



**Mwangi v Kiambu Dandora Farmers Company Limited (Environment and Land Case Civil Suit 340 of 2018) [2022] KEELC 13846 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13846 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 340 OF 2018  
SO OKONG'O, J  
OCTOBER 27, 2022**

**BETWEEN**

**MARGARET WAMBUI MWANGI ..... PLAINTIFF**

**AND**

**KIAMBU DANDORA FARMERS COMPANY LIMITED ..... DEFENDANT**

**JUDGMENT**

1. This suit was commenced by a plaint dated August 3, 2018. The plaintiff sought the following reliefs;
  1. A permanent mandatory injunction restraining the defendant whether by its servants, agents, assignees and/or nominees or whomsoever under or through it with its authority from interfering, dealing with, selling, transferring, charging, trespassing, and/or alienating and/or having any other registrable dealings whatsoever encumbering in any other manner all that property known as LR No 209/10416 (IR No 46877) in Kariobangi, Nairobi County (hereinafter referred to as “the suit property”).
  2. General damages.
  3. Costs of the suit and interest at court rates.
  4. Any other relief the court may deem fit to grant.
2. The plaintiff averred that on or around November 9, 1993 she bought the suit property which measures 0.0250 hectares from its first registered owner, one, Samson Mugacha Mwangi (hereinafter referred to only as “the previous owner”). She conducted due diligence and found that the suit property was charged to Kenya Commercial Bank through a charge dated June 9, 1987 to secure a loan that was advanced to the previous owner. The previous owner agreed to clear the outstanding loan. The loan was cleared and a discharge of charge registered against the title of the suit property on July 4, 1997. The



previous owner thereafter applied for the necessary consents and the suit property was subsequently transferred and registered in the name of the plaintiff on July 4, 1997.

3. On or about June 10, 2018, the defendant through its agents/employees invaded the suit property, fenced it off and had since then refused to remove its illegal structures thereon despite meetings between the parties to resolve the issue. The plaintiff reported the matter to Buruburu Police Station. Both parties were summoned but the defendant neither attended nor produced any ownership documents to the police. The plaintiff averred that due to the defendant's continued acts of trespass, she had continued to suffer loss and had been unable to develop the suit property.
4. The defendant entered appearance but did not file a defence to the plaintiff's claim. At the trial, the plaintiff testified as PW1. She produced her bundle of documents as exhibits and adopted her witness statement as part of her evidence in chief. She stated further as follows: She purchased the suit property in 1992 using her deceased's husband's National Social Security Fund dues. It was transferred to her in 1997. She did not develop the suit property. It was the only undeveloped plot in the neighbourhood. In 2017, her daughter wanted to develop the suit property so she went to view it in the company of an architect. She found that it had been fenced. The matter was reported to the Chief of Kariobangi South who summoned the defendant but the defendant did not show up. She reported the matter to the police but the defendant failed to honour the summons from the police. The police advised her to take the matter to court. She had paid rates for the suit property from 1993. She wanted to develop the suit property but was prevented from doing so by the fence that had been put around it. She urged the court to evict the defendant from the suit property and to award her damages and costs of the suit.
5. The plaintiff's daughter, Susan Wanjiru Mwangi gave evidence as PW2. PW2 adopted her witness statement as part of her evidence in chief. She stated further as follows: She was familiar with the suit property. She had visited it before and it was unfenced. When she visited the property in 2017, she found that it had been fenced. She called the plaintiff and they reported the matter to the area chief who later informed them that the fence was put up by the defendant. The fence was removed and then put up again. The chief called the parties for a meeting but the defendant did not show up. They reported the matter to Buruburu Police station. The defendant was summoned but did not appear. They escalated the matter to the District Officer. Someone claiming to be a director of the defendant appeared and claimed that the suit property and the surrounding plots belonged to them.
6. Since the defendant did not file a defence, it did not tender evidence at the trial. After the close of the plaintiff's case, the court directed the parties to make closing submissions in writing. The plaintiff filed her submissions on April 26, 2022 while the defendant did not file submissions.
7. The plaintiff framed a number of issues for determination that she submitted on. The first issue framed by the plaintiff concerned the ownership of the suit property. On this issue, the plaintiff cited *Shaneebal Limited v County Government of Machakos* [2018] eKLR and submitted that since the defendant neither filed a defence nor adduced evidence, the evidence adduced by the plaintiff on the ownership of the suit property was not controverted. The plaintiff submitted that she had proved that she was the owner of the suit property.
8. The second issue was whether the defendant had trespassed on the suit property. The plaintiff defined trespass as any unjustifiable intrusion by one person upon the land in the possession of another. *Clerk and Lindsell on Torts*, 18<sup>th</sup> edition, page 23 was cited for this definition. The plaintiff submitted that she was the registered proprietor of the suit property and as such the defendant's act of putting up a fence on the property amounted to trespass.
9. The last issue was whether the plaintiff was entitled to the reliefs sought. The plaintiff cited *Park Towers Ltd v John Mithamo Njika & 7 others* [2014] eKLR and *Philip Ayaya Aluchio v Crispinus Ngayo* [2014]



eKLR as well as *Halsbury's Laws of England* 4<sup>th</sup> edition volume 45 para 26 1503 and submitted that she was entitled to general damages for trespass since trespass had been proved. The plaintiff submitted that proof of trespass was sufficient and that she did not need to prove any specific damage or loss.

## Determination

10. In my view, there are only two issues for determination in this suit namely; whether the defendant trespassed on the suit property and whether the plaintiff is entitled to the reliefs sought in the plaint. The suit property is registered under the *Registration of Titles Act*, chapter 281 laws of Kenya (now repealed). Section 23(1) of the *Registration of Titles Act* that has been reproduced in section 26(1) of the *Land Registration Act, 2012* provides as follows:

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof 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 the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and 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”.

11. Section 26 of the *Land Registration Act, Act, 2012*, provides as follows:

“26 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.”

12. I am satisfied from the evidence on record that the plaintiff is the registered and lawful owner of the suit property. The plaintiff has produced evidence showing that she purchased the suit property from the previous owner on November 9, 1993. The plaintiff has proved that the property was transferred to her on June 17, 1997 and registered in her name on July 4, 1997. The plaintiff has produced in evidence a grant issued by the Commissioner of Lands on March 10, 1989 showing that the suit property was first registered in the name of the previous owner on March 28, 1989 and that the same was transferred to the plaintiff on July 4, 1997. In the absence of any evidence to the contrary, it is my finding that the plaintiff is the owner of the suit property.

13. Section 3 of the *Trespass Act*, chapter 294 laws of Kenya provides as follows:

“(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.”

14. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, *Clerk & Lindsell on Torts*, 18<sup>th</sup> Edition, page 923, paragraph, 18-01. In *Gitwany Investments Limited v Tajmal Limited & 3 others* [2006] eKLR, it was held that title to land carries with it legal possession. This means that even if one does not have actual possession of land, so long as he has a title to the land, that is deemed as possession for the purposes of trespass.
15. To establish trespass, the plaintiff had to prove that she was either lawfully in possession of the suit property or was the owner thereof and that the defendant entered and occupied the property without any justifiable cause.
16. This suit was not defended by the defendant. The defendant entered appearance but did not file a defence to the plaintiff's claim as mentioned earlier. The defendant's failure to file a defence and to tender evidence at the trial means that the allegations that were made against the defendant in the plaint were not denied and that the evidence that was tendered by the plaintiff in support of her case was not controverted by the defendants. This means that plaintiff's title to the suit property is not contested. The plaintiff's testimony that the defendant entered the suit property and fenced the same without her consent or authority is also not challenged. The plaintiff having proved her ownership of the suit property and the defendant's entry and fencing of the same, the onus was upon the defendant to justify its fencing of the property.
17. In the absence of any evidence from the defendant, the only conclusion this court can reach is that the defendants had no justifiable cause for entering and fencing the suit property and as such it is a trespasser thereon. For the foregoing reasons, I am satisfied that the plaintiff has proved her claim against the defendant and that she is entitled to the injunction sought. As concerns the prayer for general damages, I am in agreement with the plaintiff's submission that once trespass is proved, the plaintiff is entitled to damages even without proof that she has suffered any specific loss or damage. In this case, I am not satisfied that the trespass by the defendant was such that the defendant derived any benefit from the suit property or prevented the plaintiff from using the same. I will therefore award the plaintiff only nominal damages.

## Conclusion

18. In conclusion, it is my finding that the plaintiff has proved her case against the defendant on a balance of probabilities. I therefore enter judgment for the plaintiff against the defendant for;
  1. A permanent injunction restraining the defendant whether by itself, its servants, agents, assignees and/or nominees or whomsoever acting under or through it from interfering, dealing with, selling, transferring, charging, trespassing, and/or alienating and/or having any other dealings whatsoever with all that property known as LR No 209/10416 (IR No 46877), Kariobangi, Nairobi County (“the suit property”).
  2. Kshs 50,000/- being general damages for trespass plus interest at court rates from the date hereof until payment in full.
  3. Costs of the suit.



**DELIVERED AND DATED AT KISUMU THIS 27<sup>TH</sup> DAY OF OCTOBER 2022**

**S.OKONG'O**

**JUDGE**

Judgment read virtually through Microsoft Teams Video Conferencing platform in the presence of;

Mr. Kibathi for the Plaintiff

Mr. Murunga for the Defendant

Ms. J. Omondi-Court Assistant

