



Kamwere (Suing as Administrator of the Estate of John Kamwere Gichuhi – Deceased) & another v Nderitu (Environment & Land Case 19 of 2018) [2023] KEELC 15839 (KLR) (2 March 2023) (Judgment)

Neutral citation: [2023] KEELC 15839 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 19 OF 2018**

YM ANGIMA, J

MARCH 2, 2023

BETWEEN

RUTH WANJERI KAMWERE (SUING AS ADMINISTRATOR OF THE ESTATE OF JOHN KAMWERE GICHUHI – DECEASED) 1ST PLAINTIFF

GEORGE KIMANI & DAVID KANOGA KAGUMA (SUING AS ADMINISTRATOR OF THE ESTATE OF ELIUD KIARII KAGUMA – DECEASED) 2ND PLAINTIFF

AND

VINCENT NYINGI NDERITU DEFENDANT

JUDGMENT

A. The Plaintiff's Claim

1. By a plaint dated 21.09.2010 and amended on 19.03.2019 the Plaintiffs sought the following reliefs against the Defendant:
 - (a) A declaration that the Plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of all that piece of land known as Parcels Nos. Nyandarua/Njabini/90 & 91 (the suit properties).
 - (b) A permanent injunction restraining the Defendant whether by himself or his servants or agents or otherwise howsoever from interfering with the Plaintiffs' utility and occupation of Parcels Nos. Nyandarua/Njabini/90 & 91 (the suit properties).
 - (c) Vacant possession of the suit properties.
 - (d) General damages for trespass.



- (e) Costs of this suit.
 - (f) Any further relief that the Honourable Court may deem fit to grant.
2. The Plaintiffs sued as personal representatives of the deceased original Plaintiffs who were said to be owners of Parcel Nos. Nyandarua/Njabini/90 and 91 respectively in Njabini Settlement Scheme which parcels were allocated to them in 1963.
 3. It was pleaded that sometime in the 1970s the Defendant wrongfully entered and took possession of parts of Parcel 90 and Parcel 91 among others and retained possession thereof to the detriment of the original Plaintiffs. It was further pleaded that as a result of the Defendant's wrongful actions the matter was referred to the District Land Disputes Tribunal (the Tribunal) and the Provincial Land Disputes Appeals Committee (the Appeals Committee) for resolution but the parties were ultimately referred to court for adjudication of the dispute.

B. The Defendant's Defence and Counterclaim

4. The Defendant filed a defence and counterclaim dated 15.03.2011 and amended on 27.06.2019. By his amended defence the Defendant denied the Plaintiffs' claim in its entirety. He denied having a claim against the Plaintiffs' Parcel Nos. 90 and 91 and denied having encroached upon or having wrongfully taken occupation thereof. The Defendant asserted that he was only in occupation of his parcel of land known as Nyandarua/Njabini/615 (Parcel 615) which was quite distinct from those of the Plaintiffs.
5. The Defendant further pleaded that contrary to the Plaintiffs' allegations, they were the ones who had encroached and trespassed upon his Parcel No. 615 without any lawful justification or authority. The Defendant conceded that the dispute among the parties had previously been referred to the Tribunal and the Appeals Committee but contended that the Plaintiffs had frustrated efforts to have the dispute resolved.
6. By his amended counterclaim, the Defendant reiterated the contents of the amended defence and pleaded that the Plaintiffs had without lawful justification interfered with the boundaries and beacons of Parcel 615 whereupon they had encroached upon and cultivated a large portion thereof. As a result, the Defendant sought the following reliefs against the Plaintiffs in the counterclaim:
 - (a) That the Plaintiffs' suit be dismissed with costs.
 - (b) An order against the Defendants in the counterclaim to deliver vacant possession of the respective portions of parcel of land known as Nyandarua/Njabini/615 in their occupation and/or under their utilization.
 - (c) Payment of mesne profits from the date of occupation of Nyandarua/Njabini/615 against the Defendants in the counterclaim to the date when vacant possession will be given.
 - (d) A permanent injunction do issue restraining the Defendants in the counterclaim, their children, relatives, servants and/or agents from encroaching, trespassing, cultivating or in any other way whatsoever interfering with the parcel of land known as Nyandarua/Njabini/615.
 - (e) Any other relief that this Honourable Court may deem fit to grant.



C. The Plaintiffs' Response

7. The Plaintiffs filed a reply to defence and defence to counterclaim dated 04.06.2013. By their reply to defence, the Plaintiffs joined issue with the Defendant on his defence and reiterated the contents of the plaint. By their defence to counterclaim, the Plaintiffs denied the Defendant's counterclaim in its entirety and put him to strict proof thereof. They denied having interfered with the beacons or boundaries of Parcel 615 or of having cultivated large portions thereof as alleged by the Defendant or at all. The Plaintiffs further pleaded that Parcel 615 had never existed on its own and that it was merely superimposed on the Plaintiffs' parcels. It was pleaded that the counterclaim was misconceived in law hence the same should be dismissed with costs.

D. The Defendant's Reply to Defence to Counterclaim

8. The Defendant filed a reply to defence to counterclaim dated 06.06.2013 in which he joined issue with the Plaintiffs upon their defence to counterclaim. The Defendant asserted that his Parcel No. 615 was in existence and that the Plaintiffs had encroached upon it after selling part of their own land.

E. Directions on Submissions

9. Upon conclusion of the trial the parties were granted timelines within which to file and exchange written submissions. The record shows that the Plaintiffs' submissions were filed on 15.02.2022 and further submissions on 05.12.2022 whereas the Defendant's submissions were filed on 14.12.2022.

F. The Issues for determination

10. The court has noted from the record that the parties did not file an agreed statement of issues for determination. The Defendant filed his own version of issues whereas the Plaintiffs' issues were not on record by the time of preparation of the judgment. The court shall therefore frame the issues for determination as provided for under the law.
11. Under Order 15 rule 2 of the [Civil Procedure Rules](#), 2010 the court may frame issues from any of the following:
 - a. The allegations contained in the pleadings.
 - b. The contents of documents produced by the parties.
 - c. Allegations made on oath by or on behalf of the parties.
12. The court has perused the pleadings, evidence and documents on record in this matter. The court is of the opinion that the following issues arise for determination herein:
 - a. Whether the Plaintiffs have proved the trespass alleged against the Defendant.
 - b. Whether the Defendant has proved the trespass alleged against the Plaintiffs.
 - c. Whether the Plaintiffs are entitled to the reliefs sought in the suit.
 - d. Whether the Defendant is entitled to the reliefs sought in the counterclaim.
 - e. Who shall bear costs of the suit and counterclaim.



G. Analysis and Determination

(a) Whether the Plaintiffs have Proved the Trespass Alleged against the Defendant

13. The court has considered the material and submissions on record on this issue. The 1st Plaintiff's case was that her late husband, John Kamure Gichuhi was allocated Parcel 91 measuring 28.5 ha in Njabini Settlement Scheme by the Settlement Fund Trustees (SFT) in 1963 whereupon he took possession and settled thereon. It was her further evidence that it was the Defendant who bought a permanent improvement (PI) nearby in 1970s who had encroached on Parcel 91 to the extent of about 8 acres.
14. The 2nd Plaintiffs were the administrators of the estate of the late Eliud Kiarri. The evidence of David Konoga was to the effect that his late father was allocated Parcel 90 measuring 18.2 acres of land in Njabini Settlement Scheme (the scheme) by the SFT in 1963 and that he similarly took possession and settled thereon. It was his evidence that it was the Defendant who came into the area in the 1970s who encroached upon Parcel 90 to the extent of about 12.5 acres.
15. The Plaintiffs contended that the Defendant's said Parcel 615 was neither in the original map nor the nominal list for the scheme but it was created much later with the result that it overlapped upon Parcels 90 and 91 among others. The Plaintiffs contended that the PI which the Defendant was allocated was an old colonial house which could not measure a whopping 38 acres.
16. The Plaintiffs called a private surveyor who testified as PW3 and who produced a report he prepared on 20.07.2019 on the instructions of the Plaintiffs. He testified that according to the original SFT map Parcel 90 measured 26 acres and that Parcel 615 was not in existence. However, there was a new map which showed the existence of Parcel 615 and the reduction of the acreage of Parcel 90 to 17.5 acres. He was of the opinion that a reduction of acreage could result from either subdivision or encroachment. He did not, however, attach copies of the original and two new maps referred to in his report. It also emerged during cross-examination that he did not hold a practicing certificate in 2019.
17. The Defendant, on the other hand, testified that he was lawfully allocated the PI in 1970 which was designated as Parcel 615 in the scheme and that the same measured 38 acres. It was his evidence that it was the Plaintiffs who had encroached and occupied part of Parcel 615. He testified that the owner of Parcel 90 had encroached by 12 acres whereas the owner of Parcel 91 had encroached upon it by 8 acres.
18. The Defendant relied upon the evidence of the District Surveyor – Nyandarua (PW1) and the District Land Adjudication and Settlement Officer (DLASO) (DW2) in support of his claim that the Plaintiffs were the trespassers. The Defendant relied upon the District Surveyor's report dated 27.08.2013 which indicated that the Plaintiffs had encroached upon Parcel 615 to the extent claimed by the Defendant.
19. It is evident from the record that the Plaintiffs' only evidence of the alleged trespass by the Defendant was the report by PW3 dated 20.07.2019. The said report questions the creation of Parcel 615 in the 'new map' and the reduction in acreage of Parcel Nos. 90 and 91. The report concluded as follows:

“Our recommendation is therefore that there is need to establish whether Plot Nos. 90, 91, 142 and 143 did any amendments that resulted in reduction of acreage.”
20. There is no evidence on record to demonstrate that any further inquiry or conclusive investigation was ever undertaken by the Plaintiffs and an expert report prepared in that regard. As indicated earlier, neither the original map for the scheme nor the new one was produced by the Plaintiffs. Moreover, the Plaintiffs' report was not prepared by a licensed surveyor but by a Survey Assistant who had no practicing licence in 2019 when he prepared the report.



21. In the premises, the court finds no credible evidence to support the Plaintiffs' allegation of trespass against the Defendant. The DLASO who testified as DW2 stated that the definite acreage of any land allocated by SFT only becomes known when a survey has been conducted and an area list prepared. The material on record indicates that the final area list was prepared in 1978.
22. The court is further of the opinion that if the Plaintiffs intended to challenge the creation of Parcel 615 and the application of a new map by the SFT, then that objective could not be effectively achieved by filing a suit for trespass against the proprietor of Parcel 615. The suit ought to have been against the SFT with the Defendant being joined as a necessary party for the purpose of adjudicating the dispute. As long as the Defendant's title documents remained in force, he had a legitimate reason to demand restoration of his entire parcel of land.

(b) Whether the Defendant has Proved his Counterclaim of Alleged Trespass Against the Plaintiffs

23. The court has considered the material and submissions on record on this issue. The Defendant has demonstrated his ownership of Parcel 615 on the basis of his title documents, copies of the land register, and the Registry Index Map for the Scheme. The court has considered the report by the District Surveyor dated 27.08.2013. The said report was prepared pursuant to a court order made by consent of the parties before Hon A. Ombwayo J. on 29.01.2013. It is clear from the report that the Plaintiffs had encroached upon Parcel 615. According to the report, the owner of Parcel 91 had encroached on Parcel 615 by 6.0 acres whereas the owner of Parcel 90 had encroached by 12.5 acres. The court accepts the said report as adequate evidence of encroachment and trespass.

(c) Whether the Plaintiffs are Entitled to the Reliefs Sought in the Suit

24. The court has found and held that the Plaintiffs have failed to prove the trespass alleged against the Defendant. They have simply failed to prove their claim against the Defendant as required by law. It would, therefore, follow that they are not entitled to the reliefs sought in the suit, or any one of them.

(d) Whether the Defendant is Entitled to the Reliefs Sought in the Counterclaim

25. The court has found and held that the Defendant has proved his counterclaim of trespass against the Plaintiffs to the required standard. The court has noted that Simon Waweru Gichuri was deceased by the time of trial. The court has noted that one of the original Plaintiffs, George Munjuga withdrew his claim against the Defendant before the hearing date. However, the Defendant did not withdraw his counterclaim against him. In that regard, on 12.10.2021, the court directed that the counterclaim shall continue against the Plaintiffs since it is in the nature of a cross-suit. The said George Munjuga did not testify at the trial hence he did not tender any evidence in his defence to the counterclaim. The court finds and holds that the counterclaim against him has been proved on the basis of the evidence on record.
26. The court has considered the Defendant's counterclaim for mesne profits. The court has noted that the Defendant did not plead the same with particularity since no particulars of loss were specified. The court is of the opinion that the Defendant should have pleaded the claim with some measure of precision including the rate of mesne profits sought either on a monthly or annual basis.
27. The court has further noted that the Defendant did not lead any evidence on the quantum of mesne profits sought. No evidence was led as to the profits or benefits the Plaintiffs were drawing from the portion of Parcel 615 they were occupying or the profits or benefits the Defendant had lost by virtue of the Plaintiffs' occupation. Although the court has discretion to order an inquiry on mesne profits under Order 21 rule 13(1) of the *Civil Procedure Rules*, 2010 the court is not inclined to do so since



the Defendant had every opportunity of pleading his counter-claim with particularity and adducing evidence to prove his financial loss but failed to do so. Accordingly, the court is of the opinion that the Defendant is entitled to the reliefs sought in the counter-claim save for mesne profits.

(e) Who shall Bear Costs of the Suit and Counterclaim

28. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap. 21). Accordingly, the successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See – *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287.
29. The court has considered the nature of the dispute and the circumstances of the case. The court is of the opinion that although the Plaintiffs trespassed on the Defendant's property, they were not entirely to blame for the long standing dispute. The court is of the opinion that the SFT contributed to the dispute by failing to timeously explain to the Plaintiffs the discrepancies in the acreage allocated to the parties in 1963 and the one appearing in the final area list. The court is also of the opinion that the Defendant was not entirely blameless in the dispute. It is not clear how he ended up with a PI measuring 38 acres whereas the ground report produced by DLASO indicated that the PI was occupying 26 acres. The court is thus of the opinion that each party should bear his own costs of the suit and counterclaim.

H. Conclusion and Disposal Order

30. The upshot of the foregoing is that the court finds and holds that the Plaintiffs have failed to prove their claim against the Defendant on a balance of probabilities as required by law. The court further finds and holds that the Defendant has proved his counterclaim against the Plaintiffs to the required standard. Consequently, the court makes the following orders for disposal of the suit and counterclaim:
- (a) The Plaintiffs' suit be and is hereby dismissed in its entirety.
 - (b) The Defendant's counterclaim be and is hereby allowed in the following terms:
 - (i) The Plaintiffs shall deliver vacant possession of the respective portions of Parcel No. Nyandarua/Njabini/615 in their occupation or utilization.
 - (ii) A permanent injunction be and is hereby issued restraining the Plaintiffs by themselves, their agents or servants from trespassing upon or in any manner whatsoever interfering with Parcel No. Nyandarua/Njabini/615.
 - (iii) The claim for mesne profits is hereby declined.
 - (c) Each party shall bear his own costs of the suit and the counterclaim.
 - (d) For the avoidance of doubt, this judgment does not apply to Simon Waweru Gichuri since the counterclaim against him had abated.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 2ND OF MARCH, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Ng'ang'a for the Plaintiffs

Mr. Musungu for the Defendant



C/A - Carol

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Y. M. ANGIMA

JUDGE

