



**Cherono (Suing as the administratrix of the Estate of the Late Cherono Kiplagat) v County Government of Uasin Gishu, Ministry of Lands, Housing and Physical Planning (Environment & Land Case 155 of 2015) [2023] KEELC 17287 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17287 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 155 OF 2015**

**JM ONYANGO, J**

**MAY 10, 2023**

**BETWEEN**

**JOSEPHINE WAIRIMO CHERONO (SUING AS THE ADMINISTRATRIX OF THE ESTATE OF THE LATE CHERONO KIPLAGAT) ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF UASIN GISHU, MINISTRY OF LANDS, HOUSING AND PHYSICAL PLANNING ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff filed this suit in her capacity as the administratrix of the estate of her late husband Cherono Kiplagat who was the registered owner of all that parcel of land known as Eldoret Municipality Block 2/45/1 measuring approximately 0.1488 Hectares. The plaintiff's case is that on the April 20, 2015, she received a notice from the defendant requiring her to remove the structures erected on the suit property within 14 days as they had encroached on the road reserve. The plaintiff avers that if the defendant effects its threats the plaintiff will be exposed to burglary. The plaintiff therefore seeks the following reliefs:
  - a. A perpetual injunction restraining the defendant by itself, its servants and/or agents from destroying the plaintiff's structures situated on Eldoret Municipality Block 2/45/1
  - b. A declaration that the acts of the Defendant in intending to demolish structures erected in the suit land to create a road of access without following due process is unlawful (sic)
2. The Defendant filed a Defence dated June 22, 2015 denying the plaintiff's claim. The Defendant averred that the plaintiff had constructed illegal structures on the suit property without development permission from the Defendant thus encroaching on a public road reserve. The Defendant therefore prayed that the plaintiff's suit be dismissed with costs.



### **Plaintiff's Case**

3. The suit was set down for hearing and the plaintiff testified and closed her case. She adopted her witness statement dated November 15, 2015 as her evidence in chief. She stated that she was the Administratrix of the estate of the late Cherono Kiplagat who was the registered owner of the suit property. She told the court that she received a notice dated March 31, 2015 from the defendant notifying her to remove the structures they had constructed on the road reserve within 14 days otherwise they would be demolished. She produced the documents in her List of Documents as Plaintiff's exhibits 1 to 8. They include her late husband's certificate of death, the certificate of lease for land parcel No. Eldoret Municipality Block 2/45/1, a copy of the certificate of official search, the Ad Litem Grant dated 26.5.2015, Survey Maps, receipts dated 17.4 2015, a Notice from the County Government of Uasin Gishu dated 31.3.2015 and a copies of photographs of the structures on the suit property. She stated that they were allowed to build the said structures and that they did not extend to the road.
4. In cross-examination, she stated that she obtained a court order after she was served with the notice. She denied that her buildings were on the road. She stated that the road does not pass through her plot.

### **Defendant's Case**

5. When the matter came up for defence hearing, counsel for the Defendant informed the court that the dispute related to the boundary of the suit property. He then filed an application dated February 23, 2021 seeking orders that the County Surveyor visits the suit property to ascertain the boundary and file a report in court. On December 16, 2021, the court directed that the survey exercise be conducted within 60 days and the Surveyor's report be filed in court. However, despite the matter being mentioned several times, the said report was not filed in court and on November 15, 2022 the Defendant's case was marked as closed as they had no evidence to offer.
6. After the close of the Defendant's case the court directed that both parties file their submissions. The Plaintiff filed her submissions dated November 24, 2022 while the Defendant filed its submissions dated March 22, 2023.

### **Plaintiff's Submissions.**

7. Learned counsel for plaintiff submitted that the estate of the late Cherono Kiplagat was entitled to the suit property in accordance with the provisions of article 40 of *the Constitution* of Kenya and section 24 of the *land Registration Act* No. 3 of 2012. It was his submission that that the Defendant had not adduced any evidence to prove that the plaintiff's structures on the suit property encroached on a road reserve. He submitted that the maps produced by the plaintiff show that there is no public road passing through the plaintiff's parcel of land. He contended that the burden of proving the existence of the public road was on the defendant but he failed to discharge that burden.

### **Defendant's Submissions**

8. Learned counsel for the Defendant submitted that the main issue in contention was whether the plaintiff had encroached onto a public road reserve without getting the necessary approvals prior to erecting structures thereon. He submitted that the matter ought to be referred to the Land Registrar in accordance with section 18(2) of the *Land Registration Act* for the Land Registrar to determine whether the plaintiff's structures are on the road reserve. It was his contention that that the Plaintiff ought to have exhausted the remedy provided by the *Land Registration Act* before approaching the court. He relied on the case of *George Kamau Macharia v Dexka Limited* ( 2019) eKLR where the



court held that the office of the Land Registrar is mandated to deal with general boundary disputes first before the same is escalated to the court.

9. With regards to the prayer for injunction, he submitted that the Plaintiff had failed to meet the requirements for the grant of an injunction as set out in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* (2014) eKLR.

### **Analysis and Determination**

10. Having considered the pleadings, evidence on record and the rival submissions, the issues for determination are:

- i. Whether the plaintiff has a cause of action against the defendant.
- ii. Whether the plaintiff is entitled to the reliefs sought.

11. It is common ground that the suit property is registered in the name of Cherono Kiplagat-Deceased who was the husband of the plaintiff. It is also not in dispute that the plaintiff is the administrator of the estate of her late husband. The plaintiff produced the original certificate of Lease and Ad Litem Grant in respect of the estate of the deceased as her exhibits. What is in contention is whether the structures constructed on the suit property are on a road reserve.

12. The plaintiff testified that there is no road on the suit property. She produced a copy of the Registry Index Map as Plaintiff's exhibit 6 which shows that the suit property does not stretch to the road. This evidence was not rebutted by the Defendant who never called any witness. Since it is the defendant who alleged in his Defence that the Plaintiff's structures were on the road reserve, it was incumbent upon him to adduce evidence in support of his claim. Section 107 of the *Evidence Act* provides that he who alleges must prove. In the case of *Mbutbia Macharia v Annah Mutua & Another* (2017)eKLR the Court of Appeal observed as follows:

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden, therefore while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. In this case the incident of both the legal and evidential burden was with the Appellant”

13. In the instant case, the burden of discharging both the legal and evidential burden was on the defendant as he alleged that the plaintiff's structures were on the road reserve. All that the Plaintiff was required to do was to demonstrate that she has maintained the boundaries as depicted in the Registry Index Map, which she did.

14. The mere fact that the defendant made allegations in its defence and failed to call evidence in support thereof did not constitute rebuttal of the Plaintiff's case. In the case of *Trust Bank Limited v Paramount Universal Bank Limited & 2 Others* the court held that:

“It is trite that where a party fails to call evidence in support of its case, the party's pleadings remain mere statements of fact since in so doing, the party fails to substantiate its pleadings. In the same vein, failure to adduce evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.”



15. Similarly, by failing to call any evidence in support of its defence, the Defendant failed to controvert the plaintiff's evidence and the same remains unchallenged.
16. Although the Defendant contended that the dispute herein relates to boundary and therefore it ought to have been referred to the Land Registrar in accordance with section 18 (2) of the Land Registration Act, it did not produce any map to contradict the one produced by the plaintiff. Furthermore even after the Plaintiff conceded to the Defendant's application to have the Surveyor visit the suit property to establish the boundaries, the defendant did not make any follow up. This shows that the Defendant was only raising the issue of the boundary in order to buy time as the real issue in dispute was whether the plaintiff's structures are on the road reserve.
17. In the absence of evidence that the plaintiff's structures are on the road reserve it is my finding that the plaintiff has proved her case against the defendant and she is therefore entitled to the reliefs sought. Consequently, I enter judgment for the Plaintiff and make the following final orders:
  - a. A perpetual injunction is hereby issued restraining the defendant by itself, its servants and/or agents from destroying the plaintiff's structures situated on Eldoret Municipality Block 2/45/1
  - b. A declaration is hereby issued that the acts of the Defendant in issuing a notice to demolish the structures erected on the suit land in order to create a road of access without following due process is unlawful.
  - c. The costs of this suit shall be borne by the Defendant.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10<sup>TH</sup> DAY OF MAY 2023.**

.....  
**J.M ONYANGO**  
**JUDGE**

In the presence of;

1. Mr. Mathai for the Plaintiff
2. Miss Tumo for Mr. Kirwa for the Defendant

Court Assistant: A. Oniala

