



**Kahama Propertes Agencies Limited v Kenya Airports Authority & another (Environment and Land Case Civil Suit 124 of 2015) [2022] KEELC 14518 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14518 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 124 OF 2015  
EK WABWOTO, J  
OCTOBER 27, 2022**

**BETWEEN**  
**KAHAMA PROPERTES AGENCIES LIMITED ..... PLAINTIFF**  
**AND**  
**KENYA AIRPORTS AUTHORITY ..... 1<sup>ST</sup> DEFENDANT**  
**OCPD JOMO KENYATTA INTERNATIONAL AIRPORT ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This suit was commenced *vide* a Plaint dated 13<sup>th</sup> February 2015 wherein the Plaintiff sought for the following orders as against the Defendants;
  - i. A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that pieces of land known as LR Nos 9042/798 and 9042/799 Embakasi, Nairobi;
  - ii. A Permanent Injunction restraining the Defendants herein by themselves, their employees, servants, agents and or any other person claiming through them from entering, remaining thereon, disposing, trespassing, or in any other way whatsoever from dealing with the suit properties namely LR Nos 9042/798 and 9042/799 Embakasi, Nairobi.
  - iii. Costs of the suit.
  - iv. Any other relief the court may deem fit to make.
2. It is the Plaintiff's case that it has at all material times been the registered proprietor and/or beneficial owner as the lessee of LR No. 9042/798 and 9042/799 Embakasi, Nairobi and has been in occupation since 1997 when it acquired the same.



3. The Plaintiff averred that it has been dutifully paying land rates and land rent and has never parted with possession of the property. The Plaintiff further averred that in May 2013, the Plaintiff's director and his agents attempted to secure the property by fencing it off but were prevented from doing so by officers from the Defendants who had accused them of trespass and grabbing of the suit property.
4. According to the Plaintiff, the officers from the Defendants frustrated their efforts of securing their property without offering any valid reasons. The Plaintiff also averred that it was prevented from undertaking any constructing works on the said property and hence the filing of the instant suit.
5. The 1<sup>st</sup> Defendant filed a Defense on September 21, 2017 and denied all the averments in the Plaint. The 1<sup>st</sup> Defendant averred that it has never claimed any ownership of the suit property as alleged by the Plaintiff and neither has it been in physical possession of the same. It subsequently sought for the dismissal of the Plaintiffs suit with costs.
6. No appearance and or defence was filed by the 2<sup>nd</sup> Defendant and neither did he participate in these proceedings despite being served and notified of the same.
7. The matter proceeded for hearing on May 23, 2022. Samwel Mwangi, testified as the sole Plaintiff's witness. He informed the court that he is the Director and he relied on his witness statement and bundle of documents both dated February 9, 2018 which were adopted as his evidence in chief. He further stated that the Plaintiff had been totally unable to develop the property due to actions of the Defendants and they were seeking the court's intervention.
8. Upon cross examination he stated that he does not know if the property has other titles, neither is he aware who is in physical possession of the same. He also stated that all the meetings with the 1<sup>st</sup> Defendant towards resolving the issue have been unsuccessful since the Plaintiff has still been unable to access the property.
9. Joseph Ng'ang'a Waitheru testified as DW1 and the sole Defence witness. He stated that he is a land surveyor currently working with the 1<sup>st</sup> Defendant. He relied on his witness statement and bundle of documents dated September 9, 2018 which was adopted as his evidence in chief. He stated that the 1<sup>st</sup> Defendant has no interest whatsoever with the property belonging to the Plaintiff. He further stated that the 1<sup>st</sup> Defendant is the registered owner of LR No 9042/R which property is adjacent to the suit parcel known as LR No 9042/798 and 9042/799. He also stated that the boundaries are clearly demarcated and each party knows where its personal interest begins and where it ends as reflected in the survey plans and google maps.
10. DW1 stated that the 1<sup>st</sup> Defendant has never laid claim to any other property other than the property aforesaid, nor does it dispute the Plaintiff's ownership aforesaid.
11. The Plaintiff counsel filed submissions dated 29<sup>th</sup> June 2022 and submitted that the documentary evidence adduced in court confirms the Plaintiff's proprietorship of the suit properties; that the 1<sup>st</sup> Defendant has admitted that it does not lay claim on any of the Plaintiff's properties and that having demonstrated its ownership of the suit property, the Plaintiff is entitled to the orders sought. Reliance was made to the case of *Mrao v First American Bank Limited* [2003] eKLR.
12. The 1<sup>st</sup> Defendant's counsel filed submissions dated July 4, 2022 submitted that no dispute has arisen to warrant the grant of the orders sought by the Plaintiff. Reliance in this regard was placed on the case of *Mode of Proceedings & Another v Charles Wekhomba* [2017] eKLR where a plaintiff was seeking similar orders and the court dismissed the suit.



13. Having carefully considered the pleadings, the testimonies and submissions herein, the issues that arises for determination are;
- i. Whether the Plaintiff has proved its case on a balance of probabilities and if so;
  - ii. Whether the Plaintiff is entitled to the orders sought?
14. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the Evidence Act, which provides as follows:
- “(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.”
15. Sections 109 and 112 of the same Act state;
- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
- “112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
16. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in Mumbi M’Nabea v David M. Wachira [2016] eKLR stated as follows:
- “In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.
- ...The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M’mairanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:
- “Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”
17. With respect to the burden of proof, the learned Judges of Appeal in the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] eKLR, posited thus:
- “Denning J, in Miller v Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say; -



“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained.”

18. The court will be guided by the foregoing. In the present case the Plaintiff’s proprietorship of the suit plot is not disputed by the 1<sup>st</sup> Defendant. Indeed, according to the 1<sup>st</sup> Defendant’s witness, they have never laid any claim over the suit properties as alleged by the Plaintiff neither have they trespassed nor prevented the Plaintiff from accessing the same.
19. The Plaintiff’s claim to ownership of the suit property is primarily based on its certificates of title for LR Nos 9042/798 and 9042/799 together with copies of Land Rent and Land Rent receipts.
20. The provision of Section 23(1) aforesaid makes it clear that the title of a registered proprietor shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof subject to encumbrances, easements, restrictions and conditions therein or endorsed thereon, and that the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.
21. However, no evidence was adduced with respect to the allegations that the Defendants have trespassed and prevented the Plaintiff from accessing its property. In fact, the testimony of DWI was to the effect that the 1<sup>st</sup> defendant has never trespassed, grabbed nor deprived the plaintiff possession of the suit property. This could have been a case of the plaintiff flagging the wrong horse. That being the case and having carefully reviewed the evidence tendered herein by both the Plaintiff and the 1<sup>st</sup> Defendant’s witness it is the finding of this court that the Plaintiff has not established its case in this respect.
22. Flowing from the foregoing, court orders cannot be issued in vain and it follows that the Plaintiff is not entitled to any of the orders sought having failed to prove its case to the required standards.
23. On the issue of costs, Section 27 of the *Civil Procedure Act* gives the Court the discretion to grant costs. Ordinarily, costs usually follow the event, unless special circumstances are presented to Court. In the instant case I make an order that each party to bear their own costs of the suit.
24. In conclusion, the court finds that the Plaintiff has failed to prove its case on a balance of probabilities as against the Defendants. The Plaintiff’s suit is hereby dismissed with no orders as costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 27TH DAY OF OCTOBER, 2022.**

**E.K. WABWOTO**

**JUDGE**

**In the presence of;**

**Mr. Munyororo for Plaintiff.**

**Ms. Akonga for 1<sup>st</sup> Defendant.**

**N/A for the 2<sup>nd</sup> Defendant.**

**Court Assistant – Caroline Nafuna.**



**E.K. WABWOTO**  
**JUDGE**

