



**Njoroge v Mugobelo & 2 others (Environment & Land Case
90 of 2018) [2023] KEELC 827 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 827 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 90 OF 2018
OA ANGOTE, J
FEBRUARY 9, 2023**

BETWEEN

PETER NJUGUNA NJOROGE PLAINTIFF

AND

HARRISON ISINGA MUGOBELU 1ST DEFENDANT

**EMBAKASI PATANISHO JUA KALI ASSOCIATION (SUED THROUGH
ITS SECRETARY AND TREASURER) SAMUEL KARIUKI IRERI**

NJAGI 2ND DEFENDANT

NAIROBI CITY COUNTY 3RD DEFENDANT

JUDGMENT

1. In the amended plaint dated May 23, 2019, the Plaintiff is seeking for the following orders:
 - a. A declaration that the Plaintiff is the legal and registered owner of Land Parcel No. Nairobi/Block 167/254 situated in Kayole Patanisho within Nairobi County (hereinafter the 'suit property') and the acts of the 1st Defendant are unlawful and illegal.
 - b. An order of permanent injunction restraining the Defendants either by themselves, authorized agents, servants, employees or otherwise whomsoever from trespassing, entering, selling, transferring, alienating, mortgaging, charging, disposing, digging trenches, constructing and/or committing any other acts of waste or generally interfering with the Plaintiff's ownership, use, possession, occupation and quiet enjoyment of the suit property.
 - c. A declaration that the allocation and issuing of ownership documents if any in respect of the suit property (formerly known as Plot No. 620 Patanisho) by the 2nd and 3rd Defendants to the 1st Defendant or any other person was unlawful, illegal, fraudulent and void ab initio.



- d. An order declaring the ownership documents in respect of Plot No. 32 situated in Kayole Patanisho to be fraudulent, non-existent, forgeries and void ab initio and an order cancelling ownership documents in respect of Plot No. 32.
 - e. The 1st Defendant and his duly authorized agents be directed to refund the Plaintiff all the rents and other income derived from the suit property.
 - f. Damages for trespass.
 - g. Costs and interests of the suit.
2. The Plaintiff averred in the Plaint that he is the legal and registered owner of the suit property pursuant to a valid and lawful lease granted to him by the 3rd Defendant on September 7, 2016 and a Certificate of Lease issued on October 19, 2016. He further stated that he occupied the suit property without interference until the 1st Defendant with the approval/connivance of the 2nd and 3rd Defendants and without permission from him, unlawfully and illegally trespassed on the suit property digging trenches and constructing structures thereon.
 3. It was averred by the Plaintiff that the conduct of the Defendants is illegal, fraudulent and intended to deprive him of his property. The particulars of fraud pleaded by the Plaintiff include: issuing the 2nd Defendant with ownership documents while a lease had been granted to the Plaintiff; issuing ownership documents to the 1st Defendant for a non-existent plot and approving development plans for the suit property without any title documents.
 4. The 2nd Defendant filed a Defence in which it denied the Plaintiff's allegations as set out in the Plaint. The 2nd Defendant averred that the suit property was originally owned by the 3rd Defendant; that it had no control over how the 3rd Defendant issued ownership documents and that the suit discloses no cause of action against it and should be struck out.
 5. The 3rd Defendant filed a Defence dated July 18, 2019 in which it denied the Plaintiff's allegations as set out in the Plaint, save for admitting that according to its records, the Plaintiff is the registered owner of the suit property.

Hearing and Evidence

6. The Plaintiff testified as PW1. He produced his bundle of documents and supplementary bundle of documents as exhibits. He adopted his witness statement as part of his evidence-in-chief. It was his evidence that the current dispute relates to the suit property for which he has an allotment letter, a certified copy of a search and a Certificate of Lease.
7. It was the evidence of PW1 that he paid stamp duty for the suit property; that the 3rd Defendant wrote a letter confirming him as the owner of the suit property and that the 3rd Defendant further confirmed that construction was being undertaken on the suit property and not on Plot 32. According to PW1, documents relating to Plot 32 could not be used to allow construction on the suit property and that the suit property and Plot 32 were 400 metres apart.
8. The Plaintiff stated that the land initially belonged to the 2nd Defendant. The 2nd Defendant's chairman confirmed that the suit property had been allotted to the Plaintiff by the 3rd Defendant. However, it was his evidence that the 1st Defendant had unlawfully entered the Plaintiff's land and put up rental structures.



9. On cross-examination by the 1st Defendant's advocate, PW1 stated that he owns the suit property which is also known as Plot 620; that he does not own Plot 32 and that his construction is on the suit property and not Plot 32 whose owner is unknown.
10. With respect to the process of acquisition, PW1 testified that he had a letter of offer; that he conducted a site visit with a surveyor from the 2nd and 3rd Defendants; that he did not have the surveyor's report and that the plots were registered after payment of the requisite fees. That is when he was eventually issued with a title deed.
11. On cross-examination by the 3rd Defendant's advocate, the Plaintiff stated that the 1st Defendant was a trespasser as the 3rd Defendant had confirmed him as the owner of the suit property; that he had initially thought that the 3rd Defendant had facilitated a double allocation of his plot but later realized that it wasn't the case and that the declarations sought in the Plaintiff are in relation to the 1st Defendant and not the 3rd Defendant.

Submissions

12. The Plaintiff submitted that he had proved his case against the Defendants as his evidence had not been controverted by the 1st Defendant against whom interlocutory judgement had been entered and the Defendant who did not call witnesses.
13. The Plaintiff submitted that he had produced a Certificate of Lease and an official search proving his ownership of the suit property; that none of the Defendants had adduced any evidence to show that he had obtained the title illegally or fraudulently and that his title should be protected.
14. The Plaintiff submitted that trespass is actionable without proof of damage; that he had proven that he was the owner in possession of the suit property as his title documents had not been challenged and that the 2nd and 3rd Defendants had confirmed that he is the owner of the land.
15. The Plaintiff submitted that the 1st Defendant was unjustifiably on the suit property as he had proven that he was the owner; that the 1st Defendant put up a building on the suit property without his consent and that the 1st Defendant had also defied the orders of the court dated March 20, 2018 and July 19, 2018 in continuing with the construction of the building.
16. It was submitted by the Plaintiff that having proved trespass and impunity on the part of the 1st Defendant, he was entitled to the just and reasonable compensation of Kshs. 5,000,000.
17. The 1st Defendant filed his submissions on 1st April 2022. The 1st Defendant submitted that the Plaintiff had not proven that he is the beneficial owner of the suit property which was previously owned by the 3rd Defendant as he had not produced an offer letter from the 3rd Defendant.
18. Relying on section 107 (1) of the *Evidence Act*, the 1st Defendant submitted that the Plaintiff had not satisfactorily explained that Plot 620 was the suit property and that it was different from Plot 32 and that he had not also satisfactorily explained on which of the two plots the 1st Defendant was constructing.
19. In conclusion, the 1st Defendant relied on the cases of *Simon Lengete Ole Mashua vs Joseph Sampiroi & Another* [2020] eKLR and *Kenneth Omollo Simbiri & Another vs Daniel Ongor* [2020] eKLR to urge the Court to find that in the absence of a surveyor's report, the Plaintiff's claim that the suit property was Plot No. 620 and was the one being developed by the 1st defendant was untenable.



20. It was submitted by the 1st Defendant that no evidence was adduced to show that the 1st Defendant had been issued with ownership documents for the suit property.
21. The 2nd Defendant did not file submissions. The 3rd Defendant filed its submissions on December 6, 2021. The 3rd Defendant submitted that the allegations of fraud set out in the Plaintiff had not been strictly proved against the 3rd Defendant as required by the law.
22. Additionally, it was submitted, the Plaintiff failed to prove that the alleged trespass by the 1st Defendant was authorized by the 3rd Defendant. In conclusion and relying on the cases of *Drummond-Jackson vs British Medical Association* [1970] 1 WLR 688 and *Bishop J. Alfred Ndoricimpa vs The Standard Limited* [2001] eKLR, the 3rd Defendant submitted that it was wrongly enjoined in the proceedings and that the remedies sought are against the 1st Defendant and not the 3rd Defendant.

Analysis and Determination

23. Based on the foregoing, the following issues arise for determination:
 - a. Whether the Plaintiff should be declared the owner of the suit property.
 - b. Whether the 1st Defendant has trespassed on the Plaintiff's land.
 - c. Whether the Plaintiff is entitled to the orders Sought
24. The Plaintiff's case is that he is the legal and registered owner of the suit property pursuant to a valid and lawful lease granted to him by the 3rd Defendant on September 7, 2016 and a Certificate of Lease issued on October 19, 2016.
25. According to the Plaintiff, he occupied the suit property without interference until the 1st Defendant, with the approval/connivance of the 2nd and 3rd Defendants, unlawfully trespassed on the suit property digging trenches and constructing structures thereon.
26. The Plaintiff produced in evidence the letter dated 3rd June, 2019 in which the 3rd Defendant stated that land parcel number Nairobi/Block 167/254 formerly plot number 620 Patanisho, belongs to him. In the same letter, the Plaintiff stated that following a site visit, it established that there are ongoing construction works on plot number 620 and that parcel number Nairobi/Block 167/254 formerly plot number 620 Patanisho is distinct from plot number 32 Patanisho, now parcel number Nairobi/Block 167/11.
27. In addition to the letter by the 3rd Defendant, the Plaintiff also adduced in evidence a Certificate of Lease issued to him on October 19, 2016 for Nairobi/Block 167/254 together with an official search; the Lease that was signed by the 3rd Defendant and registered on October 19, 2016 and a letter of allotment for plot number 620 dated November 28, 2014.
28. Section 26 of the *Land Registration Act* provides 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.”

29. The Court in *Elijah Makeri Nyangw'ra vs Stephen Mungai Njuguna & another* (2013) eKLR stated as follows concerning the above section of the law:

“As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

30. Having produced in evidence a copy of the Certificate of Lease and a certified search in support of his ownership claim, and considering that none of the Defendants challenged the process through which the said title was acquired, it is the finding of this court that the Plaintiff has proved his case on a balance of probabilities.

31. Although the Plaintiff has asked the Court to cancel the alternative ownership documents relating to the above mentioned plots, and in particular documents relating to plot number 32, he failed to produce evidence as to the existence of such documents, or to show that the said plot relates to the suit property.

32. Indeed, the evidence adduced shows that Nairobi/Block 167/254 formerly plot number 620 Patanisho is distinct from plot number 32 Patanisho, now parcel number Nairobi/Block 167/11. For that reason, I decline to cancel the said title.

33. The Plaintiff is seeking for damages for trespass as against the 1st Defendant. The court in *Zacharia Onsongo Momanyi v Evans Omurwa Onchagwa* [2014] eKLR stated as follows in respect to a claim of trespass:

“I have considered the Plaintiff’s case as pleaded and the evidence tendered in support thereof. The Plaintiffs’ claim against the defendant is based on the tort of trespass. Trespass to land has been defined as consisting of “any unjustifiable intrusion by one person upon land in the possession of another”, (see, Clerk & Lindsell on Torts, 18th Edition at paragraph 18-01). Trespass is actionable at the suit of the person in possession of land and proof of ownership is a prima facie proof of possession. In this case therefore, the Plaintiff was under a duty to prove that the defendant had unjustifiably entered the suit property which was in his possession. I am satisfied from the Plaintiff’s testimony and the documents produced by the Plaintiff in evidence that the Plaintiff has proved on a balance of probability that the defendant has committed acts of trespass on the suit property.”

34. In the instant suit the Plaintiff has prima facie proven that he is in possession of the suit property having shown that he is the owner of the suit property.

35. The Plaintiff produced photographs which shows that construction is taking place on the suit property. The evidence supporting the assertion that the 1st Defendant was constructing on Plot No. 620 and not Plot 32 was a letter from the 3rd Defendant stating that that was the case. This assertion was not rebutted by the 1st Defendant. Indeed, the 1st Defendant did not produce any evidence to show that he was construction on a parcel of land which was distinct from the suit property.

36. That being the case, and trespass being actionable per se, it is the finding of this court that the 1st Defendant is entitled to damages for trespass to the tune of Kshs. 1,000,000.



37. For those reasons, the Plaintiff's suit is allowed as follows:

- a. A declaration be and is hereby issued that the Plaintiff is the legal and registered owner of land parcel No. Nairobi/Block 167/254 situated in Kayole Patanisho within Nairobi County.
- b. An order of permanent injunction be and is hereby issued restraining the Defendants either by themselves, authorized agents, servants, employees or otherwise whomsoever from trespassing, entering, selling, transferring, alienating, mortgaging, charging, disposing, digging trenches, constructing and/or committing any other acts of waste or generally interfering with the Plaintiff's ownership, use, possession, occupation and quiet enjoyment of Land Parcel No. Nairobi/Block 167/254 situated in Kayole Patanisho within Nairobi County.
- c. The 1st Defendant to pay to the Plaintiff damages for trespass of Kshs. 1,000,000.
The 1st Defendant to pay interest on the above amount at court rates from the date of this Judgment until payment in full.
- e. The 1st Defendant to pay the costs of the suit.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 9TH DAY OF FEBRUARY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Kamwendwa for the Plaintiff

Mrs Mutinda for the Defendants

Court Assistant - June

