



REPUBLIC OF KENYA



**Wanyande ((Suing as the Legal Representative of the Estate of Francis Wanyande Kidandi - Deceased)) v Ambiro (Environment & Land Case 224 of 2017) [2023] KEELC 467 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 467 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT & LAND CASE 224 OF 2017**  
**LN MBUGUA, J**  
**FEBRUARY 2, 2023**

**BETWEEN**

**JAMES ODUOR WANYANDE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF FRANCIS WANYANDE KIDANDI - DECEASED). PLAINTIFF**  
**(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF FRANCIS WANYANDE KIDANDI - DECEASED)**

**AND**

**MAURICE ODUOR AMBIRO ..... DEFENDANT**

**JUDGMENT**

1. Vide a plaint dated 21.3.2017, the plaintiff claims that the suit land parcel LR Nairobi Block/111/480 is registered in the name of one Francis Wanyande (deceased). It is further pleaded that the beneficiaries of the deceased have been in occupation of the said land since his demise in year 2015, but in February 2017, the defendant invaded the land and commenced construction of commercial premises.
2. The plaintiff therefore prays for the following orders:
  - a. Exemplary and punitive damages for trespass
  - b. A temporary injunction restraining the defendant his servants and agents from entering, remaining and working on the suit premises.
  - c. Costs of the suit.
  - d. Any other relief that the court deems fit to grant.
3. The matter proceeded as an undefended claim despite the fact that defendant was represented by an advocate from the infancy stage of this suit (see proceedings of 27.3.2017 and 31.5.2017 when a Mr



Awiti appeared for the defendant). However 4 years down the line, on 24.6.2021 the defence counsel informed the court that there was no defence on record and they desired to make an application seeking leave to file their pleading. The court adjourned the case on that day on the grounds that the previous defence counsel had passed on. The defence was granted a last adjournment.

4. A year later on 14.6.2022 the matter came up for hearing and again the defence had not filed any pleadings and in a ruling delivered on that day, the court observed that:

“The defence counsel had sufficient time almost one year to either prepare for the trial or leave the scene....”

5. With that, the defence counsel had walked out of the court room. Her client, the defendant was not in court and that is how the matter proceeded as an undefended claim.
6. James Oduor Wanyande the plaintiff testified as PW1. He adopted his witness statement dated 14.6.2020 as his evidence. He also produced the documents in his bundle dated 14.6.2020 as plaintiff exhibits 1-22, which include a copy of the limited grant ad-litem dated 20.3.2017 as well as the lease issued to Francis Wanyande dated 7.9.1990.
7. The plaintiff identified himself as a son of Francis Wanyande, the registered owner of the suit premises. He contends that the deceased purchased that land in 1990 where he proceeded to put up a residential house and a canteen. The deceased was also paying rates to Nairobi City Council. The family decided to renovate the canteen in year 2017. Just then, the defendant arrived with a vehicle KAZ 404K and commenced excavation works. This prompted the family of deceased to visit the lands office where they did a search and found that the land is still registered in the name of Francis Wanyande.

## Determination

8. I have considered all the evidence adduced herein as well as the submissions of the plaintiff. In the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, the court held that:

“It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest”.

9. Thus it behooves this court to determine the merits of the plaintiff’s claim even if the defendant has not tendered any pleadings or evidence.
10. I find that the plaintiff has availed tangible evidence by way of a lease indicating that Francis Wanyande is the registered owner of the suit land. The lease was registered way back on 7.9.1990 (see page 11 of plaintiff’s bundle). A search conducted at lands office availed at page 16 of the same bundle also shows that deceased was still the registered owner of that land as at 24.2.2017.
11. In terms of the provisions of section 25 of the *Land Registration Act*, the court takes the lease document as proof of proprietorship of the land by one Francis Wanyande. The plaintiff has a grant hence he has capacity to bring this suit. The deceased is also the rateable owner of the said land in the records of Nairobi City County. I am therefore inclined to find that the plaintiff’s claim is merited.
12. It is pertinent to note that for the better part of the lifespan of this suit, the litigation revolved around interlocutory applications, starting with the one where plaintiff sought injunctive orders restraining the defendant from constructing on the land. At the very beginning, of the suit on 27.3.2017, the court gave an order of status quo extending the same on 31.5.2017 to the effect that no further construction was to be carried out on the suit land. It is noted that by 27.3.2017, the defendant already had a counsel



representing him in court. However, five years down the line, the defendant has not deemed it fit to state his claim (the nature and extent thereof).

13. I am inclined to find that defendant had trespassed on the land of plaintiff's family, thus the latter are entitled to damages. In the case of *Duncan Nderitu Ndegwa v KP & LC Limited & another* [2013] eKLR, it was held that:

“Once trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages....”

14. In that regard, I proceed to award general damages for trespass against the plaintiffs family to the tune of Kshs 2,500,000.

15. It is noted that the defendant has to date been in occupation of the land. In the circumstances, having established that there was no justification for the trespass, then the court gives orders that defendant should leave the suit land.

16. In the final analysis, I proceed to give the following orders:

1. The defendant is hereby given 30 days to leave the suit land otherwise he is to be evicted from the said land.
2. A permanent injunction is hereby issued restraining the defendant, his servants and agents from any dealings with the suit parcel.
3. The defendant is condemned to pay damages for trespass in the sum of Kshs 2,500,000, the same to be paid to the estate of the deceased Francis Wanyande.
4. The defendant is condemned to pay costs of the suit and interest at court's rate from the date of filing of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2<sup>nd</sup> DAY OF FEBRUARY, 2023 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

**Masinde for Plaintiff**

**Ochanda for Defendant**

**Court assistant: Eddel**

