



**Atemba (Suing as a Trustee and Overseer Pastor of Embassy of Faith Worldwide Church) v Damani Drums Limited & another (Environment & Land Case 245 of 2019) [2022] KEELC 13817 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13817 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 245 OF 2019  
JO MBOYA, J  
SEPTEMBER 23, 2022**

**BETWEEN**

**JACK CALISTUS ATEMBA ..... PLAINTIFF  
SUING AS A TRUSTEE AND OVERSEER PASTOR OF EMBASSY OF FAITH  
WORLDWIDE CHURCH**

**AND**

**DAMANI DRUMS LIMITED ..... 1<sup>ST</sup> DEFENDANT  
HEAN TEXTILES INDUSTRIES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Background and Introduction**

1. *Vide* plaint dated the July 6, 2021, the plaintiff has sought for the for the following reliefs;
  - a. An order of the eviction of the defendants from plot numbers 26 & 58, situated within LR No Embakasi 9042/147 and 9042/148.
  - b. An order of permanent injunction against the defendants from accessing, trespassing, encroaching, alienating and/or interfering with plot Nos 26 & 58 in land parcels LR No Embakasi 9042/147 and 9042/148.
  - c. Any other orders this honourable court deems fit and just to grant.
  - d. Cost of this suit.
2. The plaint and summons to enter appearance were duly served upon the defendants and an affidavit of service was duly filed. However, despite having been served with the court process, the defendants neither entered appearance nor filed a statement of defense.



3. Premised on the foregoing, the subject matter proceeded for formal proof, whereupon the plaintiff called 1 witness, namely, Pastor Jack Calistus Atemba.

### **Evidence by the Parties:**

#### **a. Plaintiff's case**

4. The plaintiff herein testified as PW1 and same stated that he is a church minister/pastor, currently working with Embassy of Faith Worldwide Church. Further, the witness testified that Embassy of Faith Worldwide Church is a duly registered society pursuant to the Society Act chapter 108 Law of Kenya.
5. On the other hand, the witness stated that the church herein was desirous to acquire properties within the city of Nairobi and in this regard, the church tasked the witness to check out for appropriate properties and thereafter to recommend same for purchase and/or acquisition.
6. The witness added that upon receipt of the said instructions same commenced search for suitable properties in the city of Nairobi and that on or about the November 4, 2020, same was introduced to two people, namely, Dr David Watene Kabare & Wangari Kahuria both who indicated that they had properties for purposes of sale.
7. Pursuant to the foregoing, the witness stated that same was thereafter obliged to and indeed proceeded and viewed the named plots, with a view to ascertaining ownership status and suitability.
8. Other than the foregoing, the witness added that after viewing the named plots, which turned out to be plots numbers 26 and 58, respectively, which are also known as LR No's 9042/147 and 9042/148, same was convinced that the plots were suitable for the intended purpose.
9. Further, the witness added that after viewing the named plots and having been duly satisfied with their suitability, same entered into land sale agreements with both Dr David Watenene Kabare and Emily Wangare Kahuria, which agreements were duly reduced into writing and thereafter signed by the respective parties.
10. Notwithstanding the foregoing, the witness also testified that after the execution of the sale agreement, the respective vendors proceeded to and also executed the transfer documents relating to the named properties.
11. At any rate, the witness added that because the two properties had not been formerly registered in the names of the vendors, the transfer documents were also executed by the organization, who held the mother title and who ultimately, were obliged to effect the transfer in favor of the plaintiff.
12. Thereafter the witness stated that the church duly entered upon the two named properties and commenced to carryout construction of a church house.
13. Nevertheless, the witness testified that on or about the May 18, 2021 and the May 26, 2021, both days inclusive, some unauthorized persons proceeded to the suit plots and threatened the plaintiff's workers, who were constructing the church house.
14. On the other hand, the witness further added that later on, the defendants herein through their representatives came to the suit plots and sought to interfere with the plaintiff's occupation, possession and the construction that was ongoing.
15. Based on the foregoing, the witness herein has now stated that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, through their representatives constitutes and/or amounts to trespass and hence the necessity to have the defendants restrained vide orders of permanent injunction.



**b. Defendants' case:**

16. Though duly served, the defendants herein neither entered appearance nor filed any statement of defense. In this regard, upon being duly satisfied that same were duly served, the court ordered that the matter be heard notwithstanding the absence of the defendants.

**Submissions by the Parties:**

17. At the close of the hearing, learned counsel for the plaintiff herein made brief submissions. In particular, counsel for the plaintiff submitted that the plaintiff herein bought and/or purchased the two named plots from the previous registered proprietors.
18. Further, counsel for the plaintiff added that having lawfully bought and/or purchased the two plots, the plaintiff acquired lawful and legitimate rights over and in respect of same.
19. Pursuant to the foregoing, counsel for the plaintiff added that the plaintiff was therefore entitled to exclusive occupation, possession and use of the suit plots, to the exclusion of the defendants, who have no color of rights to the suit plots.
20. At any rate, counsel further submitted that having not shown and/or exhibited any legal claim to the suit plots, the defendants herein, cannot be allowed to continue interfering with the lawful rights and interests of the plaintiff.
21. In a nutshell, the counsel for the plaintiff therefore contended that the plaintiff has laid before the court sufficient and credible evidence to warrant the grant of the orders sought.

**Issues for Determination:**

22. Having reviewed the plaint dated the July 6, 2021, the witness statement and the bundle of documents, which were filed on behalf of the plaintiff and upon listening to the oral testimony by the plaintiff's witness and upon reviewing the submissions made, the following issues do arise and are thus pertinent for determination;
- i. Whether the plaintiff has proved and or laid any legitimate claim and/or interests over the suit plots.
  - ii. Whether the actions and/or activities amounts to trespass and if ,so whether the plaintiff is entitled to the orders sought.

**Analysis and Determination**

**Issue number 1 -m whether the plaintiff has proved and or laid any legitimate claim and/or interests over the suit plots.**

23. The plaintiff herein has placed before the court two sets of written agreements, which were entered into and executed with the previous registered owners of the two named plots. For clarity, the two sets of sale agreements are dated the November 4, 2020 and same were duly signed and executed by the respective parties.
24. Further, the plaintiff has tendered before the court evidence to show that the two named plots, which fall within the mother title registered in the name of Embakasi Slum Dwellers Self-help Group, were indeed registered in the names of the respective vendors, prior to and/or before the entry into and execution of the sale agreements.



25. Other than the foregoing, it is also appropriate to mention that upon the execution of the sale agreements, the vendors also took the plaintiff to the offices of Embakasi Slum Dwellers Self Help Group, who sanctioned or authorized the sale and transfer of the named plots to the plaintiff.
26. For coherence, it was further stated that after the sale agreements, the officials of Embakasi Slum Dwellers Self Help Group proceeded to and executed the transfer in favor of the plaintiff. In any event, the plaintiff added that his name was thereafter entered into the books/register of Embakasi Slum Dwellers Self Help Group, awaiting formal issuance of title.
27. Premised on the foregoing, the plaintiff therefore stated that same is the one seized and/or possessed of the requisite interest over the suit plots.
28. Suffice it to point out that the evidence by the plaintiff was neither challenged nor controverted. Consequently, same has remained unshaken and thus believable.
29. Having found and held that the plaintiff's evidence was neither impeached nor impugned, it is therefore safe and sound to find and hold that the plaintiff herein has duly established, proved and authenticated that same is the lawful owner of the two named plots.
30. To the extent that the plaintiff is the lawful and legitimate owners of the two plots, it is therefore imperative that same be afforded the requisite latitude, to enter upon, occupy and develop the named plots, albeit without interference from any third parties, the defendant not excepted.
31. To this end, it is imperative to reiterate that a person in whose favor a letter of allotment, documents conferring title or certificate of title, the latter which arises from the formal registration of the transfer instrument, has been issued to, is bestowed with legal rights to benefit from the ownership of the named plots.
32. At any rate, the fact that the plaintiff herein has not formally been issued with the certificate of lease, does not negate and or restrict the plaintiff's rights to enter upon, remain on and or develop, what is lawfully hers, pending the formal issuance of certificate of title.
33. In view of the foregoing observation, it is appropriate to adopt and endorse the holding of the court in the case of *Kenya Ihenya Company Ltd & another v Njeri Kiriba* [2019] eKLR, where the court stated and observed as hereunder;

“We say so because, firstly, the respondent produced several receipts issued by the 1st appellant in respect of the transaction between them. Those receipts corroborated the respondent's version of events, that is, she began paying for the plots as early as May 4, 1973; and she continued making payments until she had finished paying for two plots on diverse dates, that is, on August 10, 1980 and June 5, 1983; thereafter she was issued with a share certificate on June 5, 1983.

It is not lost on us that some of the receipts bore an inscription of plot No 145. However, contrary to the appellants' contention that they did not prove that the respondent had only paid for the said plot. There were other receipts which were produced, though they did not specifically mention that they were in respect of the suit land, in our view, they established the respondent's case.

34. Perhaps it is appropriate to contextualize the ratio in the decision of the court of appeal alluded to in the preceding paragraph. In this regard, it is important to note that the dispute that was being addressed related to a claim where the disputants had not formally been issued with the certificate of title, but had in their possession the requisite certificate authenticating entitlement and thus ownership.



35. In the premises, it is my considered view that the absence of the certificate of title does not diminish the vested rights of the plaintiff over and in respect of the two plots, which same lawfully bought, acquired and was issued with the requisite documents ownership.
36. In a nutshell, my answer to issue number one is that the plaintiff is the lawful and legitimate owner of the suit plots.

**Issue number 2 whether the actions and/or activities amounts to trespass and if so, whether the plaintiff is entitled to the orders sought.**

37. Having found and held that the plaintiff herein is the lawful and legitimate owner of the two suit plots, the question that then remains to be determined is whether any third party, the defendants not excepted can enter and remain upon the suit plots, without the permission of the plaintiff.
38. To my mind, by virtue of being the legitimate owner of the suit plots, the plaintiff is entitled to exclusive rights, including vacant possession and occupation of the suit plots.
39. On the other hand, the exclusive nature of the plaintiff's right, denote that no third party can enter upon and remain on the suit plots, albeit without the consent or permission of the plaintiff.
40. Contrarily, if any third party were to enter upon or remain in occupation of the suit plots, without the consent and permission of the plaintiff, then such a person would be acting in violation and breach of the plaintiff's right.
41. In the circumstances, where a third party enters upon and/or encroaches on the property of another without the others consent, such entry thus constitutes trespass. Simply put, in this case, the actions and/or activities by the defendants, therefore amounts to and constitute trespass.
42. Suffice it to point out and/or underscore, that trespass encompasses any infringement, violation or infraction of the rights of the named property owner.
43. To this end, the provision of section 3 of the [Trespass Act](#), chapter 294 Laws of Kenya is succinct and apt.
44. For convenience the section provides as hereunder;
  3. Trespass upon private land
    - (1) 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.
    - (2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.
45. Other than the foregoing, it is also appropriate to take cognizance of the holding in the case of [Fredrick Joshua Onyiego v Robert Sanganyi](#) [2014] eKLR, where the court stated and observed as hereunder;

“The plaintiff has proved that the defendant entered the suit property and has remained in occupation of the suit property without the plaintiff's permission. The defendant has admitted that he is in occupation of the suit property. Although the defendant claims to have purchased the suit property from one, Cremencia Onyiego, the defendant did not tender any evidence in proof of his title over the suit property. The plaintiff's evidence regarding



his proprietorship of the suit property has therefore not been controverted. It is therefore my finding that the plaintiff is the registered and lawful owner of the suit property.:

46. Similarly, in respect of the subject matter, the defendants have neither offered nor tendered any explanation or basis, to warrant the offensive activities that are complained of.
47. In the premises, I find and hold that the impugned activities amount to and constitute trespass onto the named suit plots.

**Final Disposition:**

48. Having reviewed and analyzed the itemized/highlighted issues for determination, it is evident that the plaintiff herein has established and proved her case on a balance of probabilities.
49. Consequently and in the premises, I find and hold that the plaintiff's case is meritorious and hence same be and is hereby allowed.
50. In the premises, I enter judgment for the plaintiff as hereunder;
  - a. The plaintiff be and is hereby declared to be the lawful and legitimate owner of LR No Embakasi 9042/147 and 9042/148.
  - b. The defendants be and are hereby ordered and/or directed to vacate and hand over vacant possession of plots numbers LR No Embakasi 9042/147 and 9042/148 to the plaintiff within sixty (60) days of service of the decree of the court.
  - c. In default, to comply with the terms of clause b hereof, the plaintiff shall be at liberty to evict the defendants in such that the costs incurred in levying the eviction shall be certified by the taxing officer and same shall be borne by the defendants.
  - d. An order of permanent injunction be and is hereby issued against the defendants from accessing, trespassing, encroaching, alienating and/or interfering with plot No s 26 & 58 in land parcels LR No Embakasi 9042/147 and 9042/148.
  - e. Cost of this suit to be borne by the defendants.

51. It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2022.**

**OGUTTU MBOYA**

**JUDGE**

**In the Presence of;**

**Kevin Court Assistant**

**Mr. Masake for the Plaintiff**

**No appearance for the Defendants**

