



**Mbindyo v County Government of Machakos & another (Environment & Land Case 98 of 2011) [2023] KEELC 18729 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18729 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 98 OF 2011**

**A NYUKURI, J  
JULY 12, 2023**

**BETWEEN**

**DAVID MUTIE MBINDYO ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF MACHAKOS ..... 1<sup>ST</sup> DEFENDANT**

**WILSON MUCHOKI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a further amended plaint dated 25<sup>th</sup> September 2018, the Plaintiff in this suit, sought the following orders against the Defendants jointly and severally;
  - (a) A perpetual and permanent injunction restraining the Defendants, their agents, servants, employees and/or assignees from further trespassing, destroying, claiming and/or interfering with the Plaintiff's property being Plot No. 5 Canaan in any manner inconsistent with the Plaintiff's right of possession.
  - (b) A declaration that the Plaintiff is the legal proprietor of property being Plot No. 5 Canaan and the Defendants have no power or right to interfere with his peaceful and/or quiet possession of the same.
  - (c) General and exemplary damages for trespass, malicious and unconstitutional deprivation of property.
  - (d) Costs of the suit.
2. The Plaintiff averred that he has since the year 2006 been registered as proprietor and entitled to possession of all that parcel of land known as Plot No. 5 Canaan (suit property) which he bought from Vitendo Women Group and thereafter the same was transferred to him, without any complaint over his ownership and development thereof.



3. He further stated that on 18<sup>th</sup> April 2011, with intend to defraud the Plaintiff, the Defendants colluded and trespassed on the suit property destroyed the Plaintiff's fence and site office and replaced the same with their own and continued to illegally occupy the suit property leading to loss and damage to the Plaintiff.
4. The 2<sup>nd</sup> Defendant entered appearance and filed his statement of defence dated 8<sup>th</sup> July 2019 opposing the suit. He denied the Plaintiff's claim and stated that he is the registered proprietor of Plot Number 10/Canaan/Phase 11 and Plot Number 17/Canaan/Phase 11. He denied colluding with the 1<sup>st</sup> Defendant with intention to defraud the Plaintiff of property and denied trespassing on the Plaintiff's Plot Number 5 Canaan.
5. In a rejoinder, the Plaintiff filed reply to 2<sup>nd</sup> Defendant's defence dated 10<sup>th</sup> July 2019 where he reiterated that he has been in occupation of the suit property since 2006. No defence was filed by the 1<sup>st</sup> Defendant who also did not participate in these proceedings despite service.
6. This matter proceeded to hearing whereof both the Plaintiff and the 2<sup>nd</sup> Defendant presented one witness each.

### **Plaintiff's Case**

7. PW1, David Mutie Mbindyo and the Plaintiff in this matter testified on 8<sup>th</sup> February 2022. He adopted the contents of his witness statement dated 20<sup>th</sup> April 2011 as his evidence in chief. His testimony was that he was the registered legal proprietor of Plot No. 5 in Mavoko Municipal Council and had been in continuous occupation since the year 2006. He stated that he developed the plot by building a permanent fence all round and built a structure thereon which he leased to someone else who used it to operate a business.
8. According to PW1, he acquired the said plot by purchase from Vitendo Women Group whereof he paid all the rates and dues for the plot and that the same was subsequently transferred to him. He stated that on 19<sup>th</sup> April 2011 he was informed that people were putting up a foundation on his plot and that he visited the plot to stop the construction and was told that Councillor Mirriam had sold the plot to the persons who were building thereon. He stated that he had never sold his plot and that the said Councillor Mirriam had no power to sell his plot. He sought for the orders stated in the plaint. He produced the documents attached to his list of documents dated 20<sup>th</sup> April 2011 as exhibits herein. He produced a transfer document, receipt from Mavoko Municipal Council confirming transfer and copy of transfer letter of 31<sup>st</sup> July 2006. That marked the close of the Plaintiff's case.

### **2nd Defendant's Evidence**

9. DW1 was Wilson Muchoki, the 2<sup>nd</sup> Defendant in this suit. He adopted his witness statement dated 8<sup>th</sup> July 2019. It was the testimony of DW1 that he was owner of Plot Number 10/Canaan/Phase II (1) and Plot Number 17/Canaan/Phase II (1) respectively. That Plot Number 10/Canaan/Phase II (1) was allocated to Collins Mutua whereas Plot Number 17/Canaan/Phase II (1) was allocated to Robert Mulei Mutua on 6<sup>th</sup> July 2004 and that the said properties were transferred to him on 28<sup>th</sup> March 2011. He stated that he had been in occupation of the said properties since 28<sup>th</sup> March 2011 to date. He stated that he set up a business on the said properties and no one had stopped him from developing the property.
10. The witness stated that he did not know where Plot No. 5 Canaan is located and that he has never trespassed on the said property. He denied conspiring with others with intention to defraud the Plaintiff.



11. On cross-examination, he stated that he bought the suit property from Collins Mutua and his father Robert Mulei. He stated further that he did not sign the transfer application form. He stated that there were alterations in the plot numbers on the forms. He stated that although the letter from the County Government showed that the property was transferred to him by Robert Mulei, the Plots did not belong to Robert Mulei and that the letter does not refer to Collins and that he bought the Plots from Robert. He stated that he had no beacon certificate, survey plan or map but that an employee of council showed him the plot. He stated that the suit property was not sold to him by councillor Mirriam and that he knew Councillor Mirriam Mwhaki and that she was the area Councillor when he got the property. He stated that there were no records for that suit property and that the surveyor who showed him the property did not prepare any certificate for confirming the site.
12. In re-examination, he stated that he did not know why there were alterations in his forms and that he had put up a hotel and petrol station on the property. He stated that he moved from the suit property in 2020 when the same was taken over by the roads department. That marked the close of the defence case.
13. Parties filed written submissions. On record are the Plaintiff's submissions dated 4<sup>th</sup> April 2023 and the 2<sup>nd</sup> Defendant's Submissions dated 24<sup>th</sup> May 2023.

### **Plaintiff's Submissions**

14. Counsel for the Plaintiff submitted that the Plaintiff's evidence on being the lawful and bona fide owner of the suit property was not controverted. Counsel submitted that the truth was that the plots described as No. 10/Canaan/Phase II and Plot No. 17/Canaan/Phase II is the same plot as Plot No. 5 Canaan, belonging to the Plaintiff and that the assertion by the 2<sup>nd</sup> Defendant that he is not aware of the suit property does not hold water. Counsel argued that the 2<sup>nd</sup> Defendant illegally took possession of the Plaintiff's property from the year 2011 utilized it until 2020 when he claimed to have vacated the land during road construction and was duly compensated.
15. Reliance was placed on the case of Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others [2016] eKLR and Caroline Awinja Ochieng & Another v Jane Anne Mbithe Gitau & 2 Others [2015] eKLR for the proposition that where the court is faced with two titles for one parcel it ought to investigate the root of the title.
16. Counsel submitted that the Plaintiff had explained the root of his title while the 2<sup>nd</sup> Defendant had not.
17. On whether the remedies sought by the Plaintiff should be granted, counsel submitted that the Defendants had unlawfully colluded to deprive the Plaintiff of his land which is contrary to Articles 40 and 65 of *the Constitution* and that the 2<sup>nd</sup> Defendant confirmed that he was compensated when the Plaintiff was the one who should have been compensated.
18. On the question of quantum of damages for trespass, counsel relied on the case of Rhoda S. Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited [2019] eKLR, for the proposition that where trespass is proved, damages ought to be awarded. Counsel therefore argued that in view of the value of the property and the duration of the trespass which according to him was nine years, he sought for general damages in the form of Kshs. 50,000,000/- and exemplary damages in the sum of Kshs. 2,000,000/-.

### **2nd Defendant's Submissions**

19. Counsel for the 2<sup>nd</sup> Defendant submitted that the 2<sup>nd</sup> Defendant in his testimony confirmed having acquired Plot No. 10/Canaan/Phase II and No. 17/Canaan/Phase II from Robert Mulei and Collins



Mulei; that the two transferred the land to him; that the County Surveyor pointed out the two plots to the 2<sup>nd</sup> Defendants which he developed as no development had been on the property as alleged by the Plaintiff; that the 2<sup>nd</sup> Defendant put up a petrol station and hotel on the two plots and that he managed his business until the government built a road and took up the two plots.

20. Counsel submitted that the burden of proof in this case vested on the Plaintiff, by dint of Section 107 of the *Evidence Act*. That the Plaintiff ought to have filed a surveyor's report to prove trespass by the 2<sup>nd</sup> Defendant. Counsel pointed out that on 8<sup>th</sup> October 2019, the court directed the Plaintiff to get a surveyor's report to aid the court in arriving at an appropriate decision. Counsel argued that there was no evidence to show collusion between the Defendants with intention to defraud the Plaintiff.
21. It was submitted for the 2<sup>nd</sup> Defendant that the plaint was an abuse of the court and misconceived as the allegations made against the 2<sup>nd</sup> Defendant were baseless and unsupported.

### **Analysis and Determination**

22. I have carefully considered the pleadings, evidence and submissions of the parties. The issues that arise for determination are;
  - (a) Whether the suit property was Plot No. 5 Canaan and not Plot Numbers 10/Canaan/Phase II and Plot Number 17/Canaan/Phase II.
  - (b) Who is the owner of the suit property?
  - (c) Whether the Plaintiff deserves the orders sought.
23. Section 107 of the *Evidence Act* places the burden of proof of any claim on the Plaintiff and provides as follows;
  - (a) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.
  - (b) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Section 108 provides as follows;

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given or either side.

While Section 109 of the *Evidence Act* provides as follows;

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of any fact shall lie on any particular person.

24. It is therefore upon a Plaintiff in a suit to prove their claim on the required standard. Section 108 of the *Evidence Act* means that the evidential burden of proof regarding proof of material facts in the suit keeps shifting so that the burden of proof will rest on the party who will fail if no further evidence is given on both sides.
25. This was aptly captured in the decision of the Supreme Court of Kenya in the Presidential Election Petition No. 1 of 2017 between Raila Amolo Odinga & Another v IEBC & 2 Others [2017] eKLR; where it was held as follows;  

[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant throughout the trial, with the Plaintiff.



However, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

- [133] It follows therefore that once the court is satisfied that the Petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the Respondent, in most cases, the electoral body, to adduce evidence rebutting the assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the Petitioner bears an evidentiary burden to adduce factual evidence to prove his/her allegations of breach, then the burden shifts and it behooves the Respondent to adduce evidence to prove compliance with the law.
26. Turning to the issue in this matter, the Plaintiff pleaded and testified that he was the owner of the of Plot No. 5 Canaan, but on the other hand, the 2<sup>nd</sup> Defendant's position from his pleadings and evidence is that he is the owner of Plot Number 10/Canaan/Phase II and Plot Number 17/Canaan/Phase II which he purchased from Robert Mulei and Collins Mulei. Both the Plaintiff and the 2<sup>nd</sup> Defendants availed documents from Mavoko Municipal Council in support of their respective cases. In view of this evidence, the question then that must be answered is what is the proper number of the disputed property. Is it Plot No. 5 as stated by the Plaintiff or Plot No. 10/Canaan/Phase II and Plot No. 17/Canaan/Phase II as stated by the 2<sup>nd</sup> Defendant?
  27. The 2<sup>nd</sup> Defendant having raised this issue through their defence and evidence filed in court, it was therefore upon the Plaintiff who was the one required under Section 107 of the [Evidence Act](#) to prove his legal right, to show that indeed the land in dispute was Plot No. 5 Canaan and not Plot Number 10/Canaan Phase II and Plot Number 17/Canaan Phase 2 as alleged by the 2<sup>nd</sup> Defendant.
  28. It is not disputed that the disputed property was within Mavoko Municipal Council and administered by the said council and therefore, records as to where the plot is and its identification are in custody of the 1<sup>st</sup> Defendant herein, being the successor of the Council. Although on 8<sup>th</sup> February 2022 counsel for the Plaintiff sought for witness summons to issue against the Chief Officer Lands, from the County Government of Machakos, that witness was never availed in court. This is despite the fact that on 8<sup>th</sup> October 2019 the same counsel appearing for the Plaintiff had sought for an adjournment when this matter came up for hearing on 8<sup>th</sup> October 2019 as he alleged that he needed a surveyor's report to prove his claim and the court gave him more time and leave to file further documents, yet no such surveyor's report was filed.
  29. As the identity of the disputed property was the main issue before the court could decide who owed it, the burden of proof lay on the Plaintiff to show by a surveyor's report and records from the Municipal Council of Mavoko and or its successor the County Government of Machakos that the suit property was indeed Plot Number 5 Canaan. As no such evidence was presented by the Plaintiff, I find and hold that the Plaintiff failed to demonstrate that the suit property was Plot No. 5 Canaan and not Plot No. 10/Canaan/Phase II and Plot Number 17/Canaan/Phase II as alleged by the Defendant. As the Plaintiff failed to show the Plot Number it is not necessary and will be an exercise in futility to inquire into who is the owner of the disputed plot.
  30. In the premises, I find and hold that the Plaintiff has not discharged his burden of proof and therefore his claim must fail. Therefore this suit is hereby dismissed with costs to the Defendant.
  31. Orders accordingly.



**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 12TH DAY OF JULY,  
2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the Presence of;**

**Mr. Munene holding brief for Mr. Ayieko for Plaintiff**

**Ms Omenta for 2<sup>nd</sup> Defendant**

**No appearance for 1<sup>st</sup> Defendant**

**Abdisalam – Court Assistant**

