



**Konini v Konini (Environment & Land Case 47 of 2017)
[2023] KEELC 18026 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18026 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 47 OF 2017**

LA OMOLLO, J

JUNE 8, 2023

BETWEEN

ALICE CHEMUTAI KONINI PLAINTIFF

AND

REGINA CHELANGAT KONINI DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff commenced this suit by way of a plaint dated February 10, 2017.
2. She avers that she is the legal owner of land parcel No Nakuru/Nessuit/982 measuring 5 acres (hereinafter referred to as the suit parcel) the said parcel having been allocated to her by the District Commissioner Nakuru District and Provincial Forest Officer Rift Valley Province. The allocation of land card bearing serial No 04755.
3. She avers that she was settled on the said parcel of land by the District Surveyor on October 3, 1996.
4. She further avers that the said parcel of land is part of Mau Forest where members of the Ogiek community were settled but no title documents of ownership of land have been processed and issued to date.
5. She also avers that the Defendant is her younger sister and that in the year 2007, their parents requested her to accommodate the Defendant on a portion of the suit property measuring $\frac{1}{4}$ acre awaiting for the return of the surveyors and the allocation of land in Mau Forest adding that to date, the surveyors have never come back.
6. It is her averment that she is also an allottee of Plot No 1885 at Mutarakwa A also measuring 5 acres which land she was allocated by the chairman of the 18 elders of Ogiek clan in consultation with the provincial administration.



7. She also avers that in the year 2015, the Defendant in connivance with the local assistant Chief of Nessuit location, begun to claim a portion of plot No 1885 Mutarakwa A which claim she abandoned in the year 2016 and started to demand 2 acres of parcel of land No Nakuru/Nessuit/982.
8. She further avers that on various dates between December 23, 2016 and February 6, 2017, the Defendant hived off part of her land by pulling down her fence and ploughing it in preparation for planting thereby damaging her crops comprising of onions and potatoes and that the Defendant also cut down trees.
9. It is the Plaintiff's averment that the Defendant is an illegal trespasser of the suit property and orders of eviction ought to be issued.
10. The Plaintiff prays for judgment against the Defendant for;
 - a. An order of permanent injunction restraining the Defendant either by herself, her servants or agents from encroaching onto, trespassing onto, cultivating, fencing, alienating or in any other way interfering with the Plaintiff's possession and quiet enjoyment of the suit land Nakuru/Nessuit/982 per allocation card serial No 04755.
 - b. An order of eviction and demolition of structures of the Defendant erected on the suit land.
 - c. Costs of this suit.
11. The Defendant filed her Statement of Defence and Counterclaim dated December 1, 2017 and admits paragraphs 1, 2, 4, 5 and 6 of the Plaintiff.
12. The Defendant denies the contents of paragraph 6 of the Plaintiff and states that the Plaintiff was allocated land serialized as 04755 in Tiritagoi (Nakuru/Nessuit/982) which is deep in the Mau Forest while she was allocated land parcel No 1962 Mutarakwa on Nessuit Settlement Scheme.
13. The Defendant states that by virtue of the business the Plaintiff had at Mutarakwa Center, the Defendant agreed to exchange possession of plot No 1962 while the Defendant would occupy Nakuru/Nessuit/982 serialized as 04755.
14. The Defendant further states that she has been in occupation of land parcel No Nakuru/Nessuit/982 serialized as 04755 since the year 1998 when the exchange took place and that any damage on land parcel No Nakuru/Nessuit/982 was done by the son of the Plaintiff who forcefully demanded ownership of the suit property despite the initial agreement.
15. The Defendant denies all the other allegations in the Plaintiff.
16. In her counterclaim, the Defendant states that the Plaintiff sent her son to land parcel No Nakuru/Nessuit/982 serialized as 04755 which she currently occupies with the intention of evicting her.
17. The Defendant reiterates that the Plaintiff is currently in occupation of Plot No 1962 on Nessuit Settlement Scheme serialized as 02042 on the allocation card belonging to the Defendant by virtue of an oral agreement.
18. The Defendant states that her claim is that the Defendant is a trespasser on to her land Plot No 1962 on Nessuit Settlement Scheme serialized as 02042 on the allotment card and that she should be evicted together with her servants, agents, employees or personal representatives.
19. The Defendant seeks the following orders against the Plaintiff;
 - a. The Plaintiff's suit be dismissed with costs.



- b. Judgment be entered for the Defendant against the Plaintiff for;
 - i. Order of permanent injunction restraining the Plaintiff either by herself, her servants, or agents from encroaching on to, trespassing, cultivating, alienating or in any other way dealing with the Defendant's land known as Plot No 1962 on Nessuit Settlement Scheme 1962 as per allocation card Serial No 02042.
 - ii. Order of evicting and demolition of structures of the Plaintiff erected on Plot No 1962 on Nessuit Settlement Scheme serialized on allocation card as 02042.
 - iii. Costs of this suit.

Factual Background.

20. This suit came before this court on July 19, 2022 for hearing of a Notice to Show Cause. The reason for issuance of the said notice was that the matter was last on court on January 20, 2020.
21. On July 19, 2022 counsel for the Plaintiff explained that the Plaintiff and the Defendant were sisters and that they had been referred to Mediation and prayers that the Plaintiff be allowed to prosecute her claim. On the other hand, counsel for the Defendant appeared and urged the court to dismiss the suit.
22. On account of the explanation offered by the Plaintiff's counsel, this suit was set down for hearing on November 21, 2022.
23. On November 21, 2022 neither counsel for the Defendant nor the Defendant attended court and the court ordered that the matter proceeds.

Plaintiff's Evidence.

24. During the hearing of the Plaintiff's case, Alice Chemutai Konini testified as PW1.
25. She prayed that her witness statement dated January 18, 2017 be adopted as part of her evidence, which prayer the court allowed.
26. She testified that the Defendant is her sister and the last born in her family.
27. It is her testimony that the suit land is 5 acres and located at Tiritagoi in Nessuit area. It is her evidence that she was allocated the land in 1996 and that the allocation card was signed by the District Commissioner Nakuru, Provincial Forest Officer adding that she appended her thumb print to it.
28. The Plaintiff went on to state that the reverse side of her allocation card is endorsed 'settled' by the surveyor and is dated October 3, 1996. The Allocation card with a number 04755 was produced as Exhibit P1.
29. It is PW1's testimony that her sister was not allocated any land. She testified that she is a member of the Ogiek clan and that they were originally living in Logoman Forest which is part of the Mau Forest. She further testified that they were removed from the said forest and resettled on the suit parcel.
30. She also testified that the Defendant entered the suit property in the year 2007 upon request from their mother because she was squabbling with their brother.
31. It is her testimony that she agreed to her mother's request and allowed her sister to occupy ¼ of an acre of the suit land. PW1 explained that she filed the present suit because the Defendant started claiming two acres of the suit property and this claims found their way to the office of the area Chief.



32. It was her testimony that after the defendant approached the area chief, one Joseph Rotich, the chief wrote a letter dated August 31, 2015 addressed to her. The letter was produced as Exhibit P2.
33. She further testified that she received another letter dated May 9, 2016 from the Chief summoning her to a meeting. The said letter was produced as Exhibit P3.
34. It was her evidence that after settlement, a survey was done and the suit parcel became No 982. She produced a sketch map as Exhibit P4.
35. PW1 produced another letter dated October 23, 2016 as Exhibit P5. She explained that in the said letter the Chief wrote to the Deputy County Commissioner alleging that the Plaintiff had agreed to give the Defendant 2 acres of the suit parcel. The Plaintiff went on to explain that she refused to sign the said letter because she had not agreed to give the Defendant land as alleged by the chief.
36. It was her further testimony that as at the time of giving evidence in court, the Defendant was no longer on the suit land having vacated it in the year 2019. She confirmed that the Defendant had also demolished all the structures that she had put up on the suit land.
37. She ended her testimony by praying for orders as sought in her plaint.
38. In her witness statement, the Plaintiff states that in the year 1996, the District Commissioner, 18 elders of the Ogiek community and the Provincial Forest Officer allocated acres of land at Tiritagoni to her and she was settled thereon on October 3, 1996.
39. The Plaintiff also states that in the year 2014, she moved part of her family to the suit property where she constructed two houses and a store.
40. The Plaintiff further states that the Defendant is using the Local Provincial Administration to claim two acres of her land which she (the Defendant) fenced and begun to plough.
41. Simon Konana Konini testifies as PW2. He prayed that his witness statement dated November 10, 2022 be adopted as part of his evidence, which prayer was allowed.
42. He testified that the suit property is at Tiritagoni village adding that in 1995, the District Officer Nakuru one Aden Nur asked their area Chief to form a committee to establish the number of Ogieks to be given land.
43. It is his evidence that when the committee was formed, he became a member adding that he was representing the Kaptirigo clan. He went on to state that Joseph Kuluman was the Chairman while John Sayaya was the Vice- chairperson of the said committee.
44. PW2 confirmed that he knows the Plaintiff adding that she was settled on 5 acres of land and given an allocation card. He also confirmed that he knows the Defendant and explained that she was not allocated any land as she (the defendant) did not have an identification card.
45. He further testified that there was disagreement between the defendant and her mother which was occasioned by her (the defendant's) illicit liquor business and the defendant's mother requested him to speak to the Plaintiff to allow the Defendant to settle on part of her land.
46. He further testified that the Plaintiff agreed to give the Defendant a small portion of the suit land but over time the Defendant started encroaching on other parts of it.
47. It is his evidence that when the Defendant lodged a complaint at the area Chief's office and members of the committee were summoned to go to the ground together with the Chief and the neighbors and find out what the Defendant's complaint was about.



48. He testified that the Chief proposed that the Plaintiff gives the Defendant land but it was not possible. He also testifies that the Defendant has since vacated the suit property after demolishing the iron sheet structure she had put up.
49. In his witness statement, PW2 states that the allocation of land was halted in the year 1997 through a court order issued on November 18, 1997.
50. The court sought clarification and the Defendant explained that the parcel of land allocated to the Plaintiff is No 04755 and that he did not seem to know about the Number 982.
51. PW2 continues with his testimony and stated that the suit parcel was surveyed and that he too was allocated land which is different from that of the Plaintiff.
52. The Plaintiff's case was then closed.
53. Upon application by the Plaintiff's Counsel, the court dismissed the Defendant's Counterclaim for want of prosecution and closed the Defence case.

Issues For Determination.

54. The Plaintiff filed her submissions dated January 19, 2023 wherein she narrates the history of this suit, the averments made in the plaint, the statement made in the written statement of Defence and reiterates her evidence as presented during the trial.
55. The Plaintiff submits that she, on a balance of probabilities has proved that she is the legitimate legal owner of the suit land which was allocated to her in the year 1995 and she has been in occupation since the year 1996.

Analysis And Determination,

56. After considering the pleadings, submissions and the testimony of the Plaintiff and her witness, the following issues arise for determination;
 - a. Whether the Plaintiff is entitled to an order of permanent injunction against the Defendant restraining her from interfering in any way with land parcel No Nakuru/Nessuit/982 as per allocation card serial No 04755.
 - b. Whether an order of eviction and demolition of the structures of the Defendant erected on the suit property should be issued.
 - c. Who should bear costs of this suit?

A. Whether the Plaintiff is entitled to an order of permanent injunction against the Defendant restraining her from interfering in any way with land parcel No Nakuru/Nessuit/982 as per allocation card serial No 04755.

57. It is the Plaintiff's case that she was allocated 5 acres of land at Tritagoni and was issued with allocation card Serial No 04755 which was produced as Exhibit P1.
58. In her evidence she stated that she was a member of the Ogiek Community who had been living in the forest before they were resettled and allocated land.
59. Her case is that upon request from her mother, she gave her sister (the Plaintiff) ¼ an acre of the suit property but she begun to lay claim over two acres of the suit parcel. The Defendant subsequently lodged a complaint at the office of the area Chief which caused the plaintiff to be summoned by the



area chief on two occasions as exhibited by Exhibit P2 and P3. The area Chief in an attempt to mediate the dispute wrote a letter (Exhibit P5) to the Deputy County Commissioner stating that an agreement had been reached to share the suit parcel in the ration of 2:3 as between the Defendant and the Plaintiff. The Plaintiff states that this letter is not a representation of what happened and adds that she did not sign the said letter.

60. The Plaintiff's testimony is that the Defendant has since vacated the suit property and demolished the structures that she had put up.
61. The Defendant did not attend court for hearing so her case was closed and her counterclaim dismissed.
62. In the case of *Shaneebal Limited vs County Government of Machakos* [2018] eKLR, the Learned Judge cited with approval the decision in *Karuru Munyororo vs Joseph Ndumia Murage & Another* Nyeri HCCC No 95 of 1988, wherein it was as follows;
 63. As indicated before, the Plaintiff is seeking that the court issues an order of permanent injunction against the Defendant restraining her from interfering in any way with land parcel No Nakuru/Nessuit/982 as per allocation card serial No 04755.
 64. The allocation card is issued by the District Commissioners Office, Nakuru to the Plaintiff of ID No 9712492/71 for Plot No 04755 at Nessuit comprising 5 acres. It is signed by the District Commissioner Nakuru District, Provincial Forest Officer with a provision for the Allottee to sign. At the back of the allocation card is a signature by a surveyor on 3rd October, 1996 and an endorsement "settled".
 65. The Plaintiff's testimony is that after settlement, a survey was done and Plot No 04755 became No 982. She produced a sketch map as Exhibit P4. Indeed, the sketch map shows a parcel No 982.
 66. PW2 in answering questions from the court stated that he knows that the Plaintiff was allocated parcel No 04755, he confirmed that the land had been surveyed but stated that he did not know the number 982.
 67. The Defendant in her Statement of Defence at paragraph 6 (a) admits that the Plaintiff was allocated land serialized as 04755 in Tiritagio which is deep in the Mau Forest, Land Parcel Nakuru/Nessuit 982. Importantly and flowing from this admission is that the Defendant acknowledges the nexus between parcel No Nakuru/Nessuit/982 and 04755.
 68. In *Miller.v. Minister of Pensions* 1947 ALL E.R. 372 Lord Denning stated as follows on the standard of proof;

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."



69. I find that the plaintiff has discharged his burden of proof and that this court has a duty to protect her rights of use and occupation of the suit parcel.
70. Further, the Defendants were given an opportunity to defend this suit but they chose not to as a result of which the Plaintiff's evidence remains uncontroverted. In the circumstances, nothing is easier than to issue orders of permanent injunction against the Defendant.

B. Whether an order of eviction and demolition of the structures of the Defendant erected on the suit property should be issued.

71. Bearing in mind my finding on issue (a) above, it follows that the Plaintiff has made a case for the grant of orders of eviction against the defendant and demolition of structures erected by her on the suit land.
72. I note that as the time of hearing, the Plaintiff in her testimony stated that the Defendant vacated the suit land in the year 2019 and demolished all structures that she had erected hereon.

C. Who should bear costs of this suit?

73. The general rule is that costs shall follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.
74. I note that the Plaintiff and Defendant are sisters. In the spirit of repairing an already fractured relationship, this court is unwilling to protract this dispute any further than is necessary. I shall make no orders as to costs.

Disposition.

75. In the result, I find that the Plaintiff's suit against the Defendant succeeds.
76. Consequently, judgment is entered in favour of the Plaintiff in the following terms:
- a. An order of permanent injunction is hereby issued against the defendant restraining her either by herself, her servants or agents from encroaching onto, trespassing onto, cultivating, fencing, alienating or in any other way interfering with the Plaintiff's possession and quiet enjoyment of Land Parcel No Nakuru/Nessuit/982 as per the allocation card serial No 04755.
 - b. An order of eviction of the Defendant and demolition of structures erected by her on the suit land is hereby issued.
 - c. The order of eviction and demolition in (b) above shall be executed 90 days after service of this judgement and/or decree- upon the defendant.
 - d. Each party shall bear own costs.
77. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 8TH DAY OF JUNE, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

Miss Bosibori for Mr. Ndubi for the Plaintiff



No appearance for Defendant

Court Assistant; Ms. Monica Wanjohi.

