



Maina & another v Ogola & 28 others; Hussein (Interested Party) (Environment & Land Case 677 of 2013) [2024] KEELC 560 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEELC 560 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 677 OF 2013
OA ANGOTE, J
FEBRUARY 8, 2024

BETWEEN

SARAH WANGARI MAINA 1ST PLAINTIFF
WINSTON MUTURI THANDI & FREDERICK NDETO MATHEKA (SUNG AS THE TRUSTEES ON BEHALF OF OLD RACECOURSE ESTATE RESIDENTS GROUP) 2ND PLAINTIFF

AND

JOSEPH KISORO OGOLA 1ST DEFENDANT
PETER KANG'ETHE 2ND DEFENDANT
SAMMY MWANGI 3RD DEFENDANT
WAITHAKA KIRAGU 4TH DEFENDANT
JOSEPH OMOLO 5TH DEFENDANT
DAVID NGUNJIRI 6TH DEFENDANT
SAMMY TUTU 7TH DEFENDANT
JOSEPH OTIENO 8TH DEFENDANT
JOE OWINO 9TH DEFENDANT
NJOROGE KIRAGI 10TH DEFENDANT
DANSON MUNGAI 11TH DEFENDANT
FELIX WAMBUA 12TH DEFENDANT
SIMON KURIA 13TH DEFENDANT
KANGETHE MUNYIRI 14TH DEFENDANT



SILVENUS ONDEGO	15 TH DEFENDANT
PETER GATHONGO	16 TH DEFENDANT
NELSON ODHIAMBO	17 TH DEFENDANT
GITAU KAMAU	18 TH DEFENDANT
GIDEON KILELI	19 TH DEFENDANT
CYPREAN ODONGO	20 TH DEFENDANT
FRANCIS ANJANG	21 ST DEFENDANT
SYLVESTA MUSYOKA	22 ND DEFENDANT
WILSON ODERA	23 RD DEFENDANT
PAUL OMOLO	24 TH DEFENDANT
NJOROGE NYOIKE	25 TH DEFENDANT
FRED OGINA	26 TH DEFENDANT
CHRISTOPHER MACUKA	27 TH DEFENDANT
MOSES NDUNG’U NDIANGUI	28 TH DEFENDANT
JACKSON NGIGI	29 TH DEFENDANT

AND

JAMA MUSA HUSSEIN	INTERESTED PARTY
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JUDGMENT

1. Vide a Further Amended Complaint dated 21st August, 2009, the Plaintiff seeks the following reliefs against the Defendants;
 - a. An eviction order against the Defendants
 - b. The OCS Pangani Police Station to enforce the order
 - c. Cost of the Suit
 - d. Damages for trespass and loss of income
 - e. Any other or further relief this Honourable Court may grant.
2. The Plaintiffs’ case is that they were at all material times the registered owners of the piece of land known as L.R. No. 209/8943 (the suit property); that the Defendants entered into the land without their permission, trespassing upon it and continuously carrying out garage business unlawfully thereby degrading the land and that as a result of the Defendants’ unlawful and illegal occupation of their parcel of land, they have been denied access and use of their plot thereby causing them loss of income.
3. The 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 13th and 27th Defendants entered appearance by way of a Memorandum of Appearance filed in court on 3rd March, 2006 by the firm of S.J. Nyang & Company Advocates, and filed a Statement of Defence of the same date.



4. In the Defence, the Defendants denied all the averments in the Further Amended Plaint. The Defendants averred that the Further Amended Plaint was incurably defective for failure to comply Order VII Rule 1 (1)(e) of the Civil Procedure Rules and ought to be struck out with costs.
5. It is the Defendants' case that the Old Race Course Jua Kali Association (hereinafter, "the Jua Kali Association") has 127 Members and their families and that the Jua Kali Association was legally authorised to occupy the suit property by the City Council of Nairobi in January, 1988 and its members have been operating thereon to date and that the Ministry of Lands as well as the Ministry of Culture & Social Services and Ministry of Labour are all aware that the suit property belongs to them.
6. The Defendants averred that the City Council of Nairobi has always issued them with a license to operate their business on the suit property and all their families rely on the said business for their livelihood; that they have on various occasions petitioned the Land Registrar for registration to no avail and that they shall contend that the Plaintiffs fraudulently, irregularly and maliciously registered the suit property in their names with the help of one Winston Muturi Thandi (deceased) who at the time worked for the Ministry of Lands.
7. It is the Defendant's case that they are entitled to the suit property by way of Adverse Possession having occupied it from 1988 to date without anyone challenging their presence or ownership. The Defendants denied being served with a demand or notice of intention to sue and urged the court to dismiss the Plaintiffs' suit with costs.

Hearing and Evidence

8. The matter proceeded for hearing on 19th October, 2022. Sarah Wangari Maina, PW1, testified that the members of the Plaintiff's group have houses in the Old Racecourse Estate which is organised into Phase I – III; that she owns a house therein and was the chairlady of the Old Racecourse Residents Group for 12 years and that in 1988, there were open spaces for recreational purposes which included a parking area.
9. It was the evidence of PW1 that the open spaces were for specific uses for a church, a nursery school and a clinic; that the suit property, L.R. No. 209/8943, was allocated to the residents of Old Race Course Estate for purposes of children's playground and that vide a letter dated 29th October, the Ministry of Lands allowed the residents to level and fence the suit property which they did.
10. It was PW1's testimony that in the year 1994, the Defendants moved into the suit property at night and set up garages and refused to vacate despite demands from the residents of Old Racecourse Estate (hereinafter "The Residents") and the Ministry of Lands to do so and that the mechanics, who are the Defendants, were allowed on the plots by the City Council and that the Defendants encroached on the space meant for recreational purposes and destroyed the fence put up by the Residents.
11. It was averred by PW1 that at the time the Residents did not have a title to the suit property because the Government never issued titles for public utility land for recreational purposes; that when this changed, the Residents pursued issuance of the title deed for the suit property and that after a long drawn out process, they managed to be registered as proprietors thereof on 9th December, 2003.
12. PW1 stated that the members of the Resident's Association continued pushing to have the Defendants move out of the suit property to which they had now obtained a title and that she has a letter from the City Council of Nairobi City Planning Department dated 20th February, 2002 stating that its Physical Planning Liaison Committee had resolved that the suit property revert back to the original designated use as a public utility.



13. According to PW1, the residents cannot develop the suit property for recreational use; that there have been concerns over the sharp rise in insecurity as the residents have no control over who can access the property and that additionally, the suit property lacks the proper infrastructure for a garage which has led to environmental degradation of the suit property causing heavy air pollution and clogged drains leading to heavy flooding when it rains.
14. The Defendants, despite entering appearance and filing a Defence as well as witness statements, did not attend court on 19th day of October, 2022 when the matter came up for hearing. The court closed their case and directed parties to file submissions.

Submissions

15. The Plaintiffs' advocate submitted that the suit property was lawfully allotted to the Plaintiffs vide a letter of allotment dated 8th May, 2003 and that they were duly registered as the proprietors; that from the title that was issued, the suit property's intended use is for recreational purposes and that under Section 26 of the *Land Registration Act*, the "Certificate issued by the Registrar is prima facie evidence of the Plaintiffs' absolute and indefeasible ownership of the suit property.
16. It was submitted by counsel for the Plaintiffs that the Defendants have not produced any evidence of the alleged fraud, malice and irregularity in obtaining the title to the suit property.
17. Counsel for the Plaintiffs submitted that the Plaintiffs had set out in elaborate detail the process they followed to acquire the title for the suit property and that the Defendants' failure to attend court on the date of hearing raises a presumption that they have admitted the Plaintiffs' ownership of the suit property.
18. Counsel further submitted that they had already been legally allotted the suit property and the Defendants cannot therefore claim to be proprietors thereof. Counsel relied on the case of M'Ikiara M'Rinkanya & Another vs Gilbert Kabeere M'Mbijiwe (1982-1988)1 KAR 196 where it was held that where there is a double allocation, the first allocation prevails.
19. On the issue of damages for trespass, Counsel submitted that the Plaintiffs were entitled to damages for trespass to their property; that the Defendants' occupation of the suit property had resulted in environmental degradation thereof and that the Defendants ought to be evicted from the suit property. It was submitted that the Defendants having oppressed the Plaintiffs for many years, they ought to bear the costs of the suit.
20. Counsel for the 1st, 2nd, 5th and 13th Defendants submitted that the Plaintiffs only managed to obtain registration of the suit property in their names through the connections of Mr. Winston Muturi Thandi, one of its Trustees, who at the time worked with the Ministry of Lands and that the process of acquisition of the land was fraudulent, malicious and illegal since it was done in total disregard of the Defendants' existence and occupation of the land.
21. Counsel for the 1st, 2nd, 5th and 13th Defendants submitted that the Jua Kali Association, registered in 1995, was issued with a business permit by the City Council of Nairobi to operate an open air garage on the suit property and that the permit was issued to them as residents of Old Race Course Estate and legal occupants of the suit property despite the title being issued to the Plaintiffs.
22. It was submitted that the Defendants ought to have been involved in the process of registration of the suit property, which was done in favour of the Plaintiffs despite the Jua Kali Association's members having been in occupation and use of the suit property and having commenced the process of allotment in 1988 as opposed to the Plaintiffs who commenced their process in 2003.



23. It was the Defendants' submissions that the suit property harbours more than 300 families that would be rendered jobless on evacuation; that the court cannot use an irregularly acquired title to evict them from the suit property; and that the court should make a determination that only the 1st, 2nd, 5th and 13th Defendant are entitled to the suit property.
24. On the issue of Adverse Possession, the 1st, 2nd, 5th and 13th Defendants' Counsel submitted that the Defendants have been in legal and uncontested occupation of the suit property since 1988; that this is evidenced by the formation of their Jua Kali Association and issuance of business permits and that the suit property was originally public utility land which could not be registered in the name of an individual.

Analysis and Determination

25. The Court has considered the pleadings, the evidence produced and the submissions of the parties. The issues that arise for determination are:-
 - i. Whether the Plaintiffs are entitled to the suit property?
 - ii. Whether the Defendants are entitled to the suit property by way of adverse possession?
 - iii. Whether the Plaintiffs are entitled to damages for trespass and loss of income? and
 - iv. Costs of the suit.
26. Before embarking on the merits of the case, it must be pointed out that as much as the Plaintiffs are required to adduce evidence in support of their case at the hearing, the Defendants are equally under an obligation to adduce evidence to prove the averments made in their pleadings.
27. Pleadings do not prove an allegation which can lead to the entry of judgment, unless the claim is undefended and is for liquidated damages. It is clear from the record that on the date the matter came up for hearing on 19th October, 2022, the Defendants and their Advocate failed to attend court.
28. This court being satisfied that the Defendants and their counsel had sufficient notice of the hearing closed the Defendants' case. As a result, none of the Defendants testified, neither did they call any witnesses.
29. Since no evidence was adduced on behalf of the Defendants, it follows that the averments contained in the Defendants' Statement of Defence filed in this suit remains mere allegations. In *North End Trading Company Limited (Carrying on the Business Under the Registered Name of) Kenya Refuse Handlers Limited vs City Council of Nairobi* (2019) eKLR, the court held as follows:

“Section 107 of the *Evidence Act* (Cap 80) Laws of Kenya provides:-

‘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.’

It is settled law in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue.”

30. The Court in the *North End Trading* case (supra) also cited the case of *Edward Muriga through Stanley Muriga vs Nathaniel D. Schulner* (1997) eKLR, where it was held that the respondents did not give



evidence and so the only explanation as to how the accident happened was the version put forward by the appellant and his brother.

31. However, whether or not the Defendants adduced evidence, the Plaintiffs' case needs to be proved. Thus, the Plaintiffs still have the onus of proving their case on a balance of probabilities.
32. The Plaintiffs have through their evidence laid out in great detail the process they followed to acquire the title to the suit property. The evidence by the Plaintiffs shows what happened from the initial interactions in 1992 when they were allowed by the Ministry of Lands vide a letter dated 29th October, 1992 to level and fence the suit property to be used as a playfield and a resting place for members of the Public, to the issuance of an allotment letter.
33. The Plaintiffs produced in evidence a letter from the City Council of Nairobi City Planning department dated 20th February, 2002 showing that the use of the land would revert to public utility. This letter also communicated the Council's request to the Commissioner of Lands to issue the Residents with a letter of allotment, and inquired whether this had been done.
34. The Plaintiffs also produced in evidence the Letter of Allotment dated 8th May, 2003 and the Certificate of Title issued thereafter on 9th December of the same year, as well as the various complaints in respect of the Defendants' occupation of the suit property. All these documents provide the paper trail documenting the Plaintiffs' journey towards acquiring the suit property.
35. The Certificate of Title produced by the Plaintiffs shows that it was issued on 9th day of December, 2003. The registration of the Plaintiffs as the proprietors of suit property vested in them the rights set out at Section 24 (a) of the [Land Registration Act](#) which 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.”

36. The effects of such registration are given under Section 26 of the said Act 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.”

37. This means that the indefeasibility of the Plaintiffs' title could only be challenged on the grounds enunciated above. In this matter, the Plaintiffs' title has been challenged on the grounds that it was acquired by a process fraught with fraud, malice and illegality/irregularity.
38. It is trite that allegations of fraud must not only be pleaded and particularized but must also be proved to a standard of proof that is higher than on a balance of probability. This is crystallised under Order 2



Rule 11 of the Civil Procedure Rules which obligates parties to plead fraud and or misrepresentation, and prove the same.

39. In *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) vs Stephen Njoroge Macharia* (2020) eKLR, the Court of Appeal held as follows:

“In the instant case, the appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud in the transaction leading to the transfer and registration of the suit land in the name of Janet all the way to the respondent. That the trio were parties to the fraud or had knowledge of it...Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities.”

40. In *Gladys Wanjiru Ngacha vs Teresa Chepsaat & 4 others* [2013] eKLR, the Court of Appeal had this to say on the issue of proof of allegations of fraud:

“In *R. G. Patel vs. Lalji Makani* (1957) E.A. 314, the predecessor of this Court at pg 317 held:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In *Mutsonga vs. Nyati* (1984) KLR 425, at pg 439, this Court held: “Whether there is any evidence to support an allegation of fraud is a question of fact”. We find that the appellant did not prove fraud on the part of the respondents.”

41. Although the allegation of fraud was raised in the Defence, the particulars of the alleged fraud were not stated. Further, the Defendants’ failure to testify means that they did not discharge their burden of proof with respect to the allegations of fraud on the part of the Plaintiffs.
42. Based on the documentary evidence produced by the Plaintiffs it is clear that they have discharged their burden. This court therefore finds that the Plaintiffs have established that they are the registered proprietors of the suit property, having lawfully obtained the title.
43. The Defendants have also claimed in the Defence that they are entitled to the suit property by way of adverse possession, having been on the suit property since 1988. To the extent that the Defendants did not testify, and considering that no evidence was produced to support this claim, the same remains unsubstantiated.
44. In any event, an order for adverse possession can only be made against a duly registered owner of land so that the order would then result in extinguishing the registered owner’s title to the land. The Court of Appeal in *Benson Mukuwa Wachira vs Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR cited with approval the case of *Amos Weru Murigu vs Marata Wangari Kambi and Another* (H.C.C.C. No. 33 of 2002 (O.S) (at Kakamega) where it was held that:-

“adverse possession can only arise where land is registered in the name of the person against whom the claim for adverse possession is made for the simple reason that land must be



occupied by a trespassing claimant adversely to the title of the owner (proprietor) against whom the claim is made under Section 38 of the *Limitation of Actions Act*.”

45. This therefore means that at the date of institution of the suit for adverse possession, there must be in existence a title which the court can declare to be extinguished by adverse possession under Section 38(1) of the *Limitation of Actions Act*.
46. The Plaintiffs’ Letter of Allotment was issued on 8th May, 2003 whereas the title was issued on 9th December, 2003. Going by the above case law, time for adverse possession could not have started to run before the Plaintiffs were registered as the proprietors of the suit property on 9th December, 2003.
47. Case law dictates that the filing of a suit asserting rights over land stops time from running in adverse possession (see Stephen Mwangi Gatunge vs Edwin Onesmus Wanjau (Suing in her capacity as the administrator of the estates of Kimingi Wariera (Deceased) and of Mwangi Kimingi (Deceased) [2022] eKLR as well as Njuguna Ndatho vs Maasai Itumo & 2 others [2002] eKLR et cetera).
48. This suit having been initially filed in the year 2005, a mere two years after the issuance of the title, it means 12 years had not lapsed for the Defendants to have acquired adverse possessory rights over the suit property. This claim must therefore fail.
49. The claim for Adverse Possession having failed, the court now needs to determine whether the Plaintiffs are entitled to an order for eviction of the Defendants from the suit property.
50. The Plaintiffs have submitted that being the registered proprietors of the suit property, they are entitled to the protection under Sections 24, 25 and 26 of the *Land Registration Act*. The Plaintiffs’ evidence on that front stands uncontroverted.
51. Section 24 (a) of the *Land Registration Act* stipulates as follows:-

“Subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
52. This court has already determined that the Plaintiffs’ Certificate of Title is valid, and is conclusive and prima facie evidence that they are indeed the registered and absolute proprietors of the suit property, being L.R. No. 209/8943. The Plaintiffs are vested with rights and interests flowing from that registration. One such right is that they are entitled to enjoy quiet and peaceful possession of their property.
53. The Defendants have by their own admission acknowledged the fact that they are in occupation of the Plaintiffs’ property. This is also evidenced by the minutes of the meeting held on 21st June, 2004 between the members of the Residents’ Association (the Plaintiffs), Members of the Jua Kali Association (the Defendants) and the District Officer, Central Division Nairobi whose Agenda was to confirm the ownership of the open ground where the Jua Kali garage is situated at Old Racecourse Estate.
54. At MIN. 2/2004 thereof, it is indicated that:-

“The Old Racecourse members informed the District Officer that the open ground in question was meant for recreation and that the residents had acquired a title for the same. This being the case the members of Jua Kali requested to be given time to vacate. They were given seven days’ notice with effect from 21st June, 2004.”



55. The Defendants having been informed of the fact of registration of the title in favour of the Plaintiffs, and having been requested to leave the suit property, their continued presence thereon constitutes trespass within the meaning of Section 3(3) of the *Trespass Act*.
56. The Defendants have despite demands from the Plaintiffs, who are the registered owners, to vacate the suit property, refused to do so. Their refusal is a direct violation of the Plaintiffs' right to quiet and peaceful enjoyment of the suit property.
57. The Defendants' acts of trespass on the Plaintiffs' property involved the setting up of an open-air garage. The Plaintiffs have complained of the sharp rise in insecurity in the Estate due to the fact that they have no control over the people who access the suit property. In the circumstances, the Plaintiffs have prayed for damages for trespass.
58. The Court of Appeal in *Kenya Power & Lighting Company Ltd vs Ringera & 2 Others* (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR) (4th February 2022) (Judgment) set out a list of parameters to be applied when dealing with the issue of damages for trespass, some of which are:-

“Harlsburys Laws of England 4th Edition Vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner's land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.

Philip Ayaya Aluchio vs. Crispinus Ngayo [2014] eKLR - the measure of damages for trespass is the difference in the value of the plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less.”

59. In *Kiambu Dairy, Farmers Co-operative Society Limited vs Rhoda Njeri & 30 Others* [2018] eKLR, the court held that the extend of an award of compensatory damages lies in the discretion of the trial court and interference therewith on appeal must be approached with a measure of circumspection and well settled principles.
60. Having proved trespass, the Plaintiffs are entitled to damages. However, this court cannot feign blindness to the unique circumstances of this case. It cannot be disputed that in asserting the Plaintiffs' proprietary rights, there is a group of people whose source of livelihood will be affected by the implementation of these orders.
61. The Defendants have submitted that their families depend on the suit property to earn a livelihood. The Defendants will probably not be able to run their businesses for a while before they are able to obtain an alternative place from where to operate. This will not be without some amount of difficulty on their part, which difficulty, in these tough economic times, will no doubt reflect on their families.
62. Bearing in mind the difficulty the Defendants will be forced to bear by their eviction from the suit property and relocation of their businesses, which difficulties have already been set out above, the court is of the view that awarding damages and costs to the Plaintiffs will be akin to punishing them further, which is not desirable in the circumstances. I therefore decline to award the Plaintiffs damages for trespass and costs.



63. For the above reasons, Judgment is hereby entered in favour of the Plaintiffs against the Defendants in the following terms:
- a. The Defendants are granted six (6) months from the date of this Judgment to vacate L.R. Number 209/8943.
 - b. An order be and is hereby issued evicting the Defendants from L.R. Number 209/8943 after the lapse of six (6) months from the date of this Judgment.
 - c. The County Commandant, Nairobi Region and OCS Pangani Police Station to enforce the order of eviction.
 - d. Each party to bear his/its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF FEBRUARY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Imbwage holding brief for Mburu for Defendants

No appearance for Plaintiff

Court Assistant – Tracy

