



**Changtoek v Mutai (Civil Suit 62 of 2005)  
[2022] KEELC 14884 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14884 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
CIVIL SUIT 62 OF 2005  
MC OUNDO, J  
NOVEMBER 17, 2022**

**BETWEEN**

**WILSON A CHANGTOEK ..... PLAINTIFF**

**AND**

**ERICK K MUTAI ..... DEFENDANT**

**JUDGMENT**

1. Vide a Complaint dated the May 20, 2005, the Plaintiff herein sought for the following orders;
  - i. A declaration that the Defendant is not entitled to ownership and/or possession of LR No 631/444 and previously known as Kericho BL 5/106 and a (sic) permanent injunction restraining the Defendant from entering, taking possession and/or in any way dealing with the suit premises.
  - ii. Costs of the suit.
  - iii. Any other or further relief as may deem fit to this honorable court grant.
2. In response, the Defendant herein filed his identical statements of defence dated June 27, 2008 on the July 3, 2008 and another dated October 22, 2008 on the October 27, 2008, denying the allegations contained in the Plaintiff's Complaint stating that the said suit was fictitious, vexatious, scandalous, an abuse of the court process, did not disclose any cause of action and therefore ought to be dismissed with costs.
3. Subsequently the matter was set down for hearing and despite the Defendant's Counsel having ceased to act for him and there having been service effected upon him personally, the Defendant failed to prosecute his matter wherein the Plaintiff's case proceeded ex-parte on the February 17, 2022 pursuant to the provisions of Order 12 Rule 2(a) of the Civil Procedure Rules.



## **The Plaintiff's case**

4. The Plaintiff, Wilson Chang'toek testified that he lived in Konoin in Ngererit village. That he was a farmer and had recorded his statement on the date he could not remember although he identified his statement as the one he had recorded. The same was dated the November 27, 2012. He sought for the same to be adopted as his evidence in chief and proceeded to testify that he knew Erick Mutai as a person who went to disturb his tenants on his plot.
5. That he had been allotted the plot, which was within Kericho, on October 1, 1989 through a letter of allotment. That subsequently he had been issued with a title deed for the plot being No Kericho/ Municipality Block 5/106. He produced the Allotment letter dated November 11, 1989 as Pf exh 1 and the Certificate of lease issued on June 28, 2010 as Pf exh 2.
6. His evidence was that the Defendant had lay claim on the plot of the land on the allegation that it had belonged to his father one James a person with whom they had had a case with at the Municipal Council, wherein the Plaintiff had succeeded. That they had also had a case with him (James) in the Nakuru High Court in Civil Case No 259 of 1980 wherein judgment had been delivered on the November 13, 1984, which judgment had been in his favour. That subsequently, an application had been filed wherein the ruling delivered thereafter had also been in his favor.
7. The Plaintiff produced the judgment dated November 13, 1984 delivered in Nakuru High Court in Civil Case No 259 of 1980, as Pf exh 3 and a ruling in the same matter delivered on November 13, 1984, as Pf Exh 4. His evidence was that he still paid rates for the plot as per the receipts herein produced as follows:
  - i. Receipt dated July 12, 2018 for payment of Kshs 12,800/=
  - ii. Receipt dated August 6, 2003 for payment of Kshs 500/=
  - iii. Receipt dated August 23, 2000 for payment of Kshs 5000/=
  - iv. Clearance certificate dated December 31, 2018.
8. He produced the said receipts as Pf Exh 5 (a-d) and proceeded to testify that the Defendant had caused disturbance to his tenant called Jackton Mwangi. That although he was in possession of the plot, the Defendant occasionally caused disturbance which necessitated him to report to the Tribunal in Nakuru where it had been held that the plot his (Plaintiff's.) He produced the holding of the Tribunal dated August 7, 2003 as Pf Exh 6 and sought that the court issues an injunction restraining the Defendant from causing disturbance and also entering on to his land.
9. The Plaintiff closed his case and filed his submissions to which I shall summarize as herein under:

## **Submissions.**

10. The submissions were that the Plaintiff had clearly proved ownership of the suit plot by producing as exhibits the allotment letter by the Commissioner of Lands, a title to the said plot as well as subsequent payments of the rates to the County Government of Kericho. That further, evidence was that pursuant to the allotment of the plot, the Plaintiff had been in continuous occupation and utilization to date.
11. The Plaintiff relied on the provisions of Section 26(1) of the *Land Registration Act* to submit that he had acquired title to the suit property procedurally and that it was a good title which was prima facie evidence of proof of ownership. That he had proved his case on a balance of probability and therefore should be granted the orders as sought in his plaint.



## Determination.

12. I have reviewed and considered the uncontroverted evidence by the Plaintiff, which was precise and to the point, in support of his claim. I find the issue for determination as being whether he is entitled to the orders sought against the Defendant which was that he sought for a permanent injunction to be issued restraining him (Defendant) from entering, taking possession and/or in any way dealing with parcel of land LR No 631/444, previously known as Kericho BL 5/106 which was the suit premises herein.
13. I have also considered the contents of the ex-parte judgment dated November 13, 1984 delivered in Nakuru High Court in Civil Case No 259 of 1980 and produced as Pf Exh 3. The same was between one James A Cheriro suing as the Plaintiff, v Wilson A Changtoek wherein the Plaintiff therein had sought ownership of Plot No 15 of the Kericho Site and Service scheme. The court had held that;

‘I grant judgment to the Plaintiff against the Defendant and order that the Defendant shall transfer to the Plaintiff Plot No 15 of the Kericho Site and Service scheme. I also direct that the Municipality of Kericho shall cancel the Defendant’s name from the documents of title in respect of Plot No 15 of the Kericho Site and Service scheme and instead thereof insert the Plaintiff’s name. I also order that the Defendant shall pay to the Plaintiff Kshs 800/= per month from January 1, 1981 until the date he hands back and possession of the plots to the Plaintiff in respect of rents received by the Defendant from tenants of the premises. Finally I award the cost of this suit and interest on the decretal amount to the Plaintiff as against the Defendant.’
14. I have also considered Pf Exh 4 which was a Ruling delivered on November 13, 1984 touching on the same case wherein the Defendant therein (Wilson A Changtoek) had sought for the ex-parte judgment entered against him on November 13, 1984 to be set aside. The court directed as follows;

‘Having considered the matter fully, I exercise my discretion in favour of the applicant/ Defendant, set aside the ex- parte judgment and all orders consequent thereon and order that the case be fixed for hearing.’
15. After the ex parte judgment was set aside, there is no evidence that the said orders were ever appealed against or the case fixed for hearing. In essence thereof, parties had been restored to their original status before the filing of the suit. It is the Plaintiff’s case that pursuant to the failure to prosecute Nakuru High Court in Civil Case No 259 of 1980, the same had been dismissed by the court, *suo moto*, for want of prosecution. That brought an end to the matter as no further orders had been sought.
16. The Defendant in the previous case, Wilson A Changtoek, now the Plaintiff herein then filed the current suit against the Defendant as a son and administrator of James Cheriro, wherein he seeks the orders herein above captioned.
17. From the uncontroverted evidence adduced, I find that the Plaintiff, who did not call any witness, through an Allotment letter dated November 11, 1989 herein produced as Pf Exh 1, was allotted land parcel No LR 631/444 Kericho Municipality wherein subsequently the same had been registered to him as No Kericho/Municipality Block 5/106 as per the Certificate of lease issued on June 28, 2010 and produced as Pf Exh 2. The Plaintiff’s evidence having been backed by documentary evidence, which were not contested since the Defendant never appeared at the hearing either in person or through Counsel, were believable.
18. It is evident that pursuant to the Defendant’s Counsel seeking leave to cease acting for the Defendant, the Defendant had been personally served with the hearing notice but had failed to turn up in court



to defend his case despite having entered their memorandum of appearance and filed the defence pleadings. However, even if the suit was not defended, the Plaintiff still had the duty to formally prove his case on the balance of probabilities as required by law.

19. The Plaintiff's case which was not rebutted was that he was the registered proprietor of the suit premises to which he had rented to one Jackson Mwangi. That sometime in March 2005 the Defendant had claimed ownership of the said premises wherein round about the May 6, 2005 he had caused M/S Nasioki Auctioneers to levy distress for rent against the same while claiming ownership of the premises apparently on the basis of the judgment delivered in Nakuru High Court in Civil Case No 259 of 1980 which judgment had been set aside on February 26, 1985. That the Defendant was a nuisance who ought to be permanently restrained from interfering with the Plaintiff's ownership of the suit premises.
20. Against this backdrop, I have considered the Defendant's defence herein and find that although the same was not prosecuted, yet it did not contain a valid or reasonable defence to the Plaintiff's claim. The Plaintiff produced in evidence a copy of a title deed for the suit property in his name which confirmed ownership of the same, the property having been registered to him on June 28, 2010.
21. The provisions of Section 24(a) of the *Land Registration Act* No 3 of 2012 outline the interests and rights of a registered proprietor as follows;

‘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.....’

22. Section 25(1) of the *Land Registration Act* also stipulates that ;

‘The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in 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..’

23. The law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the *Land Registration Act* provides as follows:

“The Certificate of Title issued by the Registrar upon registration, 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 the 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
- b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme

24. In light of the above, and there having been no evidence adduced to the contrary, this court finds that the Plaintiff has established that he was indeed the duly registered proprietor of the suit property and therefore he is entitled to all the rights appurtenant thereto.

25. Since it has been demonstrated that despite service, the Defendant failed to defend the suit, the court has no alternative but to find in favour of the Plaintiff and make the following orders:



- i. It is herein declared that the Defendant is not entitled to ownership and/or possession of LR No 631/444 and previously known as Kericho BL 5/106 and a permanent injunction is herein issued restraining the Defendant from entering, taking possession and/or in any way dealing with the suit premises.
- ii. Costs to the Plaintiff at the lower scale since the suit was undefended.

**DATED AND DELIVERED VIA ZOOM CONFERENCE AT KERICHO THIS 17<sup>TH</sup> DAY OF NOVEMBER 2022.**

**M C OUNDO**

**ENVIRONMENT & LAND – JUDGE**

