



**Presbyterian Foundation v Macharia & 28 others (Environment & Land Case
166 of 2018) [2022] KEELC 15438 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15438 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 166 OF 2018**

JG KEMEI, J

DECEMBER 20, 2022

BETWEEN

PRESBYTERIAN FOUNDATION PLAINTIFF

AND

BENSON MACHARIA 1ST DEFENDANT
DICKSON NJOGU 2ND DEFENDANT
JOHN NGUGI WANYORO 3RD DEFENDANT
JOSEPH KAWINZI 4TH DEFENDANT
JOHN THUKU KINYUA 5TH DEFENDANT
FRANCIS MBURU KAMAU 6TH DEFENDANT
BENJAMIN NYONGESAH 7TH DEFENDANT
JAMES MWANGI NG'ANG'A 8TH DEFENDANT
STANLEY GATHURIMA NAITURI 9TH DEFENDANT
JOSEPHAT MUTUA 10TH DEFENDANT
PETER KINUTHIA 11TH DEFENDANT
DAVIS GICHERU NDUGI 12TH DEFENDANT
JACKLINE AKINYI ORIDO 13TH DEFENDANT
MOSES MUSHE 14TH DEFENDANT
MICHAEL KAHARU WANDERI 15TH DEFENDANT
LUKAS KARANJA 16TH DEFENDANT
PETER NGURURI KIMANI 17TH DEFENDANT



CHARLES WAMBUGU NDIRITU	18 TH DEFENDANT
GREGORY JOHN	19 TH DEFENDANT
JOHN TOM	20 TH DEFENDANT
PAUL GAKUMO	21 ST DEFENDANT
PETER KINUTHIA	22 ND DEFENDANT
JOHN KHUTA KIRUNGI	23 RD DEFENDANT
ROBERT GACHUTI NGUGI	24 TH DEFENDANT
JOHN MBARI KARANJA	25 TH DEFENDANT
ABRAHAM MIGWI WANGUI	26 TH DEFENDANT
JOSEPH NGUNGU WAMBURU	27 TH DEFENDANT
ANNA WANJIRU	28 TH DEFENDANT
ANNE MWANGI	29 TH DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendants on May 28, 2018 seeking the following Orders;
 - a. A permanent injunction to restrain the Defendants themselves or their employees servants agents or any person claiming or acting in their names howsoever from entering encroaching on or in any other way interfering with the possession and use of all that parcel of land known as L R THIKA/MUNICIPALITY/BLOCKII/831 and L R Thika/Municipality/BlockII/1038 (suit lands).
 - b. General damages for trespass.
 - c. Costs of the suit
 - d. Any other relief that this Court might deem fit to grant.

2. The Plaintiff avers that it is the registered owner of the suit lands. It averred that the Defendants have without any right authority and permission constructed and or occupied temporary structures on the edges of the suit lands where they carry out various businesses. That the illegal occupation of the suit lands have prevented the Plaintiff from fencing, developing the suit lands and are a danger to the Plaintiffs’ staff and students as the Plaintiff runs a school on the suit land.

3. On April 3, 2019 the Court issued status quo orders in the following terms;

“That the Court will issue status quo orders to the effect that the Plaintiff should be allowed to build a wall around the school and install pipes for the water to the school and the Defendant should not interfere with the said construction of the wall and installation of the pipes for water.

That further the Plaintiff should not interfere with the Defendant’s businesses until the suit is heard and determined.



That the Defendants be and are hereby given 30 days to file their defences and thereafter parties shall have 30 days to comply with order 11

That there be pretrial directions on July 11, 2019 before the deputy registrar.

That directions of April 3, 2019 to be served upon the Defendants”.

4. The Defendants denied the Plaintiffs claim vide their statement of defence filed on July 18, 2019. The Defendants contend that they are jua kali traders carrying out small scale businesses. That in 2005 the county council then relocated them from various locations in Thika and resettled them at the central place in the outskirts of Thika. That at the time of the resettlement the land was a riparian public land, swampy and in most parts covered by reeds on the boundaries. The municipal council of Thika then invited for tenders from the public for the reclamation of the public land to resettle the jua kali artisans. That the allocation and the resettlement of the Defendants was done way before the Plaintiff requested for allotment of the land from the Municipal council. That the final documentation of the resettlement was completed in 2012 having commenced in 2005. Concerned with its boundaries of the suit lands which was and is still occupied by the Defendants/Jua Kali artisans, the Plaintiff sought for a joint identification of the beacons/boundary pertaining to plot No 831. On receipt of the request or the joint beacon/boundary identification, the Town Clerk, Municipal Council of Thika wrote to the District Physical Planner on September 7, 2007 asking for a copy of the Physical Development Plan and status of the Jua Kali plot to enable them make an informed decision during their tender committee. That as far as it is concerned no further action was taken until the approval in 2012.
5. The Defendants further contend that they together with others not made parties to the suit, were properly resettled on the suit land by the Municipal council of Thika and are no way trespassers. That the Defendants have been in occupation of the plot ever since they were allocated the plot paying rates to the county Government of Kiambu diligently. That the plot is fully serviced by the Kiambu County Government by the provision of street lighting access road and installation of public toilet upon the Defendants request on December 6, 2010 which was approved by the council in 2010. They therefore aver that they are strangers to the allegations of trespass and urged the Court to dismiss the Plaintiffs suit as it is not entitled to the orders sought.
6. At the hearing of the suit, the suit proceeded ex parte the hearing date having been taken by the parties in the presence of the Defendants’ Counsel.
7. PW1 – Samuel Gichimu Mureithi relied on his witness statement dated May 28, 2018 as his evidence in chief and produced documents marked as PEX No 1-22 in support of the Plaintiffs case.
8. The witness introduced himself as the Secretary of the Presbyterian Church of East Africa- Elijah Kagiri Church Thika Parish. That the Plaintiff is the legal trustee and custodian of all landed properties owned and developed by the church. That as a local church secretary he was the custodian of all title documents for the parish church. That the Plaintiff owns three parcels of lands; 1049, 831 and 1038. The first one was allocated to the church in 1966. That later in 1969 the church desiring more land next to the original plot sought for more land to be allocated to it, a request that was acceded to by the then Commissioner of Lands. In 2005 the then Church Minister the Rev P N Kariuki wrote to the director of Physical Planning reaffirming the churches desire to be allocated the adjoining plots parcel 1049 which at the time was being used by the pupils as a playground. The Director in reply advised them that the said plots had been allocated to private individuals and asked them to approach the land owners for purposes of purchase of the said plots. The church upon identification of the new owners purchased parcels Nos 831 and 1038 from Njoroge Nduati and Peter Mbugua Kamau respectively for purposes of expanding the school land.



9. The witness produced PEX No 20 – map showing the area encroached by the Defendants on the Plaintiff’s lands (parcel 831 and 1038) on which stands an Academy – Elijah Kagiri Academy. That the Defendants have encroached the schools play ground curtailing the school from fencing and developing the land. That the presence of the Defendants on the land creates insecurity and pose a danger to the students and the staff of the school. The witness stated that upon identification of the beacons it became clear that the Defendant’s had encroached on the two parcels of the Plaintiff’s lands. He stated that the lands were purchased from private individuals and at the time of purchase the lands were not occupied by the Defendants who progressively encroached on the lands from 2009.
10. PW2 Samuel Gatheru Kanyoro testified and relied on his witness statement dated May 28, 2018 as his evidence in chief. He stated that he is the property officer of the Plaintiff and therefore familiar with the history of the two parcels of land and the case. He reiterated the evidence adduced by PW1.
11. With leave of the Court the Plaintiff filed written submissions through the law firm of Mbigi Njuguna & Co Advocates on March 30, 2022
12. The Plaintiff submitted that the Plaintiff’s lease was issued under the Registered Land Act (now repealed) and under Section 27(b) of the said Act the Plaintiff is conferred the absolute and indefeasible title and under Section 28 the said interest cannot be defeated except as provided by law. That Section 24 and 25 of the current *LRA* vests the registered owner the absolute ownership of the land together with all rights and privileges in respect to the land. That forcible entry and occupation of the suit lands is not one of the lawful methods in which a leasehold title may be challenged.
13. Relying on the case of *Peter Ngige Kigira Vs Fredrick Nganga Kigira* (2021) eKLR the Plaintiff urged the Court to grant its prayers as sought.
14. Having considered the pleadings of the parties, the evidence adduced at the hearing and the written submissions and all the material placed before the Court, the issues for determination are;
 - a. Who owns the portion of the land on which the Defendants occupy?
 - b. Whether the Plaintiff has proved trespass against the Defendants
 - c. Is the Plaintiff entitled to general damages on trespass
 - d. Who meets the costs of the suit?
15. Despite being aware of the hearing date the Defendants did not appear for the hearing of the suit and therefore the Plaintiff’s suit proceeded exparte. In our adversarial system, the Plaintiff retains the onus to discharge the burden of proof its case on the required standard of the balance of probabilities. The fact that the Plaintiff’s evidence is not challenged does not mean that the Court will not interrogate it. The Court still has an obligation to interrogate the evidence adduced at the trial and determine whether the same is merited to enable the Court come up with a logical conclusion as exparte evidence is not automatic proof of a case. See 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.”



16. The Plaintiff's case is anchored on the alleged encroachment of the Defendants on its suit lands. Trespass is defined in Section 3(1) of the Trespass Act as follows;

“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.”

17. Equally in the 10th Edition of Black's Law Dictionary trespass is defined as follows;

“An unlawful act committed against the person or property of another; especially wrongful entry on another's real property.”

18. Clark & Lindsell on Torts, 18th Edition on page 923 defines trespass as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason.

19. Section 26 of Land Registration Act (LRA) provides as follows;

“(1) 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

20. The Plaintiff has adduced evidence in form of title deeds for parcels 1049, 831 and 1038 issued on January 21, 2013, June 19, 2009 and June 8, 2017 respectively. I am satisfied that the Plaintiff has proved ownership of the suit lands. I am also satisfied that the Defendants have not adduced any evidence before this Court to impugn the titles of the Defendants.

21. Under Section 24 and 25 of the LRA the proprietor of a title is entitled to rights and privileges as follows;

“24. Subject to this Act—

- Interest conferred by registration (a) 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; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together



with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor

- (1) 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.....”

22. Having satisfied the Court as to its proprietorship, the Plaintiff is entitled to absolute ownership of the lands which include and not limited to all the rights and privileges belonging and appurtenant thereto and the right to occupation, use and quiet enjoyment of the land. The Plaintiff has averred that the Defendants have encroached on to the land thus impeding its rights to enjoy the use and occupation of the land including development of the same and quiet and peaceful enjoyment by the students and the school community.
23. In their defence the Defendants have admitted being in occupation of the land but state that they were resettled there by the County Council then and therefore are on the land as per right given that they are paying rates to the County Government which has also provided social amenities including street lighting, toilets and other amenities.
24. I have carefully perused the evidence adduced by the Plaintiff which captures the history of the acquisition of the lands. The Court notes that there is no dispute with respect to parcel 1049. The encroachment is said to affect parcel numbers 831 and 1038 respectively. Unchallenged evidence was led by the Plaintiff that in 1969 the church requested for additional allocation of land adjoining the earlier plot No 1049 which had been allocated to it in 1966. That in 2005 the Commissioner of Lands office through the Director of Physical planning advised the church that the land they had applied for allocation had been planned vide PDP No PDP/TKA/4/95/19 dated the June 1995 had been planned for residential purpose and advised them to seek out the allottees with the aim of purchasing from them. True to the advice, the Plaintiff acquired the parcels from Njoroge Nduati (parcel 831) and Peter Mungai Kamau who had been allocated the lands on October 1, 95 and August 1, 95 respectively. Vide the letter dated September 7, 2007 the Municipal Council wrote to the District Physical Planner inquiring the status of the suit lands and the response came through the District Planners letter dated September 26, 2007 which stated as follows;

“Ref: PPD/TKA/4/5/VOL.IV/128 26th September 2007

Town Clerk

Thika Municipal Council

Box 240

THIKA

RE: PROVISION OF PART DEVELOPMENT PLAN FOR JUA KALI GROUNDS

Reference is made to your letter Ref. MCT. 26/2/2A dated 7th September 2007.



Kindly note that records in our office show that the area in question was planned for a residential by PDP/TKA/4/95/19 dated June 1995. Further PCEA (Elijah Kagiri) had applied for allocation to an area next to theirs through letter dated 17th May 2005.

Our office reply by letter Ref. PPD/TMC/PPA/2/VOL.II/68 dated 19th May 2005 was that the area falls under plot No. 5 in the above mentioned PDP. They were advised to seek the owner and buy it as they did to plot No. 6 (currently Thika Municipality Block II/831).

Enclosed find a blue print of the plan prepared for the residential plots.

J. S. OKAYANA

DISTRICT PHYSICAL PLANNING OFFICER

THIKA

Copy to: District Commissioner

Box 128 – Thika

PCEA (Elijah Kagiri)

Gatamani Parish

Box 552 – Thika.“

25. The Defendants have not led any evidence to support the alleged resettlement/ relocation of the land by the council. Even if the council did resettle them (which is denied) in 2005, the suit lands were not available for alienation or resettlement of the Defendants as the same were private lands having been alienated in 1995.
26. The answer to issue No a and b is that the land upon which the Defendants have encroached belongs to the Plaintiff and I also find that the Plaintiff has proved trespass given that the Defendants have not adduced any evidence to support the lawful occupation of the Plaintiff's land.
27. As to whether the Plaintiff is entitled to General Damages for trespass, I rely on the decision of the Court in the case of *Park Towers Limited versus John Mithamo Njika & 7 Others* (2014) eKLR, where the Court held that:-

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages awardable depending on the unique facts and circumstances of each case.”
28. Similarly in the case of *Philip Aluchio vs Crispinus Ngayo* [2014]eKLR, the Court held as follows:-

“ The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less”

The Plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass”
29. *Halsbury's Laws of England* 4th Edition Volume 45 para 26 1503 provides this Court with the guidelines to be adopted in the computation of damages in an action for trespass:



- a) If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.
 - b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
 - c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.
 - d) Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, damages may be awarded.
 - e) If the trespass is accompanied by aggravating circumstances.
30. Having made a finding that the Defendants have trespassed onto the Plaintiffs land it is trite that the Plaintiff is entitled to damages even if it has not suffered any damages. The Court is therefore being called to inquire on the next issue which is the damages payable to the Plaintiff. I have considered the size of the land occupied by the Defendants, the length of time encroachment has gone unabated, the length of time the Plaintiff has been prevented from using its land including delayed developments. I note that it is only in 2019 that this Court issued an order allowing the Plaintiff to fence the land and connect supply of water to the school. As a result of the foregoing and taking into consideration the above factors the Court finds that the Plaintiff is entitled to nominal damages for trespass in the sum of Kshs 250,000/- payable jointly and severally by the Defendants.
31. In the end I enter judgement in favour of the Plaintiff as follows;
- a. It is hereby ordered that the Defendants vacate the suit land within a period of 3 months (90 days) from the date of this judgement in default they shall be evicted in accordance with the provisions of the law.
 - b. A permanent injunction to restrain the Defendants themselves or their employees' servants' agents or any person claiming or acting in their names howsoever from entering encroaching on or in any other way interfering with the possession and use of all that parcel of land known as L R Thika/Municipality/BlockII/831 and L R Thika/Municipality/BlockII/1038 (suit lands).
 - c. General damages for trespass in the sum of Kshs 250,000/- to be paid jointly and severally by the Defendants in favour of the Plaintiff.
 - d. Each party to meet the costs of the suit.
32. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 20TH DAY OF DECEMBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms Githinji HB Mbigi

1st – 29th Defendants – Absent but served via email



