



**Tonui v Wekesa & 5 others (Environment & Land Case 23 of 2018)
[2023] KEELC 15953 (KLR) (8 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 15953 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 23 OF 2018**

**FO NYAGAKA, J
MARCH 8, 2023**

BETWEEN

RACHAEL WANJIKU TONUI PLAINTIFF

AND

ENES SITACHI WEKESA 1ST DEFENDANT

AGNES NAFULA WAFULA 2ND DEFENDANT

FRANKLINE WAFULA 3RD DEFENDANT

WILLIAM WEKESA MUCHELE 4TH DEFENDANT

MAURICE WANJALA WEKESA 5TH DEFENDANT

JOHN WEKESA WABUKE 6TH DEFENDANT

JUDGMENT

The pleadings

1. In her plaint dated February 28, 2018 and filed on March 1, 2018, the plaintiff prays for the following reliefs:
 - a. ...spent.
 - b. An order for eviction and in default an alternative order to vacate the parcel of land against the defendants.
 - c. A permanent injunction to issue restraining the defendants their servants and/or agents from any further trespass and/or interference with the plaintiff's quiet possession, use and enjoyment of the parcel of land comprised in Lr No Trans Nzoia/gidea/71.
 - d. General damages for trespass.



- e. Costs of this suit.
 - f. Interest on (c) and (d) above.
 - g. Costs of this suit.
2. The defendants entered appearance on March 23, 2018. They then filed their joint statement of defence and counterclaim dated August 2, 2018 on August 3, 2018. They denied each and every allegation contained in the plaint praying that the suit be dismissed with costs. In the counterclaim, the defendants sought for the following reliefs against the plaintiff:
- a. A declaration that the suit land having been allotted to Jackson Wekesa Namisiko (deceased) In The Year 1983 was not available for allotment in the year 1986 To One Robert Kipkoech Kirui (deceased) through whom the plaintiff claims.
 - b. A declaration that the registration of the plaintiff as the owner of the suit land was irregular and illegal.
 - c. An order for cancellation of the title deed issued to the plaintiff in respect of the suit land.
 - d. A declaration that the estate of the late Jackson Wekesa Namisikio (deceased) is entitled to be registered as the owner of the suit land upon clearance of the outstanding balance of the purchase price, if any, owed to the Settlement Fund Trustee.
 - e. Costs of the counterclaim.
 - f. Any other relief which the court may deem just and fit to grant.
3. Thereafter, the plaintiff filed her reply to defence and counterclaim dated November 4, 2018 on December 5, 2019. Upon compliance with pre-trial directions, the matter was confirmed ready for hearing and proceeded for taking of *viva voce* evidence.

The Plaintiff's Case

4. The plaintiff is the widow of the late Robert Kipkoech Kirui. Prior to his death, the deceased purchased the suit land namely LR No Trans Nzoia/gidea/71 in 1986 from the Settlement Fund Trustees (SFT). She produced in evidence the allotment letter dated November 5, 1986 and charge dated June 4, 1987 and marked them as P Exhibit 4a and P Exhibit 4b respectively.
5. When the deceased died on September 5, 1997, the plaintiff was appointed administratrix of the deceased's estate in Kericho High Court Succession Cause No 12 of 1999. She produced the Grant dated April 19, 1999 and confirmed on January 24, 2000 marked P.Exhibit 7a and P Exhibit 7b respectively.
6. Following the confirmation of the grant of letters of administration, the plaintiff applied for transmission upon paying the requisite fees. She produced in evidence several receipts in support marked them as P Exhibit 5a, P Exhibit 5b, P Exhibit 5c, P.Exhibit 5d, P Exhibit 5e and P Exhibit 5f. The plaintiff was then issued with a certificate of outright purchase dated June 7, 2000. It was produced and marked as P Exhibit 6. It is from this that she became the absolute registered proprietor of the suit land measuring 10.9 Ha on April 11, 2012. In support of this evidence, the plaintiff produced the Green Card marked into evidence as P Exhibit 1, Search Certificate issued on December 4, 2017 marked P Exhibit 2 and Title Deed marked P Exhibit 3.



7. Her testimony was that in spite of the above facts, the defendants have unlawfully moved onto the suit land, erected semi-permanent structures, cultivated, occupied without her permission and failed to grant her access as the rightful owner.
8. The unlawful trespass to the suit land has caused the plaintiff to suffer deprivation of the suit and enjoyment of the property. She accused the defendants of unlawfully claiming ownership of the suit land. As a result of the trespass she lodged complaints where the District Lands and Adjudication Officer wrote letters seeking assistance on behalf of the plaintiff to evict the defendants. She produced all these letters dated February 10, 2000, 18/08/1987 and an undated letter from the Office of the President and marked them as P Exhibit 8a, P Exhibit 8b and P Exhibit 8c respectively. She testified further that although the defendants were removed from the suit land, they came back one (1) year later. It is for the above reasons that she prayed that the reliefs be granted as sought.
9. The plaintiff also called the Land Registrar Trans Nzoia County PW2, Naomi Rop as her witness. PW2 confirmed that the property has been in the hands of two (2) registered owners; the SFT and subsequently the plaintiff. She testified that the plaintiff's produced documents in respect to ownership of the suit land were genuine. In addition, PW2 produced a transfer of settlement scheme marked them as P Exhibit 9, discharge of charge dated April 11, 2012 marked as P Exhibit 10 and stamp duty receipt dated April 11, 2012 marked as P Exhibit 11. She testified that the SFT office was the one that presented the documents for registration.
10. The witnesses to the plaintiff's case further stated that they were not aware that the suit land was allotted to one (1) Jackson Wekesa Namisiko.

The Defendants' Case

11. The 4th defendant testified on behalf of the defendants. The 1st and 2nd defendants were mothers of the other defendants who were the 4th defendant's brothers. He testified that in 1983, the suit land was allotted to their late father one Jackson Wekesa Namisiko by the SFT. He relied on a copy of the allotment letter dated September 3, 1983, a copy of a charge dated September 3, 1983, copies of receipts for payment of purchase price and a copy of a letter dated August 5, 2004 demanding for clearance of the arrears to the tune of Kshs 59,000.00 for this presupposition marked D Exhibit 1, D Exhibit 2, D Exhibit 3a, D Exhibit 3b, D Exhibit 3c and D Exhibit 4 respectively.
12. According to the receipts, the 1st payment was only effected on December 10, 1991. Additionally, all except one were made in Nairobi. Justifying the production of copies of documents, the 4th defendant accused the plaintiff and her children of attacking their deceased father and taking away the original documents.
13. The deceased died on July 30, 2013 and was buried on the suit land. The defendants produced a copy of the death certificate marked D Exhibit 5.
14. Since 1983, the defendants have been in occupation of the suit land. As such, they contended that it was not available for allotment in 1986. They denied that they were trespassers and instead claimed ownership. The 4th defendant informed the court that the plaintiff and her husband have never been in possession of the suit land. He observed that the title deed was issued on account of the fact that his late father had not settled the arrears pending. While urging this court to dismiss the plaintiff's suit, the 4th defendant prayed that the counterclaim be allowed.



Submissions

15. At the close of *viva voce* evidence, parties impressed me with their respective rival written submissions. According to the plaintiff's submissions dated November 21, 2022 and filed on November 24, 2022, the defendants could not claim title by way of allotment letter which is not proof of title. Citing section 26 (1) of the [Land Registration Act](#) and several authorities, the plaintiff submitted that the suit could only succeed in her favor since she was in possession of a title deed conclusively proving ownership of the suit land. She gave the chronology of the acquisition in a bid to show that she fully complied with the process of obtaining the title from the onset when her husband was issued with the allotment letter. Conversely, the defendants failed to demonstrate that they had fully complied with their obligations if any, to entitle them to claim ownership of the suit land. In fact, she argued that interest in land couldn't divest upon a deceased person as sought by the defendants. The plaintiff urged that the defendants have been in continuous trespass. She was thus entitled to the reliefs sought.
16. The defendants argued in their submissions dated November 30, 2022 and filed on December 6, 2022 that the suit land was allotted to their deceased father in 1984 thus had an interest. Consequently, it was not available for allotment in 1986 and subsequent issuance of a certificate of title in 2012 since their interest was first in time. They further fortified that argument by relying on the demand letter dated August 5, 2004 evincing that the deceased was the rightful owner. They maintained that the obligations from the allotment letter had been fulfilled since the deceased cleared his financial obligations. Furthermore, they had always been in occupation of the suit land as opposed to the plaintiff.

Analysis and Disposition

17. This court carefully considered the pleadings, the evidence and the submissions relied on by parties. It also considered the testimonies by rival parties and the law applicable.
18. It is the plaintiff's case that prior to his death, her husband Robert Kipkoech Kirui was allotted LR No Trans Nzoia/gidea/71 on November 5, 1986 from the SFT. He was further issued with a charge dated June 4, 1987. The settlement charge was calculated at Kshs 24,408.00 which was expected to be paid overtime. Upon fulfillment of the obligations, the process would organically lead to the acquisition of an interest in land. The plaintiff's evidence on this issue was supported by that of PW2, being the Land Registrar in charge of Trans Nzoia County.
19. On the contrary, the defendants laid the basis as to ownership of the land through a copy of a letter of allotment accepted on October 14, 1984 as well as a charge dated September 3, 1983. They were issued to one Jackson Wafula Namisiko, the 4th defendant's now deceased father. Under the terms of engagement, the deceased was required to settle the sum of Kshs. 24,204.00.
20. I must hasten to remind parties that a letter of allotment is an invitation to treat. It does not confer any rights or interest in the property. It only matures when the offeree accepts and complies with the conditions attached therein, to the satisfaction of the offeror, in this case the SFT on behalf of government. It is a step towards acquisition of interest in land but does not create ownership rights. It thus cannot and will not defeat the title of a person registered as the proprietor.
21. The plaintiff continued that following the deceased's death on September 5, 1997, letters of Administration conferred her the position of Administratrix over the suit land in Kericho High Court Succession Cause No 12 of 1999. She successfully applied for transmission upon payment of the requisite fees. The plaintiff continued to make several payments in fulfillment of the obligations set out in the allotment letter.



22. It is for this reason that she was issued with a certificate of outright purchase dated June 7, 2000, being indicating that she had paid the full purchase price of Kshs 24,408.00. An analysis of the evidence of the plaintiff by way if a quick calculation from the receipts produced in evidence as P Exhibit 5(a)-(f) shows that the plaintiff had since paid a total sum of Kshs 51,700.00 in furtherance of her pursuit for the suit property. After that the SFT had to take steps to transfer the land from their own to the plaintiff, and it was when they would officially discharge the land and sign transfer forms that it would be private land. In the circumstances, the SFT undertook to transfer to her the freehold interest in the said plot upon survey and satisfaction of all conditions.
23. The Trustee then, as seen from P Exhibit 1, registered the suit land in its favor on 10/03/2004. That was the first entry of and opening of the Register in relation to the said Plot No 71 (the suit land herein). In the meantime, five months later, the SFT issued, and the 4th defendant's deceased father received a letter dated August 5, 2004, produced by the DW1 as D Exhibit 4, from the Ministry of Lands and Settlement demanding for payment of the sum of Kshs 59,000.00. The deceased was asked to settle the said sum within the next thirty (30) days failing which the office reserved its right to repossess the land. By deduction from of the information on the D Exhibit 1 and D Exhibit 4 that by that time the loan had accumulated to the sum demanded on August 5, 2004.
24. It appears that demand was never fulfilled since a calculation of the receipts produced reveals that only a sum of Kshs 18,400.00 had been remitted. Secondly, the 4th defendant testified that although the deceased never settled the arrears, the defendants were entitled to the suit land having been in possession since 1983. It was evident that the demand for the payment to be made within thirty days of August 5, 2004 was the final offer made by the SFT. It was not complied with and the SFT had all the right to proceed to effect the transfer of the land to the plaintiff who had made the complete payment.
25. The plaintiff subsequently obtained title on April 11, 2012. All along, the plaintiff embarked on evicting the defendants from the suit land. After lodging several complaints, several letters were written seeking the assistance of the relevant authorities to remove the defendants from the parcel of land on February 10, 2000 and August 18, 1987. Although initially removed, the defendants returned to the suit land one (1) year later.
26. This court finds that from the plaintiff's evidence, she took steps as a genuine and prudent owner of parcel of land could do to secure her interest in and possession of the land. This court must commend her the affirmative and procedural steps she took towards acquisition of the suit land. She was thoroughly meticulous and organized since inception. The documents she produced and the evidence adduced were her proper grounding base that ultimately set her above that of her adversaries.
27. On the other hand, the defendants case was marred with procedural technicalities, confusion and blame games. Firstly, they stated that they were only able to produce copies of documents arguing that since the plaintiff and her children attacked the deceased and they took the originals. However, evidence of such assault was never produced by way of documentary evidence. It thus puts the credibility of that assertion to high doubt since it was never reported to the relevant offices. In any event, the defendants never took any steps to verify and have the documents they purported to rely own prepared and brought to in evidence in terms of section 80 and 81 of the *Evidence Act*, chapter 80 of the Laws of Kenya, which provide on how copies of public documents, and certified ones for that matter, may be proved. One would have anticipated that with the theft of such crucial documents, the victims would take the requisite steps to either recover them or seek alternative remedies. That was not done here. In any event, no officer was called from the relevant offices to prove the authenticity or otherwise of the copies which, even though not certified, were tendered in evidence by the defendants.



28. Secondly, it appears that, if indeed it was true that the 4th defendant's father was allotted the suit land as alleged, but which this court finds that it was not, he failed to comply with the conditions set out in the allotment letter which produced DExh1. Although demanded to pay the balance in 2004, the deceased did not comply; the non-compliance continuing to take precedence even after his death. Instead, by that failure to fulfill his obligations, he granted the SFT the right to repossess the suit land.
29. Thirdly, the 4th defendant stated that the suit land ought to vest in the estate of their deceased father. However, it is instructive to note that the defendants were sued in their capacities as individuals and not administrators of the deceased's estate. It was their action to stay on the suit land without permission from the plaintiff that led to the present suit. Procedurally, as individuals, they were estopped from claiming ownership on behalf of the deceased's estate since they produced no evidence in support of those assertions other than the proof of the deceased's death. Whereas at paragraph 18 of the counterclaim the 4th defendant pleaded that he was the personal representative of the estate of his late father John Wekesa he did not prove that indeed he was. As a result, he failed to prove that he could raise or sustain a claim on behalf of the deceased's estate. Equity does not aid him and all the defendants as well since ingress onto the suit land and compliance with the obligations attendant to allotment are two (2) separate things even though they failed to prove that. In any event, they had previously been evicted from the land, an assertion not denied by them.
30. PW2, Naomi Rop, the Land Registrar Trans Nzoia County confirmed that the property has been in the hands of two (2) registered owners, that is to say, the SFT and subsequently the plaintiff. She testified as to the authenticity of the plaintiff's produced documents in respect to ownership as genuine. That evidence was not controverted or countermanded.
31. Section 26 (1) of the [Land Registration Act](#) provides that the certificate of title issued by the Registrar shall be taken by all courts as *prima facie* evidence that the proprietor is the absolute and indefeasible owner. The title shall not be subject to challenge except on the ground of fraud, misrepresentation or where the certificate was acquired by means of illegality, unprocedurally or through a corrupt scheme.
32. The defendants raised, in paragraph 7 of the defence that they were in occupation of the suit land for over 35 years. In his witness statement dated March 28, 2018 and filed on April 3, 2018 and adopted November 2, 2022 the 4th defendant stated that the defendants had been on the land for 37 years. What is the import of that evidence of that evidence in relation to the title herein? Lest individuals who illegally enter, occupy and use or squat on public land be buoyed to live lives demonstrative of joyfully and shamelessly plundering public resources this Court shall make a finding on this issue raised by the defendants. One thing that remains clear is that, as evidenced by P Exhibit 1 the land parcel was first registered as the property of the SFT on March 10, 2004 and remained the property of the Fund until April 16, 2011 when it was fully paid discharged in readiness for transfer to the plaintiff. And from the Discharge of Charge bearing the same date, signed in her favour, which she produced as Exhibit 10, it is clear that the suit land was officially transferred into private proprietorship on April 11, 2012. Thus, whether the defendants had been on the land for 37 years or even if their later father remained thereon until July 30, 2013 when he died, as claimed by them, that would not entitle them to any better proprietary right over the land above that of the person in the name of the plaintiff, who had been offered the parcel of land and fulfilled the conditions of offer and obtained title thereto from government because before the SFT transferred the land to the latter it was public land.
33. The case of [Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa \(Amicus Curiae\)](#) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment) is instructive illegal occupation of public land by the landless does not and cannot confer title to that land. Thus, since the parcel of land belonged to the SFT until the time it was discharged



for transfer to the plaintiff, it was public property hence it did not matter how long the defendants had been on it or whatever else they had done on it in terms of development. It remained public property until the time of transfer. The claim by the defendants that they had resided on the land for 37 years form the basis for them raising any defence of limitation as they implied by their oral and written testimony.

34. The laudable and systematic conduct of the plaintiff herein all along as her evidence, including documentary, shows leads this Court to conclude that she is the absolute and indefeasible owner of the suit land namely LR No Trans Nzoia/Gidea/71. There is no procedural irregularity that has been shown on the part of the plaintiff in acquiring the parcel of land. In the same vein, the defendants were in unlawful occupation of the suit land since April 11, 2012 without the plaintiff's permission. Their actions of moving onto the suit land without any color of right, erecting semi-permanent structures, cultivating, occupation and failing to grant the plaintiff access since the date above, as the rightful owner, makes them trespassers on the suit land. The plaintiff is hence entitled to general damages for trespass.
35. In assessing the general damages, I observe that the plaintiff did not submit on the assessment of the same through arguments or by way of a valuation report. The court in *Philip Aluchi vs Crispinus Ngayo* [2014] eKLR faced with a similar predicament held as follows:

“The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately after the trespass or the costs of restoration, whichever is less ... The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass...”

36. Taking into account the fact that the plaintiff has been denied access to the suit land and that the defendants have been in occupation thereof since the time the parcel of land became the plaintiff's, and since the presumption is that the plaintiff should have been using it for farming since then, I exercise my discretion and award a sum of Kshs 200,000.00 in damages for trespass.

Orders and Disposition

37. Having established that the plaintiff's claim is merited and that of the defendants is unmerited, I proceed to make the following final orders:
- a. The plaintiff is the lawful absolute registered proprietor of all that parcel of land namely LR No Trans Nzoia/gidea/71;
 - b. The defendants, their servants, agents and/or personal representatives are hereby directed to remove themselves forthwith at their own cost, or in default, be evicted from the suit premises namely LR No Trans Nzoia/gidea/71;
 - c. A permanent injunction be and is hereby issued restraining the defendants their servants, agents and/or personal representatives from trespass and/or interference with the plaintiff's quiet possession, use and enjoyment of the parcel of land comprised in LR No Trans Nzoia/gidea/71;
 - d. The plaintiff is awarded against the defendants jointly and severally Kshs. 200,000.00 in general damages for trespass.
 - e. The plaintiff shall have the costs of this suit.



- f. Interest is awarded on (d), (e) and (g) above and below at court rates from the date of judgment until payment in full.
- g. The defendants' Counterclaim dated 02/08/2018 is hereby dismissed with costs to the plaintiff.

38. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS
8TH DAY OF MARCH, 2023.**

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

