



REPUBLIC OF KENYA



KENYA LAW
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**Ngungu v China Road Bidge Corporation (K) & another (Environment & Land
Case 378 of 2017) [2022] KEELC 15299 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15299 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 378 OF 2017
TW MURIGI, J
NOVEMBER 24, 2022**

BETWEEN

MARGARET MWIKALI NGUNGU PLAINTIFF

AND

CHINA ROAD BRDGE CORPORATION (K) 1ST DEFENDANT

ELIJAH NGUNGU MWENGI 2ND DEFENDANT

JUDGMENT

1. By an amended Plaint dated 1st of August 2016, the Plaintiff sought for the following orders against the Defendant: -
 1. An order of permanent injunction restraining the 1st Defendant whether by itself, its agents or servants from doing any of the following acts, this to say, entering into, trespassing, encroaching, excavating, harvesting sand and/or in any other manner interfering with the Plaintiff's previous quiet possession, occupation and enjoyment of all those parcels of land known as Plot Numbers 232 and 1260 at Kiboko "B" Settlement Scheme.
 2. A Declaration that the Defendants are bound to offer compensation for the value of the land for extinguishing the same and an Order that they do compensate the Plaintiff with the true market value of the property.
 3. Damages for trespass.
 4. Costs of this suit.
2. The 1st Defendant filed an amended statement of Defence dated 15th of June, 2021 and denied the Plaintiff's claim. He urged the Court to dismiss the Plaintiff's suit with costs.



3. The 2nd Defendant filed his statement of Defence and Counter Claim dated 11th of June, 2018 and sought for the following reliefs: -
 - a. That the Plaintiff's suit be dismissed with costs.
 - b. That judgment be entered for the 2nd Defendant for absolute ownership of the suit property and compensation at the market value.
 - c. General damages and loss of mesne profits.
 - d. Costs of the Defence and Counter Claim and interest on (b) and (c) above at Court rates from the date of filing of the Defence and Counter Claim until judgment.
 - e. Any other or further relief as this Honourable Court may deem fit and just to grant.
4. The Plaintiff filed a reply to the 2nd Defendant Defence and Counter Claim dated 6th of July, 2018 and urged the Court to strike out the same and enter judgment for the Plaintiff as prayed.
5. Vide a Notice of Withdrawal dated December 8, 2021, the Plaintiff withdrew her case against the 2nd Defendant.

The Plaintiff's Case

6. This matter proceeded for hearing on 15th of June 2022.
7. At the trial, the Plaintiff testified as the sole witness in support of her case. Testifying as PW1, the Plaintiff adopted her statement dated 2nd of October, 2015 as her evidence in chief and produced the list of documents dated 2nd of October, 2015 as exhibit 1 to 4 respectively. She also produced the supplementary list of documents dated 13th of June, 2022 as exhibit 5 and 6.
8. PW1 Margaret Mwikali Ngungu told the Court that she is the equitable and beneficial owner of Plot numbers 232 and 1260 Kiboko B Settlement Scheme by virtue of a Vesting Order issued in HCCC No 24 of 2006. She stated that she occupied the properties after she was issued with the Vesting Order. She told the Court that while she was in the process of having the suit properties registered in her name, she travelled to Makindu to fence off the suit properties where she found the Defendant had occupied the suit properties and was carrying out excavation activities without her permission. It is her evidence that attempts to sort out the issue amicably with the aid of the local administration hit a snag and hence the present suit.
9. It is her further evidence that as a result of the excavation activities carried out by the Defendant, the economic value of the suit properties was diminished due to the holes and huge stones that were left on the suit properties. She further stated that the Defendant did not compensate her for the degradation that it had caused on the suit properties. She urged the Court to grant the orders sought in the Plaintiff.
10. In cross examination she stated that she was the owner of Plot No 232 and 1260 Kiboko B Settlement Scheme pursuant to the Vesting Order issued in HCCC No 24 of 2006 on November 26, 2010. She further stated that she had made an application before the High Court in Nairobi to review the Vesting Order, but due to the Covid 19 pandemic the order was yet to be rectified.
11. She further testified that the Defendant entered onto her land without her permission or consent and employed people to excavate murram thereon. It is her testimony that she did not conduct a search at the National Transport and Safety Authority to establish who was the registered owner of the motor vehicles that were carrying out excavation activities on her land. She further stated that although she



did not report the matter to the police she made a report to the chief who in turn informed the DO Makindu who then advised her to file a suit in Court.

12. She further testified that according to the Chief's letter dated May 22, 2015 (exhibit 4), the suit property belongs to her husband. She admitted that the map produced in support of her evidence did not have a signature or stamp from the Director of Surveys.
13. She further testified that she filed an application dated June 3, 2010 to review the Vesting Order dated November 26, 2010 but the same was dismissed on the grounds that there was an Appeal pending before the Court of Appeal. It is her testimony that the Appeal was thereafter dismissed by the Court of Appeal.
14. On re-examination, she reiterated that the Court of Appeal dismissed the appeal that was filed by her husband. It was her testimony that the Defendant in paragraph 4 of the Defence admitted that they were in occupation of her land.

The Defence Case

15. The Defendant did not call any witness and closed its case.
16. At the close of the trial the parties tendered written submissions.

The Plaintiff's Submissions

17. The Plaintiff's submissions were filed on 8th of July 2022
18. Counsel for the Plaintiff raised the following issues for the Court's determination: -
 - i. Whether the Plaintiff granted the Defendant authority to dig, excavate, harvest and remove sand and murram for the construction of the Standard Gauge Railway and whether the Defendant trespassed onto the suit properties rendering them useless and not viable for any other economic activity.
 - ii. Whether the Plaintiff is entitled to damages.
 - iii. Whether the order of permanent injunction restraining the Defendant whether by itself, its agents or servants from entering onto, trespassing, encroaching, excavating, harvesting sand and dealing with the suit properties should be granted.
 - iv. Who bears the costs of the suit.
19. Counsel submitted that the Plaintiff's evidence was not controverted as the Defence did not call any witness to adduce evidence in support of its claim. To support this argument Counsel placed reliance on the case of *Shaneebal Limited Vs County Government of Machakos* (2018) where the Court cited the case of *Janet Kaphiphe Ouma & Another Vs Marie Stopes International (Kenya)* Kisumu HCCC No 68 of 2007.
20. Counsel argued that in the absence of any evidence by the Defendant, the Plaintiff's evidence on ownership as pleaded and proved remains unchallenged. In addition, Counsel submitted that by virtue of the Vesting Order, the Plaintiff was vested with the absolute right to exclusively occupy and use the suit properties.
21. With regards to the issue of whether the Plaintiff granted the Defendant permission to excavate her land, Counsel submitted that the Defendant trespassed onto the Plaintiff's land without her permission or consent. Counsel further submitted that the Plaintiff cannot use the suit properties



for any economic activity due to the massive excavation carried out on the suit property, In defining trespass, Counsel cited Section 3 (1) of the [Trespass Act](#) which provides as follows;

- (1) Any person who without reasonable excuse enters, 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.
22. On the issue of whether the Plaintiff is entitled to damages, Counsel submitted that Plaintiff is entitled to damages due to the extensive damage caused by the Defendant on the suit properties.
23. With regards to the issue of whether a permanent injunction should be granted, Counsel submitted that the Plaintiff being the owner of the suit properties is entitled to protection and to have her land preserved. Counsel submitted that the Plaintiff has met the threshold required for the grant of an injunction. Counsel argued that the Plaintiff has established a *prima facie* case with a probability of success as she is the registered owner of the suit properties.
24. On the second factor, Counsel submitted that the Plaintiff has established that she had incurred substantial loss as a result of the wanton destruction of the suit property. In addition, Counsel submitted that the Plaintiff's loss and suffering can only be compensated by way of damages. Counsel further submitted that the balance of convenience tilts in favour of the Plaintiff as she is the owner of the suit properties.
25. On the issue of costs, Counsel submitted that the Plaintiff has proved her case on a balance of probabilities and is therefore entitled to costs in line with Section 27 of the [Civil Procedure Act](#).

The Defendant's Submissions

26. The Defendants submissions were filed on 26th of July, 2022.
27. Counsel for the Defendant raised the following issues for the Court's determination: -
 - a. Whether the Plaintiff is the equitable/beneficial owner entitled to possession of the suit properties at the material time to this suit. Pleaded in paragraph 4 of the Amended Plaintiff and denied in paragraph 3 of the Amended Defence.
 - b. Whether the Defendant trespassed onto the suit properties. Pleaded in paragraph 6 of the Amended Plaintiff and denied in paragraph 6 of the Amended Defence.
 - c. Whether the Plaintiff is entitled to the reliefs sought.
28. With regards to issue of whether the Plaintiff is the beneficial and equitable owner of the suit properties as at the material time of this suit, Counsel submitted that the Plaintiff did not tender any evidence to demonstrate that she is the equitable and beneficial owner of the suit properties as at the material time of this suit.
29. Counsel went on to submit that it was not in dispute that properties numbers 232 and 1260 Kiboko B Settlement Scheme are not amongst the properties that were vested upon the Plaintiff in the Vesting Order issued by Justice Kimaru on November 26, 2010. In addition, Counsel maintains that the Plaintiff admitted in her evidence that the Vesting Order had not been rectified or reviewed to include the suit properties.
30. With regards to the issue of whether the Defendant trespassed onto the Plaintiff's land, Counsel submitted that to prove trespass the Plaintiff must plead and prove the following elements: -



- a. The Plaintiff was in possession or entitled to immediate possession of the suit properties as at the material time of this suit.
 - b. The Defendant entered into the suit properties at time when the Plaintiff was in possession or entitled to immediate possession of the suit properties.
31. Counsel submitted that the Plaintiff did not plead that she was in active possession of the suit properties. Counsel contended that the Plaintiff's claim is based on entitlement of the suit properties by virtue of equitable and beneficial ownership based on the Vesting Order issued on November 26, 2010.
 32. With regards to the issue of whether the Plaintiff was in possession of the suit property, Counsel submitted that the Plaintiff did not produce any evidence to demonstrate that she was in possession of the suit property as at the material time of this suit. That to the contrary, the Plaintiff was not in possession of the suit properties as she was not even aware of the proper identification of the plot numbers and relied on a map obtained from the chief.
 33. Counsel went on to submit that the Plaintiff did not produce any evidence to prove that the Defendant entered onto the suit properties and excavated murrum thereon. Counsel argued that the photographs produced by the Plaintiff in support of her case are inadmissible since the Plaintiff did not produce a certificate of electronic evidence to show the authenticity of the photographs.
 34. Counsel asserts that the Defendant being a limited company is incapable of committing acts of trespass. He argued that the Plaintiff did not plead vicarious liability nor produce evidence to demonstrate that the alleged acts of trespass were committed by the Defendant's agents. He went on to submit that the Plaintiff conceded that she did not have any evidence to prove that the motor vehicles shown in the photographs belonged to the Defendant or that they were being driven by its employees or servants.
 35. With regards to the issue of whether the Plaintiff is entitled to the orders sought, Counsel submitted that the order for a permanent injunction was not practicable as Plaintiff conceded that the Defendant had since left the suit premises. Counsel argued that the Court cannot make a declaration that the Plaintiff is entitled to market value compensation since the Plaintiff's claim is for trespass whose remedy is general damages. Counsel argued that market value compensation is only applicable where the property is sold at free market or where the property has been compulsorily acquired by the Government.
 36. On the issue of damages, Counsel submitted that the Plaintiff is not entitled to damages as she had failed prove that the Defendant had trespassed onto the suit properties. Counsel argued that the Plaintiff did not prove that the Defendant was liable for the trespass.
 37. Counsel contended that in the event that the Court is convinced that the Defendant trespassed onto the suit properties, the Plaintiff should be awarded Kshs 100,000/- in general damages.

Analysis and Determination

38. Having considered the pleadings, the evidence on record and the rival submissions, I find that the following issues arise for determination: -
 - a. Whether the Plaintiff is the beneficial and equitable owner of the suit properties.
 - b. Whether the Defendant trespassed onto the suit properties.
 - c. Whether the Plaintiff is entitled to the reliefs sought.



- d. Who shall bear the costs of the suit.
39. Although the Defendant did not call any evidence to support its claim, the Plaintiff has a duty to formally prove its case on a balance of probabilities as is required by the law. This was the holding in the case of *Kirugi and Another Vs Kabiya & 3 others* (1987) KLR 347 where the Court of Appeal held that;
- “The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”
40. Similarly, in the case of *Gichinga Kibutha Vs Caroline Nduku* (2018) eKLR the Court held that;
- “It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

Whether the Plaintiff is the Equitable And Beneficial Owner of the Suit Property

41. The Plaintiff told the Court that she is the equitable and beneficial owner of the suit properties by virtue of the Vesting Order issued in Nairobi HCCC No 24 of 2006 on 26/11/2010. In this regard, she produced a copy of the Vesting Order dated November 26, 2010 issued in HCCC No 24 of 2006(OS) as exhibit (1)
42. The Defendant on the other hand denied in paragraph 3(a) to 3(c) of the amended Defence dated 18th of October 2022, that the Plaintiff was the equitable and beneficial owner of properties known as Plot numbers 232 and 1260 Kiboko B Settlement Scheme. The Defendant further denied that the Plaintiff was vested of the properties *vide* a Vesting Order made on November 26, 2022.
43. Counsel argued that as per paragraph 4 of the Plaint, the Plaintiff was not even aware of the proper identification of the plot numbers since the documents of ownership were with her husband.
44. The Plaintiff's ownership of the suit properties was contested by the Defendant.
45. The Plaintiff's claim over the suit properties is anchored on the Vesting Order issued by Justice Kimaru on November 26, 2010 in HCCC No 24 of 2006 which states as follows: -
- a. That an order be and is hereby issued vesting this properties ie LR No 15065/17. Off Ndalat Road, Karen, Hardy, LR No Nairobi/Block72/361 Onyonka Estate (House No C 30), the piece of land in Kibwezi and Motor Vehicle Registration Number KAM 853C to the Petitioner.
 - b. That the Petitioner will not claim any other properties from the Respondent.
 - c. That by having the above properties vested in her name, the Petitioner has forfeited her right over the other properties that the Court had declared that she is a 50% joint holder.
 - d. That the Respondent be served with the order and if he does not execute the conveyancing documents transferring the suit properties to the Petitioner within forty-five (45) days of the date of service the Deputy Registrar of this court be at liberty to execute the said conveyancing and transfer documents on behalf of the Respondent.
 - e. That there shall be no order as to costs.



46. In cross examination the Plaintiff testified that the Vesting Order has not been reviewed or rectified to include the suit properties. It was her testimony that she had filed an application to review the Vesting Order but the same was dismissed on the grounds that there was an appeal that was pending before the Court of Appeal. In this regard she produced the application dated 15th of September, 2020 as (exhibit 6). In the aforesaid application, the Plaintiff sought for the following orders: -

1. Spent.
2. That the Honourable Court be pleased to review its Orders made on 26th of November, 2010 by specifically amending Order 1 thereto by adding the following words after the words Kibwezi that is to say;

“being Kiboko “B” Settlement Scheme Plot Numbers 232 and 1260 (combined).”

47. In the aforesaid application, the Plaintiff sought for the review of Order No 1 of the Vesting Order dated November 26, 2010 so as to include the suit properties herein. The Plaintiff admitted that the application for the review of the Vesting Order was dismissed. It is clear that the Plaintiff has made attempts to have the Vesting Order reviewed so as to include the suit properties herein. As at the time of hearing this matter, the Vesting Order issued on November 26, 2010 had not been rectified or reviewed to include the suit properties.

48. In the Vesting Order, Order No 1 speaks of the land in Kibwezi amongst other properties vested on the Plaintiff. It is crystal clear that the Vesting Order has not given the specific title numbers of the land in Kibwezi. The order speaks generally of the land in Kibwezi. The suit properties were not specified in the Vesting Order.

49. It is trite law that Parties are bound by their own pleadings. In paragraph 4 of the Plaint, the Plaintiff pleaded as follows;

“at all material times relevant to this suit, the Plaintiff was the equitable and beneficial owner, in actual control and entitled to exclusive possession, use and occupation of all that premises known as plot numbers 232 and 1260 at Kiboko “B” Settlement Scheme (hereinafter referred to as the suit premises). The Plaintiff was vested of the properties in a judgment issuing in matrimonial dispute pitting her and her estranged husband the 2nd defendant who was initially the registered owner in HCCC NO 24 of 2006 (OS) *vide* a court vesting Order made on 26th of November 2010.”

50. The Plaintiff reiterated the averments in her evidence that she is the equitable and beneficial owner of plot numbers 232 and 1260 within Kiboko B Settlement Scheme by virtue of the Vesting Order issued in HCCC No 24 of 2006 (OS) on 26th of November, 2010.

51. Section 107 of the *Evidence Act* places a mandate upon a party that asserts certain existing facts to prove them. Section 107 provides as follows;

“Whosoever 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.”

52. The burden of proof was upon the Plaintiff to prove that the two parcels of land (Plot numbers 232 and 1260 Kiboko “B” Settlement Scheme) were one and the same thing as what was referred as the land in Kibwezi in the Vesting Order dated 26th of November, 2010. On the basis of the material placed before me, this Court is unable to determine whether the land in Kibwezi mentioned in the Vesting Order



is the same as Plot numbers 232 and 1260 Kiboko “B” Settlement Scheme. Having considered the evidence placed before me, I find and hold that the Plaintiff has not proved on a balance of probabilities that she is the equitable and beneficial owner of the suit properties.

Whether the defendant trespassed on the suit properties.

53. *Black’s Law Dictionary* 10th Edition defines trespass to land as follows;

“A person’s unlawful entry on another’s land that is visibly enclosed.”

54. In the case of *Municipal Council of Eldoret Vs Titus Gatitu Njau* (2020) eKLR the Court of Appeal cited the case of *M’Mukanya Vs M’Mbijiwe* (1984) KLR 761 where the ingredients of tort of trespass were stated as follows;

“trespass is a violation of the right to possession and a Plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership see *Thomson Vs Ward* (1953) 2 QB 153.”

55. The Court of Appeal in the case of *M’Mukanya Vs M’Mbijiwe* (1984) KLR 761 set out the ingredients of the tort of trespass as follows;

“Trespass is the violation of the right to possession and a Plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership.”

56. To establish trespass, the Plaintiff had to prove that she was either lawfully in possession of the properties or was the owner thereof and that the Defendant entered and occupied the properties without any justifiable cause.

57. In the case of *Gitwany Investments Limited Vs Tajmal Limited & 3 Others* [2006] eKLR, the Court 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.

58. It was the testimony of the Plaintiff that while she was in the process of having the suit properties registered in her name she travelled to Makindu where she found the Defendant carrying out excavation activities without her permission or consent. The Plaintiff told the Court that the Defendant had excavated her land and caused wanton destruction thereon. She went on to add that the Defendant in paragraph four of its Defence did not deny that it was in occupation of her property.

59. In this regard, she produced photographs of the suit property (exhibit 3) and photographs of the ground presently (exhibit 5). The Defendant in its Amended Defence denied trespassing onto the suit properties as alleged by the Plaintiff and went on to state that the Plaintiff has not established that she is the owner of the suit properties.

60. The Defendant argued that the photographs produced in support of the Plaintiff’s case are inadmissible since they are not accompanied with a certificate of electronic evidence. The Plaintiff told the Court the economic value of the suit properties had been extinguished due to excavation and wanton destruction caused by the Defendant. The photographs marked as Plaintiff exhibit 5 (the ground presently) clearly show huge stones that are on the suit premises. It was the Plaintiff’s testimony that the Defendant was carrying out excavation activities on the suit properties. That when the Defendant got wind that she was the owner of the suit properties, they started carrying out the excavation activities during the day and night. In this regard the Plaintiff produced photographs of the



suit property marked as (exhibit 2). The photographs clearly show Komatsu vehicles excavating what appears to be sand or soil. The Plaintiff was under a duty to prove that the motor vehicles carrying out the excavation activities on the suit properties belonged to Defendant. The Plaintiff ought to have produced a copy of records to demonstrate that indeed, the Defendant was the registered owner of the motor vehicles that were carrying out excavation on the suit properties.

61. The Plaintiff did not produce any evidence to demonstrate that the Defendant was the owner of the said vehicles or its servants or agents were operating the said vehicles. This Court finds and hold that the Plaintiff has not proved on a balance of probabilities that the Defendant unjustifiably entered the suit property which was in her possession.

Whether The Plaintiff is Entitled to the Orders Sought

62. The Plaintiff sought for a permanent injunction restraining the Defendant from entering, trespassing, encroaching, excavating, harvesting or interfering with the Plaintiff's previous quiet use, possession, occupation and or enjoyment of the suit properties. Counsel submitted that the Plaintiff is entitled to an order of injunction and protection of the law as she is the registered owner of the suit properties.
63. Section 24(a) of the *Land Registration Act* provides for the interest conferred by registration. It provides as follows;
- Subject to this Act;
- The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.
64. Section 25 of the *Land Registration Act* provides for the rights of a proprietor. It provides as follows;
- I. the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided by this Act and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject;.....
65. These provisions vest on the registered owner of land with rights and privileges and provides for instances when the right can be taken away.
66. It is clear from the evidence on record that Plaintiff has not proved to the satisfaction of this Court that she is the equitable and beneficial owner of the suit properties. This Court finds and holds that the Plaintiff is therefore not entitled to the rights and privileges over the suit properties as provided by section 24 and 25 of the *Land Registration Act*.

Who is Liable for the Costs of the Suit?

67. Under Section 27 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, costs of and incidental to a suit is at the discretion of the Court and as a general rule, costs follow the event. In this case, the Plaintiff has failed in her claim against the Defendant.
68. In view of the time taken to determine this matter, I direct that each party shall bear its own costs.
69. The upshot of the foregoing is that the Plaintiff has failed to establish her claim against the Defendant on a balance of probabilities. Accordingly, the Plaintiff's suit against the Defendant is dismissed. Each party to bear its own costs.

HON. T. MURIGI

JUDGE



JUDGMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 24TH DAY OF NOVEMBER, 2022.*

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi

Ms. Wanjiku for the Plaintiff

Masila for the Defendant.

