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30TH DAY OF SEPTEMBER, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Agwara for the Plaintiff

No appearance for the Defendant

Court Assistant - June

