



**Odhiambo v Mwangi (Environment & Land Case 475 of 2015)  
[2022] KEELC 13492 (KLR) (11 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13492 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 475 OF 2015  
MD MWANGI, J  
OCTOBER 11, 2022**

**BETWEEN**

**LUKE OUKO ODHIAMBO ..... PLAINTIFF**

**AND**

**WAITHAKA MWANGI ..... DEFENDANT**

**JUDGMENT**

**Background**

1. The plaintiff in this case claims ownership of a plot number LR 8285/1125 in Nairobi, Kariobangi Light Industries (herein referred to as the suit property). He alleges that the defendant has trespassed and illegally occupied the said plot without his authority and has continued to commit acts of wastage on the plot and has even started what the plaintiff terms as ‘illegal construction’. Despite demand and notice from the plaintiff, the defendant has refused to vacate the suit property necessitating the filing of this suit. The plaintiff therefore prays for a permanent injunction to restrain the defendant from interfering with his quiet possession of the suit property, damages for trespass, an order that the defendant gives vacant possession of the suit property and costs of the suit.
2. The defendant filed a statement of defence whereby he denied the plaintiff’s claim in its entirety. The defendant while refuting the plaintiff’s allegation of trespassing into the suit property on his part avers that he is the owner of Plot No 386, Kariobangi Light Industries, which he alleges to have brought from one Chris Muriuki Waithaka who in turn had bought from the original allottee, Isaac G Githuku. He was categorical that he has nothing to do with the Plaintiff’s plot.
3. The defendant’s position was that he owns and was in occupation of Plot No 386 Kariobangi Light Industries not the plaintiff’s plot number LR 8285/1125. He therefore affirms that the plaintiff is not entitled to the orders sought and that the plaintiff has unnecessarily dragged him to court.



4. In the year 2018, the defendant made an application to join the Nairobi City County Government and the Chief Valuer of the County Government of Nairobi as 3<sup>rd</sup> parties in this matter. The application was allowed on March 15, 2018. I have perused the record of the court. There is no evidence that the intended 3<sup>rd</sup> parties were joined into the pleadings despite the order of the court. The defendant did not participate in these proceedings thereafter.
5. The hearing of the case proceeded on June 16, 2022 in the absence of the defendant who had been served with the hearing notice through his advocates on record.

#### **Evidence Adduced on behalf of the Plaintiff.**

6. The plaintiff testified in his case and called one more witness.
7. The plaintiff adopted his witness statements on record as his evidence in chief. In his testimony, the plaintiff narrated how he acquired a letter of allotment in respect of the suit property from the Nairobi City County Government in the year 2015. He proceeded to make all due payments and was then issued with a deed plan from the survey of Kenya through the Nairobi City County. Upon receipt of the deed plan, the plaintiff applied for a lease. The lease was issued to him on making payments to the Kenya Revenue Authority. He was subsequently issued with a certificate of lease from the Lands Office. He exhibited the receipts confirming the payments and the documents issued to him.
8. The plaintiff testified that having acquired the ownership documents, he commenced developing the suit property. However, the defendant encroached into the suit property claiming ownership of the same, and that is why the plaintiff moved to court. The plaintiff produced the documents on his list of documents as exhibits in support of his case.
9. The plaintiff's 2<sup>nd</sup> witness was one Stephen Opondo Otieno who resides at Kariobangi. He confirmed that the plaintiff indeed acquired the suit property from the County Government of Nairobi. The witness confirmed that the plot was and is still vacant. No developments have been done on it.
10. As stated earlier on, the defendant did not participate in the proceedings herein.

#### **Court's Directions.**

11. Upon conclusion of the hearing, the court directed the plaintiff to file written submissions. The plaintiff complied and the court has had the opportunity to read through the said submissions.

#### **Issues for Determination.**

12. In the opinion of the court, and considering the pleadings filed, the evidence adduced and the submissions by the plaintiff, the issues for determination in this matter are: -
  - a. Whether the plaintiff is the legal owner of the suit property.
  - b. Whether the plaintiff is entitled to the orders sought.
  - c. Whether the plaintiff is entitled to damages for trespass and if so, the quantum of the same.
  - d. Whether the plaintiff should get the costs of the suit.



## Analysis and Determination

### A. Whether the Plaintiff is the legal owner of the suit property.

13. In his submissions, the plaintiff reiterates that he had provided sufficient evidence to demonstrate how he acquired the suit property and became the legal owner of thereof. The plaintiff further submitted that his evidence was not rebutted by the defendant who did not call any evidence at all. He therefore urges the court to find that he is the sole lawful owner of the suit property.
14. To support his submissions, the plaintiff relied on three cases; *Nortend Trading Company Ltd alias Kenya Refuse Handlers Ltd -vs- City Council of Nairobi* (2019) eKLR, *Edward Muriga through Stanley Muriga -vs- Nathaniel D Schalter*, Civil Appeal No 23 of 1997 (unreported) & *Mortex Knitwear Ltd -vs- Gopitex Knitwear Mills Ltd* Nairobi Milimani HCCC 834 of 2002 (unreported)
15. In all the three cases, the courts expressed the same opinion to the effect that where a defendant does not adduce evidence, despite having filed a statement of defence, the plaintiff's case stands unchallenged since the allegations by the defendant in his statement of defence have not been substantiated. They remain mere allegations.
16. This court in the case of *Nyeri Teachers Investment Co Ltd -vs- Solio Ranch Ltd and another* Nairobi (Environment and Land Case Civil Suit 1538 of 2014) {2022} KEELC 2400 (KLR), arrived at a similar opinion on the consequences of a defendant's failure to adduce evidence in support of its defence and counter claim. Failure by the defendant to call evidence in support of his case renders his allegations in his statement of defence just that; mere allegations, since they have not been substantiated.
17. Accordingly, having considered the unchallenged evidence adduced by the plaintiff and the exhibits produced in support of his case, I find that the plaintiff has proved on a balance of probabilities that he is the sole lawful owner of the suit property.

### B. Whether the Plaintiff is Entitled to the orders of Vacant Possession and a Permanent Injunction.

18. The plaintiff being the lawful owner of the suit property herein is entitled to enjoy quiet possession of the said property. The plaintiff in his plaint prays for an order that the defendant unconditionally gives him vacant possession of the suit property and further for an order of permanent injunction restraining the defendant by himself and/or through his agents, servants, employees or any other person purporting to have been permitted to act on his behalf from interfering with the plaintiff's quiet possession of the suit property.
19. In the case of *Kenya Power & Lightning Co Ltd -vs- Sheriff Molana Habib* (2018) eKLR, Korir J correctly elaborated the essence of a permanent injunction when he stated that,

“A permanent injunction which is also known as a perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”
20. This court is convinced that the plaintiff is entitled to the orders sought; the order of vacant possession of the suit property as well as the order of a permanent injunction.



**C. Whether the Plaintiff is entitled to damages for trespass, and if so, the quantum of the same**

21. The plaintiff in his pleadings had further sought for damages for trespass against the defendant. I note that the plaintiff in his submissions did not submit on the same.
22. The plaintiff's witness, 'PW 2' in his evidence in chief confirmed that he has been 'keeping an eye' on the suit property. It was his testimony that the suit property is vacant or unoccupied. There were no development or any activity on it. This was a contradiction of the allegations in the pleadings that the defendant had committed acts of wastage in the suit property and even started an illegal construction.
23. I am unable to tell whether the defendant abandoned the 'illegal construction' or whether the plaintiff managed to repossess the suit property from the defendant along the way.
24. Though trespass to land is actionable without proof of any loss on the part of the claimant, in this instance, I am unable to establish the exact position of the suit property. Therefore, I find no basis whatsoever upon which to assess general damages for trespass.

**D. Whether the Plaintiff is Entitled to the Costs of the Suit**

25. On the issue of costs, it is a well-established principle of law that costs follow the event. I will therefore award the plaintiff the costs of this suit.

**Conclusion.**

26. Accordingly, the plaintiff's case against the defendant is allowed in the following terms: -
  - A. An order be and is hereby issued that the defendant unconditionally give the plaintiff vacant possession of the parcel of Land Known as LR No 8285/1125 at Nairobi Kariobangi Light Industries.
  - B. An order of permanent injunction be and is hereby issued against the defendant barring him by himself, agents, servants and or employees or any other person claiming through him from interfering with the plaintiff's quiet possession of the parcel of land known as LR No 8285/1125 in Nairobi, Kariobangi Light Industries.
  - C. The plaintiff shall have the costs of the suit.

It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF OCTOBER, 2022**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

No appearance by the parties.

Court Assistant Hilda.

**M.D. MWANGI**

**JUDGE**

