



**Kinuthia Wainaina v Kiarie Wangugi & another (Environment & Land Case 127 of 2019) [2022] KEELC 13336 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13336 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 127 OF 2019  
JG KEMEI, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**RAPHAEL KINUTHIA WAINAINA ..... PLAINTIFF**

**AND**

**PHILIP KIARIE WANGUGI ..... 1<sup>ST</sup> DEFENDANT**

**SOPHIA NYANDIRI WANGUGI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff filed this suit in 2003 seeking the following orders;
  - a. An order for the eviction of the defendants their servants and or agents and anybody else claiming through them from land parcel no Chania/Makwa/1493 together with mesne profits.
  - b. In the alternative to (a) above the defendants do pay commensurate compensation for value of land parcel Chania/Makwa/1493 (suit land).
  - c. Costs of the suit.
2. The plaintiff's case is that he is the registered owner of the suit land measuring 0.42 hectares and that the defendants have trespassed onto his land without his consent and approval occasioning him loss for which he has sought mesne profits.
3. The defendants denied the plaintiffs claim and sought to put the plaintiff in strict proof. They claim that they and their families have been in occupation of the suit land since 1958 and have developed the land by planting coffee. That their occupation is adverse to the title of the plaintiff and that the plaintiff's title has been extinguished by the operation of law.
4. In addition, the defendants in their counterclaim sought orders as follows;
  - a. A declaration that the plaintiffs title to land has been extinguished by operation of law.



- b. That the plaintiff's title be cancelled and the land be registered in the name of the defendants
  - c. The deputy registrar do execute the necessary documents to effect the transfer in favour of the defendants.
5. At the hearing the plaintiff testified solely and relied on his witness statement dated the June 11, 2012 as his evidence in chief. He produced documents marked as PEX 1-4. Further he stated that he is the registered proprietor of the suit land which portion emanated from parcel No 496. That he discovered in 1992 during the subdivision of the mother title that his land had been encroached by the defendants and sought the intervention of the assistant chief of the area. That the defendants have refused to vacate the land.
  6. The defendants failed to attend court despite the hearing date having been taken in open court in the presence of their lawyer on November 24, 2021.
  7. The plaintiff filed his submissions which I have read and considered.
  8. The issue for determination is whether the plaintiff has proved trespass against the defendants.
  9. As earlier stated the defendants failed to attend the hearing and thereby defend the suit. Their counterclaim dated May 12, 2021 therefore stands dismissed for want of prosecution/non-attendance. The plaintiff's evidence therefore remains unchallenged and uncontroverted. That said the plaintiff is required to proof his case on the required standard of balance of probabilities. The fact that the plaintiff's evidence is not challenged does not mean that the court will not interrogate it. The court still has an obligation to interrogate the tendered evidence and determine whether the same is merited to enable the court come up with a logical conclusion as *exparte* evidence is not automatic proof of a case. The plaintiff has a duty to discharge the burden of proof.
  10. I rely on the case of *Gichinga Kibutha v Caroline Nduku* (2018) eKLR, the court held that:-

“It is not automatic that instances where the evidence is not controverted the claimants shall have his way in court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”
  11. Section 24 and 25 of the *Land Registration Act* provides as follows;
    - “24. Interest conferred by registration  
Subject to this Act—
      - (a) 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; and
      - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
    25. Rights of a proprietor
      - (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of



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-

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

12. I have seen the certified copy of the title together with a search dated the April 12, 2001 which shows the plaintiff became registered as the owner of the land on the 3/8/1993.
13. The plaintiff’s case is premised on trespass. Trespass is defined as section 3(1) of the [Trespass Act](#) defines trespass as follows;

“Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
14. According to the 10<sup>th</sup> Edition of [Black’s Law Dictionary](#) trespass is defined as follows;

“An unlawful act committed against the person or property of another; especially wrongful entry on another’s real property.”
15. [Clark & Lindsell on Torts](#), 18<sup>th</sup> Edition on page 923 defines trespass as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the plaintiff to prove that the defendant invaded his land without any justifiable reason.
16. The plaintiff has led evidence that he realized in 1992 upon subdividing the mother title that the land was small and upon inquiry he noticed that the defendants had encroached on to his land to the extent of 2 acres. That he reported the matter to the assistant chief who ordered the defendants to vacate but have adamantly remained on the land. I have seen the proceedings of the land dispute tribunal held in 1993 where the tribunal made a finding that the defendants have been on the land. In [Clerk and Lindsell on Torts](#) 16<sup>th</sup> Edition Paragraph 23-01 a continuing trespass is defined as;

“Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.”
17. With respect with mesne profits, is it evident that the plaintiff failed to lead evidence in support of the claim and therefore the court is unable to grant any orders under this prayer. Mesne profits are special damages which must be pleaded and specifically proved.



18. In the absence of any evidence to the contrary, it is the finding of the court that the defendants have trespassed on the land and no justifiable reason has been given for their continued occupation of the same.
19. I therefore enter judgment in favour of the plaintiff as follows;
- a. It is hereby ordered that the defendants vacate the suit land within a period of 6 months in default they shall be evicted in accordance with the provisions of the law.
  - b. The prayer for mesne profits is declined.
  - c. Each party shall meet the costs of the suit
20. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 29TH DAY OF SEPTEMBER 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

plaintiff – Absent

defendant 1 – Absent

defendant 2 – Absent

Court Assistant – Phyllis Mwangi

