



REPUBLIC OF KENYA



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**Waweru v Maina (Environment and Land Case Civil Suit E15 of 2022)
[2023] KEELC 15995 (KLR) (7 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 15995 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE CIVIL SUIT E15 OF 2022**

FM NJOROGE, J

MARCH 7, 2023

BETWEEN

MARGARET MUMBI WAWERU PLAINTIFF

AND

VERONICA WAMBUI MAINA DEFENDANT

JUDGMENT

1. In the plaint dated 24/03/2022, the plaintiff sought the following orders:
 - a. A declaration that the plaintiff is the bonafide owner of Plot No. 1707 on property known as Kiambogo/Kiambogo Block 12 having duly purchased the plot from Nakuru Mutukanio Farmers Company Limited which plot measures 1.17 Ha.
 - b. An order of declaration that the defendant and her servants and/or agents are trespassers on the plaintiff's Plot No. 1707 on property known as Kiambogo/Kiambogo Block 12.
 - c. An order of eviction against the defendant, her servants and/or agents, evicting the defendant and her said servants and agents with all their belongings from Plot No. 1707 on property known as Kiambogo/Kiambogo Block 12.
 - d. An order of permanent injunction restraining the defendant, her servants and/or agents from re-entering, occupying or continued occupation/possession and/or wasting the plaintiff's Plot No. 1707 on property known as Kiambogo/Kiambogo Block 12 and/or from doing anything that will interfere with and/or violate the plaintiff's proprietary rights and/or quiet possession in/over Plot No. 1707 on property known as Kiambogo/Kiambogo Block 12.
 - e. Damages and/or mesne profits from the date of trespass until the defendant delivers up possession of the said Plot No. 1707 on property known as Kiambogo/Kiambogo Block 12.
 - f. Costs of this suit.



- g. Any other relief that this honourable court deems fit to grant.
2. The plaintiff avers that vide share certificate No. 131/1707 issued on 2/02/2011 she became the registered owner of Plot No. 1707 on property known as Kiambogo/Kiambogo Block 12 which measures 1.17 Ha. She claims that after she bought the suit property, she paid for the surveyor's fees and was issued with a Clearance Certificate by Nakuru Mutukanio Farmers Company Limited. She took possession in the year 2013 and put up three iron sheet houses which she rented out.
 3. In the year 2017, her tenants were evicted by the defendant who claimed to be the new owner of the suit property and after lodging a complaint with the police, she found out that her sons Leonard Chege and Geoffrey Muirika had sold the property to the defendant. The matter was reported to the Chief and her sons were charged in Naivasha Criminal Case No. 1255 of 2019. She further stated that the defendant has threatened to demolish the three houses and has continued to fell and sell the trees on the suit property.
 4. The defendant did not file any statement of defence.

Evidence of the Parties

5. Margaret Mumbi Waweru testified as PW1 and adopted her witness statement dated 24/3/2022 as part of her evidence. It was her evidence that her plot No. 1707 is situated at Ngwataniro Mutukanio. She testified that she bought the suit property in the year 1976 from a company known as Ngwataniro Mutukanio; that at the time she bought the property it was bushy and had wild animals including buffalos on it. After she bought the property, she built houses on it and that while she was in church, someone broke into her house and stole her documents; that she later learnt that it was her son who had brought people to steal the said documents. It was her evidence that in the year 2009 her daughter fell ill and she leased the land and the houses and went to Kikuyu.
6. She testified that when she found out that it was her son who had plotted the theft of her documents, she got him arrested and when he was released, she was informed by her neighbors that her land had been sold. Her son was charged in Naivasha Criminal Case No. 1255 of 2019 after she had reported the matter to the Criminal Investigations Department Headquarters and the Criminal Investigations Department offices at Nakuru and Gilgil. It was further her evidence that she was threatened by her son to prevent her from going to the suit and but that she went there with some CID officers.
7. She testified that the defendant took possession of the suit property in the year 2017 and illegally evicted her tenants; that she also begun to cut down the trees on the property. The plaintiff then produced copies of the documents in the list of documents dated 24/3/2022 as exhibits. She testified that the defendant is in occupation of her three houses on the suit land and has cut down all her trees. She sought eviction orders against the defendant.
8. The plaintiff's case was then closed. The defendant's case was also closed because despite service, she was not present in court.

Submissions

9. The plaintiff then filed her submissions dated 1/03/2023 on 03/03/2023 while the defendant did not file any submissions. The plaintiff identified the following issues for determination;
 - i. Whether the plaintiff is the bona fide owner;
 - ii. Whether the plaintiff's share certificate should prevail;



- iii. Whether the defendant is a trespasser;
 - iv. Whether an order of eviction should be granted;
 - v. Whether the defendant has proved fraudulence/illegality;
 - vi. Whether the plaintiff is entitled to be granted a permanent injunction against the defendant;
 - vii. Whether the defendant should pay damages and or mesne profits to the plaintiff;
 - viii. Whether the defendant should pay costs of the suit.
10. On the first issue, the plaintiff submitted that she is the bona fide owner of the suit property and has lived on it since the year 2013. She further submitted that she has developed the suit property by putting up three iron sheet houses that she has rented out and relied on the case of *Lawrence Mukiri v Attorney General & 4 others* [2013] eKLR in support of her arguments. The plaintiff also submitted that she has exclusive interests and rights over the suit property and further relied on section 24 of the *Land Registration Act* and the case of *Joseph Kamuya Maitha v Noah Leinah & another* [2018] eKLR.
 11. On the second issue, the plaintiff relied on the cases of *Christopher Mwangi Kioi v The Chief Land Registrar & 2 others* (unreported), *Wreck Motors Enterprises v The Commissioner of Lands and others* Civil Appeal No. 71 of 1997 and submitted that the defendant attached to her replying affidavit a share certificate that was issued on 7/01/2014 which was issued after the plaintiff's Share certificate dated 02/02/2011. She further submitted that the ownership document issued first in time should prevail. It was the plaintiff's submissions that the defendant had failed to prove any illegality in the acquisition of the suit property by the plaintiff and that her title and interests in the suit property are lawful.
 12. On the third issue, the plaintiff relied on section 3(1) of the *Trespass Act* cap 294 and the case of *Charles Chebore Chelimo & another v Jackson Cherono* [2019] eKLR and submitted that the defendant had illegally occupied the plaintiff's property, evicted the tenants and cut down trees without the authority of the plaintiff and she should therefore be evicted.
 13. On the fourth issue, the plaintiff cited the decisions in the cases of *Norah Ndunge Henry & another v Abednego Mutisya & another* [2022] eKLR, *Joseph Kipchirchir Koech v Philip Cheruiyot Sang* [2018] eKLR among other cases and reiterated that the defendant is in occupation of the suit property without the authority of the plaintiff and she should be evicted. The plaintiff submitted that upon the defendant taking possession of the suit property, she reported the matter to the police and preferred criminal charges against her sons in Naivasha Case No. 1255 of 2019 Republic Versus Geoffrey Mwirikia Mwarite who had allegedly sold the suit property to the defendant without her consent.
 14. On the fifth issue, the plaintiff relied on section 107 and 116 of the *Evidence Act* and the case of *Susan Wambui Wachira v Christine Kasavi Monyi* [2018] eKLR among other cases and submitted that upon service of the plaint and the application earlier filed, the defendant failed to file a Statement of Defence but filed a replying affidavit where she claimed that she is the lawful owner and made various allegations of fraud without providing any proof of the same.
 15. On the sixth issue, the plaintiff cited among other cases, the decisions in the cases of *Bandari Investments & Co. Ltd v Martin Chiponda & 139 others* [2022] eKLR, *Keiyian Group Ranch v Samwel Oruta & 9 others* [2021] eKLR and reiterated that the defendant should be evicted from the suit property and be barred from permanently accessing it. The plaintiff also submitted that she had established a prima facie case that warrants the issuance of orders of a permanent injunction.



16. On the seventh issue, the defendant cited the decisions in the cases of *Park Towers Ltd v John Mithamo Njika & 7 others* [2014] eKLR, *Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited* [2017] eKLR among other cases and submitted that since the defendant is a trespasser, she is entitled to damages or mesne profits.
17. On the issue of costs, the plaintiff submitted that she is entitled to costs and relied on the cases of *Pamela Waitbera Mburu v County Government of Kajiado* [2018] eKLR and *Catherine Wambui Waruinge v Retia Ene Samera Mutemperia & 5 others* [2021] eKLR in support of her argument.

Determination

18. After considering the pleadings and the evidence, the only issue that arises for determination is whether the plaintiff is entitled to the orders sought in the Plaintiff.
19. The plaintiff in this matter alleged that she is the owner of Plot No. 1707 on the property known as Kiambogo/Kiambogo Block 12 after purchasing it from Nakuru Mutukanio Farmers Company Limited. In support of her allegations she produced as PExh.1 the letter dated 2/02/2011 from Nakuru Mutukanio Farmers Co. Limited issued to her which indicates that she is the holder of share certificate No. 131/1707 of Kiambogo/Kiambogo Block No. 12.
20. The plaintiff also produced as PExh.2 share certificate No. 131/1707 issued by Nakuru Mutukanio Farmers Company Limited Kiptangwanyi to in respect of Plot number 1707 measuring 1.17 Ha. It required payment of Kshs.220/= for R.I.M fee and Kshs. 3,260/= for survey fee for LR No. 4339 Kiambogo/Kiambogo Block 12; it was issued on 02/02/2011. The plaintiff produced as PExh.3 a receipt for Kshs. 2,380/= issued to her by Kiptangwanyi Mutukanio Title deed group on 02/02/2011 and another receipt dated 14/02/2011 for Kshs. 3,480/= for survey fees as PExh.4. A receipt dated 6/7/2012 was produced as PExh.5 issued by Kiptangwanyi Mutukanio Farms to the plaintiff for Kshs.200 as payment for maps and a clearance certificate No. 2772 issued by Kiptangwanyi Mutukanio Farms Nakuru to the plaintiff for plot number 1707 and for plot number 2772 measuring 0.020 Ha as P.Exh. 6.
21. In the present matter, it is my view that the plaintiff has sufficiently demonstrated that she acquired the suit property from Kiptangwanyi Mutukanio Farmers Limited as she produced the relevant documents that included the receipts and the share certificate as highlighted earlier in this judgement. Since the defendant did not participate in the proceedings, the plaintiff's evidence is uncontroverted.
22. The plaintiff seeks for damages and/or mesne profits from the date of trespass till the defendant delivers possession of the suit property in the plaintiff.
23. The court in the case of *Peter Githinji Kamau v William Cheruiyot Rotich* [2019] eKLR held as follows:
 11. In addition to the prayer that he be entitled as owner, the plaintiff has also sought general damages for trespass and mesne profits. I was not given any particulars of loss that the plaintiff may have suffered for not using the land. It is therefore my view that the claim for mesne profits is unsupported and the same fails. I however acknowledge that the defendant had no right to use the suit land and thus the plaintiff is entitled to general damages for trespass. Considering all circumstances, I do award the plaintiff the sum of Kshs. 250,000/= as general damages for trespass.
24. It is my view that in the present case, the plaintiff did not give any particulars of loss that she might have suffered for not using the land and therefore as was held in the case of *Peter Githinji Kamau v*



William Cheruiyot Rotich (*supra*) cited above, the plaintiff is not entitled to mesne profits. However, I award the plaintiff Kshs. 200,000/= (Two Hundred Thousand) only as general damages for trespass.

25. The plaintiff has established her claim on a balance of probabilities against the defendant and I hereby enter judgment for her against the defendant and I issue the following final orders:
- a. An order of declaration declaring that the plaintiff is the *bona fide* owner of Plot No. 1707 on property known as Kiambogo/Kiambogo Block 12 having duly purchased the plot from Nakuru Mutukanio Farmers Company Limited which plot measures 1.17 Ha.
 - b. An order of declaration declaring that the defendant and her servants and/or agents are trespassers on the plaintiff's Plot No. 1707 on property known as Kiambogo/Kiambogo Block 12.
 - c. The defendant, her servants and/or agents, shall remove themselves and all their belongings from Plot No. 1707 on property known as Kiambogo/Kiambogo Block 12 forthwith and in default they shall be evicted at their own cost.
 - d. An order of permanent injunction is hereby issued restraining the defendant, her servants and/or agents from re-entering, occupying or continued occupation/possession and/or wasting the Plaintiff's Plot No. 1707 on property known as Kiambogo/Kiambogo Block 12 and/or from doing anything that will interfere with and/or violate the plaintiff's proprietary rights and/or quiet possession in/over Plot No. 1707 on property known as Kiambogo/Kiambogo Block 12.
 - e. There will be no order for payment of mesne profits since no evidence was led in proof thereof;
 - f. The defendant shall pay to the plaintiff Kshs. 200,000/= (Two Hundred Thousand) only as general damages for trespass;
 - g. The defendant shall pay to the plaintiff the costs of the instant suit.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 7TH DAY OF MARCH 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

