



REPUBLIC OF KENYA



KENYA LAW
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**Mbuthi v Osman & another (Environment & Land Case E004 of 2022)
[2024] KEELC 387 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 387 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E004 OF 2022**

JA MOGENI, J

FEBRUARY 1, 2024

BETWEEN

JESEE MUGO MBUTHI PLAINTIFF

AND

MUNYA OSMAN 1ST DEFENDANT

JULIANA MUTISO 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated 29/11/2021 the Plaintiff herein sought for Judgment against the Defendants jointly and severally for the following orders: -
 - a. A declaration that the plaintiff is the legal beneficial and registered owner of the suit property known as Plot No A 49 Kayole Shopping Centre (Extension) and also known as LR No. Nairobi/Block 190/3072.
 - b. An order for immediate eviction of the defendants and all persons claiming under them from the suit property and removal of all their illegal developments therein including excavations at their own cost and restoring the property with vacant possession to the plaintiff.
 - c. A permanent injunction restraining the defendants and all persons claiming under them from interfering with the plaintiff's use enjoyment and quiet possession of the suit property or continuing to commit further acts of trespass and encroachment thereon.
 - d. A declaration that any documents issued to the defendants for the suit property, if any, are illegal, irregular, null and void and an order for the immediate cancellation of the same.
 - e. General damages for trespass.
 - f. Costs of the suit together with interest thereon.



- g. Any further or other relief that this honorable court may deem just to grant.
2. The suit is not opposed. Despite being served with the court process; the Defendants did not enter appearance or file a defence. In consequence and pursuant to Order 10 Rule 9 of the [Civil Procedure Rules](#), the case was set down for formal proof hearing on 3/10/2023.

Plaintiff's Case

3. It is the plaintiff's case that at all material times relevant to this suit, the plaintiff has been the legally registered proprietor for the leasehold interest of the property known as LR No. Nairobi/Block 190/3072- Nairobi District Land Registry (herein after referred to as the suit property) measuring 0.017 hectares, located in Kayole, Nairobi and previously known as plot No. A - 49 Kayole Shopping Centre (Extension) vide letter of allotment from the Nairobi City Council (as it then was) dated 19/07/2003.
4. He avers that pursuant to the allocation of the suit property to the plaintiff by the City Council as aforesaid, the plaintiff took possession of the property and paid the allotment fees, the ground rent, and rates due and was issued with the relevant receipts by the Council. The plaintiff also proceeded to lay a foundation for a building therein and build three layers of stone.
5. It is his case that in October 2019, the plaintiff found some other construction going on in the suit property without his consent or knowledge. He reported the encroachment and trespass to the sub-county administrators' office, Kayole who summoned the owners of the strange construction to his office. The plaintiff got to know during this meeting at the sub-county office that the owners of the illegal construction and the encroachment and trespass to his suit property were the defendants. The plaintiff then held discussions with the defendants who agreed orally in the presence of the sub-county officials, that their plot was A-77 Kayole and not A-49 Kayole and they would stop further developments on the plaintiff's plot A-49 Kayole.
6. That despite the oral agreement and confirmation that the plaintiff's plot A-49 Kayole was not their plot, the defendants continued with construction on the plaintiff's plot and have failed to date to stop the said trespass and encroachment on the plaintiff's plot A-49 Kayole later known as Nairobi/Block 190/3072 by virtue of the certificate of lease issued to the plaintiff by the Land Registry, Nairobi. The plaintiff avers that the said construction is illegal and unsanctioned by the relevant authorities and himself as owner of the suit property.
7. The plaintiff contended that he has never executed any contract and/or at all entered into any legally binding agreement with the defendants jointly or individually over the occupation and/or utilization of the said property or at all to allow them to enter, use and carry on developments therein.
8. The plaintiff avers that the defendants jointly or severally have commenced and continued construction over the property illegally despite his protest and without any proper authority and/or requisite permissions from the Nairobi City County, NEMA, nor NCA, and without the authority or consent of the plaintiff. The plaintiff therefore pleads trespass and illegal construction against the defendants.
9. He listed the particulars of illegality and trespass by the 1st and 2nd defendants as follows: The defendants without any authority whatsoever have entered upon the plaintiff's suit property known LR No. Nairobi/Block 190/3072- Nairobi District Land Registry previously known as Plot No. A -49 Kayole Shopping Centre (Extension) and illegally commenced construction without any authority from the plaintiff, entering the plaintiff's suit property without any color of right, continuing with an illegal development on the suit property while they knew or ought to have known that their plot number was a different one from that of the plaintiff, the 1st and 2nd defendants without any



legal authority have entered the plaintiff's property and have deliberately caused the dumping of construction materials on the suit property and the building of illegal structures without the relevant approvals, continuing with construction despite the protest from the plaintiff and summons by their sub county office and acknowledgement that they were constructing on the plaintiff's suit property and not their own and an agreement to stop further developments, causing an illegal development to be erected on the plaintiff's suit property and depriving the plaintiff of his right to quiet possession, use and enjoyment of the suit property.

10. The plaintiff continues to be prejudiced and suffer loss in light of the 1st and 2nd Defendants breach of his property rights, and the illegality and trespass.
11. The plaintiff avers that there is no other suit pending, and that there have been no previous proceedings, in any Court between the plaintiff and the defendants over the same subject matter except Nairobi ELC No. 3 of 2020 which was withdrawn on a technicality, without being heard and determined.

Evidence by the Plaintiff

12. The case proceeded as an undefended case under Order 10 Rule 9 of the Civil Procedure Rules. The Plaintiff testified as PW1. He gave evidence that he resides in Nakuru and confirmed that he is the plaintiff. He adopted his witness statement dated 29/1/2021 and relied on list and bundle of documents dated 29/11/2021 as his evidence. He also produced the originals in court.
13. It was his testimony that his claim is for Plot No. A-49 new number is Nairobi/Block 190/3072. He testified that his claim is as per the plaint and he would like the defendants evicted. He went to the plot with a surveyor. He added that the 1st defendant had said that he would make away but he continued with the construction on the wrong plot. He has not done the search. He was allocated in 2010 and he applied for the lease. He surrendered the allotment letter and applied for the lease in 2019.
14. With that evidence, the Plaintiff closed his case.
15. At the close of the hearing, the Court gave directions on filing of written submissions, which counsel for the plaintiff did and I have taken note of them. The plaintiff's written submissions dated 14/11/2023 were filed on 28/11/2023.

Analysis and Determination

16. With the foregoing outline of the pleadings, litigation history, evidence, submissions and of course the relevant law, I must now decide the suit.
17. The main issue for determination is whether the Plaintiff has proved his case against the Defendants to the required standard.
18. Although the suit was undefended, the Plaintiff has a duty to formally prove his case on a balance of probabilities as is required by law.
19. In the case of *Kirugi and Another v Kabiya & 3 others* (1987) KLR 347 the Court of Appeal held that;

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”



20. Similarly, 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 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.”

21. Proof of ownership of land is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities, but the court must be left in no doubt that the holder of the documents proved is the one entitled to the property.

22. It is the Plaintiff’s case that he is the legally registered proprietor for the leasehold interest of the property known as LR No. Nairobi/Block 190/3072 Nairobi measuring 0.017 hectares, located in Kayole, Nairobi and previously known as plot No. A - 49 Kayole Shopping Centre (Extension) vide letter of allotment from the Nairobi City Council (as it then was) dated 19/07/2003. That pursuant to the allocation of the suit property to the plaintiff by the City Council as aforesaid, the plaintiff took possession of the property and paid the allotment fees, the ground rent, and rates due and was issued with the relevant receipts by the Council. From the documentary evidence vide the copy of the certificate of lease for Title No. Nairobi/Block 190/3072 marked as “JMM1”, it is evident that the plaintiff was registered as the proprietor of the suit property on 4/11/2019. The title document was issued on the same day.

23. The Plaintiff has also adduced documentary evidence of the letter of allotment dated 17/07/2003 which alludes that Kshs. 27,400 had been paid on 9/04/2010 on the face of the letter. The Plaintiff also produced various receipts of payments made to the city council for Plot A-49; receipt no. 145051 dated 9/04/2010 for Kshs. 10,000 on account of Plot A-49 paid by the Plaintiff, receipt no. 145052 for Kshs. 17,400 dated 9/04/2010 on account of Plot A-49 paid by the Plaintiff, receipt no. 317626 dated 23/03/2014 for Kshs. 11,280 on account of Plot A-49 paid by the Plaintiff and receipt no. 039067 dated 24/01/2017 for Kshs. 8,640 on account of Plot A-49 paid by the Plaintiff. The Plaintiff produced a statement of account by the Nairobi city council dated 15/10/2013 for plot A-49 which demonstrates that the Plaintiff is the account holder of Plot No. A-49.

24. From the foregoing, I am persuaded that the documents produced in support of the Plaintiff’s suit have met the evidentiary threshold for proof of title to land. It therefore followed that the plaintiff was allotted the suit property known as Plot No. A-49 and no one else could be allotted. See the case of *Rukaya Ali Mohamed v David Gikonyo Nambacha & Another* (Kisumu HCCA No. 9 of 2009, where the Court held that: -

“Once (an) allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment, since a letter of allotment confers (an) absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation, or that the allotment was out rightly illegal or it was against the public interest.”

25. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.



26. In addition to the above, the law is very clear on the position of a holder of a title in respect to the land. Section 24(a) of the [Land Registration Act](#) provides for the interest conferred by registration. It provides;
- “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 the rights and privileges belonging or apparent thereto.”
27. Section 26(1) of the [Land Registration Act](#) provides as follows:
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is 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.”
28. The Plaintiff has proved that he is indeed the registered owner of the suit property and therefore the rightful owners having been allotted the suit property by the Nairobi City Council vide letter of allotment dated 19/07/2003.
29. The Plaintiff having been able to show the root of their title, the Court finds and holds that he has then proved that it is the absolute and indefeasible owner of the suit property.
30. Having found that the Plaintiff is the absolute and indefeasible owner of the suit property, then the Court finds that the Plaintiff is entitled to enjoy the rights of an absolute owner of the property as provided by Section 24 and 25 of the [Land Registration Act](#). As the Court finds that the Plaintiff acquired his allocation and registration regularly and without any evidence of fraud, then it is evident that the Plaintiff is entitled to protection of his property as provided by Article 40 of [the Constitution](#) and therefore entitled to the Injunction orders sought.
31. There was no evidence availed by the Defendant to prove that the Plaintiff acquired the suit land illegally. However, the Plaintiff has proved on the required standard what he had alleged – that the suit property belongs to him. I find that the Plaintiff is entitled to all the rights, interest and privileges that pertain to the suit property. The Plaintiff is therefore entitled to prayers (a), (b), (c) and (d) as sought.
32. On the prayer for general damages for trespass, it is the Plaintiff’s case that it was only sometime in October 2019 that he found some other construction going on in the suit property without his consent and knowledge. It is his case that he reported the encroachment and trespass to the sub-county administrators’ office, Kayole. The Plaintiff’s counsel also relied on the case of [Keiyian Group Ranch v Samuel Oruta and 9 Others](#) ELC 05 of 2021 Kilgoris in his prayer for general damages for trespass.
33. I note that the Plaintiff claimed to have begun construction of a building but failed to adduce the approvals of the City Council to support this claim. Further, in the case aforementioned authority that the Plaintiff totally relies on, the Land Registrar conducted a cite visit to the property to determine the boundary and the extent of encroachment. There was also a sub-county surveyor’s report and a sketch map filed before that Court outlining the boundary features between the two sides and the extent of the



encroachment. No such evidence has been adduced before me in the present case. No encroachment has been established or proved by the plaintiff herein.

34. The Plaintiff only produced his official complaint letter dated 21/11/2019 to the sub-county administrator, Embakasi Central wherein he complained of encroachment. No evidence of the alleged encroachment was annexed. The other evidence before me is a letter ref no. EC/PO/8/11/2019 dated 21/11/2019 from the sub-county administrator – Embakasi Central addressed to the Assistant Director – site and scheme wherein the sub-county administrator – Embakasi Central informed the recipient of the letter of a complaint registered in his office regarding two plots. That parties have laid claim to the same plot with different numbers. He requested the recipient to solve the dispute by sending a surveyor to identify the respective plots and furnish him with a report. No report has been produced before me to establish if this dispute was solved or attended to. There is no evidence demonstrating whether the surveyor ever went to the plot to solve the issue. To me, the evidence before me is not sufficient to prove trespass. To this end, the court finds that the Plaintiff never furnished the court with evidence on the damages he had suffered. The Plaintiff did not provide the value with which the Court is to work with. I will decline to award them the same.
35. Section 27 of the *Civil Procedure Act* gives the Court the discretion to grant costs. It is trite that costs usually follow the events. In this instant case, the Plaintiff is the successful party and is therefore entitled to the costs of the suit.

Final Orders

36. Having carefully considered the pleadings herein, the available evidence, the exhibits produced in Court, the written submissions and the relevant provisions of the law, the Court finds that the Plaintiffs has proved his case on the required standard of balance of probabilities.
37. Consequently, the Court enters Judgement for the Plaintiff against the Defendants jointly and severally as prayed in the Plaint dated 29/11/2021, in the following terms of prayers (a), (b), (c), (d) and (f): -
- a. A declaration be and is hereby issued that the plaintiff is the legal beneficial and registered owner of the suit property known as Plot No. A 49 Kayole Shopping Centre (Extension) and also known as LR No. Nairobi/block 190/3072.
 - b. An immediate eviction order be and is hereby issued directed to the defendants and all persons claiming under them ordering them to vacate from the suit property and removal of all their illegal developments therein including excavations at their own cost and restoring the property with vacant possession to the plaintiff.
 - c. A permanent injunction be and is hereby issued restraining the defendants and all persons claiming under them from interfering with the plaintiff's use enjoyment and quiet possession of the suit property or continuing to commit further acts of trespass and encroachment thereon.
 - d. I award the Plaintiff the costs of the suit plus interest from the date hereof until payment in full.
- It is so ordered.

DATED, SIGNED AND DELIVERED THIS 1st DAY OF FEBRUARY 2024.

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**MOGENI J.
JUDGE**



In the virtual presence of ;-

Mrs Maria for the Plaintiff

No appearance for the Defendant

Caroline Sagina : Court Assistant

