



REPUBLIC OF KENYA



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**Waithaka v Katram Limited & another (Environment & Land Case
177 of 2010) [2022] KEELC 14489 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14489 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 177 OF 2010
LN MBUGUA, J
OCTOBER 27, 2022**

BETWEEN

JOHN ROKI WAITHAKA PLAINTIFF

AND

KATRAM LIMITED 1ST DEFENDANT

RAHAB MUKIAMA 2ND DEFENDANT

JUDGMENT

1. The Plaintiff through the Plaint dated 19th April 2010 claims to be the registered lawful owner of parcel LR No. 20530, being the Grantee of a leasehold interest of 99 years from 1st November 1992. The ownership came about pursuant to a Transfer dated 27th March 1997 from Cape Equatorial Holding Co. Ltd and the said property was subsequently registered in his name on 1st April 1997 as Grant Number IR 72421/2 upon which he took possession, erected a fence and put up semi-permanent houses. That between 5th, 12th and 14th April 2010, the Defendants entered into the suit property without his authority dug up an access road and removed the fence and the house the Plaintiff had erected on the suit property, ostensibly because the the 1st Defendant had acquired an allotment of the suit property from the Commissioner of Lands.
2. The plaintiff therefore seeks the following orders;
 - i. A declaration that the Plaintiff is the sole and exclusive legal and legitimate owner of all that piece or parcel of land known as LR No. 20530 and that any purported allotment of the same to any of the Defendants is wrongful, illegal, null and void.
 - ii. General damages for trespass and an order of permanent injunction restraining the Defendants by themselves or their respective servants or agents and/or work persons from constructing or erecting any roads or structures whatsoever on the Plaintiff's property being the premises known as LR No. 29530, from depositing and offloading of construction materials therein



or from entering, remaining or otherwise howsoever from trespassing into the said premises or from disposing, letting, charging or mortgaging or dealing with the said property in any adverse manner whatsoever.

- iii. Costs of the suit.
- iv. Interest on the sums found due above.
3. The Defendants filed separate statements of Defences, both dated 25th May 2010 and filed by the same advocate. The defence of 1st defendant contains a general deny of plaintiff's claim adding that a company known as Cape Equitorial Holdings Company Limited does not exist. For the 2nd defendant, she contends that plaintiff's claim is directed against the 1st defendant, hence there is no cause of action against her.
4. During the trial, the Plaintiff John Roki Waithaka testified as PW1. He adopted his witness statement dated 12th August 2012 as his evidence, and he produced nine documents in his bundle as Plaintiff Exhibit 1 to 9. He reiterated the contents of his pleading adding that, while on a routine visit and inspection of his property on 12.4.2010, he found people making a road into the inside of his property without his permission or authority. Upon inquiry from them, they confirmed that they had for the past one week been instructed by one Rahab Mukiyama, the 2nd Defendant herein to carry out the said works.
5. Pw1 duly reported the matter to the Kileleshwa Police Station, and he also sought the audience of the 2nd Defendant who resides nearby, and upon inquiring from her under whose authority she had instructed the said workmen to carry out the said road works, she avered that her Company known as Katram Limited, the 1st Defendant had been allotted the suit land by the Commissioner of Lands. Pw1 contends that he had occasion to look at the purported Letter of Allotment and had found the same to be fake and irregular as it refers to an indistinguishable residential plot of land in "Kileleshwa – Nairobi.
6. The defendants apparently invaded the suit premises again on 14th and 15th October 2010.
7. On cross examination by Counsel for the Defendants, PW1 confirmed that the Deed Plan for the suit property is No. 192734 and the number 1 and 4 omitted in the copy could have been a photocopying issue. That he purchased the suit land from Cape Equitorial Holding Co. Ltd vide the sale agreement executed on 27th January 1997 and the transfer was registered on 1st April 1997. Pw1 avered that he has been in occupation of the suit property since then.
8. Pw1 further stated that there was a letter in the Defendants' documents from the registrar of companies indicating that Cape Equatorial Ltd did not exist in their records and there was also a letter from the Directorate of Survey indicating that LR No.20530 did not fall within Kileleshwa area and that the Deed Plan No. 9273 was not supported by the survey records, and that there was a letter from Nairobi City Council dated 29/11/2011 indicating that L.R.NO. 20530 was not in their data base.
9. He clarified that the suit property is situated in Kileleshwa. He also reiterated that he has occupied the suit premises since year 1997.
10. He went on to state that he sued the Defendants because of the hard-core stones poured on the suit property and he had information that 2nd defendant was the person behind the works which was being undertaken on the land.
11. On re-examination, Pw1 affirmed that the Deed Plan Number for the suit property bore number 192734, that the Rates invoice bore number 209/20530 and that the Defendants had also annexed rates invoice of 2011 bearing the name of the plaintiff and same number.



12. He further stated that the workmen he found on the suit property informed him that they had been engaged by the 2nd Defendant to execute works on the suit property, a position that was also confirmed by the 2nd Defendant.
13. PW2, Edwin Munoko Wafula introduced himself as a Land Registrar based at Ardhi House, Nairobi. His evidence is that the Deed File regarding L.R No. 20530 was comprised in Grant No. IR 72421. The said Deed File in their records contained; a copy of the title (where the current registered owner of the suit land is John Roki Waithaka registered on 1st April 1997, and that this is the same information on the official search dated 26th April 2010), the registrars copy of the title as well as the transfer were also in the deed file. He confirmed that the previous proprietor was Cape Equatorial Holding Company Ltd having been registered as proprietor on 4th March 1997. He also confirmed that the property is located in the City of Nairobi.
14. On Cross-examination, PW2 stated that a deed file ought to contain copy of the title plus any instrument registered against the title, and that a copy of the letter of allotment is contained in the correspondence file which is kept in the land administration section and not in the Lands Registry. He doesn't know if the dispute at hand was a case of double allocation. However the deed file did not have a copy of the consent to transfer the property to the Plaintiff, though that document was supposed to be there. He affirmed that from the file, the original owner was issued with the Title on 4th March 1997 and transferred it on 1st April 1997. Highlighting that it was possible for a transfer to be effected within seven days and that it was possible that Cape Equatorial was issued with the Title before they processed the transfer.
15. He confirmed that the copy of the Deed Plan on the file was dated 13th January 1995 and the signed transfer in the file was dated 27th January 1997 before Title was issued, and that this was possible if the parties are able to access the correspondence file. Adding that a Deed Plan was specific to the property and if one wanted to confirm authenticity of a deed plan, he would write to the Director of Survey.
16. On the issue of Cape Equatorial, Pw2 indicated that he was not aware that it was non existent and that it was only registered by the defendant after this case was filed. He was also not aware that the suit property was still un-surveyed.
17. On re-examination, PW2 stated that there was no policy on timelines for disposal of registered proprietors and that there was nothing irregular on the face of the transfer from Cape Equatorial to the plaintiff, stating that consent to transfer was issued by the Commissioner of Lands.
18. He further stated that the survey plan produced by the plaintiff was in relation to FR 268/86 which was authenticated on 16th November 1994 and does not relate to F/R 48/239. He was however not well acquainted with the procedure of numbering at the Department of Survey.
19. For the defence, one Anthony Macharia K Gathata testified as DW1 and introduced himself as a retired Inspector of Police. He adopted his witness statement filed in court on 14th March 2018 as his evidence. He stated that before his retirement he worked with the Criminal Investigation Department, Land Fraud Section. He was given instructions by the 2nd defendant who was the director of 1st defendant to investigate the genuineness of the land parcel 20530 at the survey of Kenya and at city hall. To this end, the 2nd defendant gave him two copies of deed plans Nos 9273 and 192734 both dated 13th January 1995, signed by G.O. Wayumba to assist in establishing the truth.
20. Dw1 had then proceeded to the directorate of survey Ruaka where he was given survey plan F/R 268/86 for land reference 20530 which was received there on 16/11/94 through computations No 32603, where a file No. CT/128/36/191 had been opened. The said land had an area of 0.827 ha.



21. Dw1 noted that the above survey plan was received and registered at Survey of Kenya 58 days before the preparation of the deed plans (9273 and 192734) by G.O. Wayumba and later used to register land reference 20530 on 3/3/1993 through Grant IR 72421.
22. Dw1 also observed that LR 72421 was registered in the names of Cape Equatorial Holding company limited at the registrar of companies, but upon investigations, he found that no such a company existed. He therefore advised Rahab Mukiyama to take that opportunity and register the said company in her name to prevent any other person from taking advantage and fraudulently using that company to her detriment.
23. Dw1 also advised the 2nd defendant to write to the Director of Survey which she did through her advocate and the response thereof is a letter of 22nd April 2010 which indicates that the deed plan no. 9273 was not supported by any other survey.
24. On investigations at city hall valuation department, Dw1 found that parcel LR 20530 did not exist as this land reference could not be in Nairobi, but Land reference 209/20530 existed contrary to the survey plan.
25. On Cross examination Dw1 confirmed that Defendant's letter of allotment addressed to Katram Limited dated 2nd January 1999 made reference to "Residential Plot- Kileleshwa Nairobi" but did not bear any plot number. He however confirmed that the plaintiff's Grant registered on 4th March 1997 came to be before the issuance of the 1st Defendant's letter of allotment.
26. He stated he did not have the Grant which was registered on 3rd March 1993 which he had made reference to at paragraph 8 of his witness statement and which was the basis of his investigation because it was given to him by the 2nd Defendant and he handed it over back to her. He confirmed that the Plaintiff's Grant was signed by the Commissioner of Lands on 3rd March 1997 and registered as a title on 4th March 1997.
27. He went on to state that as per paragraph 9 of his witness statement, IR 72421 was registered in the name of Cape Equatorial Holding Company Limited a company that never existed. He therefore advised the defendants to register a similar company.
28. He confirmed that he was given 2 deed plans 9273 and 192734 and the Plaintiff's Grant was supported by deed plan no.192734 dated 13th January 1995 and the Plaintiff's survey plan was dated 1994. He stated that in his experience, a survey plan was prepared before a deed plan was extracted. He did not have deed plan No. 9273 which was similarly given to him by the 2nd Defendant and he returned it to her and that the report he received from the Directorate of Survey dated 28th April 2010 related to Deed Plan No. 9273. According to his investigations, he confirmed that Land Reference Number 209/20530 existed in City Council Records under the name John Roki Waitthaka.
29. He further stated that according to the survey plan, it showed that the suit property had two roads connected to it, but in reality there were no roads meaning the survey plan was fraudulent.
30. In his submissions dated 10th June 2022, the plaintiff avers that he is the undisputed and exclusive registered owner of the suit land as he has a valid title. Thus he has indefeasible rights over the suit land which deserves protection by the court. He contends that Defendants' purported allocation of the property was on 2nd January 1999 which was way after he had already owned the property meaning, the suit land was no longer available for allocation and the said allotment letter did not specify the said 'Residential Plot in Kileleshwa'.



31. The plaintiff therefore avers that he is entitled to damages of Kshs. 10,000,000 for trespass occasioned by the defendants and causing destruction on his property. The plaintiff also prays for costs of the suit.
32. In support of his claims, the plaintiff relied on the cases of Simeon Nyachae & Another v County Government of Mombasa [2020] eKLR, Joseph Kipchirchir Koech v Philip Cheruiyot Sang [2018] eKLR, Ochako Obinchi v Zachary Oyoti Nyamongo [2018] eKLR, Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited [2017] eKLR, Rhoda S Kiilu v Jiangxi Water And Hydropower Construction Kenya Limited [2019] eKLR and Eunice Nkirote Ringera v Kenya Power & Lighting Company [2020] eKLR.
33. The submissions of the Defendants are dated 5th August 2022 where they contend that once the 1st Defendant was issued with the allotment letter, they complied with the terms thereof including payment of rates and it was evident that the allotment letter conferred ownership of the suit property to the 1st Defendant.
34. It was also submitted that the records at the Department of Survey also showed that the 1st Defendant was the owner of that land. And in the event that such an allocation was erroneous, the 1st Defendant should not be condemned for the mistake of the Commissioner of Lands because they were innocent purchasers. Adding that the Department of Survey on 28th April 2010 confirmed that LR No. 20530 was not within the Kileleshwa area and that Deed Plan 9273 was not in their survey records. It was also submitted that plaintiff had not given details in relation to the claim of trespass.
35. In support of their case, the defendants relied on the cases of Isaac Gathungu Wanjohi & another v Attorney General & 6 others [2012] eKLR, Shimoni Resort vs Registrar of Titles & 5 Others [2016] eKLR, John Waweru Kiarie v Maina Njuguna & 2 others [2019] eKLR, Philip Aluchio vs Crispinus Ngayo [2014] eKLR and Charterhouse Bank Limited (Under Statutory Management) vs Frank N. Kamau [2016] eKLR.

Analysis and Determination

36. This court finds that the issues for determination are:
 - i. Whether the plaintiff is the legitimate owner of the suit parcel No. LR 20530.
 - ii. Whether the plaintiff is entitled to general damage for trespass.
 - iii. Who should bear costs of the suit.

Ownership

37. I find that the plaintiff has given a consistent and plausible account of how he came to be registered as the owner of the land. That the suit land was registered in the name of Cape Equatorial Holding Company Limited on 4.3.1997 and was transferred to the plaintiff on 1.4.1997. Page 3 of the Grant No. I.R. 72421 for Parcel LR. 20530 (plaintiff exhibit one) confirms these details. The transfer of the land was via a purchase reflected in the sale agreement in tandem with plaintiff exhibits 2 & 3.
38. Pw2, a Land Registrar confirmed that the current registered owner of the suit property is the plaintiff and that the previous registered owner of that land was Cape Equatorial Holdings Company Limited, thus the registration record of the suit land as availed by Pw2 are consistent with the evidence of Pw1. The court takes judicial notice that the land registry is the custodian of registration records in Kenya in so far as registered land is concerned.



39. In the case of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another* [2013] eKLR, the court while making reference to the provisions of Section 26 of the *Land Registration Act* stated that:
- “The law is extremely protective of title and provides only two instances for the challenges of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party, The second is where the certificate of title has been acquired illegally procedurally or through a corrupt scheme”.
40. From the evidence tendered by Dw1, it is not clear as to the basis upon which the defendants are challenging the title of the plaintiff. After all nowhere in their pleadings have the defendants advanced a defence of fraud, illegality, misrepresentation or any such other factors that may vitiate the title of the plaintiff. The defendants are not even staking a claim of ownership of the suit land in their respective pleadings save a general statement made in paragraph 7 of 1st defendant’s defence that plaintiff used a court order to trespass on their land. If the defendants were claiming ownership of that land, nothing could have been easier than to assert such a claim in their pleadings.
41. In the case of *Galaxy Paints Company ltd v. Falcon Guards Ltd* [2000] eKLR, the court stated that:
- “It is trite law.... that issues for determination in a suit generally flow from the pleadings ...”
42. The pleadings of the defendants have never been amended since year 2010, thus defendants are estopped from advancing issues of fraud or illegality at the trial. On the same breadth, it is irregular and untenable for the defence to adduce evidence of the validity of their allotment at the stage of submissions.
43. Needless to say that the evidence tendered by Dw1 which purports to impeach the title of the plaintiff is fraught with material discrepancies and was not corroborated by the defendants themselves. For instance, Dw1 has stated that the Director of Survey had written a letter stating that the deed plan No. 9273 was not supported by any survey hence no Grant could be registered thereof; but in cross examination he confirmed that plaintiff’s Grant is supported by the deed plan No 192734 dated 13.1.1995. Dw1 further stated that the copy of the Grant he was given to investigate for parcel 20530 indicates that the land was registered on 3.3.1993. However, plaintiff’s Grant was first registered on 4.3.1997 as clearly seen in plaintiff exhibit 1. Dw1 did not avail the deed plan No 9273 or the Grant registered on 3.3.1993 hence the nexus of these documents to the dispute at hand was not established.
44. I find that the plaintiff has given concrete evidence regarding his claim of ownership of the land and that the defence has not rebutted that evidence. I therefore find that plaintiff is the lawful owner of the suit land.

Trespass

45. It is pertinent to note that plaintiff has pleaded that the trespass occurred on 4th, 5th, and on 14th April 2010 whereby the invaders removed his fence and proceeded to dig an access road. The courts records indicate that the alleged invasion prompted the plaintiff to file an application seeking injunctive orders to restrain the defendants from constructing the road amongst other acts of trespass. A ruling thereof was delivered by the court (Judge Muchelule as he then was) on 31.1.2011 in favour of the plaintiff.
46. In his recorded statement at paragraph 3 & 4, again the plaintiff reiterated how the acts of trespass occurred. The Plaintiff even sought the audience of the 2nd defendant as she resides nearby and her explanation of the invasion was that her company (1st defendant) had a letter of allotment.



47. The last exhibits of the plaintiff are assorted photographs which clearly depicts an access road under construction and the same is leveled with hard core stones. The defendants have not out-rightly rebutted that evidence of the plaintiff.
48. The authorities cited by the plaintiff in relation to the issue of trespass are relevant particularly the case of *Ochako Obinchu v Zachary Oyoti Nyamongo* [2018] eKLR, where it is stated that;
- “Trespass has been defined as any unjustifiable intrusion by one person upon the land in the possession of another”
49. In the circumstances, I proceed to award damages for trespass to the plaintiff as against the defendants for ksh. 1,500,000.
50. In the final analysis, I allow plaintiff’s claim in the following terms:
1. An order is hereby issued declaring the Plaintiff as the legitimate owner of all that parcel of land known as L.R. No. 20530; Any purported allotment of the said land to any of the Defendants is found to be wrongful, illegal, null and void.
 2. The plaintiff is awarded General Damages for trespass to the tune of ksh. 1,500,000 against the defendants jointly and severally.
 3. The plaintiff is awarded costs of the suit plus interest at courts rates. The interest to run from the date of this judgement.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Wachira for Plaintiff

Ndolo for both Defendants

Court Assistant: Eddel Barasa

