



REPUBLIC OF KENYA



**KENYA LAW**

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**Ochieng v Owino & 3 others (Environment & Land Case E006 of 2021)  
[2023] KEELC 585 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 585 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE E006 OF 2021  
AY KOROSS, J  
FEBRUARY 9, 2023  
ORIGINALLY KISUMU ELC CASE NO. E6 OF 2020**

**BETWEEN**

**STEPHEN OMONDI OCHIENG ..... PLAINTIFF**

**AND**

**WILLIAM OCHIENG OWINO ..... 1<sup>ST</sup> DEFENDANT**

**STEPHEN OCHIENG OWINO ..... 2<sup>ND</sup> DEFENDANT**

**CHRISTOPHER JUMA OMONDI ..... 3<sup>RD</sup> DEFENDANT**

**GEORGE JUMA ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Background of the case**

1. By way of a plaint filed on 5/01/2021, the plaintiff instituted suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant died in the course of the proceedings. By an amended plaint dated June 7, 2022, the 3<sup>rd</sup> and 4<sup>th</sup> defendants were joined to these proceedings.
2. The plaintiff averred that he was the registered proprietor of land parcel no.Ugenya/Karadolo/1712 ('suit property') having purchased it from the 1<sup>st</sup> defendant on December 23, 2010 at Kshs 120,000/= wherein he paid for it by two instalments of Kshs 55,700/= and 64,300/= respectively.
3. He contended that after the purchase, the defendants trespassed on the suit property; the 3<sup>rd</sup> and 4<sup>th</sup> defendants trespassed at the behest of the 1<sup>st</sup> defendant. The reliefs he sought were inter alia, permanent injunctive orders; the removal of a caution lodged by the 2<sup>nd</sup> defendant against the suit property, eviction of the defendants, general damages and costs of the suit.



4. In response, all the defendants who acted in person filed their respective defences. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a joint one that was dated January 26, 2021. They denied the averments made in the plaint and asserted that the plaint was misconceived, bad in law, did not disclose a cause of action, an abuse of the court process and that they had never conferred any interests over the suit property to the plaintiff by way of a transfer instrument and the title documents must have been obtained fraudulently by the plaintiff and the suit property was ancestral land.
5. Both the 3<sup>rd</sup> and 4<sup>th</sup> defendants defences were dated July 15, 2022. In both defences, they denied the averments of the plaint and contended that they had purchased portions of the suit property from the 1<sup>st</sup> defendant during his lifetime; the 3<sup>rd</sup> defendant having purchased one quarter of an acre at Kshs 90,000/= on December 28, 2021 whilst the 4<sup>th</sup> defendant purchased 1 acre at Kshs 60,000/= on October 10, 2021. They urged this court not interfere with their purchased portion. According to them, the plaintiff appeared to be a land grabber and they prayed for the plaintiff's suit to be dismissed with costs.

### **Plaintiff's evidence**

6. The plaintiff testified as PW1, his testimony is contained in his oral testimony and his adopted witness statement. According to him, he purchased the entire suit property that measured 0.87 Ha. He paid the 1<sup>st</sup> installment on December 23, 2010 and the 2<sup>nd</sup> one on September 24, 2011. That sometimes in 2014, the vendor, who was the 1<sup>st</sup> defendant, trespassed on the suit property and commenced construction and when he requested him to desist, he obliged. Later, the 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant once again trespassed. His pleas to the local administration did not yield fruits.
7. In compliance with the summons that were issued against him by Ugenya, district land registrar, he attended a meeting on December 31, 2015 whereby the 1<sup>st</sup> defendant denied selling him the suit property; the issues remained unresolved.
8. Another meeting was scheduled for September 1, 2016 where he was to tender the transfer document that led to his eventual registration; this 2<sup>nd</sup> meeting was futile. On, September 12, 2019, the land registrar notified him that the 2<sup>nd</sup> defendant had lodged a caution claiming licensee interest which prompted him to file the instant suit. During the pendency of the proceedings, the 1<sup>st</sup> defendant sold portions of the suit property to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. He produced several documents in support of his case which included the alleged agreement of sale, title document, summons and notice of restriction.
9. On cross examination by the 2<sup>nd</sup> defendant, he testified that the 1<sup>st</sup> defendant transferred the suit property to him before executing the agreement of sale and the land registrar was alive to these happenings. At the time of purchase, the 1<sup>st</sup> defendant did not reside on the suit property. On cross examination by the 3<sup>rd</sup> defendant, he contradicted himself and testified that he obtained the title document after making payments on the last instalment.

### **Defendants' evidence**

10. The 2<sup>nd</sup> defendant, DW1, was stepped down after the defence counsel Ms Odera objected to him testifying apparently because he had not filed his witness statement. After being stepped down, it emerged he had filed a witness statement. The court vacated the order and issued a further hearing date of October 31, 2022; he did not attend court on that day and the defence case was marked as closed.
11. DW2, the 3<sup>rd</sup> defendant adopted his witness statement. He testified that he purchased one quarter portion acre from the 1<sup>st</sup> defendant who died on March 11, 2022. He contended the 1<sup>st</sup> defendant told



him he (1<sup>st</sup> defendant) had only sold one-acre portion of the suit property to the plaintiff and not the entire suit property and the title held by the plaintiff was a forgery. In support of his case he produced his agreement of sale.

12. During cross examination, he testified that he conducted due diligence and the official search demonstrated the suit property belonged to the 1<sup>st</sup> defendant. He later changed his mind and averred that he did not conduct an official search.
13. The 4<sup>th</sup> defendant testified as DW3. He adopted his witness statement. He corroborated the testimony of the DW2 and contended that he purchased one quarter-acre portion from the 1<sup>st</sup> defendant. He produced an agreement of sale in support of his case.
14. During cross examination, he testified that he did not know the parcel no. of the property he bought from the 1<sup>st</sup> defendant and that it was registered in the plaintiff's name.
15. DW4, Paul Oduor Alango testified that DW2 indeed bought a portion of the suit property from the 1<sup>st</sup> defendant. In cross examination, he testified that he was not present when the agreement was executed and that he did not prepare a witness statement.

#### **Parties' written submissions.**

16. As directed by the court, Ms Odera filed the plaintiff's written submissions dated November 7, 2022. Counsel submitted that the sale between the plaintiff and 1<sup>st</sup> defendant and the title documents were undisputed and by virtue of Sections 24 and 26 of the [Land Registration Act](#), the plaintiff was the absolute owner of the suit property. Section 24 provides;

‘24. Interest conferred by registration.

Subject to this Act—

- (a) 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; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.’

While Section 26 of the [Land Registration Act](#) states as follows;

“26 (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.”



17. To buttress her case, counsel placed reliance on the persuasive decision of *Margaret Njeri Wachira v Eliud Waweru Njenga* (2018) eKLR where JG Kemei, J in her obiter stated;

‘The courts are therefore mandated by statute to consider a title document as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated as above...Among the rights to be enjoyed by a registered owner of any land is the right for peaceful and quiet enjoyment of the land he owns, in other words the rightful owner to the land has a right to possession, occupation and use of the suit land.’

18. Counsel submitted that trespass was actionable per se and placed reliance on the decision of Mutungi, J in *Park Towers Ltd v John Mihamo Njika & 7 others* (2014) eKLR where the court expressed itself thus;

‘I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. ...’

19. Placing reliance on Sections 72 and 78 of the *Land Registration Act* and several decisions including *Christian Wafula Omusolo & 2 others v Pauline Jerotich & another* [2019] eKLR, counsel argued that the 2<sup>nd</sup> defendant could not claim a licensee interest after the property had changed hands in plaintiff’s favour and because the 2<sup>nd</sup> defendant was a trespasser, the restriction should be removed.

20. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed written submissions both dated November 11, 2022. The 2<sup>nd</sup> defendant introduced new evidence in his submissions. That he was a brother to the deceased, the suit property was ancestral land, probate proceedings had not been conducted over it, he was not an encroacher but a legitimate owner in occupation of one-half portion of the suit property and DW2 had purchased a portion of the suit property from the 1<sup>st</sup> defendant.

21. In his submissions, the 3<sup>rd</sup> defendant contended that it was not plausible for an agreement of sale to have been executed after a transfer over the suit property had taken place. He contended that with the demise of the deceased, he was apprehensive that he would not recoup the purchase price.

### **Analysis and Determination**

22. I have considered the pleadings, evidence by the parties including the documents they produced in support of their cases as well as their rival submissions. Being guided by the provisions of law and judicial precedents that have been well articulated in M/s. Odera’s submissions, I shall now proceed to consider the merits or otherwise of the case. The issues falling for determination are;

- I. Whether the suit against the 1<sup>st</sup> defendant was incompetent.
- II. Whether the plaintiff proved his claim of trespass against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.
- III. What orders ought to issue.
- IV. Who shall bear costs.

#### **I. Whether the suit against the 1<sup>st</sup> defendant was incompetent**

23. Notwithstanding the 1<sup>st</sup> defendant’s death certificate was not tendered before this court, it is not in doubt that the 1<sup>st</sup> defendant died on March 11, 2022; this was in the course of these proceedings. The suit against the 1<sup>st</sup> defendant has not abated, however, no effort was made to substitute the 1<sup>st</sup> defendant



with a legal representative of his estate as a party in accordance with the provisions of Order 24 Rule 4 of the *Civil Procedure Rules*.

24. The claim against the 1<sup>st</sup> defendant was in personum, appertained to land and the suit survived his death. One need look no further on the causes of action that survive a deceased defendant other than the clear statutory provisions of Section 2(1) of the *Law Reform Act* which stipulates that;

‘2. Effect of death on certain causes of action

- (1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.’

25. The propriety of the proceedings conducted after the 1<sup>st</sup> defendant died could not go unheeded by this court. Upon his demise, the rights accruing to him or any obligations owing from him can only be enforced by the duly appointed administrator of his estate. The onus will be on his administrators to determine their next cause of action. There being no such administrator appointed, I find the suit against the 1<sup>st</sup> defendant as incompetent and I hereby strike it out.

## II. Whether the plaintiff proved his claim of trespass against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants

26. I agree with M/s. Odera that by virtue of Sections 24 and 26 of the *Land Registration Act* and the persuasive decision of Margaret Njeri Wachira v Eliud Waweru Njenga (Supra) courts prima facie deem the registered owner as the proprietor. However, this right is not absolute and a title can be challenged on grounds of fraud, misrepresentation or where the certificate of title had been acquired illegally, unprocedurally or through a corrupt scheme.

27. The plaintiff did produce the title document in support of his case and on this basis, the court shall prima facie deem him as the owner unless otherwise proven. However, the court made certain observations on the plaintiff's documents which it cannot turn a blind eye upon. The manner in which the plaintiff obtained title document to the suit property is culpable. The 1<sup>st</sup> defendant seemed to have been the previous registered owner and appeared to have restlessly questioned the manner in which the plaintiff acquired the title document over the suit property. The land registrar was drawn into the impasse and on December 31, 2015, he (land registrar) informed the plaintiff to tender the transfer instruments to his office. This court is uncertain if that was complied with.

28. In his testimony, the plaintiff was inconsistent in the manner in which he acquired title to the suit property; whether it was before or after the agreement of sale. I have scrutinized the documents that were produced by the plaintiff. A plain self-explanatory reading of these documents exhibits the transfer was effected on October 22, 2009, title deed issued on 27/5/2010 and the agreement of sale between the plaintiff and 1<sup>st</sup> defendant dated December 23, 2010. The process alluded to in the documents that were produced by the plaintiff clearly raised a red flag and flew on the face of the mandatory provisions of Section 108(1) of the Repealed *Registered Land Act*, which provided that;

‘108. (1) Every disposition of land, a lease or a charge shall be effected by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve, and every person shall use a printed form issued by the Registrar unless the Registrar otherwise permits. (2) Leases and charges shall be presented for registration in triplicate.



(3) Instruments shall contain a true statement of the amount or value of the purchase price or loan or other consideration (if any), and an acknowledgement of the receipt of the consideration.’ Emphasis added.

29. Obviously, the title document acquired by the plaintiff raised more questions than answers. I empathize that the 1<sup>st</sup> defendant died before he could shed light on the issues that had been brought fore by the plaintiff. Be that as it may and in light of my findings on the 1<sup>st</sup> issue, the administrators of the estate of the 1<sup>st</sup> defendant are at liberty to pursue their interests over the suit property. I will now proceed to address the alleged trespass.
30. Section 152A of the [Land Act, 2012](#) states:-  
  
‘A person shall not unlawfully occupy Private, Community or Public Land.’
31. The case of [John K Koech v Peter Chepkwony](#) [2019] eKLR cited [Clerk & Lindsell on Torts](#) 18th Edition at paragraph 18-01 which defined trespass as follows:  
  
“ Any unjustifiable intrusion by one person upon land in possession of another”...Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession.”
32. It was the plaintiff’s testimony that the defendants at different intervals trespassed on the suit property. It is trite law that he who alleges must prove. Even if the 2<sup>nd</sup> defendant did not testify, the plaintiff had the onus to discharge prove against the 2<sup>nd</sup> to 4<sup>th</sup> defendants.
33. It is not stated in the amended plaint when the alleged encroachment occurred but from the plaintiff’s witness statement it is apparent the 2<sup>nd</sup> defendant encroached between 2014 and 2015 because during this intervening period, the plaintiff sought assistance from the local administration. Though submissions are not evidence but arguments, his counsel clarified that the 2<sup>nd</sup> defendant encroached in the year 2014. This suit was filed on 6/01/2021 which was 7 years after the event. Clearly, by the provisions of the Section 4(2) of the [Limitation of Actions Act](#), a claim of trespass must be filed within a period of 3 years. The plaintiff did not lead any evidence on whether it was a continuing trespass and it is my finding that his claim against the 2<sup>nd</sup> defendant was statutory barred.
34. The 3<sup>rd</sup> and 4<sup>th</sup> defendants by their own testimony confirmed that they ‘owned’ portions of the suit property having acquired them during the pendency of the suit. By this allusion of ‘owning’ I am not in doubt that they had trespassed on the suit property. Had they conducted due diligence, they would have established that the suit property was registered in the name of the plaintiff. Unless and until this court had pronounced itself in accord with Section 80 of the [Land Registration Act](#) and the plaintiff’s title document cancelled, the suit property was not available for sale, dealings, encroachment or otherwise. This underscores the importance of seeking legal advice before purchasing land. It is my finding that the 3<sup>rd</sup> and 4<sup>th</sup> defendants are trespassers.
35. I agree with counsel’s submissions that it is trite law that trespass is actionable per se. Counsel did not submit on the amount of general damages the plaintiff was seeking. By the agreements, it is my consideration that the trespass was barely a year and taking into account that the plaintiff did not testify that there were any damages caused by the 3<sup>rd</sup> and 4<sup>th</sup> defendants, I will award the plaintiff nominal damages of Kshs 100,000/-. The said amount shall be payable by the 3<sup>rd</sup> and 4<sup>th</sup> defendants.
36. Counsel contended that a caution lodged by the 2<sup>nd</sup> defendant should be lifted. From the official search that was produced, it was a restriction that was registered and not a caution. From the provisions of the



Section 76 (2A) of the Land Registration Act, a land registrar could register a restriction if transactions did not comply with specified conditions.

37. Earlier in this judgment, the court had raised concerns over the plaintiff's dealings over the suit property. Further, the suit property had been the subject of investigations by the land registrar and it would appear the transfer instruments were not in the parcel file hence the reason why the land registrar sought for these documents from the plaintiff. It would appear that the plaintiff did not allay the land registrars' fears. The land registrar was not joined in these proceedings.
38. There is no evidence that the plaintiff sought for the removal of the restriction in accordance with Section 78 (1) of the same Act. It would be premature for this court to lift the restriction before the plaintiff followed the laid down procedures envisaged under Section 78 of this same Act.
39. It is my ultimate finding that the plaintiff proved his case against the 3<sup>rd</sup> and 4<sup>th</sup> defendants. It is trite law costs follow the event and in the absence of special circumstances, I award him costs of the suit which for the avoidance of doubt shall be borne by the 3<sup>rd</sup> and 4<sup>th</sup> defendants. I issue the following disposal orders;
  - a. The 3<sup>rd</sup> and 4<sup>th</sup> defendants are hereby granted 90 days from the date of service of the orders of this court to remove themselves and their developments from land parcel no.Ugenya/Karadolo/1712 and give the plaintiff vacant possession, and in default, the plaintiff shall forcefully evict the 3<sup>rd</sup> and 4<sup>th</sup> defendants together with their servants or agents.
  - b. A permanent injunction be and is hereby issued restraining the 3<sup>rd</sup> and 4<sup>th</sup> defendants, their servants, agents and workers from entering or occupying, constructing, destroying, damaging or dealing whatsoever with land parcel no.Ugenya/Karadolo/1712.
  - c. General damages for trespass are ordered in the sum of Kshs 100,000/- payable by the 3<sup>rd</sup> and 4<sup>th</sup> defendants to the plaintiff.
  - d. The plaintiff's claim against the 1<sup>st</sup> defendant is struck out.
  - e. The plaintiff's claim against the 2<sup>nd</sup> defendant is dismissed.
  - f. The cost of the suit is payable by the 3<sup>rd</sup> and 4<sup>th</sup> defendant to the plaintiff.
40. For the avoidance of doubt herein, eviction of the 3<sup>rd</sup> and 4<sup>th</sup> defendants from the suit property shall be undertaken in accordance with Sections 152 B, 152E, 152F, 152G, 152H, and 152I of the Land Act.
41. Orders accordingly.

**DELIVERED AND DATED AT SIAYA THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**09/2/2023**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:**

Ms Odera for the plaintiff

2<sup>nd</sup> & 3<sup>rd</sup> defendants acting in person present

Court assistant: Ishmael Orwa

