



**Kenpol Services Limited v Cabinet Secretary Ministry of Transport Infrastructure,  
Housing, Urban Development and Public Works & 2 others (Environment & Land  
Case E225 of 2020) [2024] KEELC 681 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 681 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E225 OF 2020**

**J OMANGE, J  
FEBRUARY 8, 2024**

**BETWEEN**

**KENPOL SERVICES LIMITED ..... PLAINTIFF**

**AND**

**THE CABINET SECRETARY MINISTRY OF TRANSPORT INFRASTRUCTURE,  
HOUSING, URBAN DEVELOPMENT AND PUBLIC WORKS 1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. In this suit dated 11<sup>th</sup> November 2020, the Plaintiff's representative that is Anthony Mose Njehu seeks orders for a permanent injunction restraining all the defendants from entering into, remaining upon, excavating stones, scooping soil, dumping building materials, carrying out any form of construction or dealing in any manner with LR No 24893 IR 173315 Enterprise Road hereinafter referred to as the suit property. The Plaintiff further seeks an order of eviction directing the removal of the Defendants, their agents and or otherwise from the suit property.
2. The Plaintiff avers that at all material times it was the registered owner of LR No24893 I.R 173315 situate on Enterprise road in Nairobi City. That the 1<sup>st</sup> Defendant invaded the suit property claiming ownership on 9<sup>th</sup> November 2020 and with bulldozers brought down a section of the perimeter wall which actions they tried to stop but could not. The Plaintiff claims that he has an allotment letter which was issued on the 6<sup>th</sup> April 1998 and thereafter he was issued with a certificate of title on the 16<sup>th</sup> March 2016. The Plaintiff's argue that failure of the 1<sup>st</sup> defendant to produce any ownership documents to challenge the Plaintiff's title nor discredit their title leaves them as the rightful owner hence seek



the court's intervention to stop the defendants from interfering with their quiet possession and use of their land.

3. The Defendants were duly served with all the relevant pleadings and filed their joint Statement of Defence dated 30<sup>th</sup> September 2022 in which they denied contents of the plaint and raised the issue of *res judicata* claiming the suit property is one and the same as 209/13559 LR No 75461 subject matter in ELC 279 of 2009 Kenya Anti-Corruption Commission vs Wilson Gacanja & 3 others.
4. The Plaintiff called one witness Anthony Moses Njehu who testified in Court on the 24<sup>th</sup> May 2023. The witness relied on his witness statement dated 24<sup>th</sup> October 2022 in which he stated that they had been in possession of the suit property from the date they were issued with the allotment letter in 1998 and had enjoyed quiet possession of the same until the unlawful invasion of it by the 1<sup>st</sup> Defendant.
5. The Plaintiff's counsel submitted that the act of the Defendants to invade and pull down the perimeter wall was illegal as there is no court order and no competing ownership rights. The Plaintiffs contend that the lease document was issued after the Plaintiff had met the conditions which conditions included payment of premiums, and as such the suit property could not be allocated to another party. Further the certificate of title gave the Plaintiffs indefeasible rights provided in section 26 of the [Land Registration Act](#) and Article 40 of [the constitution](#) of Kenya 2010 as to absolute ownership. Counsel relied on the cases of [Shiramba & 27 others vs County Government of Uasin Gishu & 3 others](#) (Environment and Land petition 14 of 2018.) and [Dr Joseph Arap Ng'ok BVs Justice Moiwo Ole Keiwua & 7 others](#) Civil application No 60 of 1997 that addressed the issue of an allotment letter as a document that transfers proprietary interests once the terms of the allotment have been met such as paying the standard premiums.
6. On the issue of *res judicata*, the Plaintiff argue that they were not parties in ELC 279 of 2009 Kenya Anti-Corruption Commission vs Wilson Gacanja & 3 others and secondly in the said suit there was no evidence adduced to prove that the two parcels of land are one and the same and as such the Defendant's claims are mere allegations as they are not backed by evidence.
7. The Defendants did not call any witness in support of their case but filed submissions dated 13<sup>th</sup> October 2023 and submitted mainly on the issue whether there is a cause of action against the defendants. Counsel submitted that the 1<sup>st</sup> Defendant has not at any point claimed ownership over the suit property and that it has not been proved the alleged invasion was conducted by the 1<sup>st</sup> Defendant. In view of this, the Defendants argue that the Plaintiff has not met the standard of proof as envisaged by section 107 and 108 of the [Evidence Act](#). Counsel referred the court to the case of [Peter Kanithi Kimunya vs Aden Guyo Haro](#) ( 2014) eKLR.
8. On the question of whether costs should be awarded the defendants submit that the award of cost is discretionary based on the circumstance of each case as highlighted in [Morgan Air Cargo Limited vs Everest Enterprises Limited](#) (2014) eKLR.
9. In the instant case the Plaintiff has given evidence in support of its case but the defendants have failed to call any witness in support of the allegations in the defence which then remain as mere allegations. In [Janet Kaphiphe Ouma & Another vs. Marie Stopes International \(Kenya\)](#) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in [Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter](#) Civil Appeal No. 23 of 1997 held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere



allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

10. Having considered the pleadings and evidence the substantial issue for determination is whether there is a cause of action as against the defendants. The Plaintiff went to great lengths to establish that the suit property belongs to them. This was not seriously contested save for the one line mention in the Defence that the land is public property belonging to the Meteorological Department. In any event, the issue of title is not up for determination as there is no prayer on the same. The main issue then is whether the Plaintiffs have proved that the 1<sup>st</sup> Defendants committed the acts of trespass.
11. For the court to issue the orders sought, the court needs to be satisfied that the 1<sup>st</sup> Defendant occasioned the acts of trespass by demolishing the perimeter wall excavating and conducting other construction activities on the suit property. There is no doubt that there is an act of trespass but it is not clear who is responsible for the same. The Plaintiff in the witness statement and in his evidence allege that they were informed that it is the 1<sup>st</sup> Defendant who is responsible for the same. However, in letters which he produced as evidence the Plaintiffs had written letters to the Meteorological Department asking if the Department was claiming the land. It is not clear at all from the Plaintiffs case the connection between the Meteorological Department and the 1<sup>st</sup> Defendant. The Plaintiff does not come out clearly on how they reached the conclusion it is the 1<sup>st</sup> Defendant who trespassed on the suit property.
12. The fact that a defence is held as mere allegation in no way lessens the burden on the Plaintiff to prove its case. The court in the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR 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.”

The Plaintiff despite the absence of evidence from the defendants is obligated to prove its case on a balance of probabilities. The Plaintiff has stated that it wrote several letters to the Kenya Meteorological department which letters have been attached to the list of documents inquiring whether they had any interest in the suit property occasioning the acts of trespass but there is no letter on record addressed to the defendants herein seeking confirmation if any over the suit property or the acts of trespass. These two are separate government entities and even if they were the same, save for the hearsay evidence from unnamed sources who allegedly told the Plaintiff it is the 1<sup>st</sup> Defendant who trespassed, there is no evidence that points to the 1<sup>st</sup> Defendants being the intruders on the suit property.

13. The Plaintiff is bound by the provisions of sections 107 and 108 of the evidence act which provide;

“ 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.”

14. In the instant case the Plaintiff needed to prove on a balance of probability that as pleaded that it is the 1<sup>st</sup> Defendant, its servants or agents who committed the acts of trespass. The photos while proving there is an act of trespass do not connect the 1<sup>st</sup> Defendant to the act complained of.
15. Even if it were to be argued that the Meteorological Department did not respond to letters the Plaintiff wrote hence an inference should be made of their guilt the Plaintiff did not adduce any evidence to connect the Department with the 1<sup>st</sup> Defendant. In the end I find that the Plaintiff has not proved its case on a balance of probability and the suit is dismissed. Given that the Defendants did not attend court I order that each party will bear their own costs for the suit.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 8<sup>TH</sup> DAY OF FEBRUARY 2024.**

**JUDY OMANGE**

**JUDGE**

In the presence of: -

Mr. Kabaiku for Plaintiff

Ms Kuba for Defendants

Steve - Court Assistant

