



REPUBLIC OF KENYA



**Macho Agencies Limited v Mwau & 3 others (Civil Suit 634 of 2012)
[2022] KEELC 15137 (KLR) (5 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15137 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL SUIT 634 OF 2012
JA MOGENI, J
DECEMBER 5, 2022**

BETWEEN

MACHO AGENCIES LIMITED PLAINTIFF

AND

BENJAMIN MULI MWAU 1ST DEFENDANT

ESTHER WANGECHI MUTURI 2ND DEFENDANT

ABRAHAM MWANGI MUTURI 3RD DEFENDANT

**JOSEPH KAGO NGUGI T/A BRIDGE VIEW SELF HELP
GROUP 4TH DEFENDANT**

JUDGMENT

Introduction

1. By an amended Plaint dated October 10, 2018 the plaintiff herein sought for Judgment against the Defendants jointly and severally for the following orders: -
 - i. A declaration that the plaintiff is the lawful owner of plot number 18273 situated within the City of Nairobi.
 - ii. A permanent injunction restraining the defendants by themselves, their agents and/or servants from entering and/or remaining in the plaintiff's said plot LR No 18273 Nairobi.
 - iii. A mandatory injunction ordering the defendants to vacate land parcel LR No 18273 Nairobi.
 - iv. An order directing the OCPD Kayole to supervise the implementation of orders of eviction against the defendants from LR No 18273
 - v. General damages for trespass.



- vi. Cost for the suit.
2. Despite being served with summons to enter appearance, the 1st and 4th Defendants did not enter appearance or file a defence. The 2nd Defendant entered appearance on January 16, 2013 and filed a statement of defence dated January 24, 2013. The 3rd defendant entered appearance on October 12, 2012 and filed a statement of defence dated October 24, 2012. The 1st and 4th Defendant have never attended court despite service. The 2nd and 3rd Defendant never attended court during the hearing despite them being physically served with the hearing notice as evidenced by a return of service dated June 14, 2022 . The hearing therefore proceeded *ex-parte*.
3. It was the plaintiff's uncontroverted evidence that they are the registered owner of Plot No 18273 within the City of Nairobi. She avers that on or about the beginning of the year 2011, the defendants without any colour of right, permission and/or authority, trespassed into the said parcel of land and commenced erecting thereat illegal structures.
4. She contends that the plaintiff is desirous of developing the said land parcel which it cannot do owing to the said illegal occupation by the defendants. The Plaintiff avers that the said illegal occupation by the defendants on the said land parcel has denied it the quiet user and enjoyment of the said land parcel and the defendants continued occupation of the same has caused the plaintiff unnecessary nuisance, loss, anxiety and damage.
5. The Plaintiff avers that the defendants threaten, unless restrained by this Honourable Court to subsist and/or repeat the unlawful acts complained of.
6. Despite being served with Summons to Enter Appearance which is indicated through the various affidavits of service filed the Defendants failed to appear in court for hearing. The matter proceeded for formal proof hearing, wherein the Plaintiff gave evidence for herself and called no witness.

Plaintiff's Case_

7. PW1 – Regina Murugi Kimani testified that she is one of the directors of the Plaintiff company. She adopted her witness statement dated February 18, 2022, including the list of documents dated February 23, 2022. She testified that the plaintiff's case is that Macho Agencies is the owner of the suit property. The company acquired the property in 2011. The defendants claim that they have an allotment letter from the Nairobi city county, but the plaintiff exchanged the land with the original allottee. A transfer was also registered on December 8, 2011.
8. She testified that at page 40, there is a transfer of lease that was registered. The transfer has never been contested. She testified that she seeks her prayers as per her plaint. She also sought the court to order the defendants to vacate her property. Page 49 of the bundle shows her directorship.
9. In her witness statement, she avers that on or around the year 1995 a sister company of the plaintiff Ms. Kimani investments Limited entered into an exchange agreement of all that piece of land known as Land Reference No. 18273 being a portion of land resulting from the sub-division of plot number 18273 with its other assets. That the property remained unregistered into the names of the said company Kimani Investments Limited and later the company resolved to have the same transferred to the plaintiff and the plaintiff was registered as the Lessee on the 8 December, 2011 as per the lease document referred in the Plaintiff's Exhibits as exhibit number.
10. It is the plaintiff's case that their efforts to develop the land has been faced with problems as the defendants have encroached on the said parcel of land and erected illegal structures and have refused to remove the same despite the plaintiff's efforts and demands.



11. That the defendants have at one time purported to approach the defunct City Council of Nairobi to formalize their illegal occupation by purporting that they have subdivided the plot and given portions of it to themselves and reserved some plots for others claiming to be members of Bridge View Self Help Group.
12. That the plaintiff has not condoned neither agreed to this encroachment hence this suit after all efforts to have the matter resolved amicably. The plaintiff has been paying rates due to the County Council of Nairobi.
13. Further, PW1 is aware that Kimani Investments Limited secured ownership of the suit property from the original allottee, one Agnes Omolo Onyango vide an Agreement for Exchange of Properties dated April 13, 1995. It is the plaintiff's case that pursuant to the plaintiff's Sister Company's resolution register the lease in the Plaintiffs name, the original allottee Agnes Omolo Onyango, agreed to formally transfer all her rights and interest in the lease to the Plaintiff herein. PW1 testified that she is aware that the instrument of Transfer of Lease was duly executed by both parties on November 29, 2011.
14. With that evidence, the Plaintiff closed its case and they were given time to file their written submissions. The Plaintiff filed their submission dated November 23, 2022 in which they urged that that Plaintiff had proved its case on a balance of probabilities and prayed that judgment be entered for the Plaintiff in terms of the prayers in the Amended Plaint.

Defendants' Case

15. Despite being served with summons to enter appearance, the 1st and 4th Defendants did not enter appearance or file a defence. The 2nd Defendant entered appearance on January 16, 2013 and filed a statement of defence dated January 24, 2013. The 3rd defendant entered appearance on October 12, 2012 and filed a statement of defence dated October 24, 2012. The Defendants did not file any written submissions. The Plaintiff's case is therefore unchallenged and uncontroverted.

Analysis and Determination

16. I have considered the pleadings, the submissions and the evidence adduced and the exhibits thereto.
17. The Defendants failed to defend their suit. The fact that the suit has not been opposed means that the Plaintiff's evidence remained unchallenged and uncontroverted. However, the Plaintiff is still required to prove their case on the required standard of balance of probability. See the case of *Shaneebal Limited Vs County Government of Machakos* (2018) eKLR, where the Court cited the case of *Karuru Munyororo Vs Joseph Ndumia Murage & Another*, Nyeri HCCC No 95 of 1988, where it was held that:-

“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaint and in the absence of the Defendant's and or their Counsel to cross examine her on evidence, the Plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon”

18. The fact that the evidence is not challenged does not then mean that the Court will not interrogate the evidence of the Plaintiff. The Court still has an obligation to interrogate the Plaintiff's evidence and determine whether the same is merited to enable the Court to come up with a logical conclusion as ex-parte evidence is not automatic prove of a case. The Plaintiff has to discharge the burden of proof.



See the case of [Kenya Power & Lighting Company Limited Vs Nathan Karanja Gachoka & Another](#) [2016] eKLR, where the Court stated: -

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

19. Further the case of [Gichinga Kibutha Vs Carooline Nduku](#) (2018) eKLR, where 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.”

20. The Plaintiff alleges that it is the legal and registered owner of the suit property Land Parcel LR No 18273 Kayole Block Y within the City pursuant to the transfer and registration of a lease issued by the City Council of Nairobi dated July 21, 1993. That the original Lessee and allottee of LR No 18273 from the city council of Nairobi was one Agnes Onyango vide lease dated July 21, 1993. The Plaintiff produced a certificate of lease dated July 21, 1993 registered in the name of Agnes Omolo Onyango. That Agnes Omolo subsequently entered into an agreement for transfer of property with the Plaintiff's sister company, Kimani Investments Ltd, for the exchange of various properties, the suit property being one of them dated April 13, 1995. Part of the terms of agreement of that Kimani Investment Ltd shall transfer its property LR No Block 72/1262 Nairobi and all the building and structures thereon to Agnes Omolo Onyango and in lieu thereof and as a consideration for the transfer the said Agnes Omolo Onyango shall transfer the following Properties to Kimani Investments Ltd and LR 18273 Kayole Nairobi (among others). The Plaintiff also produced a transfer document dated December 8, 2011 in favour of the Plaintiff.

21. The Court notes that the exchange of properties agreement was reduced into writing and signed by all the parties. Section 3 (3) of the [Contract Act](#) provides that;

"3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing.

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

22. The Court has carefully perused the exchange of properties agreement dated April 13, 1995 produced as Exhibit by the Plaintiff and noted that the same is in writing and is signed by the parties. It thus met the requirements of Section 3(3) of the [Contract Act](#). Further the exchange of properties agreement contains the names of the parties, the property size and the consideration thereto. A look at the said exchange of properties agreement confirms that the same is a valid agreement which is enforceable by



the parties. See the case of *Nelson Kivuvani Vs Yuda Komora & Another*, Nairobi HCCC No 956 of 1991, where the Court held that:-

“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.

23. Additionally, Article 40 of the *Constitution* guarantees the property rights of every person and provides under Article 40(3) that no person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property.
24. Furthermore, evidence tendered before this Court started at the root of title/ownership. The Plaintiff demonstrated that Agnes Omolo Onyango was the original allottee of the suit property and thereafter entered into an agreement and transferred the same to the Plaintiff Company vide transfer of lease dated November 29, 2011. She produced evidence demonstrating payment of consent fees dated October 12, 2011, receipts for payment of rates dated October 11, 2011 and clearance certificate dated October 11, 2011. Without any evidence to controvert this, then this Court finds and holds that the Plaintiff is the legal proprietor of the suit property.
25. As I have stated hereinabove, the 2nd and 3rd Defendants only filed a defence where they made a general denial. They never came to court to give evidence. In the case of *CMC Aviation Ltd – Vs- Cruisair Ltd (No 1)* 1978 KLR 103; [1976-1980] I KLR 835, Madan J (as he then was) stated as follows:-

“Pleadings contain the averments of the parties concerned. Until they are proved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain unproven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that is truth.”

26. The Defendants having not adduced any evidence to controvert the Plaintiff’s evidence, I find that the evidence of the Plaintiff remains uncontroverted. The evidence is credible. I therefore find that the Plaintiff has proved its case on a balance of probabilities.
27. The second issue is whether the Plaintiff has proved that the Defendants trespassed onto his land. The Plaintiff testified that the Defendants have put up structures and erected buildings the suit the suit property. It is the Plaintiff’s evidence that all attempts to remove the Defendants from the property proved futile and that they continued to occupy the premises and purported to allocate themselves the property as squatters on the suit property.
28. In the case of *Nyangeri Obiye Thomas V Yunuke Sakagwa Nyoiza* ELC Case No 277 of 2018 Okong’o J observed as follows:

“Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 defines trespass as follows:



"Any unjustifiable intrusion by one person upon land in possession of another."Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession"

29. From the evidence on record, it is my finding that the Defendants are unlawfully occupying the suit property. This amounts to trespass to land.
30. Regarding the third issue as to whether the Plaintiff is entitled to the reliefs sought, the Plaintiff seeks various remedies; a permanent injunction, a mandatory injunction against the Defendants, an order of eviction against them and general damages for trespass.
31. The principles that guide the court in granting an order of injunction are set out in the celebrated case of *Giella Vs Cassman Brown & Company Limited* 1973 EA 358 as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”
32. From the Plaintiff’s evidence stated above, it is my finding that they have met the threshold for the grant of an injunction. Similarly, the Plaintiff is entitled to an eviction order in the event that the Defendants do not vacate the suit property.
33. From the evidence adduced which stands uncontroverted, the plaintiff has demonstrated that they are the lawful proprietor of the suit property. The Plaintiff produced the exchange of properties agreement showing that they acquired the suit property in 1995 for a consideration as set out in the said agreement. They also demonstrated that they tried to stop the defendants from trespassing on the Plaintiff’s land, in vain.
34. As to whether Plaintiff is entitled to damages as a result of the Defendants acts of trespass, the Plaintiff submitted that they are entitled to Kshs 3,000,000.00 as compensation for general damages for trespass. It is counsel’s submission that the Court should conder the location of the suit property in Kayole Nairobi County and the number of years that the Defendants have illegally occupied the suit land including the rate of inflation over the years. Based on the evidence before me, I find that indeed the Defendants’ acts on the suit lands amount to trespass as they had interfered with the Plaintiff’s rights to occupation and enjoyment of their properties. PW1 however did not adduce sufficient evidence on the loss the Plaintiff had incurred as a result of the Defendants’ acts of trespass. No evidence has been let to justify that figure.
35. In the case of *Duncan Nderitu Ndegwa v KP& LC Limited & Another* (2013) eKLR where P Nyamweya J held:-

“...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”
36. Insofar as the Plaintiff failed to adduce sufficient evidence on the loss they had incurred due to the Defendants’ acts on suit lands but in, associating myself with the decision cited above, I find that the



Plaintiff indeed suffered damages as a result of the defendants' acts of trespass for those years. I will proceed and award them Kshs 200,000 as general damages.

37. Regarding the title, the plaintiff explained that parties-initiated registration of the lease and evidence of receipt of payment of land rates and rents, clearance certificate and consent fees were produced before this Court. I also take judicial notice that sometimes it takes a while to process title deeds after purchase of land. However, I take note that these receipts were obtained in 2011 and so this has taken a bit too long to get a title registered in the name of the plaintiff. Regardless, the plaintiffs have given evidence of ownership and have established that it has executed an instrument of transfer of lease dated November 29, 2011 and that it was lodged at the registry. Further, it is true that a copy of the original lease has been produced before this court and it is confirmed that an endorsement of registration is made on the lease, the same having been registered on December 8, 2011.
38. Costs generally follow the event, and in this instant case, since the Plaintiffs have been inconvenienced with the defendants' acts culminating in filing this suit, I find that they are indeed entitled to costs of the suit and will award it to them.
39. The upshot of the foregoing is that the plaintiff has proved their case on a balance of probabilities. I therefore enter judgment for the Plaintiff against the Defendants in terms of prayers (i), (ii), (iii), (iv) and (vi) of the Amended Plaint. The Plaintiff be and is hereby awarded Kshs 200,000.00 (Kenya Shillings Two Hundred Thousand only) as general damages for trespass.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 5TH DAY OF DECEMBER 2022

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MOGENI J

JUDGE

In the virtual presence of:

Ms. Akoth Aluoch for the Plaintiff

None appearance for 2nd and 3rd Defendant

No appearance for 1st and 4th Defendant

Caroline Sagina : Court Assistant

