



Mbuthia & 2 others (Suing for and on behalf of Mpeketoni Jua Kali Savings & Credit Cooperative Society Limited) v Kilonzi & 4 others (Environment & Land Case 16 of 2020) [2023] KEELC 669 (KLR) (6 February 2023) (Judgment)

Neutral citation: [2023] KEELC 669 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 16 OF 2020
MAO ODENY, J
FEBRUARY 6, 2023**

BETWEEN

**BENSON CHEGE MBUTHIA 1ST PLAINTIFF
SIMON MUCHIRA GACHOKI 2ND PLAINTIFF
LUCAS NG'ANG'A JOHN 3RD PLAINTIFF
SUING FOR AND ON BEHALF OF MPEKETONI JUA KALI SAVINGS &
CREDIT COOPERATIVE SOCIETY LIMITED**

AND

**DANIEL KILONZI 1ST DEFENDANT
CHARLES MAINA MVITA 2ND DEFENDANT
PETER IKENYE KWERI 3RD DEFENDANT
JOHN MACHARIA 4TH DEFENDANT
PETER NJAU 5TH DEFENDANT**

JUDGMENT

1. By a Plaint dated February 18, 2020 the plaintiff's herein sued the defendants seeking the following orders: -
 - a. A permanent injunction restraining the defendants by themselves, their agents, servants, representatives, assigns or any other person claiming under them from claiming ownership, selling, alienating, disposing of, transferring, wasting, trespassing, fencing, encroaching, erecting temporary and/or permanent structures and/or interfering in any way or from



adversely dealing with all that commercial plot known as plot no 707 situated at Jua Kali area in Mpeketoni within Lamu County.

- b. A declaration that all that commercial plot known as plot no 707 situated at Jua Kali area in Mpeketoni within Lamu County belongs to the plaintiffs and a further order directing and compelling the 5th defendant herein to demolish and remove the semi-permanent wooden workshop erected on the plaintiffs' plot and give vacant possession of the suit property to the plaintiffs.
- c. Costs of the suit.
- d. Any other or further relief that the court shall deem fit and just to grant.

Plaintiffs' case

2. PW1 Benson Chege Mbuthia adopted his written statement dated February 18, 2020 and stated that he had been authorized by the plaintiff society to file the present suit. He testified that the society bought the suit property plot No 707 measuring approximately 0.01 hectares for a consideration of kshs 600,000/- from Mpeketoni electricity project as per the sale agreement dated November 5, 2018. PW1 also produced exhibits 1 to 8 in support of his case.
3. It was PW1's case that sometime in January 2019, the defendants started laying claim to the suit property by refilling holes dug by the plaintiffs and that the 5th Defendant further erected a semi-permanent wooden workshop on the suit property, hindering the plaintiffs' access and use. That the defendants have since continued to trespass on the suit property causing the plaintiffs financial loss.
4. The defendants were served with summons to enter appearance but neither filed a memorandum of appearance nor a defence therefore the matter proceeded undefended.

Plaintiffs' submissions

5. Counsel submitted on indefeasibility of title as provided for under sections 24, 25, and 26 of the [Land Registration Act](#) and urged the court to find that the plaintiffs have demonstrated how they acquired the suit property hence the title is indefeasible.
6. Counsel relied on the case of *Dr Joseph Arap Ngok v Justice Moiwo Ole Keiwua & 5 others* Civil Appeal no Nairobi 60 of 1997 and submitted that the plaintiffs' registration as proprietors of the suit land bestows upon them legitimate rights over the same as they validly acquired the suit land which is undisputed.
7. On the issue whether the defendants' conduct amounts to trespass, counsel relied on an excerpt from [Clerk & Lindsell on Torts](#) 18th edition, as cited in the case of [Nyangeri Obiye Thomas v Yunuke Sakagwa & another](#) [2014] eKLR and submitted that the defendants are trespassers on the plaintiffs' parcel of land.
8. Counsel further relied on the provisions of order 7 rule 1 of the [Civil Procedure Rules](#), section 25 (i) (a) and (b) of the [Civil Procedure Act](#), and the case of [Philip Kiptoo Chemwolo & another v Augustine Kubende](#) [1986] eKLR, and submitted that there was no evidence to challenge the plaintiffs' evidence hence they are entitled to the reliefs sought.

Analysis and determination

9. The issues for determination is whether the plaintiffs are the rightful owners of commercial plot known as plot no 707 at Jua Kali area Mpeketoni and whether the 5th defendant has trespassed on the suit land.



10. The plaintiff gave evidence on how they acquired the suit property and produced a copy of letter of allotment dated August 23, 1998 in favour of Mpeketoni Electricity Project, a sale agreement dated November 5, 2018 between the trustees of Mpeketoni electricity project as the Vendor and the trustees of Mpeketoni Jua Kali Sacco as the purchaser over a property described therein as 0.01 ha portion of land excised from that entire industrial plot measuring approximately 0.02 ha situated within Mpeketoni township, pursuant to letters of allotment dated August 23, 1998.
11. The plaintiff further produced photographs showing the wooden structure erected on the suit plot by the 5th defendant. The plaintiffs having produced evidence to show that they are the rightful owners of the suit land, the defendants have no right to continue trespassing on the plaintiffs' parcel. They are restrained from further acts of trespass on the suit land.
12. The defendants were served with summons to enter appearance but failed to file any documents within the prescribe period therefore the matter proceeded undefended.
13. It is trite that even if a case in undefended a party is still under a duty to prove his/her case on a balance of probabilities as was held in the case of *Gichinga Kibutha v Caroline 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.”

14. I find that the Plaintiffs have proved their case on a balance of probabilities as their uncontroverted evidence bore weight as was held in the case of *Peter Ngigi & Another (suing as legal representative of the Estate of Joan Wambui Ngigi) v Thomas Ondiki Oduor & Another* 2019 eKLR, where the court had this to say regarding uncontroverted evidence: -

“There are many authorities that deal with the question of uncontroverted evidence, such as the situation in the present case where the defence did not show up at the trial. The general position running through such authorities is that uncontroverted evidence bears a lot of weight and a statement of defence without any evidence to support the assertions therein will amount to mere statements.”

15. Consequently, I make the following orders; -
 - a. The plaintiffs are the rightful owners of commercial plot no 707 situated at Jua Kali area in Mpeketoni within Lamu County.
 - b. A permanent injunction is hereby issued restraining the defendants by themselves, their agents, servants, representatives, assigns or any other person claiming under them from claiming ownership, selling, alienating, disposing of, transferring, wasting, trespassing, fencing, encroaching, erecting temporary and/or permanent structures and/or interfering in any way or from adversely dealing with all that commercial plot known as plot no 707 situated at Jua Kali area in Mpeketoni within Lamu County.
 - c. The 5th defendant to demolish the semi-permanent wooden structures erected on the suit plot and give vacant possession within 30 days failure to which eviction notice to issue.
 - d. Costs of the suit to be paid by the defendants.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH DAY OF FEBRUARY 2023.



M A ODENY

JUDGE

NB: In view of the Public Order no 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

