



**Maina & 2 others v Ndichu & another (Environment & Land Case  
69 of 2020) [2022] KEELC 12620 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12620 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 69 OF 2020  
BM EBOSO, J  
SEPTEMBER 23, 2022**

**BETWEEN**

**FAITH WANJIRU MAINA ..... 1<sup>ST</sup> PLAINTIFF  
PHILIP MIONKI M'MWERERIA ..... 2<sup>ND</sup> PLAINTIFF  
STANLEY KIPTANUI ROP ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**JEREMIAH MUIRURI NDICHU ..... 1<sup>ST</sup> DEFENDANT  
PETER MAINA MUNDIA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Plaintiffs' Case**

1. The three plaintiffs initiated this suit on 11/9/2020 through a plaint dated 25/8/2020. Their case was that they were the registered proprietors of a parcel of land registered as Thika Municipality Block 9/1109, located at Gatitu in Thika Sub County, Kiambu County. They contended that the defendants were illegally, unlawfully, and without any colour of right, entering and depositing sand on the said parcel of land, and were using the land as a yard/depot for selling the sand to third parties. It was their case that the defendants were trespassers on the land. They itemized various particulars of trespass.
2. Consequently, they sought the following verbatim reliefs against the defendants:
  - a. A declaration that land parcel number Thika Municipality Block 9/1109 belongs to the plaintiffs.
  - b. A permanent injunction be issued restraining the defendants, their servants, agents, employees and/or any other persons claiming to act under their authority from entering, using, depositing



sand or other materials, conducting business or in any other way interfering with the plaintiffs' parcel number Thika Municipality Block 9/1109.

- c. An order of eviction against the defendants from parcel number Thika Municipality Block 9/1109.
- d. General damages for trespass
- e. Costs of this suit.
- f. Interest at court rate.

### **Defendant's Case**

3. The defendants filed a joint statement of defence dated 25/9/2020. They averred that they were non-suited because they were the chairman and vice-chairman of a self-help group. They denied illegally carrying on business on the suit property. They contended that they had been carrying on business on part of a public cemetery and a public road reserve. They further contended that if the plaintiffs acquired title number Thika Municipality Block 9/1109 relating to the land on which they were carrying on business, then the said title had been irregularly and fraudulently acquired. They itemized various particulars of irregularity and fraud on part of the plaintiffs.
4. The defendants further contended that if the plaintiffs' title was lawful (which they denied), then they (the defendants) had acquired rights and interest in the land through adverse possession, since they had been using the land for the preceding twenty two (22) years. They denied the particulars of trespass itemized by the plaintiffs and emphasized that they operated on public land. They urged the court to dismiss the plaintiffs' suit.

### **Evidence**

5. The plaintiffs led evidence by the second plaintiff, Philip Mionki M'Mwereria, who testified as PW1. He adopted his written witness statement dated 25/8/2020 as part of his sworn evidence-in-chief. He produced seven exhibits, namely: (i) Copy of a certificate of lease relating to title number Thika Municipality Block 9/1109; (ii) Copy of an official search dated 10/8/2020, relating to the said title; (iii) Copy of a letter dated 23/3/2009 from the Commissioner of Lands, confirming that the suit property was planned through Part development plan No KBU/4/9435A which was approved on October 24, 1994 and that the user was commercial; (iv) Copy of the letter in (iii) above, dated 23/3/2009 [the said letter was exhibited twice]; (v) Photographs; (vi) Copy of the judgment in Thika CMCC Civil Case No 694 of 2009; *Philip Mionki M'Mwereria & 2 Others v County Government of Kiambu*; and (vii) Copy of the decree relating to the above judgement.
6. PW1 testified that they were the registered proprietors of the suit property. He added that on or about January 2020, the defendants started depositing sand on the suit property for storage pending sale to third parties. He added that since then, the defendants were illegally using the suit property as a depot/yard for depositing sand for sale to third parties. It was his evidence that they lodged complaints with the police at Thika Police Station twice, and the complaints were entered in the Police Occurrence Book as OB No 51/7/1/2020 and OB No 61/16/7/2020 respectively. He added that the 2nd defendant had been charged with an offence relating to their illegal activities on the suit property. During cross-examination, he testified that their title was a subdivision out of a previous title which they had not exhibited.
7. The defendants led evidence by Raphael Gitonga Magwa [DW1] and Peter Maina Mundia [2nd defendant] – DW2. The testimony of DW1 was that, on 4/3/2021, he received instructions from the



- defendants' advocates to undertake a survey and prepare a report relating to the suit property. He was to establish whether the parcel exists and whether it was a road reserve. He went to Survey of Kenya and got a registry index map. The suit property did not exist on the registry index map. He prepared a report dated 4/3/2021. He produced the said report as an exhibit.
8. During cross examination, he testified that he studied up to form 4 and subsequently did a three year course in land survey at the Kenya Institute of Survey and Mapping between 2001 and 2003. He added that he was not a registered surveyor and he was not a member of the Institute of Surveyors of Kenya. It was his evidence that he was in the process of applying to be registered as a surveyor. Shown his report, he stated that the report was not conclusive on whether or not the suit property existed. He added that there was no official receipt attached to the report.
  9. Peter Maina Mundia (2nd defendant) testified as DW2. He adopted his written statement dated 13/4/2021. His evidence was that he was a businessman dealing in sand, building stones and hardcore. He stated that he was the chairman of Gatitu Main Kwa Muthanga Community Based Organization which had 103 members who carried on the business of "depositing and selling of building sand at a road reserve and a plot reserved for public use adjacent to the Thika - Garissa Road". He added that members of the organization had been using the said area since 1998. He contended that if any plot had been excised from the said area, the excision did not follow the due process of the law and that they had not been notified.
  10. DW2 added that any purported title excised from the said space was fraudulently or irregularly acquired. He contended that Title Number Thika Municipality Block 9/1109 did not exist. He produced three exhibits, namely: (i) List of members of Gatitu Main Kwa Muthanga Community Based Organization; (ii) the Organization's annual CBO registration certificate dated 2/7/2003; and (iii) CBO registration certificate issued on 13/1/2021.
  11. During cross-examination, he stated that he was the chairman of the organization while the 1st defendant was the vice chairman. He added that they had been using the suit property since 1998. He did not know if the plaintiffs had a title to the suit property although they were contesting the title. He denied that the registration certificate obtained on 13/1/2021 was triggered by this case. He added that he did not have any business licence because their business is considered to be a public nuisance hence it is not licenced. He stated that they carry their business on a road reserve. Lastly, he stated that they did not have documentary evidence proving that the suit property is a road reserve.

## Submissions

12. The plaintiffs filed written submissions dated 6/5/2022 through M/s Karanja Kangiri & Co Advocates. Counsel for the plaintiffs submitted that the defendants had failed to demonstrate that the suit property was either a public cemetery or a road reserve. They contended that DW1 was "a quack" who confirmed that he was not qualified to practice as a land surveyor. He urged the court to disregard the evidence of DW1.
13. Counsel for the plaintiffs contended that the plaintiffs had discharged their burden of proof by demonstrating that they were the registered proprietors of the suit property. They added that no attempt had been made to impeach the plaintiffs' title. Counsel argued that the fact that the "defendants" had been charged with the criminal offence of "forcible detainer contrary to section 91 of the *Penal Code*" confirmed that the defendants were in illegal occupation of the suit property and should therefore vacate it. Counsel urged the court to "give life to article 40 of the *Constitution*".
14. The defendants filed written submissions dated 9/5/2022 through M/s Jesse Kariuki & Co Advocates. Counsel for the defendants argued that because the plaintiffs did not file a reply to defence, the



averments made by the defendants were deemed not denied. He added that the defendants' averments were similarly not controverted through evidence. Counsel contended that the evidence by DW1 had demonstrated that land parcel number Thika Municipality Block 9/1109 could not be found within the locality where the defendants carry their business. Counsel argued that the evidence of DW1 raised "a lot of questions as to the authenticity and genuineness of the title deed presented in court by the 1st plaintiff."

15. Citing section 26 of the [Land Registration Act](#), counsel submitted that the defendants had established that the number on the title held by the plaintiffs did not exist in the area. Counsel argued that the plaintiffs had failed to prove their case, hence their rights under section 24 and 25 of the [Land Registration Act](#) could not be protected by the court. Counsel urged the court to dismiss the plaintiffs suit.

### **Analysis and Determination**

16. I have considered the parties' pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence. Parties did not agree on a common statement of issues. Taking into account the parties' pleadings and submissions, the following are the issues that fall for determination in this suit: (i) Whether there is a cause of action disclosed against the defendants; (ii) Whether failure to file a reply to defence constitutes an admission; (iii) Whether the title held by the plaintiffs relating to parcel number Thika Municipality Block 9/1109 was obtained irregularly and/or fraudulently; (iv) Whether the land in dispute is a road reserve; (v) Whether the land in dispute is a public cemetery; (vi) Whether the defendants have acquired title to parcel number Thika Municipality Block 9/1109 through adverse possession; (vii) Whether the defendants are trespassers on parcel number Thika Municipality Block 9/1109; and (viii) Whether the plaintiffs are entitled to the reliefs sought in the plaint. I will make brief sequential pronouncements on the eight issues in the above order.
17. The first issue is whether there is a cause of action disclosed against the defendants. In their statement of defence dated 25/9/2020, the defendants contended that they were non-suited because they were chairman and vice chairman, respectively, of a self-help group. They faulted the plaintiffs for suing them in their individual names. In his subsequent evidence, the 2nd defendant [DW2] confirmed that he carried on the business of selling sand, building stones and hardcore on the land in dispute.
18. The plaintiffs' claim is based on the tort of trespass to land. An unincorporated organization does not commit trespass. Individuals do. Each and every individual who commits trespass is personally liable for the tort of trespass and for the crime of trespass. Consequently, to the extent that the plaintiffs directed their claims of trespass to land against the defendants as the alleged trespassers, the claim is proper. That is my finding on the first issue.
19. The second issue is whether failure to file a reply to defence constitutes an admission by the defaulting plaintiff. Counsel for the defendants contended that because the plaintiffs did not file a reply to defence, the averments made in the defence should be deemed as not denied. I do not agree with that view. order 2 rule 12(1) of the [Civil Procedure Rules](#) provides a clear position on this issue in the following framework:

"If there is no reply to defence, there is a joinder of issue on that defence."
20. My understanding of the above framework is that, if there is no reply to defence, the plaintiff is deemed to have denied the averments contained in the defence. That, in my view, is the position in this suit. Put differently, if indeed the plaintiff did not file a reply to defence, there was a joinder of issues on the defence filed by the defendant. That is my finding on the second issue.



21. The third issue is whether title number Thika Municipality, Block 9/1109 held by the plaintiffs was obtained irregularly and/or fraudulently. The allegation that the above title was obtained irregularly and/or fraudulently was made by the defendants. section 107 of the Evidence Act places the burden of proof on the defendants. It provides thus:

- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

22. The Court of appeal said the following in Kinyanjui Kamau v George Kamau [2015] eKLR about the evidential duty of a party who alleges fraud:

“To succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding. In the present appeal, there is no such evidence, and the courts below rightly came to the conclusion that the appellant had not made out a case for the grant of the orders he sought.”

23. No evidence was tendered by the defendants to prove that the title held by the plaintiffs was acquired irregularly or fraudulently as alleged in paragraph 3 of their defence. No evidence of any irregularity or fraud was tendered by the defendants. In the circumstances, the court has no basis upon which to make a finding of irregularity or fraud on part of the plaintiffs in the obtention of the title which they hold. That is my finding on the third issues.

24. The fourth and fifth issues are related. They raise the questions as to whether the land in dispute is a road reserve and/or a public cemetery. The defendants contended that the title held by the plaintiffs does not exist. It was their case that the land which the plaintiffs are claiming to be comprised in title number Thika Municipality Block 9/1109 is a road reserve. They at the same time contended that the said land is a public cemetery. It was their case that the land comprised in the plaintiff's title does not exist.

25. The only evidence which the defendants tendered to support their allegations against the plaintiff's registered title was a report signed by DW1. The report reads as follows:

“Re: Thika Municipality Block 9/1109

The above subject matter refers. Having received instruction to carry out a survey on the above parcel of land, we found out the following.

That parcel of land does not appear on the current and latest registry index map; Thika Municipality Block 9.

So therefore it was not possible to ascertain whether the Gatitu Main Kwa Muthanga sit on the alleged piece of land and to what extent of encroachment has alleged.

Attached herein please find a copy of registry index map Thika Municipality Block 9.

Yours faithfully

(signed)

R G Magwa (Land Surveyor)



For Mapland Agencies”

26. It is apparent from the report that the purported findings in the report are not conclusive. The author [DW1] stated that it was not possible to ascertain whether Gatitu Main Kwa Muthanga sits on the disputed title. More important, it turned out during cross-examination that DW1 was not a registered or licensed surveyor. One would have expected the defendants to bring documentary evidence from the lands registry and the relevant departments of Physical Planning, Roads and Public Health, to demonstrate that the title relates to a road reserve or a public cemetery as alleged. No evidence was tendered by the defendants to prove the allegations made in the defence in relation to the plaintiffs’ title.
27. On their part, the plaintiffs tendered evidence to demonstrate that they hold a registered title to the land in dispute and that the title they hold is a product of Part Development Plan No KBU/4/94/35A approved on 24/10/1994. They produced an official search [an extract from the land register] showing that the land register was opened on 4/10/2019 and that the title was duly issued by the department of Lands.
28. Section 26 of the [Land Registration Act](#) contains the following framework on admission of evidence relating to registered land instruments and on the legal import of a registered title to land;
- “(1) 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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”
29. The tenor and import of the above framework is that this court is obligated to accept as *prima facie* evidence of proprietorship, the title and the official search exhibited by the plaintiffs. Secondly, in the absence of fraud or misrepresentation to which the plaintiffs are proved to be parties to, or in the absence of proven illegality, unprocedurality or corrupt scheme to which the plaintiffs are proved to be parties to, this court is obligated to protect the rights conferred by registration as proprietor of land.
30. The defendants in this suit contended that the land in dispute is a public road reserve. They at the same time contended that the land in dispute is a cemetery. Further, they contended that the plaintiffs’ title was procured irregularly and fraudulently. They did not, however, tender necessary evidence to demonstrate that the land in dispute is a road reserve or a cemetery. They did not tender any evidence of irregularity or fraud. The result is that this court has no basis upon which to make a finding to the effect that the land in dispute is a public road reserve or a cemetery. That is my finding on the fourth and fifth issues.



31. The sixth issue is whether the defendants have acquired title to the suit property through adverse possession. The plaintiffs contended that the defendants entered the suit property in January 2020. They made reports to the police, seeking to have the defendants removed from the land. They subsequently initiated this suit. It was the case of the defendants that they had been on the land since 1998, knowing the land to be a public road reserve and at the same time a cemetery. They had contested the validity of the plaintiff's title in their defence and evidence. Can the defendants who have contested the validity of the registration of the plaintiffs as proprietors of the suit property at the same time maintain the defence of adverse possession? Not to my understanding of the law on adverse possession. To maintain a defence or claim of an adverse possessor, the adverse possessor must acknowledge the validity of the title of the registered proprietor. If the title is a nullity, it cannot be acquired through adverse possession.
32. Secondly, if indeed the plaintiffs had been on the land as adverse possessors since 1998, they could have initiated proceedings under sections 37 and 38 of the *Limitation of Actions Act* upon expiry of 12 years in 2010. No such proceedings were initiated. None was initiated by way of counterclaim. In my view, the alternative defence of adverse possession is an afterthought.
33. For the above reasons, my finding on the sixth issue is that the defendants have not acquired title to the land in dispute through adverse possession.
34. The seventh issue is whether the defendants are trespassers on the suit property. The plaintiffs tendered evidence to demonstrate that they are the registered proprietors of the suit property. They further led evidence demonstrating that registration of the suit property was a result of an approved part development plan. The defendants did not tender any evidence to demonstrate that their use of the land as a yard for depositing sand is lawful. Infact they conceded that their business is not licensed because it is considered to be a public nuisance. Based on the above evidence, it is my finding that the defendants are trespassers on the suit property.
35. Having come to the above findings, it follows that the plaintiffs are entitled to the protection accorded by article 40 of the *constitution* and sections 24 and 25 of the *Land Registration Act*. Consequently, the plaintiffs are entitled to prayers (a), (b) and (c). I would have had no hesitation in awarding the plaintiffs reasonable general damages had they addressed the court on the issue. Other than praying for general damages, nothing was said about that relief in the plaintiffs' written submissions.
36. On costs, no basis has been laid as to why the general principle in section 27 of the *Civil Procedure Act* should not apply in this suit. Consequently, the plaintiffs are entitled to costs of the suit.

### **Disposal Orders**

37. In the end, judgment is entered in favour of the plaintiffs in terms of prayers (a), (b), (c) and (e) of the plaint.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Ms Mugo for the Plaintiffs

Ms Macharia for the Defendants



Court Assistant: Sydney

