



Slums Information Development Resources Centre v Nyaga & 10 others (Environment & Land Case 1433 of 2016) [2022] KEELC 15113 (KLR) (24 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15113 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1433 OF 2016
MD MWANGI, J
NOVEMBER 24, 2022**

BETWEEN

SLUMS INFORMATION DEVELOPMENT RESOURCES CENTRE . PLAINTIFF

AND

**LUKE NJERU NYAGA 1ST DEFENDANT
JAMES OSOMAI 2ND DEFENDANT
FRANCIS WAKHUNGU 3RD DEFENDANT
JOHN NGOMU 4TH DEFENDANT
JAMES MBUI GITARI 5TH DEFENDANT
TENE DIDA DABASO 6TH DEFENDANT
SIMON NGUGI KUNGU 7TH DEFENDANT
EVERLINE ILADO 8TH DEFENDANT
HELENA WAMBUI MANEGENE 9TH DEFENDANT
AMINA ABDUBA ALI 10TH DEFENDANT
SYLVESTER MUTUA KAMWILU 11TH DEFENDANT**

JUDGMENT

Background

1. The Plaintiff in this matter filed the suit by way of a plaint dated 18th November 2016 which was subsequently amended on 12th July 2021. The Plaintiff claims legal ownership of parcel of land known as L.R No. 209/12675 within Nairobi City (hereinafter referred to as the suit property) and whose



title it acquired in the year 2000. The Plaintiff avers that it purchased the suit property for value from its previous owner and was duly registered as the sole proprietor on 10th August 2000.

2. The Plaintiff alleged that it at all times was in occupation of the land enjoying quiet possession until the Defendants without any colour of right illegally encroached onto the suit property and trespassed therein erecting structures on the land without the Plaintiff's consent and or authority. Despite demand and notice of intention to sue, the Defendants have adamantly refused to vacate the Plaintiff's land necessitating the filing of this suit.
3. The Plaintiff therefore prays for an order of permanent injunction, alternatively an order of mandatory injunction restraining the Defendants either by themselves or anyone claiming through them from interfering with the Plaintiff's possession of the suit property, an eviction order, general damages and costs of the suit.

Response by the Defendants

4. On their part, the Defendants vide their amended statement of defence and counterclaim dated 23rd February 2017 categorically denied the Plaintiff's allegations and disputed the Plaintiff's title to the suit property. The Defendants allege that they have continuously occupied and continue to occupy the suit property situate at Imara Daima, Mukuru Kwa Njenga slums for an uninterrupted period of 20 years, since 1998. Indeed, the Defendants further allege that the Office of the President in the year 2015 directed that the land be surveyed, subdivided and they be issued with titles.
5. The Defendants therefore seek a declaration that they are the rightful owners of the suit property by virtue of adverse possession. Further they pray that the Court directs that the Director of Surveys and the Registrar, Ministry of Lands carry out a survey of the suit property and issue the interested parties with title deeds.
6. The case proceeded to full hearing.

Evidence adduced on behalf of the Plaintiff

7. The Plaintiff called 1 witness, one Lucy Mukami Maathai who introduced herself as the Founder Executive Director of the Plaintiff organization. She adopted her witness statement dated 12th July 2021 as her evidence in chief.
8. It was her testimony that the Plaintiff has been in occupation of the suit property since 1999. Within the suit property the Plaintiff runs various enterprises including a school, a radio station and a community library amongst other activities.
9. She termed the counter-claim by the Defendants against the Plaintiff as baseless and without any factual basis. According to the witness, the Defendants have actually encroached into the Plaintiff's land. That was the reason why the Plaintiff moved to court seeking orders to enable it develop the suit property without undue interference from the Defendants.
10. In cross-examination, the Plaintiff's witness affirmed that the Plaintiff is a registered legal entity capable of suing on its own but did not produce any registration document to show how the organization is registered; neither a registration certificate nor a PIN Certificate. She further had no document to prove that she was the Executive Director of the Plaintiff organization as claimed in her testimony.
11. The witness further clarified that the Plaintiff did not acquire the suit property through purchase, as stated in the amended plaint, rather that the Plaintiff applied for the same from the Land Registrar. Though the title indicated that the original grantee was Belgo Holdings Ltd, she claimed that Belgo



- Holdings Ltd transferred the property to the Plaintiff as a gift. The witness did not however produce any documents to prove that the Plaintiff was actually gifted the land by Belgo Holdings Ltd. She did not have the deed of transfer with her either.
12. The witness insisted that the Plaintiff's title was genuine. She denied the allegation by the Defendants that the President of the Republic of Kenya had at any one time visited the suit property and ordered that titles be issued to the Defendants and other beneficiaries. She insisted that the suit property was private property exclusively owned by the Plaintiff.
 13. The suit property is approximately 0.5 hectares. At one point, the witness explained that the Plaintiff had fenced it all-round but the fence was destroyed.
 14. At the time of the hearing of the case, there was a perimeter wall around the space the Plaintiff actually occupied which is only about 40% of the entire suit property.
 15. The Plaintiff's witness denied that she was allocated the land by one Yusuf Mohammed (a village elder). She insisted that at the time the Plaintiff took possession of the suit property, it was vacant and there were no homes or any structures on the land.
 16. The Plaintiff's witness affirmed that she was not aware of the alleged 2nd title to the suit property, L.R. No 209/12675 in the name of Kaplana Sheth.
 17. The witness denied that the Head of Public Service had ordered the subdivision of the suit property for the benefit of squatters. She denied that the Defendants had been on the land for 20 years as alleged in their pleadings. It was further not true as far as she was concerned that they had ownership certificates before the Plaintiff came into the land.
 18. The Plaintiff's witness stated that she had conducted due diligence of the land including a search before she took up the land. She however, did not produce the copy of the search conducted then.
 19. In re-examination by the Plaintiff's advocate, PW1 affirmed that the Plaintiff is a community based organization registered in Kenya since 1996. Although the Plaintiff had legal documents, she had not filed them in court since the legality of the organization was not in issue in the case.
 20. It was PW1's testimony that the Plaintiff's title to the land was genuine and had never been challenged by any person. The Plaintiff had been gifted the land by Belgo Holdings Ltd and had followed the due process to register it.

Evidence adduced on behalf of the Defendants

21. On their part, the Defendants called 3 witnesses.
22. DW1 was James Gitari Mbui, the 5th Defendant. He testified that he lived at the 'moto moto' slum next to the Plaintiff's enclosed premises since 1998. He adopted his witness statement dated 23rd February 2017 as his evidence in chief.
23. DW1 affirmed that he had been living within the 'moto moto' slum all the years since 1998. The area is generally referred to as the "moto moto slum". He was shown the ground where he constructed his home by one of the village elders who were in charge of the slum, one Yusuf Mohammed. He was issued with 2 certificates of ownership under the name of 'Milimani Welfare Association'. The other defendants too were issued with similar certificates.
24. The land where the Defendants live is within the suit property- L.R. No. 209/12675. DW1 had conducted an official search of the title to the suit property on 3.3.2017 and the same indicated that the



- title belonged to one Kaplana Sheth and not the Plaintiff. The search was one of the exhibits produced in evidence.
25. DW1 had conducted a more recent search of the suit property which confirmed the earlier details that the title belonged to one Kaplana Sheth and not the Plaintiff. The same was also produced as an exhibit. He was of the opinion that the title by the Plaintiff was not genuine.
 26. DW1 further stated that he had already settled on his portion of land by the time the Plaintiff was allocated its portion by the village elders. It was the witness PW1 who was allocated the land in the year 2000. DW1 stated that he even assisted PW1 to store her building materials. He affirmed that the Plaintiff's witness, Lucy Mukami Maathai came into the area as an individual and was allocated land by the elders, a slightly bigger plot than everyone else which DW1 estimated to be about 1/8 of an acre. He wasn't sure of the exact size of the land allocated.
 27. PW1, one Lucy Mukami Maathai thereafter introduced the name 'Slums Information Development and Resource Centre' and started assisting the community to construct and upgrade their homes. The Defendants thought that she was running a non-governmental organization. DW1 confirmed that the Plaintiff had a school and a radio station within its enclosed portion of land.
 28. It was DW1's testimony that the Plaintiff was allocated land by the elders who were in charge of the slum. Belgo Holdings Ltd was not known to the Defendants. The witness prayed for the dismissal of the Plaintiff's case and that their counter-claim be allowed.
 29. In cross-examination, DW1 confirmed that he had built several rental units on his two plots and he actually had tenants. He had two certificates of ownership that were given to him by the General Secretary of 'moto moto' slums.
 30. As per the certificate of search, the suit property was registered in the name of Kaplana Sheth since 1994. The Plaintiff's alleged title was supposedly issued later on.
 31. DW2, Mary Wairimu Kimani is a resident of 'moto moto' slums too. She testified that when PW1 came into the slum, she was one of those who assisted her in the constructions. She was also engaged as a volunteer to help the youth and children in the slum under a programme established by the Plaintiff.
 32. DW2 asserted that she was still living in the slum when PW1 came and was allocated land by the elders.
 33. DW3 on his part testified that he had lived in the 'moto moto' slum since 1977 and is one of the elders in charge of the slum. He was the one who allocated the Plaintiff through PW1 the land where they are situated. He affirmed that no survey work has ever been carried out in the area and no titles have been issued to any person.
 34. DW3 denied the Plaintiff's allegations that the Defendants had encroached into her land. The Plaintiff as far as the witness could tell was in occupation of the land allocated to it through 'the director' (PW1).
 35. Upon the conclusion of the hearing, the court directed parties to file written submissions. Both sides complied and the court has had the opportunity to read the submissions.

Issues for Determination.

36. Having considered the pleadings filed in this matter, the evidence adduced and the submissions filed by the parties, the court is of the view that the issues for determination in this matter are as follows;
 - i. Whether the Plaintiff has the legal capacity to sue or be sued.
 - ii. Whether the Plaintiff has established a legal claim of ownership over the suit property.



- iii. Whether the Defendants can sustain a claim of adverse possession against the Plaintiff.
- iv. What was the effect of 10 defendants failing to testify in support of their claims?
- v. Who should bear the costs of the suit and the counter-claim?

Analysis and Determination.

i. Whether the Plaintiff has the legal capacity to sue and be sued

- 37. The Defendants raised the issue of the legal capacity of the Plaintiff in their amended statement of defence and during the cross-examination of the Plaintiff's witness.
- 38. In its amended plaint, the Plaintiff merely described itself as a charitable organization with its registered offices in Nairobi. The Plaintiff did not attach or produce in evidence any legal registration documents to prove its legal capacity to sue or be sued.
- 39. In re-examination by the Plaintiff's Advocate, the Plaintiff's only witness stated that the Plaintiff is a community based organization registered in Kenya since 1996. She stated that though the Plaintiff had the legal documents to confirm that it is a duly registered organization, she did not find it necessary to produce them in court since the legality of the organization was not in issue.
- 40. As I have already stated, the legal capacity of the Plaintiff was actually contested by the Defendants and was an issue in this case.
- 41. The issue of capacity to sue is not a mere procedural issue. It cannot be cured by the oft cited article 159 of *the Constitution* or the 'oxygen principle' under sections 1A, 1B, and 3A of the *Civil Procedure Act*. (See *Amina Hassan & 372 others (suing as Lekiji Community -vs- Nigel Weiby Trent & Another* (2011) eKLR and *Football Kenya Federation -vs- Kenya Premier League & 4 others* (2015) eKLR.
- 42. An unincorporated society cannot sue or be sued in its name. It can only sue or be sued through its officials or trustees (*African Orthodox Church of Kenya -vs- Rev Charles Omuruka & Lagos Ministry for Orthodox Renewal* (2014) eKLR.
- 43. In the case of *Mumo Matemu & 5 others -vs- Trusted Society of Human Rights Alliance* (2014) eKLR, the Court of Appeal while addressing itself to the provisions of Articles 22 and 258 of *the Constitution* explained that it is only where a person was acting in the public interest and when instituting proceedings before a court challenging the contravention of *the Constitution* (be they Non-Governmental Organizations or Associations) that they can be permitted to institute proceedings as 'persons'.
- 44. The court had addressed itself on article 260 of *the Constitution* in the case of *Kirinyaga United Bar Owners -vs- County Secretary Kirinyaga County Government & 6 others* (2014) eKLR and stated that:

"The above constitutional provision for me indicate that a person named with a capacity to act on his own can bring a representative suit on his own behalf and on behalf of others. A person who lacks capacity to institute a suit can also bring an action under Article 22(1) through another person. The person bringing the action should clearly indicate his name in the suit stating that he/she is bringing the action on behalf of another or on his behalf in addition to others who for purposes of clarity must be named and must give authority or mandate if they wish to benefit or obligated from the relief sought. In the absence of a named person, then it becomes difficulty to know whether legal capacity is vested or not. Under Article 260 of *the constitution* a " person " includes a company, association or other body of



persons whether incorporated or not. Of course bodies have capacity to sue or be sued as the law vests them with legal capacity. What *the constitution* addresses here are unincorporated bodies or a class of persons such as self-help groups. The law does not bestow them with the legal capacity per se but constitution provides for an avenue through which they can competently appear in court and this is through person(s) vested with legal capacity. It is a bit absurd to imagine that the new constitution has opened doors for anybody including people of unsound mind, minors, bankrupts without a next friend, or a person with legal and sound capacity to represent them. Self-help group, or community based organizations were created by the government to address poverty eradication and other noble causes, but were not clothed with the capacity to sue but can do so through its elected officials whose description should be given to show who they are and who they represent."

45. On this basis alone, I would strike out the Plaintiff's suit. I will however, as good practice demands proceed to determine the other issues.

ii. Whether the Plaintiff has established a legal claim of ownership over the suit property.

46. The Plaintiff in its pleadings averred that it was the legal owner of the suit property. In her testimony, the Plaintiff's witness produced the certificate of lease for L.R. No. 209/12675 ('PE1') as the evidence of ownership of the suit property. She insisted that the title was genuine and had not been challenged anywhere or by anybody for that matter.

47. PW1 was wrong in that respect. The Defendants have challenged the Plaintiff's title to the suit property. Indeed, they produced 2 official search certificates showing that the suit property was actually registered in the name of Kaplana Sheth and not the Plaintiff.

48. In the case of *Munyu Maina -Vs- Hiram Gathiba Maina* (2013) eKLR, the court stated that: -

"When a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is the instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register."

49. The Plaintiff in this case did not go beyond 'the dangling of the title' to prove its legality or how it acquired the title and show that the acquisition was legal in view of the 'challenge' by the Defendants. In its pleadings, the Plaintiff had averred that it had purchased the suit property for value. PW1 however, in her testimony gave a contradictory explanation and alleged that the Plaintiff was gifted the suit property by Belgo Holdings Ltd. She did not produce any documentation to support the allegations. She too did not produce any search of the title to confirm that the suit property was in the name of the Plaintiff contrary to contradict the searches produced by DW1.

50. The court finds that the Plaintiff has not established a valid legal claim of ownership over the suit property to justify the issuance of the orders sought in its amended plaint.

iii. Whether the Defendants can sustain a claim of adverse possession against the Plaintiff.

51. In addressing the 1st issue herein, this court made a finding in agreement with the Defendants' submissions that the Plaintiff lacks the legal capacity to sue and be sued. The law, like a double-edged sword cuts both ways. The Plaintiff does not have the capacity, either to sue or be sued. The Defendants' counter-claim against the Plaintiff cannot therefore stand.



52. Secondly, the Defendants were categorical, both in their pleadings and the evidence adduced in court by the DW1 that the Plaintiff was not the legal owner of the suit property. Two official searches were produced in court indicating that the registered owner of the suit property was one Kaplana Seth. How then could the Defendants institute and sustain a claim for adverse possession against a ‘non-owner’?
53. In the case of *Henry Mwangi Kihara –vs- Rachel Nyambura Kimani & 4 others* (2005) eKLR cited by the Defendants in their submissions, the court was explicit that “adverse possession only runs against the rightful owner and property in the absence of the rightful owner.”
54. The court’s finding that the Plaintiff has not established a valid and legal claim of ownership over the suit property then defeats the Defendants’ claim for adverse possession against the Plaintiff.
55. The Defendants should have at the opportune time either applied to join Kaplana Sheth as a party in the suit or filed an independent suit against Kaplana Sheth altogether.

iv. What was the effect of 10 defendants failing to testify in support of their claims?

56. Amongst the 11 Defendants in this matter, only one of them testified, purportedly on behalf of all the rest. The said Defendant did not however produce before the court the authority to represent or testify on behalf of his 10 co-defendants.
57. Odunga J (as he then was), in the case of *Linus Nganga Kongo & 3 others vs Town Council of Kikuyu* (2012) eKLR, while considering a similar situation stated that the consequence of failure by the Defendant to call evidence meant that the claims made by the Defendant in his statement of defence and counter claim were unsubstantiated and in those circumstances the counter claim had to fail.
58. A similar finding was arrived at by Lady Justice Lessit in the case of *Trust Bank Ltd vs Paramount Universal Bank Ltd & 2 others*, (2009) eKLR where the court held that: -

“It is trite law that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of facts since in so doing, the party fails to substantiate its pleadings.”
59. I agree with the above decisions on the consequences of failure to call evidence to substantiate the pleadings. Consequently, I find that the failure by the 10 Defendants to testify in support of their respective individual claims meant that the averments made in their statement of defence and counter claim were unsubstantiated. In those circumstances their counter claim would have to fail on that basis too.

Disposition

60. The upshot is that the Plaintiff’s case against the Defendants is dismissed. Likewise, the Defendants counter claim against the Plaintiff is dismissed.
61. In the circumstances, the court orders that each party bears its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

M.D. MWANGI

JUDGE

In the virtual presence of:



Ms. Millicent Small holding brief for Beacco for the Defendants.

Ms. Cherono holding brief for Nyagito for the Plaintiff.

Court Assistant – Hilda/Yvette.

M.D. MWANGI

JUDGE

