



REPUBLIC OF KENYA



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**Charterhouse Investment Limited v Charo & 5 others (Environment & Land
Case E047 of 2021) [2025] KEELC 1006 (KLR) (4 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1006 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E047 OF 2021
FM NJOROGE, J
MARCH 4, 2025**

BETWEEN

CHARTERHOUSE INVESTMENT LIMITED PLAINTIFF

AND

KABIBI CHARO 1ST DEFENDANT

KITSAO K NDORO 2ND DEFENDANT

SIMON K KENGA 3RD DEFENDANT

SAMUEL K GIA 4TH DEFENDANT

TABU NYULE MWAGUNDU 5TH DEFENDANT

DZENDERE HARE 6TH DEFENDANT

JUDGMENT

1. In a plaint dated 17/5/2021, the Plaintiff sought the following reliefs: -

1. An order of permanent injunction directed at the Defendants, their servants, agents, members, or any person claiming through them, jointly or severally, from trespassing, encroaching, mining, taking out anything capable of being taken out of all that parcel of land known as L.R No. 24590 delineated on land survey plan number 2XXXXX7 situated in North of Kilifi Township District and L.R No. 24591 delineated on land survey plan number 2XXXXX22 situated in North of Kilifi Township District.
2. An order of mandatory injunction directed at the Defendants their servants, agents, members, or any person claiming through them, jointly or severally, to vacate and never set foot on L.R No. 24590 delineated on land survey plan number 2XXXXX7 situated on North Kilifi



Township District and L.R No. 24591 delineated on land survey plan number 2XXXXX22 situated in North of Kilifi Township District.

3. An order directed to the OCS, Kilifi Police Station to ensure compliance with orders 1 and 2 herein above and to provide any necessary security required to enforce compliance with orders 1 and 2 herein.
 4. Any other order that this Honourable Court may deem just and fair to grant.
 5. Costs of this suit.
2. The Plaintiff pleaded that it was at all material times the registered owner of all those parcel of land identified as L.R No. 24590 delineated on Land Survey Plan Number 2XXXXX7 and L.R No. 24591 delineated on Land Survey Plan Number 2XXXXX22, both situated in North of Kilifi Township District and both containing by measurement 4.000Ha respectively, (hereinafter referred to as “the suit properties”)having acquired a 99-year lease from 1/10/1989; that the Defendants entered the suit properties and carried out illegal mining activities, turning it into a quarry. This necessitated a formal complaint which culminated into a meeting convened by the Tezo Location Chief. The plaintiff states that despite the said meeting, the Defendants have continued with the mining activities which actions continue to waste the suit properties.
 3. The Defendants filed a statement of defence dated 26/4/2023 wherein they denied the allegations raised in the Plaintiff. The Defendants averred that they have peacefully resided on the suit properties for a period over 20 years. They alleged that the Plaintiff illegally acquired the ownership documents to the suit properties, and immediately prior to the filing of the present suit, it invited the Defendants in order to fish for information from them.
 4. The Defendants alleged that the said excavation activities within the suit properties were being conducted by third parties, not parties to this suit, under the permission of the Plaintiff. They further averred that the Plaintiff has since demolished their houses and covered up the graves of their relatives, in a bid to deprive the Defendants of their rights.
 5. In response to the statement of defence, the Plaintiff filed a reply dated 16/7/2024 denying the allegations raised by the Defendants.
 6. At the hearing which took place on 2/12/2024, the Plaintiff closed its case after the testimony of one witness, Sophia Chemengen Too. The Defendants were not present, so their case was equally closed.
 7. Sophia adopted her testimony previously given when the matter initially came up for formal proof. In that testimony, she had adopted her written statement dated 17/5/2021 and produced the documents in the list of documents evenly dated, as P.Exh 1-5. She testified that the Plaintiff is the registered owner of the suit properties and as the Plaintiff’s director, she is in occupation thereof. She told the court that the Defendants are not in occupation and have no structures thereon; that the only house on the suit properties is the one she built for her employee and that the plaintiff has owned the suit properties since the year 1999.

Plaintiff’s submissions

8. Counsel for the Plaintiff argued that in the absence of evidence to support the defence, the Plaintiff’s evidence remains uncontroverted as was stated in the case of *Moses Theuri Ndumia v I G Transporters Limited & another* [2018] eKLR. He added that the burden of proof as captured under Section 107-109 of the *Evidence Act*, is a burden that is borne by the Plaintiff. According to counsel, the Plaintiff has shown, through the title and Survey Plans that it is the proprietor of the suit property, as such,



the court needs only to reaffirm that position. To support this, counsel cited Section 26 of the [Land Registration Act](#), and the case of *Kirugi & another v Kabiya & 3 others* [1987] KLR 347.

Analysis and Determination

9. Having considered the pleadings, evidence and submissions filed, the issues for determination are: -
- i. Who is the rightful owner of the suit properties?
 - ii. Whether there was trespass by the Defendants and if an Order of Permanent Injunction should issue;
 - iii. Whether the reliefs sought in the Plaint are merited.
10. The Defendants filed a defence denying the Plaintiff's allegations. At the hearing, the Defendants were required, as much as the Plaintiff was, to adduce evidence to prove the statements set out in their pleadings. Statements made in pleadings are mere allegations. The Defendants did not call any evidence at all to prove their defence. It follows that the Defendants' defence remained mere allegations. There has, indeed been many decided cases on this issue. One such case is, *North End Trading Company Limited (Carrying on the business under the registered name of) Kenya Refuse Handlers Limited -v- City Council of Nairobi* (2019) eKLR where the court stated thus: -

“ 18. In [Edward Muriga Through Stanley Muriga Vs. Nathaniel D. Schulter Civil Appeal No.23 of 1997](#), it was held that where a defendant does not adduce evidence the plaintiff's evidence is to be believed, as allegations by the defence is not evidence.”

11. It is therefore clear that uncontroverted evidence bears a lot of weight. However, even in the absence of a defence, a Plaintiff still bears the burden to prove their case on a balance of probabilities as is required by law. In the case of *Gichinga Kibutha -v- Caroline Nduku* (2018) eKLR the Court held that:

“It is not automatic that instances where the evidence is not controverted the Claimant 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.”

Section 107, 108 and 109 of the [Evidence Act](#), Cap 80 provide as follows:

“ 107. Burden of proof.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact.



The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

12. In the case *Miller -v- Minister of Pension* (1947) ALL ER 373 the civil standard of proof was said to be as follows: -

Thus, proof on a balance of probabilities means a win, however narrow; a draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

13. The *Land Registration Act* is very clear on issues of ownership of land, and Section 24(a) of the *Land Registration Act* provides as follows:

"Subject to this Act, 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."

14. Section 26 (1) of the *Land Registration Act* further states as follows:

"The Certificate of Title issued by the Registrar upon registration ... 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... 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."

15. The Plaintiff produced as P. Exh 1 and 2 copies of certificate of title for the suit properties, both registered in its name. In the absence of any other evidence to the contrary, I am satisfied that the Plaintiff is the owner of the suit properties.

16. Section 3 (1) of the *Trespass Act* Cap 294 defines trespass as including entry into, remaining on or erection of any structure on or cultivation, tilling, grazing or permitting of stock to be on a private land without the consent of the occupier.

17. In Black's Law Dictionary 11th Edition Thomson Reuters Page 667 encroachment is defined as infringement of other's right, interference with or intrusion onto another's property.

18. The Plaintiff produced some copies of photographs which it alleged were a depiction of the illegal mining activities being carried out by the Defendants. In the circumstances, I find that there was trespass on the part of the Defendants. Upon considering the evidence tendered by the Plaintiff, it is evident that the Defendants entered onto the suit properties.

19. The principles relating to injunctions were established in the celebrated case of *Giella -v- Cassman Brown & Co. Ltd* (1973) EA 358. Having considered the Plaintiff's exhibits produced in court, I hold that the Plaintiff has indeed proved its case to the required threshold to warrant the grant of permanent injunctive orders sought. Consequently, this court finds that the Defendants either by themselves, agents, servants and /or anyone claiming under the defendants should be permanently restrained from



entering, trespassing onto, cultivating, building structures thereon, interfering with and/or in any other manner dealing with the suit properties.

20. The outcome is that the reliefs sought in the Plaint are merited and are hereby granted as prayed in prayers no 1, 2, 3 and 5.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 4TH DAY OF MARCH 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

