



**Yiembe v Adala (Environment & Land Case 40 of 2021)  
[2022] KEELC 13273 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13273 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE 40 OF 2021  
AY KOROSS, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**PETER CHIZITO YIEMBE ..... PLAINTIFF**

**AND**

**WILLIAM OCHIENG ADALA ..... DEFENDANT**

*([Originally Kisumu ELC No 24 of 2015])*

**JUDGMENT**

**Introduction**

1. By the firm of Adiso & Company Advocates, the plaintiff filed a plaint dated January 27, 2015 against the defendant asserting that he had trespassed and taken possession of portions of East Gem/Nyamninia/1492 and East Gem/Nyamninia/1521 (“the suit properties”) that were registered in the plaintiff’s name.
2. He sought for several orders; a declaration that he was the registered owner of the suit properties, permanent injunctive orders, eviction, costs, interest and any other orders that court deemed fit.
3. In response, the defendant by the firm of Morigori, Ondieki & Co Advocates filed a defence and counterclaim dated March 4, 2015 in which he denied the averments and contended that the plaintiff acquired the suit properties by fraudulent means and he had enjoyed peaceful and quiet occupation of the suit properties from the year 1990. He prayed for the plaintiff’s suit to be dismissed, a nullification of the plaintiff’s title documents to the suit properties, costs and interest.
4. The plaintiff filed a reply to defence and defence to counterclaim dated March 20, 2015 in which he denied the assertions made therein. He prayed for the defence and counterclaim to be dismissed and judgment entered in his favour.



### **The plaintiff's case and evidence**

5. The plaintiff's case is contained in his pleadings, reply to defence and defence to counterclaim, his witness statement and that of his witness, oral evidence tendered in court during the hearing and documents produced as exhibits.
6. In summary, it was his case that he was the registered owner of the suit properties having purchased them on December 10, 1995 from the previous registered owner one Joseph Mugo Wagunda [Joseph] who was deceased. That the defendant had wantonly trespassed on the suit properties and interfered with it; he had cut down trees, destroyed fences and put up a structure. He produced several documents in support of his case including agreements of sale, copies of title documents, certificates of official searches and a demand letter. In cross examination he testified that the defendant was Joseph's son.
7. The plaintiff's evidence was led by Hellen Atieno Ogada as PW2. She testified that she was Joseph's daughter. She asserted that the defendant was her cousin; their respective fathers were brothers. It was her testimony that in order to avert acrimony with family members, Joseph disposed of the suit properties to the plaintiff and he relocated to another parcel of land which he bought and his remains were interred there. During cross examination she testified that the defendant constructed on the suit property in the year 2014 and he had never lived on the suit properties prior to that.

### **The defendant's case and evidence**

8. Despite filing a defence and counterclaim and witness statement dated March 4, 2015, the defendant did not adduce any evidence and his case was closed.

### **Parties' submissions**

9. The plaintiff's counsel Mr T O Odiso filed undated written submissions on February 13, 2018 in which he rehashed the witnesses' testimonies and stated the plaintiff had proved his case on a balance of probabilities. He asserted that the plaintiff was an innocent purchaser for value. The defendant did not file any written submissions.

### **Analysis and determination**

10. I have considered the plaintiff's pleadings, evidence, submissions and the issues falling for determination are;(i) whether the plaintiff is the registered owner of the suit properties and (ii) whether the defendant had trespassed on them. But before I apply my mind to the issues in a sequential manner, it behoves upon this court to address the defence and counterclaim that are on record.
11. Despite filing a defence, counterclaim and witness statement, the defendant did not adduce evidence to prove his case and his case was marked as closed by the court on March 27, 2017. As it is, his pleadings remained mere allegations. The net effect is that the plaintiff's case was unchallenged, the defence and counterclaim were unsubstantiated and, in the circumstances, the counterclaim fails. This position of law has been upheld in a line of court decisions and I need not re-invent the wheel. The recent court decision of *Netah Njoki Kamau & another v Eliud Mburu Mwaniki* [2021] eKLR cited with approval the Court of Appeal decision of *Edward Mariga through Stanley Mobisa Mariga v Nathaniel David Shulter & Another* [1979] eKLR where the court stated thus;

“The respondents did not give evidence and so the only explanation as to how the accident happened was the version put forward by the appellant and his brother.”

I will now proceed to address the issues for determination.



12. On the 1<sup>st</sup> issue, the legal framework on legitimacy of title documents is governed by sections 24, 25 and 26 of the [Land Registration Act](#). Section 24(a) recognises the registered owner as the absolute owner of land. This section provides as follows;
 

“The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.
13. This absolute right is limited by section 25 which provides that the land shall be held by the registered proprietor together with all other privileges appurtenant thereto but subject to charges, leases, encumbrances, restrictions, liabilities, rights and interests as stipulated in section 28.
14. Section 26 states that courts shall prima facie deem the registered owner as the proprietor. However, this right is not absolute and a title can be challenged on grounds of fraud, misrepresentation or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
15. In his testimony, the plaintiff produced copies of title deeds of the suit properties and they demonstrated that they were registered in his name. He was registered as the proprietor of East Gem/Nyamninia/1492 and East Gem/Nyamninia/1521 on the respective dates of April 18, 1995 and April 26, 1996. He also produced copies of sale agreements.
16. Even though the agreements of sale did not evidence the particulars of the suit properties he purchased, the plaintiff’s testimony was corroborated by PW 2 who testified that the agreements of sale were on the suit properties. PW 2 was a biological daughter of Joseph and she must have known the intricacies of how Joseph sold the suit properties to the plaintiff. This leads to the logical conclusion that the two properties that were sold by Joseph to the plaintiff are the parcels of land mentioned in the agreements of sale. It is my finding that the plaintiff is the registered proprietor of the suit properties.
17. The 2<sup>nd</sup> issue is on trespass. Section 3 of the [Trespass ACT](#) defines trespass as;
 

“trespass upon private land is when 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.
18. The case of [John K Koech v Peter Chepkwony](#) [2019] eKLR cited [Clerk & Lindsell on Torts 18th Edition](#) at paragraph 18-01 which defined 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”
19. It was the plaintiff’s testimony that the defendant trespassed on the suit properties in the year 2014 and he put up a structure, cut down trees, mutilated fences and even cultivated them. PW2 corroborated that the defendant constructed a house on the suit properties in the year 2014. The plaintiff proved that he was the proprietor of the suit properties and therefore the defendant’s intrusion was unjustifiable and without reasonable excuse. I am not inclined to hold otherwise but to find that the defendant trespassed on the suit properties.
20. It is trite law that courts are bound by the pleadings of the parties and it is restrained from entering into the realm of litigation because to do otherwise would cause an injustice to any party. Despite trespass



being a tortious action, the plaintiff neither sought general nor special damages. I am unable to grant him any reliefs on damages.

21. Before I issue my disposal orders, I will make certain observations on the peculiar circumstances of this case. Woe unto a purchaser of a parcel of land if a vendor dies without leaving behind a son. Like vultures, distant male relatives start hovering the particular parcel of land in search of a slice of the pie. They do so by first obtaining limited grant of letters of administration and shortly thereafter file suit on all manner of grounds against the purchaser. Courts as defenders of justice must at all times be extra vigilant to weed out such schemers and ensure that justice prevails in all circumstances. In the circumstances of this case, the plaintiff had the uphill task of tracing Joseph's daughters who had long relocated upon marriage in order for them to testify in his favour. It is not lost to this court that the defendant for some reason or the other vanished into thin air without a trace.
22. It is my finding that the plaintiff proved his case on a balance of probabilities and is entitled to the orders sought. It is trite law costs follow the event and in the absence of special circumstances, I award him costs of the suit and issue the following disposal orders;
  - a. A declaration be and is hereby issued that the plaintiff is the rightful owner of land parcel numbers East Gem/Nyamninia/1492 and East Gem/Nyamninia/1521 and is entitled to proprietary rights over them;
  - b. A permanent injunction is hereby issued restraining the defendant from interfering with the plaintiff's parcels of land comprised in East Gem/Nyamninia/1492 and East Gem/Nyamninia/1521;
  - c. An order of eviction is hereby granted ordering eviction of the defendant from the plaintiff's parcels of land comprised in East Gem/Nyamninia/1492 and East Gem/Nyamninia/1521;
  - d. The defendant is hereby granted 60 days from the date of service of the orders of this court to remove himself and his developments from the plaintiff's parcels of land comprised in East Gem/Nyamninia/1492 and East Gem/Nyamninia/1521; and
  - e. Costs to the plaintiff.

It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**HON. A. Y. KOROSS**

**JUDGE**

**29/9/2022**

**JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO  
CONFERENCING PLATFORM IN THE PRESENCE OF:**

**In the Presence of:**

N/A for the plaintiff

N/A for the defendant

Court assistant: Ishmael Orwa

