



REPUBLIC OF KENYA



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**Wekesa v Kerae & 2 others (Environment & Land Case 46 of 2020)
[2022] KEELC 14809 (KLR) (15 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14809 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 46 OF 2020
FO NYAGAKA, J
NOVEMBER 15, 2022**

BETWEEN

DAVID SITUMA WEKESA PLAINTIFF

AND

BHIMJI KERAЕ 1ST DEFENDANT

JACOB CHERIREI 2ND DEFENDANT

DANIEL MBUGUA 3RD DEFENDANT

JUDGMENT

1. The plaintiff filed the present suit on July 24, 2020, seeking the following reliefs:
 - a. A declaration that the parcels of land comprised in lease Nos Kitale Municipality Block 10/197, 195 and 196 do solely belong to the plaintiff and that the three defendants have no proprietary interest whatsoever in the said respective lands.
 - b. An order be issued that the defendant Nos 1, 2 and 3 and their agents, servants or anybody claiming under them, do move out of land parcel No Kitale Municipality Block 10/197, 195 and 196 respectively and remove the standing structures on the said parcels and failing which they be forcefully evicted and the standing structures demolished at their cost.
 - c. A permanent injunction do restrain the defendants from ever again entering or interfering with the plaintiff's user of lands compromised in parcel Nos Kitale Municipality Block 10/197, 195 and 196.
 - d. Costs
 - e. Interest
 - f. Any other relief that this Hon court may deem fit to grant.



2. The suit was defended. The defendants' joint statement of defence filed on October 2, 2020 denied each and every allegation contained in the plaint as if the same was expressly set out verbatim and traversed seriatim. They urged this court to dismiss the suit and award them costs.

The Plaintiff's Case

3. The gist of the suit is that the plaintiff acquired the proprietorship of all that parcel of land namely Kitale Municipality Block 10/50 on July 19, 2013. He took vacant possession thereof. He was issued with a certificate of lease.
4. In that very year, the plaintiffs in Kitale ELC No 140 of 2013; Mark Joseph Simiyu Kisembe & 2 others v Michael Kimtai & 5 others brought a suit wherein they sought, inter alia, an order of cancellation of title issued in the present plaintiff's favor. They alleged that they were the lawful owners of the suit land. The plaintiff was a defendant in that matter. The present defendants in this matter were not parties to the suit, namely, Kitale ELC No 140 of 2013.
5. The plaintiff herein but defendant in the said matter, filed a defence and counterclaim in Kitale ELC No 140 of 2013; Mark Joseph Simiyu Kisembe & 2 others v Michael Kimtai & 5 others. He sought declaratory orders as the lawful registered owner of the suit land.
6. By judgment of the court delivered on October 3, 2019, produced in evidence herein as P exhibit 3, the court dismissed the plaintiffs' claim and allowed the defendant's counterclaim. In that regard, the plaintiff herein was declared the lawful proprietor of the suit land while the title acquired by the plaintiffs in that matter was declared fake. Additionally, a permanent injunction was issued restraining the plaintiffs from interfering with possession of the plaintiff's use and occupation of the suit land. No appeal has been preferred.
7. During the pendency of Kitale ELC No 140 of 2013, the plaintiff sub-divided Kitale Municipality Block 10/50 into six (6) portions on August 15, 2018 namely Kitale Municipality Block/10/194, Kitale Municipality Block/10/195, Kitale Municipality Block/10/196, Kitale Municipality Block/10/197, Kitale Municipality Block/10/198 and Kitale Municipality Block/10/197. Certificates of title were issued subsequently. They were produced in evidence and marked P exhibit 1 (a) - (g) respectively. He further produced an excerpt of the Registry Index Map (RIM) evincing the location of the parcels of land. It was marked P exhibit 2. The titles were declared by the court to be lawful subdivisions of the parcel of land declared to belong to the defendant in Kitale ELC No 140 of 2013.
8. Again, during the pendency of Kitale ELC No 140 of 2013, the defendants herein gained entry and took possession of portions of the suit properties. In particular, the 1st, 2nd and 3rd defendants took possession of Kitale Municipality Block/10/197, Kitale Municipality Block/10/195 and Kitale Municipality Block/10/198 respectively. They claimed to have bought the parcels from the plaintiffs in Kitale ELC No 140 of 2013.
9. The plaintiff suspected that the defendants ingressed the subdivided portions after he filed his counterclaim in that antecedent dispute. He discovered that structures had been put up by the defendants when judgment was entered. It is this entry onto the suit land that is the kernel of the dispute.
10. The plaintiff contended that the defendants remained trespassers and ought to vacate the suit premises. He testified that he could not initiate eviction order proceedings against them in Kitale ELC No 140 of 2013 since they were not parties to the suit.



11. The plaintiff continued that the claim by the defendants as the registered proprietors of the subdivided portions ought to be dismissed since they failed to file a counterclaim in the instant suit, seeking such declaratory orders as such. He further disputed the contents of paragraph 6 and 7 of the defendants' statement of defence as misleading. In response to paragraph 8 of the statement of defence, the plaintiff countermanded that the 3rd defendant could not acquire any (better or otherwise) title from the 1st plaintiff in Kitale ELC No 140 of 2013; *Mark Joseph Simiyu Kisenbe & 2 others v Michael Kimtai & 5 others* since the court found that the plaintiffs lacked ownership of the suit land. The plaintiffs in Kitale ELC No 140 of 2013 could not pass any title to the defendants herein.
12. The plaintiff highlighted the contents of the court's judgment in Kitale ELC No 140 of 2013. He cited paragraph 47 that demystified possessory rights of the claimants therein. He observed that the court found that the defendants lacked possessory rights of the suit lands since it found that the plaintiff's title was valid. Finally, he was adamant that one Raphael Wafula Kabende (deceased) was never an owner of the suit land during his lifetime. As he could not thus pass title to the 3rd defendant.
13. The defendants on their part acquiesced on their right to call witnesses and/or shielded away from adducing any evidence. Without that, they marked their case as closed.

Submissions

14. The plaintiff's submissions dated June 17, 2022 were filed on that day. He submitted that the all suit properties belonged to him. His summary was that his evidence was corroborated by the production of P exhibit 1 (a) - (g) as well as P exhibit 3. He submitted that following the judgment in Kitale ELC No 140 of 2013, the defendants remained trespassers of the suit properties.
15. He stated that while the defendants explained that they purchased the properties as purchasers for value, no evidence was furnished in support of these assertions. He justified that the present suit could only ensue upon ascertainment of proprietorship of the primary suit land namely Kitale Municipality Block 10/50. He relied on the Court of Appeal case of [*Henry Mochonge Ogaro v Barnabas Majibo Naset & another*](#); Civil Appeal No 135 of 2018 urging this court to adopt similar findings.
16. The defendants' submissions dated September 23, 2022 were filed on that day. They submitted that the absence of the defendants' evidence did not shift the burden of proof away from the plaintiff. He submitted that the suit is res judicata, having met the elements set out in section 7 of the [*Civil Procedure Act*](#). They submitted that since the plaintiff admitted that the defendants claimed under the plaintiffs in Kitale ELC No 140 of 2013, it was incumbent upon them to enjoin the Defendants in those proceedings per order 1, rule 10 (2) of the [*Civil Procedure Rules*](#). To them, the suit was thus good for dismissal.
17. The defendants continued to hold that they were in possession and occupation of the suit properties prior to issuance of title in favor of plaintiff. They submitted that their proprietary rights to ownership superseded that of the plaintiff prior to registration by dint of section 25 (1) and 28 (b) of the [*Land Registration Act*](#). They fortified their submissions by relying on several binding decisions of the superior courts, which I have considered and I am of the view that they are distinguishable. They urged this court to dismiss the suit against them with costs.

Analysis And Disposition

18. I have carefully considered the pleadings, the evidence and the submissions relied on by parties. I have also considered the law as enshrined in statute and stare decisis. I hypothesize that the following issues fall for determination before this court:



(a) Whether The Suit Is Res Judicata

19. The defendants raised in their submissions the issue of the suit being *res judicata*. They posited that the plaintiff ought to have enjoined them in Kitale ELC No 140 of 2013 as the issue of ownership becomes enviably central in both matters.
20. Notably, the issue of *res judicata* was raised in the defendants submissions. It was neither pleaded anywhere nor proved. I take the view that this was an onerous way of introducing a serious issue that goes to the root of the matter. I say so because submissions are not pleadings. Furthermore, the plaintiff has been locked out of addressing me on the same because of the introduction of this imperative issue at this late stage of the proceedings. It required evidence to support it. I am guided by the court in [George Kamau Kimani & 4 others v County Government of Trans Nzoia & another](#) [2014] eKLR that held:
- “... One cannot raise a ground of *res judicata* by way of preliminary objection. The best way to raise a ground of *res judicata* is by way of notice of motion where pleadings are annexed to enable the court to determine whether the current suit is *res judicata*.”
21. The court further in [Henry Wanyama Khaemba v Standard Chartered Bank \(K\) Ltd & another](#) [2014] eKLR:
- “... The issues of *res judicata*, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st defendant”
22. In light of the above, I am of the firm view that the defendants improperly raised *res judicata* at submissions stage. It would have been proper for them to initiate those proceedings by way of a notice of motion application to further give their adversaries an opportunity to respond to those allegations. If this court were to decide upon this issue, it would essentially be sanitizing parties to steal a march on others and get away with it. In any event, submissions are not pleadings and can never take the place of the propounder’s intentions. I adopt the reasoning of the Court of Appeal in [Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another](#) [2014] eKLR thus:
- “Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”
23. Furthermore, as have observed the issue of *res judicata* was neither pleaded nor probed in the defendant’s defence. None of the averments contained therein even gave a simple notice that such a prayer would have been sought during the pendency of the trial. The case of [Joseph Mbuta Nziru v Kenya Orient Insurance Company Ltd](#) [2015] eKLR referring to a decision of Nigerian Supreme Court in [Adetoun Oladeji \(Nig\) Ltd v Nigeria Breweries](#) PLC SC 91/2002 expressed thus and which I wholly adopt:
- “... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”



24. I will thus disregard and dismiss the issue. And even if I were not to find as I have done above, the fact that only an admission, by way of oral testimony, that the defendants herein were claiming through the 1st plaintiff in Kitale ELC No 140 of 2013, that did mean that the defendants herein were parties in that suit. What this court understood the evidence to mean was that the defendants herein ‘camouflaged’ in the 1st defendant’s position in that suit as the owner because he purported to sell to them the parcels of land. There is nothing of the sort of *res judicata* in that piece of evidence. For the reasons set out above herein and move on to the next issue for determination.

(b) The Import Of The Failure By The Defendants To Call Any Evidence

25. Upon entering appearance, the defendants filed their joint statement of defence on October 2, 2020. However, they failed to call any witnesses to adduce any evidence in support of the averments raised. It is trite law that pleadings take the nature of allegations. They can only be relied on to found a decision in favour of the ‘owner’ or party once life has been breathed to it by the production of witnesses and furnishing of evidence. Pleadings alone cannot found a decision in favour of a party unless they are only being considered for purposes of determining preliminary objections.

26. In *Motex Knitwear Limited v Gopitex Knitwear Mills Limited Nairobi* (Milimani) HCCC No 834 of 2002, Lesiit, J. citing the case of *Autar Singh Bahra and another v Raju Govindji*, HCCC No 548 of 1998 appreciated:

“Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the defendant in his defence and counter-claim are unsubstantiated. In the circumstances, the counter-claim must fail.”

27. Similarly, in *CMC Aviation Ltd v Crusair Ltd (No 1)* [1987] KLR 103, the court held as follows:

“The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.” (Emphasis mine)

28. I hasten to add that regardless of the court’s holding that the defendants’ pleadings herein remained mere allegations, this does not automatically qualify the merits of a case. It must be carefully analyzed and scrutinized to ascertain whether the averments contained in the plaint have met the standard of proof threshold. Put differently, the plaintiff will still bear the burden of proof, as required under section 107(1) of the *Evidence Act*, chapter 80 of the laws of Kenya, being on a balance of probabilities, unless the law specifically shifts that burden from him. That brings me to my next issue for determination.

(c) Whether The Plaintiff Has Proved His Case On A Preponderance Of The Evidence Adduced

29. The plaintiff’s testimony was that he acquired vacant possession and proprietorship of all that parcel of land namely Kitale Municipality Block 10/50 on July 19, 2013.

30. During that year, the plaintiff was sued as one (1) of the defendants in Kitale ELC No 140 of 2013; Mark Joseph Simiyu Kisembe & 2 others v Michael Kimtai & 5 others. It was his further testimony that the plaintiffs in that suit sought inter alia an order of cancellation of title issued in the present plaintiff’s favor as they alleged that they were the lawful owners of Kitale Municipality Block 10/50.



The plaintiff filed a counterclaim therein, seeking a declaration that he was the lawful owner of the suit land. The present defendants in this matter were not parties to that suit.

31. By a judgment of the court, delivered on October 3, 2019, which was produced as P exhibit 3, the plaintiff was declared the lawful proprietor of the suit land while the title acquired by the plaintiffs was held fake. Additionally, a permanent injunction was issued restraining the plaintiffs from interfering with possession of the plaintiff's use and occupation of the suit land. His evidence was that that decision was neither appealed nor reviewed and remains unchallenged to date.
32. The plaintiff sub-divided Kitale Municipality Block 10/50 into six (6) portions on 15/08/2018 namely Kitale Municipality Block/10/194, Kitale Municipality Block/10/195, Kitale Municipality Block/10/196, Kitale Municipality Block/10/197, Kitale Municipality Block/10/198 and Kitale Municipality Block/10/197 marked Pexh1 (a) - (g). He further produced an excerpt of the Registry Index Map (R.I.M) locating the parcels of land marked Pexh2.
33. During the pendency of Kitale ELC No 140 of 2013, the plaintiff complained that the Defendants illegally gained entry and took possession of portions of the suit properties namely Kitale Municipality Block/10/197, Kitale Municipality Block/10/195 and Kitale Municipality Block/10/198.
34. The plaintiff testified that the defendants entered upon the suit land and set up structures after he filed his counterclaim at trial in Kitale ELC No 140 of 2013. It is this entry upon the suit land that is the kernel of the dispute. The plaintiff accused the defendants of trespass.
35. The plaintiff relied on the court's judgment, P exhibit 3, to hold that he remained and was declared the lawful owner of the subdivided suit lands arising out of Kitale Municipality Block 10/50.
36. From the evidence adduced, I am satisfied to hold that indeed the plaintiff was and remained the proprietor of Kitale Municipality Block 10/50 that morphed into the six (6) subdivisions as listed above herein in this judgment. The titles remained legitimate and in favor of the plaintiff.
37. The plaintiff referred this court to its earlier decision in Kitale ELC No 140 of 2013. In that case, the court was invited to determine which of the two (2) diverging parties had a legitimate title. It found that the plaintiff's documents herein had an edge over that of the plaintiffs' in the suit. While the court acknowledged that the surveyor's report disclosed that the plaintiffs were in actual possession of the suit land, the court found that the plaintiffs could not under any statute claim that their rights were overriding those of the title holder.
38. Ultimately, the court declared that the plaintiff herein was and remained the lawful registered proprietor of as well as the subdivisions thereof. The court further restrained the plaintiffs from interfering with the plaintiff's herein right to quiet possession of the suit land. Once the court made that declaration, it was a judgment in rem. It remains to be so, unless and until declared otherwise by a court of competent jurisdiction. For a 'thief' to 'declare' himself the lawful owner of another's property and hold so and attempt to convince the whole world as such is nothing but sheer loss of good reasoning. No wonder it can only be from an individual of such debased character.
39. It is not denied that the defendants herein were not parties to the suit in Kitale ELC No 140 of 2013. I, however, agree with the Plaintiff that ascertainment of true ownership would only have preceded the present proceedings as the rightful way of proceeding with the dispute herein.
40. Even if I were to consider the defendants' submissions which to wit insinuated that by virtue of the provisions set out in section 25 (1) and 28 of the [Land Registration Act](#), I would not find any rights by the defendants overriding the plaintiff's title. If I understand their proposition, the defendants purport



to state in their submissions that the said parcels of land were subject to overriding interests in the nature of a trust.

41. How? No. Never. The defendants failed to demonstrate how the purported trust arose. Even a rudimentary counterclaim approach seeking declaratory orders that they were the lawful proprietors with the production of evidence would have buttressed their allegations. With every armor part at their disposal, the defendants did not implore its use and could only blame themselves for not exploring that possibility of outcomes. And even if they did, this court sees not how that would have succeeded.
42. The plaintiff has demonstrated that he remains the registered proprietor of the subdivided portions. I am satisfied that the onus of proof has been discharged to the required standard. The defendants herein, so long as they are not in possession by permission of the plaintiff or any lawful court order, continually remain trespassers.

(d) What Orders, If Any, Are To Issue?

43. Let us hear the conclusion of the whole matter: On the evidence before me, I am satisfied that the plaintiff has discharged his burden of proof, being on a balance of probabilities, that he is entitled to the reliefs sought. Consequently, I make the following orders:
 - a. A declaration be and is hereby made that land parcels No Kitale Municipality Block 10/197, Kitale Municipality Block 10/195 and Kitale Municipality Block 10/196 do solely belong to the plaintiff and that the defendants, their agents, servants, assigns or anyone whatsoever claiming under them, have no proprietary interest whatsoever in the said respective lands.
 - b. An order be issued and is hereby issued directing the defendants, their agents, servants or anybody claiming under them, to move out of land parcels No Kitale Municipality Block 10/197, Kitale Municipality Block 10/195 and Kitale Municipality Block 10/196 respectively and remove their standing structures on the said parcels, within thirty days of this judgment and failing which they be forcefully evicted and the standing structures demolished at their cost.
 - c. A permanent injunction be and is hereby issued restraining the defendants from entering or interfering with the plaintiff's user of lands compromised in parcel Nos Kitale Municipality Block 10/197, Kitale Municipality Block 10/195 and Kitale Municipality Block 10/196.
 - d. The plaintiff is awarded costs of the suit with interest thereon at court rates.
44. It is so ordered.

JUDGMENT, DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 15TH DAY OF NOVEMBER, 2022

HON DR IUR FRED NYAGAKA

JUDGE, ELC KITALE

