



Muruaki Farmers Co-operative Society v Mwangi (Environment & Land Case 316 of 2017) [2022] KEELC 15224 (KLR) (8 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15224 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 316 OF 2017**

**YM ANGIMA, J
DECEMBER 8, 2022**

BETWEEN
MURUAKI FARMERS CO-OPERATIVE SOCIETY PLAINTIFF
AND
MWANGI NJOROGE MWANGI DEFENDANT

JUDGMENT

A. The Plaintiff's Claim

1. By a plaint dated March 12, 2010 amended on May 17, 2011 and further amended on October 8, 2018 the Plaintiff sued the Defendant seeking the following reliefs:
 - a. A permanent injunction to restrain the Defendant from encroaching or in any way interfering with the Plaintiff's quiet possession and enjoyment of land reference number Nyandarua/Muruaki/6107.
 - b. That this honourable court be pleased to issue a temporary injunction to restrain the Defendant, his agents, employees or servants from encroaching, ploughing, planting, weeding, subdividing, alienating or in any way using the Plaintiff's Parcel number Nyandarua/Muruaki/6107 pending hearing and determination of this suit.
 - c. A declaration that the Plaintiff is the legal owner of land reference number Nyandarua/Muruaki/6107 and if the Defendant has a title to the same or part of the same parcel of land, then the same is irregular, illegal and null and void and the same to be cancelled.
 - d. That the provincial land surveyor or any surveyor to be agreed upon by the parties or appointed by court to visit, verify the beacons on the ground separating the Plaintiff's parcel of land number 6107 and that of the Defendant whose title overlaps that of the Plaintiff and file a report in court.



- e. Eviction orders against the Defendant from land reference number 6107 be granted together with costs and interest.
2. The Plaintiff pleaded that at all material times it was the registered proprietor of Title No Nyandarua/Muruaki/5435 (Parcel 5435) measuring approximately 2.021 ha. It was further pleaded that the Defendant was the owner of Title No Nyandarua/Muruaki/2411 (Parcel 2411) and that he had been unlawfully laying a claim to parcel 5435 without lawful justification. It was further pleaded that the dispute had previously been referred to the Land Registrar who determined that Parcel 5435 belonged to the Plaintiff. It was contended that despite issuance of a demand and notice of intention to sue the Defendant had failed to desist from interfering with the Plaintiff's land hence the suit.
3. The Plaintiff further pleaded in its further amended plaint that on May 9, 2012 it caused Parcel 5435 to be divided into Parcel Nos 6107, 6108 and 6109 and that the parcel of land which the Defendant was interfering with was now Parcel 6107.

B. The Defendant's Response

4. The Defendant filed a statement of defence dated July 13, 2010 in which he denied the Plaintiff's claim in its entirety. He denied that the Plaintiff was the registered owner of Parcel 5435 and put it to strict proof thereof. In addition, he denied the existence of Parcel 5435.
5. The Defendant admitted having been the owner of Parcel 2411 but stated that the same had been subdivided into Parcel Nos 2747 and 2748. He denied having laid a claim upon Parcel 5435 or having pestered the Plaintiff about it as alleged or at all.
6. The Defendant further pleaded that his only claim was upon Parcel 2747 measuring approximately 5.4 ha which the Plaintiff had wrongfully encroached upon and caused a school to be built thereon in 1996. The Defendant further pleaded that he had previously lodged a claim before the South Kinangop Land Disputes Tribunal (the Tribunal) over the dispute and that the Tribunal had decided the dispute in his favour and ordered the Plaintiff to vacate the disputed land.
7. The Defendant also pleaded that the instant suit was misconceived and an abuse of the court process on account of previous proceedings before the Tribunal. He denied service of a demand or notice of intention to sue and put the Plaintiff to strict proof therefore. Finally, he prayed for dismissal of the Plaintiff's suit with costs.
8. The Defendant filed a second statement of defence dated March 25, 2013 filed by a different firm of advocates. The Defendant similarly denied the Plaintiff's claim in its entirety and put it to strict proof thereof. The Defendant pleaded that Parcel 5435 was an illegal sub-division of the original Plot No 180 at a time when he had already obtained a decree against the Plaintiff in Nyahururu PM Land Case No 55 of 2005. The Defendant further pleaded that Parcel 5435 was part and parcel of his land which the Plaintiff had wrongfully annexed from his original Plot No 322. It is evident from the first defence that Plot No 322 is what later came to be known as Parcel 2411.

C. The Plaintiff's Reply

9. The Plaintiff filed a reply to defence dated April 24, 2013 in which it joined issue upon the Defendant on its defence. It denied all the adverse allegations contained in the defence and reiterated the contents of the plaint. The Plaintiff denied that Parcel 5435 was part and parcel of the Defendant's land.



D. Directions on Submissions

10. Upon conclusion of the trial the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiff's submissions were filed on June 22, 2022. whereas the Defendant's submissions were filed on September 29, 2022.

E. The Issues for Determination

11. The court has noted that the parties did not file an agreed statement of issues. In the premises the court shall frame the issues for determination as provided by law. Under Order 15 rule 2 of the *Civil Procedure Rules, 2010* the court may frame issues from any of the following:
 - a. The allegations contained in the pleadings.
 - b. The contents of documents produced by the parties.
 - c. The statements made on oath by or on behalf of the parties.
12. The court has considered the pleadings, the documents and the evidence on record in this suit. The court is of the opinion that the following issues arise for determination herein:
 - a. Whether the Plaintiff was the rightful proprietor of the Parcel No 6107.
 - b. If the answer to (a) is in the affirmative, whether the Defendant has wrongfully interfered with it.
 - c. Whether the dispute before court has previously been heard and determined by the Tribunal.
 - d. If the answer to (c) is in the affirmative, what is the legal consequence thereof.
 - e. Whether the Plaintiff is entitled to the reliefs sought in the suit.
 - f. Who shall bear costs of the suit.

F. Analysis and Determination

a. Whether the Plaintiff was the rightful proprietor of the Parcel No 6107

13. The court has considered the evidence and submissions on record on this issue. The Plaintiff's evidence was that it was initially the owner of Plot No 180 whereas the Defendant was the owner of Plot 322. The two Plots were separated by an access road. It was the Plaintiff's evidence that it subdivided Plot 180 into Parcel Nos 2978 and 2979 and later on Parcel 2978 was further sub-divided into Parcel Nos 3608 and 3609. Parcel 3608 was later sub-divided into Parcels 5435, 5436 and 5437. It was the Plaintiff's further evidence that Parcel 5435 was ultimately sub-divided into Parcels 6107, 6108 and 6109. It was contended that it was on Parcel 6107 that the Defendant had encroached without lawful justification or excuse.
14. It was further the Plaintiff's evidence that sometime in 2005, the dispute between the parties was reported to the District Land Registrar for resolution and that upon visiting the site the Registrar found that the Defendant had encroached upon Parcel 5435. It was further contended that vide a court order made by this court, the Land Registrar and the District Surveyor visited the disputed property to ascertain its boundaries and that vide a report dated October 14, 2016 and filed on October 17, 2016 it was found that the Defendant had encroached on the Plaintiff's property which was then still part and parcel of Parcel 5435.



15. The Defendant, on the other hand, testified that he was allocated Plot No 322 in 1963 whereas the Plaintiff was allocated Plot No 180. It was his evidence that sometimes in 1972 the Plaintiff crossed over the access road separating the two Plots and occupied a portion of his Plot No 322. He further stated that despite complaining about the Plaintiff's land grab to the District Land Registrar and the Settlement Officer no action was taken to remedy the situation. It was his further evidence that in 2005 he filed claim No 26 of 2005 before the Tribunal which heard the dispute and determined the case in his favour. He further testified that the award of the Tribunal was adopted by the Magistrate's Court at Nyahururu as a judgment of the court in SPM's LDT Case No 55 of 2005.
16. During cross-examination the Defendant stated that he did not agree with the map for Muruaki Settlement Scheme which was produced by the Plaintiff. He did not also agree with the position of the access road as shown thereon. He contended that there was an original map which was not before court which showed the correct position on the ground. When asked whether he had any evidence to prove that Parcel 5435 belonged to him he answered in the negative but insisted that the land belonged to him and that part of it had been wrongfully given to a primary school even though he was still using part of the land.
17. The court is of the opinion that although the Plaintiff did not produce a complete record of all the green cards for sub-division of the original Plot No 180, the court is satisfied that Parcel 5435 was part and parcel of the original Plot No 180 and not the Defendant's original Plot No 322 (which later became Parcel 2411 and later on Parcel Nos 2747 and 2748 upon sub-division).
18. The map for the demarcation of Muruaki Settlement Scheme was produced by the Plaintiff as exhibit P-1. The Plaintiff also produced certified copies of the Registry Index Map (RIM) for Muruaki Scheme which showed the relative positions of the original Plot 180 and the original Plot 322. The official records were clear that the two plots were separated by a crescent road and not a straight road as claimed by the Defendant. The Defendant did not produce any other map or RIM which showed a contrary position. Accordingly, the court shall go by the official government records which were tendered in evidence.
19. The court is further satisfied that the suit property belongs to the Plaintiff because there is an official report by the County Land Registrar -Nyandarua dated October 14, 2016 which was prepared pursuant to a court order. The report was produced as exhibit P-8 at the trial. It is evident from the said report that the Registrar found that the Plaintiff was the owner of Parcel 5435 and that the Defendant had encroached upon it to the extent of about 0.6 ha.
20. Finally, a copy of the green card for Parcel 5435 indicated that it was registered in the name of the Plaintiff and that the title was closed in 2013 upon sub-division into Parcel Nos 6107, 6108 and 6109. Accordingly, there is adequate evidence on record to demonstrate that the Plaintiff is the legitimate proprietor of Parcel 6107 which was a sub-division of Parcel 5435.

b. If the answer to (b) is in the affirmative, whether the Defendant has wrongfully interfered with it

21. The court has already found that the Plaintiff is the proprietor of Parcel 6107. It is evident from the material on record and, in particular, the Land Registrar's report that the Defendant has encroached on a portion of Parcel 5435 which was sub-divided to give rise to Parcel 6107. The Defendant's own evidence at the trial also confirmed his interference with the Plaintiff's property. During cross-examination by the Plaintiff's advocate the Defendant maintained that the land in dispute was his and that he was still utilizing a portion thereof for cultivating livestock fodder. There is also some evidence on record to demonstrate that the Defendant has previously been committed to civil jail for disobeying an interim injunction which restrained him from interfering with the suit property which was then part



of Parcel 5435. The court is thus satisfied on the basis of the material on record that the Defendant's interference with the suit property has been established.

c. Whether the dispute before court has previously been heard and determined by the Tribunal

22. The court has considered the material and submissions on record on this issue. Although the Defendant submitted at length on the issue, the Plaintiff did not submit thereon. The Defendant submitted that the dispute before court was conclusively resolved by the Tribunal in Claim No 26 of 2005 whose award was adopted in Nyahururu PM Land Case No 55 of 2005. It was submitted that the instant suit was res judicata and otherwise an abuse of the court process. It was contended that the Tribunal had jurisdiction to entertain the suit since it was a claim for trespass.
23. The court has perused the record of the proceedings in PM Land Case No 55 of 2005. The original record of proceedings of the Tribunal is not in the file. The original award of the Tribunal is also not in the file. However, it is evident from the order of the Magistrate's Court adopting the award that the Tribunal was dealing with a dispute concerning Parcel 2747 and had made, inter alia, the following awards:
- a. That the directors of the Plaintiff should give back to the claimant his portion of land they had 'fraudulently' taken.
 - b. That the directors of the Plaintiff should pay the claimant mesne profits at the rate of Kshs 3,000/= per acre per year from January 1980 until the date the land is transferred back to the claimant.
 - c. That the directors of the Plaintiff should reimburse the claimant his expenses of Kshs 80,000/= incurred on the disputed since 1979.
 - d. If the answer to (c) is in the affirmative what is the legal consequence thereof
24. It is evident from the material on record that by the time the Tribunal heard and determined the dispute, the Plaintiff was the registered as owner of the disputed land and that is why it ordered that mesne profits shall be payable until the said land was transferred to the claimant. It is also evident that the Tribunal held that the Plaintiff's directors had fraudulently acquired a portion of the Defendant's land. It was not a case of trespass as submitted by the Defendant's advocate in the instant suit. The Plaintiff was already registered as owner of the disputed property hence the reason it was required to transfer it back to the claimant. That cannot constitute trespass as known to law. The court is of the opinion that it was clearly a case involving title to land.
25. Under Section 3(1) of the Land Disputes Tribunals Act 1990 which was then in force the jurisdiction of the Tribunal was stipulated as follows:
- ' (1) Subject to this Act, all cases of a civil nature involving a dispute as to:-
- a. The division of, or the determination of boundaries to land, including land held in common;
 - b. A claim to occupy or work land;
 - c. Trespass to land, shall be heard and determined by a Tribunal established under Section 4.'
26. The court is of the opinion that the nature of the dispute which was presented before the Tribunal and determined by it had nothing to do with trespass to land as contended by the Defendant. It



was a claim for alleged fraudulent acquisition of a portion of the Defendant's land since it was land which had already been registered in the name of the Plaintiff. Accordingly, the Tribunal acted without jurisdiction in purporting to entertain and determine the claim which related to title to land.

27. The consequence of the Tribunal's usurpation of jurisdiction has been the subject of judicial consideration in several decisions. For instance, in the case of *Stanley Atira Odera –vs- Johnson Odera Ambululi & 5 Others [2019] eKLR* the Court of Appeal held, inter alia, that:

' What then would be the effect of sub-dividing the 1st respondent's land as ordered by the Tribunal? To our mind in order to put to effect the ruling of the Tribunal the 1st respondent would have been forced to transfer his land to the appellant failing which thereto the court registrar would have signed the transfer documents on his behalf. We do not think that under the Act the Tribunal had jurisdiction to transfer a person's land to another person. See *Asman Maloba Wepukhulu & Another –vs- Francis Wakwabubi Biketi CA No 157 of 2001*. We are therefore of the view that the Tribunal acted ultra vires and beyond its jurisdiction when it ordered for the sub-division and transfer of a portion of the 1st respondent's land to the appellant and his family.'

28. In the case of *Republic –vs- Awendo Land Disputes Tribunal & Another [2010]* it was held by the High Court, inter alia, that:

' It has been affirmed by the Court of Appeal that a Land Disputes Tribunal does not have jurisdiction to hear and determine disputes relating to ownership of land. See *Asman Maloba Wepukhulu & Another –vs- Francis Wakwabubi Biketi, Civil Appeal No 157 of 2001*. A decision made by a Tribunal without jurisdiction is a nullity. At the time when the 1st interested party instituted the claim before the 1st respondent, the suit land was already registered in the name of the exparte applicant.

The decision by the 1st respondent having been made without jurisdiction cannot stand and its adoption by the 2nd respondent was of no legal consequence.'

29. The court is thus of the opinion that the Tribunal had no jurisdiction to entertain the claim and to make the award it made. It was a Tribunal without competent jurisdiction hence its award was a nullity. The subsequent adoption of the award by the subordinate court was equally a nullity and of no legal consequence. Accordingly, the court is unable to agree with the Defendant's submission that the Plaintiff's suit is res judicata or an abuse of the court process.

e. Whether the Plaintiff is entitled to the reliefs sought in the suit

30. The court has already found that the Plaintiff is the legitimate owner of Parcel 6107. The court has found that the Defendant has encroached upon and interfered with the suit property. The court has further found that the Tribunal had no jurisdiction to entertain and determine the claim which was filed before it by the Defendant and that its award was a nullity and of no legal consequence. It would therefore follow that the Plaintiff has proved its claim against the Defendant hence it is entitled to the reliefs sought in the suit as shall be specified hereafter.

f. Who shall bear costs of the suit

31. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason,



directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co Ltd [1967] EA 287*. The court finds no good reason to deprive the successful party of the costs of the action. Accordingly, the Plaintiff shall be awarded costs of the suit.

G. Conclusion and Disposal

32. The upshot of the foregoing is that the court finds and holds that the Plaintiff has proved its claim against the Defendant on a balance of probabilities as required by law. Accordingly, judgment is hereby entered for the Plaintiff against the Defendant in the following terms:

- a. A declaration be and is hereby made that the Plaintiff is the legal owner of Parcel No Nyandarua/Muruaki/6107.
- b. A permanent injunction be and is hereby granted restraining the Defendant from encroaching upon or in any way interfering with the Plaintiff's quiet possession and enjoyment of Parcel No Nyandarua/Muruaki/6107.
- c. The Defendant shall hand vacant possession of Parcel No Nyandarua/Muruaki/6107 to the Plaintiff within 14 days from the date hereof in default of which he shall be forcibly evicted therefrom.
- d. The Plaintiff is hereby awarded costs of the suit together with interest thereon

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 8TH DAY OF DECEMBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Mboga for the Plaintiff

Mr. Waichungo for the Defendant

C/A - Carol

Y. M. ANGIMA

JUDGE

