



**Mucheru & another v Manyatta Paradise Limited & 2 others (Environment & Land Case 238 of 2010) [2022] KEELC 15524 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15524 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 238 OF 2010  
LC KOMINGOI, J  
NOVEMBER 24, 2022**

**BETWEEN**

**MARGARET WAIRIMU MUCHERU ..... 1<sup>ST</sup> PLAINTIFF**

**FLORENCE NJERI MUCHERU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MANYATTA PARADISE LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**VERONICA NJERI KAMINJA ..... 2<sup>ND</sup> DEFENDANT**

**SWYARI LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated May 14, 2010 and amended on July 4, 2019, the plaintiffs pray for judgement against the defendants jointly and severally for:-
  - a. A mandatory injunction to compel the defendants to remove structures that encroach on LR No 72/2934.
  - b. A permanent injunction order to restrain the defendants and/or their authorized servants, agents and/or any other person acting on their behalf from ever entering into and/or encroaching on the Plaintiff's suit premises known as Title No Nairobi/Block 72/2934.
  - c. General damages and quantum thereof to be determined by this honourable court.
  - d. Special damages.
  - e. Costs of the suit.



- f. Interest on ( c ),( d),and (e ) above.
2. It is the Plaintiffs' case that they are registered as joint proprietors of the parcel of land known as Nairobi/Block 72/2934 whereas the 1<sup>st</sup> defendant is the registered proprietor of the adjacent parcel of land known as Nairobi/Block 72/2425.They further contend that the 3<sup>rd</sup> defendant was on August 13, 2015 registered as the new proprietor of the adjacent parcel under unclear circumstances and during the pendency of this suit.
  3. It is their case that sometime in July the year 2005, they discovered that the 1<sup>st</sup> defendant's buildings erected on the adjacent property had encroached and /or extended onto the suit premises by 7.10 meters as per a survey carried out by M/s Geocom Africa Surveyors. They added that the premises encroached onto by the 1<sup>st</sup> defendant's building comprises of 4 rooms, 3 of which are vacant and one is let out to the 2<sup>nd</sup> defendant who operates a posho mill.
  4. The plaintiffs also contend that they intend to develop the suit premises and their buildings plans were approved by the City Council, of Nairobi on April 19, 2007 and owing to the defendants' encroachment, they continue to suffer loss and damage. They sought Kshs 224,500/= as special damages. It is also their case that the 1<sup>st</sup> defendant filed ELC No 59 of 2008 against them and the City Council of Nairobi but it has never taken out summons thus frustrating the Plaintiff's effort to file a counterclaim.

#### **The Defendants' case**

5. The defendants filed the statement of defence dated July 11, 2011.They denied allegations contained in the plaint .The 1<sup>st</sup> defendant contended that it is the registered owner of the parcel of land known as Nairobi/Block 72/2425 on which it constructed its premises between 1991 and 1993. It is its case that the adjacent land now known as Nairobi/Block 72/2934 was initially a public utility plot used as a public parking and is listed in the Ndun'gu Commission Report as grabbed land. They accused the Plaintiffs of illegally and fraudulently encroaching on their parcel of land as well as on the public utility plot.
6. In the Proceedings on April 29, 2021,the court confirmed that the 2<sup>nd</sup> defendant was excused from the proceedings until the determination of the suit.

#### **Evidence of the Plaintiffs**

7. PW1, Margaret Wairimu Mucheru, the 1<sup>st</sup> Plaintiff testified on April 29, 2021. Her witness statement dated July 9, 2015 was adopted as part of her evidence in chief. When cross-examined, she stated that the defendants have encroached on her property by 7.10 meters as shown by the surveyor's report. She further stated that the court ordered a joint survey and it showed there was encroachment though it was not done by a government surveyor. The defendant did not attend.
8. PW1 also stated that they purchased the property in 2004 after she saw it advertised in one of the local dailies. She stated that they bought it from Pauline Muringe who gave them the letters of allotment and a deed plan relating to the plot. She also stated that she did not know that the said Pauline Muringe was a senior lands officer and that she was not made aware that the plot was grabbed. She stated that at the time they bought, the 1<sup>st</sup> defendant was operating a club/ bar and when the Plaintiff demanded that it demolishes the encroached developments, the defendant asked the plaintiffs to give it six (6) months to remove the structures but later refused.



9. She also stated that change of user for the suit property was not challenged and it was done by the City Council of Nairobi. She added that as per their plans, their parcel of land is a shopping center cum residential and it does not state that it is a parking lot and even if it was, the 1<sup>st</sup> defendant would not be entitled to build a pub on the parking lot.

### **The Evidence of the Defendants**

10. DW1, Sylvia Wangari Mbau, a director of the 1<sup>st</sup> defendant testified on February 7, 2022. She told the court that the 3<sup>rd</sup> defendant is the 1<sup>st</sup> defendant which changed its name to Sywari Limited and that it is the registered owner of Nairobi/Block 72/2425 located in Ngei Estate. It was her testimony that they bought it from Mbaria Mama who was the original allottee from the Government of Kenya. She testified that it has a permanent building at the front and permanent structures at the back which were constructed in 1991. She added that the title was allocated by the Commissioner of lands and that they have been on the land since 1991 and even have tenants from 1991.
11. She stated that the 2<sup>nd</sup> Plaintiff called her and told her that she had bought the adjacent property and that she had encroached on the said adjacent land by 3 meters. It was her testimony that the Plaintiffs wanted her to demolish her building but she told the 2<sup>nd</sup> Plaintiff that the plot had been reserved for public utility and which was leased to City Council of Nairobi for use as a parking space for Mugumoini market, mosque. There was also a car wash operating there. She added that the plot is listed in the Ndung'u report as public land illegally acquired.
12. She also told the court that the public ought to have been involved before the plot was allocated to the Plaintiffs and that the community forbade them from developing it. She stated that there should be minutes to approve the allocation from Nairobi City Council and in the absence of the minutes, then the plot would be irregularly allocated. She also stated that if the adjacent land was free land, they ought to have been given the opportunity to buy.
13. When cross-examined, she stated that she has shops at the front of Nairobi/Block 72/2425 and that the posho mill run by the 2<sup>nd</sup> defendant is a permanent structure and she is aware that the 2<sup>nd</sup> defendant has stated that she will abide by the outcome of this case. She further stated that the Plaintiffs property is not developed, it just has 3 or 4 containers that operate as shops.
14. When referred to the plaintiff's documents, she stated that she saw that Pauline Muringe was allocated Nairobi/Block 72/2934 and she sold it to the Plaintiffs vide the sale agreement dated January 8, 2004. When referred to her lease, she stated that her husband intended to put a cinema on their portion initially but they applied for change of user to commercial use.
15. She stated that she recalls the court directed that surveyors ought to ascertain the boundaries. When referred to the affidavit of Eliaph Maina Gakinya sworn on September 27, 2011, she stated that LR 72/2934 is less by 3 metres.
16. When referred to extracts from the Ndung'u report that show that LR 72/2934 is public land, she stated that the extract is stamped by Mugumoini Residents Association and it is not signed by members of the Ndu'ngu commission but the report is in the public domain.
17. At the close of oral testimonies parties tendered final written submissions.



## The Plaintiffs' Submissions

18. They are dated April 12, 2022. They raise the following issues for determination;
  - a) Whether the defendant's land encroaches on the Plaintiff's land.
  - b) Whether the plaintiff's title was acquired fraudulently.
  - c) Damages.
19. On the issue of encroachment and trespass, counsel for the Plaintiff submitted that while the defendants refused to cooperate on this court's orders to undertake a joint survey, they commissioned their own surveyor-Eliaph Maina Gakinya whose report confirms that the defendants' developments had encroached on the Plaintiff's land. He added that the defendants also commissioned their own survey which also confirms the same position.
20. On whether the Plaintiff's title was acquired fraudulently, counsel submitted that the defendants failed to prove their allegations on what they perceived to be missing steps in the allocation processes of the suit plot. He added that the extract produced and alleged to be an extract of the Ndung'u commission report was not authenticated and that even if the subject property was subject of that report, courts have held that Ndung'u report on its own cannot constitute a cause of action. He relied on the decisions in *John Peter Mureithi v Attorney General*[2006]e KLR and *Jared Benson Kagwana v Kenya Agricultural Research Institute*[2014]e KLR.
21. It was also counsel's submission that in Nairobi ELC Case No773 of 2012, which was a suit brought by the Plaintiffs' herein against some trespassers on the same land, the court stated; "...The Protection of property afforded by the *Constitution* excludes property found to have been lawfully acquired under article 40(6). Only the bodies mandated by law to make a finding that the land was unlawfully acquired can take such a decision."
22. On the issue of damages, counsel submitted that the Plaintiffs' plan to build a commercial complex were hindered by the defendants' activities and that their estimated monthly loss would be Kshs 600,000/= per month over the last twelve (12) years. He added that it would amount to Ksh 86,400,000/= and if one discounted half of it as its cost of construction and a 1/3 of the remainder as taxation and other expenses, the Plaintiffs would still collect more than Kshs15 million.

## The Defendants' submissions.

23. They are dated June 17, 2022. Counsel for the defendants submitted that the 1<sup>st</sup> and 3<sup>rd</sup> defendant are the same as the 1<sup>st</sup> defendant just changed its name to Sywari Limited. He further submitted that the lessor of the suit land is Nairobi City Council and since the land had been set aside as a public parking, there out to have been minutes from the council authorizing allocation to the plaintiffs and that there would have been some form of public participation or change of user to show that the land had changed from public parking to commercial use.
24. It was also counsel's submission that the defendant having been in possession of their suit premises, since 1990 where it constructed a permanent commercial building on its portion extending slightly on the portion now claimed by the plaintiffs should be allowed to remain on the portion and the same to revert to the public. He relied on the case of *ET v Attorney General and Another*[2012]eKLR, *Pangaea Holidays LLC and another v Hacienda Development Limited & 2 others* [2020]eKLR and the case of *Bryan Erick Focker & 2 Others v Joseph Herman M Ssemuju*[2017]eKLR.



25. I have considered the pleadings and the evidence on record. I have considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-
- (i) Whether the defendants' plot encroaches on the Plaintiffs' plot.
  - (ii) Whether the plaintiffs' title was acquired fraudulently.
  - (iii) Are the plaintiffs entitled to the reliefs sought?
  - (iv) Who should bear costs of this suit?
26. On the face of it this appears to be a dispute on the boundary of two plots being Nairobi/Block 72/2425 registered in the 3<sup>rd</sup> defendant's name formerly in the 1<sup>st</sup> defendant's name. The 1<sup>st</sup> defendant has since changed its name to Swyari Limited. The other plot is Nairobi/block 72/2934 belonging to the Plaintiffs. The Plaintiffs claim the defendants have encroached on their parcel by over seven (7) meters. It is the defendants' case that it has occupied the disputed portion since 1991 and that the Plaintiffs were irregularly allocated Nairobi/Block 72/2934 which is public land reserved for the community parking purposes.
27. On the September 29, 2011, the court ordered parties to undertake a joint survey to establish whether there was an encroachment. It is not clear what transpired but there are two conflicting opinions on the exact acreage of the encroachment.
28. The Plaintiffs' surveyor in his report dated November 3, 2011 stated that the defendant has encroached by over 7 metres. The said report states in part ".....since this parcel of land is defined by a fixed boundary as stated in the *Survey Act*, the solution is to replace the beacons as they are defined by the survey plan, and each of the proprietors affected by this encroachment to confine his/her structure within the area defined by the boundary beacons".
29. A survey commissioned by the 1<sup>st</sup> defendant, whose report is filed by Eliaph Maina Gakinya indicates that the encroachment is by 3 metres. In his affidavit sworn on September 27, 2011 he states in part ".....Title No Nairobi/Block 72/2934 was also identified and ground measurements found to be less than the plan distances on FR NO 272/559". PW1 told the court that after they purchased the plot they discovered the 1<sup>st</sup> defendant was encroaching on it. It is her testimony that the 1<sup>st</sup> defendant promised to remove the structures within six (6) months.
30. I note that the plaintiffs claim to have purchased the plot in 2004 and yet this suit was filed in the year 2010. One wonders why it took so long for the Plaintiffs to file this suit. It is noted that the defendants' title is dated December 14, 1992. That they have had possession since 1991. This was thirteen (13) years before the plaintiffs bought their plot.
31. The question is, did the Plaintiffs do due diligence before purchasing the plot? Did they visit the plot to ascertain its location? The answer to the above questions cannot be in the affirmative.
32. It is the plaintiffs' case that they purchased the plot from one Pauline Muringe through her attorney Joseph Kuria Kiragu. None of them was called as a witness in this case. The two would have shed light on how the said plot was acquired.
33. There is evidence that the said plot as claimed by the Plaintiffs was designated as a public parking. There is no change of user or consent to change from public parking to commercial purposes.



34. It is clear that the land was not available for allocation to the said Pauline Muringe the initial owner of the plot. This could explain why the Plaintiffs have not been able to develop the plot. It could be due to hostility from the area residents.
35. It would not be in the interest of justice to cancel the Plaintiffs title as there is no counterclaim seeking the same. perhaps, the relevant bodies may pursue this matter further.
36. All in all, I find that the plaintiffs have failed to prove their case as against the defendants on a balance of probabilities. Consequently, I find that the plaintiffs are not entitled to the reliefs sought.
37. In conclusion, I dismiss the plaintiffs suit. Given that each party is the registered owner of the their/ its respective plot, I order each party to bear own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

**No appearance for the Plaintiffs**

**No appearance for the 1<sup>st</sup> – 3<sup>rd</sup> Defendants**

**Mutisya- Court Assistant**

