



REPUBLIC OF KENYA



KENYA LAW
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**Munyao v Mutua & 4 others (Environment & Land Case E070 of 2021)
[2022] KEELC 14981 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14981 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E070 OF 2021
CA OCHIENG, J
NOVEMBER 22, 2022**

BETWEEN

NAOMI KALONDU MUNYAO PLAINTIFF

AND

FRANCIS MWALUKU MUTUA 1ST DEFENDANT

KILONZO MUTUA 2ND DEFENDANT

BENARD MUSYOKA MUTUA 3RD DEFENDANT

EMMANUEL MUIA MUTUA 4TH DEFENDANT

SIMON KIMEU MUTUA 5TH DEFENDANT

JUDGMENT

1. By a plaint dated the May 26, 2021, the plaintiff prays for judgment against the defendants for;
 - a. An order of eviction against the defendants from land parcel Ndithini/Mananja Block 6/627.
 - b. Damages and or *mesne* profits for the wrongful occupation.
2. The defendants failed to enter appearance nor file a defence, despite being duly served. The matter proceeded for hearing on the May 24, 2022 when the plaintiff called one witness.

Evidence Of The Plaintiff

3. The plaintiff's claim is that she is the duly registered owner of all that parcel of land Known as Ndithini/Mananja Block 6/267 located within Mananja in Machakos county (hereinafter the "suit land.") It is the plaintiff's case that on or about May, 2019 without any lawful cause and or excuse and without any colour of right, the defendants wrongfully entered the suit land and took possession of the same. It was PW1's testimony that despite asking the defendants to stop encroaching on the suit land, they



have persisted in doing so. To support her case, she produced the following documents as exhibits: certificate of title for land parcel Ndithini/Mananja Block 6/267; demand letter and photographs of the structure put up on the suit land by the defendants.

Submissions

Plaintiffs' submissions

4. The plaintiff in her submissions contended that she has established her right to the suit land and therefore entitled to the benefits accruing therefrom in accordance with sections 24, 25 and 26 of the *Land Registration Act*, 2012. She relied on section 107 of the *Evidence Act* and stated that the defendants have not proved ownership of the suit land and having not entered appearance nor filed a defence, it clearly shows that they have no claim over it. She reiterated that her claim remains uncontroverted. Further, that the defendants' actions amount to trespass. To buttress her averments, she relied on the following decisions: *Ocean View Plaza Ltd v Attorney General* (2002) eKLR; Milan Kumarn Shah & 2 others City Council of Nairobi & another and *Shancebal Limited v County Government of Machakos* (2018) eKLR.

Analysis and Determination

5. Upon consideration of the plaint, the plaintiff's testimony and submissions the following are the issues for determination: Whether the plaintiff is the proprietor of the suit land (Ndithini/Mananja Block 6/267). Whether the defendants have trespassed thereon and should be evicted therefrom. Whether the plaintiff is entitled to the orders sought in the plaint.
6. As to whether the plaintiff is the proprietor of the suit land (Ndithini/Mananja Block 6/267).
7. The plaintiff tendered evidence that she is the registered proprietor of the suit land. The defendants never controverted the evidence of the plaintiff. I note the plaintiff produced a certificate of title to the suit land which shows she was registered as its proprietor on April 23, 2019.
8. On proof of ownership of land, I wish to make reference to sections 24(a) and 26(1) of the *Land Registration Act*. Section 26(1) of the *Land Registration Act* which provides as follows:-

“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

section 24(a) of the *Land Registration Act* stipulates as follows:

“Subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land



together with all rights and privileges belonging or appurtenant thereto...”

9. In the case of *Willy Kipsongok Morogo v Albert K. Morogo* (2017) eKLR the court held as follows:

“The evidence on record shows that the suit parcel of land is registered in the names of the plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the *Land Registration Act*.”
10. While in the case of *Joseph N K Arap Ng’ok v Moiwo Ole Keiwua & 4 others* [1997] eKLR, where the Court of Appeal held that:

“Once one is registered as an owner of land, he has absolute and indefeasible title which can only be challenged on grounds of fraud or misrepresentation and such is the sanctity of the title bestowed upon the title holder.”
11. Further, in Civil Appeal No 246 of 2013 *Arthi Highway Developers Limited v West End Butchery Limited and others*, the Court of Appeal expressly stated thus:

“section 23(1) of the then Registration of Titles Act (now reproduced substantially as sections 25 and 26 of the *Land Registration Act* set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”
12. Based on the evidence before me while associating myself with the cited decisions as well as the legal provisions quoted above, since the defendants never demonstrated that the plaintiff acquired the suit land illegally or fraudulently, I find that she is indeed the absolute proprietor of land parcel number Ndithini/Mananja Block 6/627 and hence entitled to protection of the law in accordance with the provisions of sections 24, 25 and 26 of the *Land Registration Act*.
13. As to whether the defendants have trespassed thereon and should be evicted thereon.
14. It was PW1’s testimony that the defendants had entered her land in 2019, without her consent, proceeded to put up mud and ‘mabati’ structures thereon and refused to stop their acts of illegally occupying the said land.
15. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See *Clerk & Lindsell on Torts*, 18th Edition, page 923, paragraph, 18-01.

While section 3 of the *Trespass Act* provides that:-

“(1) Any person who without reasonable excuse enters, is 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.(2)Where any person is charged with an offence under subsection



(1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”

16. From the evidence tendered by PW1 which was uncontroverted, it has emerged that the defendants have persisted in their acts of trespass since May, 2019. The plaintiff has claimed damages and *mesne* profits as a result of the defendants’ acts of trespass. In the case of *Duncan Nderitu Ndegwa v KP& LC Limited & another* (2013) eKLR, P Nyamweya J (as she then was), held that:-

“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000 as compensation of the infringement of the plaintiff’s right to use and enjoy the suit property occasioned by the 1st and 2nd defendants’ trespass.”

17. See also the case of *Ochako Obinchi V Zachary Oyoti Nyamongo* (2018) eKLR.

18. In so far as the plaintiff did not provide evidence on the loss she had incurred due the defendants’ aforementioned acts but in associating myself with the above decisions, I find the plaintiff indeed suffered damages as a result of the defendants’ acts of trespass. I will proceed and award the plaintiff Kshs 50,000 as general damages. I will further direct that the defendants to grant the plaintiff vacant possession of the suit land or be evicted therefrom.

19. However, on the issue of mesne profits, I wish to refer to section 2 of the *Civil Procedure Act* cap 21 which defines it as follows: -

“*mesne* profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”

20. From the evidence tendered in court, I find that the plaintiff did not provide any proof on the basis of her demand for *mesne* profits and I will not award her the same.

Who Should Bear The Costs Of The Suit.

21. Since the plaintiff has been inconvenienced with the defendants’ defiance to move from the suit land, I find that she is entitled to costs.

22. It is against the foregoing that I find that the plaintiff has proved her case on a balance of probability and will proceed to enter judgment in her favour and make the following orders:

- a. An order of eviction be and is hereby issued against the defendants from the plaintiff’s land parcel number Ndithini/ Mananja Block 6/267 after ninety (90) days from the date hereof, after issuance of requisite notice.
- b. The plaintiff be and is hereby awarded Kshs 50,000 as damages for trespass.
- c. The costs of the suit is awarded to the plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 22ND DAY OF NOVEMBER, 2022

CHRISTINE OCHIENG

JUDGE

