



**Nderu v Ng'ang'a (Environment & Land Case 303 of 2019)
[2022] KEELC 12770 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12770 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 303 OF 2019
MD MWANGI, J
SEPTEMBER 27, 2022**

BETWEEN

MARGARET WANGUI NDERU PLAINTIFF

AND

ALICE WACEKE NG'ANG'A DEFENDANT

JUDGMENT

Background and History of Litigation

1. The plaintiff filed this case way back on November 18, 2009. In her plaint of even date, the plaintiff prays for judgment against the defendant for an order of eviction from LR No Ngong/Ngong/5677 and recovery of cows, 3 pigs, and 4 piglets, general damages for trespass, conversion and/or detainee. The plaintiff also prays for a declaration that motor vehicles KAB xxxx KAR xxxx and KAH xxxx belong to her and that the defendant be ordered to surrender their title/ownership documents to her.
2. The plaintiff avers that the parcel LR No Ngong/Ngong/5677 (hereinafter referred to as the suit property) was their matrimonial home with her late husband, Wallace Nderu Kamau who passed on on the September 9, 2009. At the time of her husband's death, the plaintiff was residing and working in the USA. The deceased stayed behind and resided in the suit property until his death.
3. Upon the passing on of Wallace Nderu Kamau, the Plaintiff and her 3 children came back to make burial arrangements which burial which eventually took place on September 24, 2009. It was then that the plaintiff found out that the defendant and several of her relatives had taken over her entire homestead on suit property.
4. The plaintiff states that she unsuccessfully attempted to remove the defendant and her relatives from the suit property after the burial of Wallace Nderu Kamau but they barricaded themselves and have adamantly remained on a portion of the suit property hence the suit before this court.



5. I wish to note that the defendant herein on December 5, 2014 appointed a firm of Advocates known as Ms Kiarie Njuguna & Co Advocates to represent her. The said law firm merely filed a notice of appointment of advocates. They did not file any pleadings on behalf of the defendant.
6. The defendant later on appointed the law firm of Pekke & Co Advocates to act for her. The said law firm too did not file any pleadings on behalf of the defendant. *Vide* a chamber summons application dated August 18, 2021, the law firm sought leave of the court to cease from acting for the defendant. leave was granted October 14, 2021. When the case therefore came up for hearing, the defendant was not represented by an advocate. She acted in person. The defendant did not at any one time file a statement of defence.

Evidence adduced before the court

7. This case proceeded to hearing on November 24, 2022. Each of the parties respectively testified in their own case. The court allowed the defendant to participate fully in the case despite not having filed a statement of defence.

The Plaintiff's case.

8. The plaintiff, Margaret Wangui Nderu adopted her witness statement dated June 26, 2012. She further produced the documents in her list of documents of even date which were marked as 'PE 1-7' accordingly.
9. Amongst the documents produced by the plaintiff is the title to the suit property (PE 6) which is in the plaintiff's name, Margaret Wangui Nderu. It was registered in the plaintiff's name on 30.9.2009, after the death of her husband. Previously, it was in their joint names as exhibited under 'PE 5'. It therefore automatically passed on to her upon the death of Wallace Nderu Kamau, the joint owner.
10. The plaintiff testified that she indeed filed a succession cause in the estate of her late husband Wallace Nderu Kamau being Nairobi High Court Succession Cause 2338/2009 (*in the matter of the estate of Wallace Nderu Kamau - deceased*). The defendant herein, Alice Wacheke Ng'ang'a on her part filed an objection in the succession cause claiming that she too was a widow of the deceased. She claimed to have been the 2nd wife of the deceased. She listed her adult children as dependants of the deceased. She further claimed that the suit property herein, LR No Ngong/Ngong 5677 was part of the estate of the deceased.
11. The plaintiff's testimony was that the defendant's objection in the succession court was dismissed and the court found that the defendant was not and could not have been lawfully married to the deceased. The court therefore found that the defendant was not a lawful dependant of the deceased; neither were her children.
12. The succession court also made a finding to the effect that the suit property herein Ngong/Ngong 5677 was jointly purchased by the deceased and the plaintiff and registered in their joint names. The property therefore automatically reverted to the surviving joint owner by operation of the law. The suit property was therefore not available as part of the deceased's estate. All the land comprising the suit property belonged solely to the plaintiff herein.
13. The plaintiff was at length cross-examined by the defendant who as already stated was acting in person. The plaintiff maintained that the vehicles she had listed in her plaint had been in the names of Wallace Nderu Kamau (deceased) though she did not have nor had she ever seen their logbooks.



14. The plaintiff further restated that the defendant was not a wife of the deceased as pronounced in the High Court Succession Case. She affirmed that she had the original death certificate of her late husband and if at all there was any other, it must have been fake. Finally, the plaintiff re-affirmed that she was the owner of the suit property and that the defendant did not have any right to be there.

The Defendant's testimony.

15. The defendant testified as the only witness in her case. She stated that the plaintiff's testimony was untruthful. She alleged that the suit property LR No Ngong/Ngong 5677 belonged to her late husband, Wallace Nderu Kamau. The defendant further stated that the deceased had in fact built a house for her within the suit property after dividing it into two.
16. It was the defendant's testimony that she took care of the deceased while the plaintiff was away living in the USA with her children. She alleged that she took him to many hospitals the last one being Nairobi Hospital where he eventually passed away.
17. The defendant admitted that the plaintiff had indeed filed a succession cause but without informing her. That was the reason why she had filed an objection after she became aware of it. Though her objection was dismissed on September 27, 2017, the defendant averred that she was dissatisfied with the findings of the court and had therefore lodged an appeal by filing a notice of appeal dated November 10, 2017. According to her, the appeal was yet to be heard and determined. It is still pending before the Court of Appeal.
18. The defendant further denied that the plaintiff jointly owned the suit property with the deceased. As far as she knew, the late Wallace Nderu Kamau had bought the suit property alone and was therefore the sole owner of it. She insisted that having been a wife of the deceased, she had a right as a dependant to live in the suit property. She denied being trespasser as alleged by the plaintiff.
19. On cross examination, the defendant reiterated that she was lawfully married to the late Wallace after divorcing her former husband by the name of John Ng'ang'a. She admitted that she had been married to John Ng'ang'a in 1969 but later filed for divorce. She obtained a *decree nisi* in the divorce case on June 5, 2007 in Nairobi Chief Magistrate's Court Divorce Cause No 94/2003 (*Francis Ng'ang'a Njuguna Alice Wacheke Ng'ang'a*).
20. The Defendant further confirmed that she had 4 children with her former husband, the last born having been born in 1980. She did not have any children with the late Wallace Nderu who passed on on September 9, 2009.
21. The defendant further confirmed that she sold the cows and pigs that had been in the suit property before the death of the late Wallace Nderu Kamau to cater for his hospital bills. In regard to the motor vehicles claimed by the plaintiff, the defendant affirmed that they did not belong to the late Wallace Nderu Kamau. One of them belonged to her and the other one belonged to her son. She had sold all of them.

Court's Directions

22. Upon the close of the hearing, the court directed parties to file written submissions. The plaintiff complied with the directions but the defendant did not despite being granted additional time by the court. A judgment date was therefor given by the court being the March 29, 3022.
23. Before judgment was delivered however, the defendant appointed another advocate who by a notice of motion application dated March 11, 2022 filed under certificate of urgency sought for orders that



the court re-opens the defendant's case 'to allow her file documents and be adequately represented by counsel and further that the court recalls the plaintiff for cross examination'. The court once again bent backwards to accommodate the plaintiff and deferred the judgment pending the hearing and determination of the application by the defendant.

24. The application was duly considered on its merits and the court delivered a ruling on June 16, 2022 dismissing the said application with costs. In the said ruling, the court granted the defendant 14 more days from the date of the ruling to file her written submissions in respect of the main case, if she so wished.
25. The defendant did not file any written submissions despite further indulgence by the court. The court has therefore had the opportunity of reading the written submissions by the plaintiff only.

Issues for determination

26. Having considered the plaint filed herein, the testimonies adduced before the court and the submissions filed by the plaintiff, the court is of the opinion that the issues for determination in this case are as follows:
 - a. Whether the plaintiff is the lawful owner of the suit property Ngong/Ngong 5677.
 - b. Whether the plaintiff is entitled to an order of eviction against the defendant.
 - c. Whether the plaintiff is entitled to general damages for trespass conversion and or detinue as against the defendant.
 - d. Whether the plaintiff is entitled to the declaration sought in respect of motor vehicles KAB xxxx, KAP xxxx & KAH xxxx.
 - e. Whether the plaintiff is entitled to an order of recovery of the 10 cows, 3 pigs and 4 piglets.
 - f. Whether the plaintiff is entitled to the costs of the suit.

Analysis and Determination

A. Whether the Plaintiff is the lawful owner of the suit property Ngong/Ngong 5677.

27. The plaintiff testified that she is the duly registered sole absolute proprietor of the suit property. She produced the title to the suit property as 'PE 6' to support her claim. Prior to her being registered as the sole proprietor of the suit property, she had been jointly registered with her late husband, Wallace Nderu Kamau. She too exhibited that previous title as her 'PE 5'. Upon the demise of her husband therefore, she automatically and by application of the law became the sole absolute owner of the suit property.
28. Section 26(1) of the *Land Registration Act*, 2012 is categorical that the certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission issued 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 only to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate of title.
29. The certificate of title produced by the plaintiff shows that the suit property is registered in her name. The position was not challenged by the defendant. In fact, I had already noted earlier on that the defendant did not file any statement of defence in this case to contradict the plaintiff's case. The court gave her the opportunity to testify in this case only on the basis of the fact that she was unrepresented



by an advocate. Her testimony though was a mere denial. She did not provide any material evidence to contradict the plaintiff's case in any way. I therefore find that the plaintiff is the sole lawful absolute owner of the suit property.

30. I must also point out that the plaintiff in her testimony also produced as an exhibit, the judgment in Nairobi High Court Succession Cause Number 2338 of 2009 (*in the matter of the Estate of Wallace Nderu Kamau*) delivered on September 22, 2017. The judgment was in respect of the objection filed by the defendant herein against the petition by the plaintiff in the estate of her late husband Wallace Nderu Kamau.
31. The court in the above referenced succession cause made findings that are relevant to this case. Amongst those findings was the dismissal of the cross petition by the defendant herein on the basis that she was not a wife of the deceased Wallace Nderu Kamau. Secondly, the court also found that the suit property Ngong/Ngong/5677 was jointly purchased and registered in the deceased's and the petitioner's (plaintiff in this case) names. Therefore, by operation of the law, (and) upon the demise of one joint owner, the property automatically vested to the surviving joint owner. The suit property was not therefore part of the estate of the deceased. These findings of the High Court, which is a court of equal status with the Environment and Land Court have not been varied and or set aside.

B. Whether the Plaintiff is entitled to an order of eviction against the Defendant.

32. Having found that the plaintiff is the sole registered absolute and lawful owner of the suit property, this court has a responsibility to uphold the plaintiff's right to peaceful and quiet ownership of her land. The plaintiff has the right to possession, occupation and use of her land. I fully agree with the holding of JG Kemei J in the case of *Margaret Njeri Wachira v Delius Waweru Njenga* (2018) eKLR, that,

“ Among the rights to be enjoyed by a registered owner of any land is the right for peaceful and quiet enjoyment of the land he owns, in other words the rightful owner to the land has the right to possession, occupation and use of the suit land.”

33. The plaintiff adduced evidence that the defendant has illegally taken possession of and continued to occupy a portion of her land and has despite notice and demand by the plaintiff to vacate the same, adamantly continued to occupy the said portion of the land. The defendant has not provided any lawful justification to entitle her to occupy, use and or possess a portion of the plaintiff's land. She is a trespasser and has no right whatsoever to be on the plaintiff's land. The court therefore issues an eviction order against her as prayed for by the plaintiff.

C. Whether the Plaintiff is entitled to general damages for trespass conversion and or detinue as against the Defendant

34. Trespass to land is actionable '*per se*'. In the case of *Park Towers Ltd v John Mithamo Njika & 7 Others* (2014) eKLR which was cited with approval in the case of *Avid Developers Ltd v Blue Horizon Properties Ltd & 2 others* (2021) eKLR, the court held that where trespass is proved, a party needs not prove that he/she suffered any specific damage or loss in order to be awarded damages. Damages however, shall be awarded depending on the unique facts and circumstances of each case.
35. In this case, the plaintiff submits for an award of Kshs 10 million as general damages. In her evidence in chief, the Plaintiff mentioned in passing that the portion of the suit property occupied by the defendant was capable of generating her rental income of upto kshs 50,000/= per month. She did not however substantiate the figure of Kshs 50,000/= per month. She merely mentioned the same. As far as this court is concerned, that figure is speculative and not actual. The plaintiff did not place any material



evidence before the court to justify the same. She could as well have called an expert from the real estate sector to give an informed opinion which she did not do.

36. In the case of Peter Musangi Mbutia and another vs Samow Edin Osman (2014) eKLR, the court of Appeal expressed the opinion that it was upon the party seeking an award of general damages to place evidence before the court upon which an order of ‘mesne profits’ could be made.
37. Without the benefit of such evidence, this court is only left with the option of assessing the appropriate figure for the award of general damages based on the particular circumstances and facts of this case. Looking at the unique circumstances of this case, the period of time that the defendant has been in unlawful occupation of the plaintiff’s premises, I would assess general damages for trespass at Kenya Shillings One Million (Kshs 1.0 million) only.

D. Whether the plaintiff is entitled to the declaration sought in respect of motor vehicles KAB xxxx, KAP xxxx & KAH xxxx.

38. At paragraph 7 of her plaint, the plaintiff pleaded that ‘on or about September 19, 2009, the defendant while accompanied by a person who claimed to be the OCS Ongata Rongai police station took away all her household goods, motor vehicles (3 in number), 10 cows, 4 piglets and 3 pigs’ which items had been bought by her deceased husband with funds she had sent him.
39. The plaintiff did not place any proof before the court in regard to the ownership of the motor vehicles. She may not have had the logbooks but she could have conducted searches at the office of the Registrar of Motor Vehicles where motor vehicles were registered to prove that they were registered in the name of the deceased. Without such proof, I am unable to make the declarations sought by the plaintiff in respect of the three motor vehicles or to order the surrender of the title/ownership documents to the plaintiff.
40. It is incumbent upon a party who desires the court to give judgment in her favour as to any legal right dependent on the existence of facts which she alleges, to prove the existence of those facts. Simply stated, he who alleges must prove.

E. Whether the Plaintiff is entitled to an order of recovery of the 10 cows, 3 pigs and 4 piglets

41. As pointed out above, the alleged violation arose on September 19, 2009, over 12 years ago. It is inconceivable that the animals claimed would still be alive or in the same condition which they were as at that time. The court had expected the plaintiff to amend her plaint taking into consideration the lapse of time and claim the value (money-worth) of the animals. That did not happen. In any event, the plaintiff did not even place any tangible evidence before the court to substantiate the claim. This court refuses to make a futile order. Courts do not exercise their jurisdiction in futility. The order sought by the plaintiff is therefore declined.

F. Whether the plaintiff is entitled to the costs of the suit

42. The basic rule on attribution of costs in a civil suit is that costs follow the event. I see no reason to deviate from the norm in this case. Accordingly, I award the costs of this suit to the plaintiff.

Conclusion

43. The conclusion of this matter is that the plaintiff’s suit against the defendant succeeds in the following terms: -



- a. An eviction order be and is hereby issued against the defendant directing her to vacate the plaintiff's parcel of land Ngong/Ngong/5677 within 45 days from the date hereof failing which she be forcefully removed.
- b. The plaintiff is awarded a sum of Kshs 1,000,000/= as general damages for trespass against the defendant with interests at court rates from the date of this judgment until payment in full.
- c. The defendant shall pay the costs of this suit to the plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF SEPTEMBER 2022.

M.D. MWANGI

JUDGE

In the Virtual Presence of: -

Ms. Kithinji h/b for Mbigi Njuguna for the Plaintiff

N/A for the Defendant

Court Assistant: Hilda

M.D. MWANGI

JUDGE

