



**Mulei & another v Ndululu & another (Environment & Land Case
3 of 2022) [2023] KEELC 20558 (KLR) (3 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20558 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE 3 OF 2022
LG KIMANI, J
OCTOBER 3, 2023**

BETWEEN

ANTHONY MWANZIA MULEI 1ST PLAINTIFF

MULEI WAMBUA 2ND PLAINTIFF

AND

JEREMIAH MUTIKA NDULULU 1ST DEFENDANT

CHARLES NDULULU MUTIKA 2ND DEFENDANT

JUDGMENT

1. Before the Court is a suit instituted vide Plaint dated 27th September 2016 and amended on 16th April 2018 where the 1st Plaintiff claims as the registered owner of all that parcel of land known as Nzambani/Kyanika/1452 measuring approximately 1.4 Ha while the 1st Defendant is the registered owner of the neighbouring parcel of land Nzambani/Kyanika/2260.
2. The 1st Plaintiff claims that on or about the year 2007, the 1st Defendant trespassed into the suit property and put up illegal structures thereon, purporting that his father, Charles Ndululu Mutika, bought a portion of the said parcel of land from the plaintiff's father, Mutei Wambua. It is averred that the 1st Defendant's father filed a suit against the 1st Plaintiff's father in the year 2010 vide Kitui PMCC No. 379 of 2010 which was dismissed and a subsequent appeal in Machakos ELCA No. 75 of 2018 was also dismissed.
3. The 1st Plaintiff avers that his father, the 2nd Plaintiff thereafter legally and through due process caused the said parcel of land to be transferred and registered in the 1st Plaintiff's name on 6th August 2013. He claims that despite the judgment in the said Kitui PMCC No.379 of 2010, the 1st defendant has refused to demolish the illegal structures that he had constructed on the plaintiff's land and/or to vacate the plaintiff's said land parcel number Nzambani/Kyanika/1452.



4. The 1st Plaintiff further accuses the 1st Defendant of wrongfully and unlawfully making bricks on the suit land, hence denying him both access and use of his said parcel of land. The 1st Plaintiff avers that his requests that the 1st defendant vacate the suit property have been ignored.
5. Further, 1st Plaintiff avers that he made an application to have the boundary ascertained between the suit property and 1st Defendant's adjoining land and it was established that 1st Defendant's house was actually on the suit property whilst 2nd Defendant's homestead was on his own said parcel of land (Nzambani/Kyanika/2260)
6. The Plaintiff prays for:
 - a. An order of permanent injunction restraining the defendant, his agents and/or servants from cultivating, baking bricks, growing crops, grazing or in any other way interfering with Land Parcel Number Nzambani/Kyanika/1452.
 - b. A declaration that the land parcel Number Nzambani/Kyanika/1452 legally belonged to the 2nd Plaintiff and was lawfully transferred to the 1st Plaintiff by the 2nd Plaintiff
 - c. Eviction of the 1st defendant from Land Parcel No. Nzambani/Kyanika/1452 and demolition of the defendant's structure thereon.
 - d. General damages for loss of user (mesne profits) and the destruction occasioned.
 - e. Costs of the suit and interest at Court rates.
7. By an application dated 24th March 2017, the initial Defendant Jeremiah Mutika Ndululu sought an amendment to the Plaint to include the 2nd Plaintiff and the 2nd Defendant as parties to the suit herein and the said application was allowed by the Court leading to filing of the Amended Plaint.
8. It has been stated that Mulei Wambua is the father of the 1st Plaintiff while the 2nd Defendant, Charles Ndululu Mutika, was the father of the 1st Defendant. There is no evidence in the court file if the 2nd Defendant was served with the summons to enter an appearance and whether he filed a defence. It has, however, been stated that the 2nd Plaintiff and the 2nd Defendant are since deceased and are not represented by any of the personal representatives of their respective estates. The parties chose to proceed with the suit as it was without any substitution.

The Defendant's Statement of Defence

9. The 1st Defendant denied the contents of the Plaint and stated that he had appealed against the decision of Kitui SPMCC 379 of 2010 before the High Court at Machakos HCCA 158B of 2013 which is still pending before the Court. He averred that the transfer of the suit property from Mulei Wambua was only done to defeat the course of justice and defeat any orders that would be issued in the appeal. The 1st Defendant further stated that the 1st Plaintiff has never asked him to vacate any land or demolish any structures on the suit property.
10. The 1st Defendant also averred that he was not the one who constructed on the suit property but his father did and that he filed a case demanding the transfer of a portion of the suit property which he had purchased from the 1st Plaintiff's father.
11. The 1st Defendant concludes that the 1st Plaintiff is not entitled and has no basis upon which to ask for the prayers being sought in this claim until the rights of the parties in the appeal pending before the Machakos High Court have been determined and that this suit is an attempt to circumvent, derail and defeat the course of justice.



Evidence at the trial

12. The hearing proceeded on 14th March 2023 where PW 1, Anthony Mwanzia Mulei, the 1st Plaintiff testified and adopted his witness statement dated 17th June, 2022 and a bundle of documents of even date as evidence. The 1st Plaintiff testified that he is the registered owner of the suit property Nzambani/Kyanika/1452 which was transferred to him by his late father, the 2nd Plaintiff herein. He further stated that the 2nd Defendant had filed a suit against the 2nd Plaintiff who is the 1st Plaintiff's father in the year 2010 vide Kitui PMCC No. 379 of 2010 claiming that he had bought a portion of the said parcel of land from the 2nd Plaintiff. The said suit was concluded in favour of the 2nd Plaintiff in 2013 and thereafter the suit land was transferred and registered in the 1st Plaintiff's name on 6th August, 2013.
13. The 1st Plaintiff's testimony was that despite the judgment of the court in Kitui PMCC No.379 of 2010, the 1st Defendant refused to demolish the illegal structure that he had constructed on the suit land and appealed against the lower court decision Machakos High ELC Appeal No.75 of 2018. Further, the 1st Defendant started making bricks on the suit land hence denying the 1st Plaintiff access to the land. The 1st Plaintiff made an application to have the boundary ascertained between the suit land and the 2nd Defendant's adjoining land where it was established that the 1st Defendant's house was on the suit property. It is therefore the 1st Plaintiff's claim that the 1st Defendant's house illegally stands on his land title number Nzambani/Kyanika/1452. The 1st Plaintiff noted that the 2nd Plaintiff and the 2nd Defendant are now deceased and his claim reverts to the format he instituted on 28th September 2016.
14. Upon cross-examination, the 1st Plaintiff stated that when the title was registered in his name on 6th August 2013, he was not aware that the 1st Defendant had lodged an appeal and that there was no order for eviction. It was his view that his father was the one to follow up on the case since he was not a party to the suit. He also stated that the 1st Defendant had been on the suit land since 2009. On re-examination, the 1st Plaintiff stated that the appeal at Machakos was dismissed.
15. DW 1, Jeremiah Mutika Ndululu testified stating that he works with the Federation of Women Lawyers (FIDA) as a process server and a mediator. He adopted his witness statement filed on 9th November, 2022 and produced in evidence documents contained in the list of documents dated 7th November, 2022.
16. In his witness statement, the 1st Defendant stated that sometime in 1996, his father, Charles Ndululu Mutika the 2nd Defendant who is now deceased had entered into a written agreement with the 1st Plaintiff's father that he would pay school fees for the 1st Plaintiff until he completed his education if he would sell him a portion of land for his family to settle. Despite the 1st Defendant's father honouring his end of the agreement, the Plaintiff's father refused to transfer the portion of the suit land to him and destroyed the developments made, which prompted him to file SPMCC 379/2010 to defend his rights. He stated that the said suit was dismissed and he proceeded to appeal the decision vide Machakos HCCA 158B/13.
17. The Defendant's view was that the dispute over the suit property was between their deceased fathers, that he has never claimed any interest in the suit property that no one has ever asked him or his family to vacate the suit property and they have never been asked to demolish any structures. He denied encroaching onto the 1st Plaintiff's portion of land and stated that he has lived there since 1993 when his father agreed to the sale of land with the 1st Plaintiff's father.



18. On cross-examination, the Defendant acknowledged that the appeal was dismissed on 19th February, 2021 and that the evidence and the matter of the sale agreement was dealt with in Kitui Civil Case No.379/2010.

The 1st Plaintiff's written submissions

19. Counsel for the Plaintiff gave a summary of the case and submitted that Section 24 of the Land Registration Act confers absolute ownership upon registration of a person as the proprietor of the land. He also cited Section 26 on indefeasibility of ownership in the title holder unless challenged on grounds of fraud and misrepresentation or on the ground that the title has been acquired illegally, unprocedurally or through a corrupt scheme. He relied on the case of Dr. Joseph Arap Ngok v Justice Moiye ole Keiwa and 5 others Civil Appeal 60 of 1997.
20. The Plaintiff's submission is that he has proven that he is the rightful owner of the land title number Nzambani/Kyanika/1452 and is vested with all the rights and privileges thereto.
21. Secondly, the Plaintiff's counsel submitted that the transfer of the suit land's title to his name by his father was never challenged and that the Defendant did not produce any evidence of fraud, misrepresentation or illegality contrary to Section 107 of the Evidence Act and finally that he is entitled to the reliefs sought.
22. Regarding the order for general damages for loss of user and unlawful occupation, he proposed that the plaintiff be awarded damages amounting to KES. 1,000,000.00 while relying on the holding in the case of Edwin Kago Kagwi vs Simon Kahia(2021) eKLR and urged for the court to enter judgment as prayed.
23. The Defendant was given 7 days to file and serve submissions by the Court on 11th July 2023 but the same are not on the court record.

Analysis and Determination

24. Based on the pleadings and submissions filed the court considers the following as the issues arising for determination;
- B. Whether the Defendant is a trespasser on the Plaintiff's land.
- (C) Whether the Plaintiff is entitled to the prayers sought in the plaint.
- On issue No. A

A. Whether the Plaintiff is the registered owner of land parcel No. Nzambani/Kyanika/1452.

25. The 1st Plaintiff claims that he is legally registered as owner of the suit land parcel number Nzambani/Kyanika/1452 measuring approximately 1.4 acres while the 1st Defendant's land parcel of land Nzambani/Kyanika/2260 borders the said Plaintiff's land. He claims that on or about the year 2007, the 1st Defendant trespassed into the suit property and put up illegal structures thereon, purporting that his father had bought a portion of the said land from the Plaintiff's aforesaid father. That the 1st Defendant's father filed a suit against the 2nd Plaintiff who is the 1st Plaintiff's father in the year 2010 vide Kitui PMCC No. 379 of 2010 which was dismissed. An appeal filed against the trial court's decision in Machakos ELC Appeal No.75 of 2018 was also dismissed on 19th February 2021.
26. The 1st Plaintiff avers that his father, the 2nd Plaintiff thereafter legally and through due process caused the said parcel of land to be transferred and registered in his name on 6th August 2013. He claims



that despite the judgment in the said Kitui PMCC No. 379 of 2010, the 1st defendant has refused to demolish the illegal structures he had constructed and/or to vacate the said Land.

27. The 1st Defendant, on the other hand, stated that his father, Charles Ndululu Mutika now deceased had entered into a written agreement with the 1st Plaintiff's father, Mulei Wambua on grounds that he would pay school fees for the 1st Plaintiff until he completed his education if he would sell him a portion of land for his family to settle. Despite the 1st Defendant's father honouring his end of the agreement, the 1st Plaintiff's father refused to transfer the portion of the suit land to him and destroyed the developments made. This prompted him to file a suit in SPMCC 379/2010 to defend his rights. He claims that the portion of the suit property land parcel number Nzambani/Kyanika/1452 that he occupies was duly sold to his father and that they have never been told to move out of the land.
28. A copy of the Title Deed and the Certificate of official search indicates that the Plaintiff, is registered as the absolute proprietor of the suit land and the title deed for the said land was issued on 6th August 2013. The proceedings in Kitui PMCC 379 of 2010 produced by both parties indicate that the suit was dismissed by the trial court on 24th July 2013 and that the subsequent appeal arising from it which was Machakos ELC Appeal 75 of 2018 was dismissed by Hon. Angote J on 25th February 2021 for want of prosecution.
29. In the said suit the 1st Defendant's father Charles Ndululu Mutika claimed a portion of the suit land parcel number Nzambani/Kyanika/1452 which he stated had been sold to him by the 2nd Plaintiff who is the 1st Plaintiff's father Mulei Wambua through an agreement of sale dated 7th April 1996. In the court's view, the sale agreement referred to in the suit PMCC No 379 of 2010 is the same one that is the subject matter of this suit. The Plaintiff in PMCC No. 379 of 2010 sought permanent orders of injunction to restrain the Defendant from subdividing the suit land and selling to a third party the portion the Plaintiff occupied. He also prayed for an order of subdivision of the land in his favour and the consent of the Land Control Board.
30. Having looked at the plaint, defence and judgement in PMCC No. 379 of 2010 where the parties were Charles Ndululu Mutika vs. Mulei Wambua and the Memorandum of Appeal in Machakos ELC Appeal 75 of 2018, it is the court's view that the claim now made by the Defendant that his father purchased a portion of the suit land from the Plaintiff's father is the same claim as was before the courts in the previous suit and the appeal.
31. The existence and legality of the agreement for the sale of the suit land being pursued by the 1st Defendant as a defence to the 1st Plaintiff's claim was fully heard and determined in the judgment of the Court in Kitui PMCC 379 of 2010 and the Court invalidated the said agreement and dismissed the suit on the basis that the details of the arrangements of the payment of school fees by the Defendant's father were not clear and could not form the basis of a contract and therefore did not meet the legal threshold of a contract as set out in Section 3(3) *Law of Contract Act* CAP 23 Laws of Kenya.
32. The issue of ownership of the suit land is thus in the court's view res judicata within the meaning of Section 7 of the *Civil Procedure Act*. The test for determining the application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. It provides thus:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”



33. In the case of *E.T. v Attorney General & another* [2012] eKLR it was held that;

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in the form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi vs NBK & Others* (2001) EA 177, the court held that “parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.”

34. Section 26(1) of the *Land Registration Act* No.3 of 2012 provides that Certificate of title to be held as conclusive evidence of proprietorship: -

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

35. The Defendant has not shown to the court that the title deed held by the 1st Plaintiff was acquired illegally, unprocedurally or through a corrupt scheme and neither has he shown that it was acquired through fraud or misrepresentation. The court thus takes the said title deed as prima facie evidence that the 1st Plaintiff, being the person named as proprietor of the land parcel number Nzambani/Kyanika/1452, is the absolute and indefeasible owner.

B. Whether the Defendant is a trespasser on the Plaintiff’s land

36. Section 24 of the *Land Registration Act* confirms the interest conferred by the registration of land and states that “the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”

37. One of the rights conferred by ownership of land is possession thereof. This was stated by the Court of Appeal in the case of *Ruth Wangari Kanyagia –vs.- Josephine Muthoni Kinyanjui* [2017] eKLR while citing the India Supreme Court decision in the case of *Karnataka Board of Wakf –vs- Government of India & Others* [2004] 10 SCC 779 where the court stated thus: -

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title.”

38. Section 25 of the *Land Registration Act* further confirms the rights of a proprietor and states that;

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except



as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.”

39. Section 3 (1) of the [Trespass Act](#), Cap 294 provides that:

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

40. According to the 10th Edition of Black’s Law Dictionary trespass is defined as follows;

“An unlawful act committed against the person or property of another; especially wrongful entry on another’s real property. Clark & Lindsell on Torts, 18th Edition on page 923 defines trespass as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason.”

41. Trespass is defined in the case of Martha Kigen vs. Johnson Tibino (2014) eKLR as the unjustifiable intrusion by one person upon the land of another without permission.

42. Having established the registered proprietary rights of the 1st Plaintiff in the suit law, the next thing is to establish whether the 1st Defendant committed acts of trespass onto the suit land. The 1st Plaintiff states in the plaint that on or about 2007 the Defendant with the directions of his father wrongly and unlawfully entered into the Plaintiff’s land and put up illegal structures purporting that his father had bought the portion of land from his father. The 1st Plaintiff further stated that in or about August 2016 the 1st Defendant wrongfully started making bricks on the suit land hence denying him access to and use of the suit land.

43. The 1st Plaintiff further averred that he made an application to have the boundary ascertained between the suit property and the 2nd Defendant’s adjoining land and it was established that the 1st Defendant’s house was on the suit property whilst his father’s house was on his land parcel Nzambani/Kyanika/2260.

44. The 1st Defendant on the other hand stated that upon entering into the sale agreement with the 2nd Plaintiff’s father, his father took possession of and settled on the agreed portion of land in the year 2001 while continuing to host and educate the 1st Plaintiff. The 1st Defendant further stated that his father constructed a house for himself where he (the 1st Defendant) and his brother reside. He stated that his father erected a fence around the land but the 2nd Plaintiff’s father demolished the same giving rise to suit no 379 of 2010.

45. The 1st Defendant further denied being the one who constructed on the suit land and stated that he has never laid claim to the suit land he has never been asked to vacate the land and no demand letter has ever been issued to him asking him to vacate the land. The 1st Defendant denied that he entered the suit land and started making bricks thereon. In the evidence in court, the 1st Defendant stated that he has lived on the suit land since 1993 when his father agreed with the 1st Plaintiff’s father to purchase a portion thereof. He has never claimed ownership of the land and he rides on his father’s right to the land as a result of purchase. He stated that they have always ensured the use of their portion of the suit land within the appropriate limits and have never encroached on the Plaintiff’s portion



46. The 1st Defendant further stated that the court while sitting in Machakos Hon. Angote directed through an order issued on 8th February 2017 that the status quo be maintained and the parties access their respective houses or homes.
47. From the foregoing evidence, there is no doubt that the 1st Defendant has a home on the suit land even though he claims that the same was constructed by his father. The legality of the sale of the portion claimed by the 2nd Defendant was determined by a competent court and the said determination has not been set aside. It is the court's view that the 1st Defendant's use of and occupation of a portion of the suit land Nzambani/Kyanika/1452 is unlawful and an infringement on the 1st Plaintiff's proprietary rights. In the court's view the Defendant is a trespasser on the suit property within the meaning of the law cited above Section 3 (1) of the Trespass Act, and the legal authorities cited Martha Kigen Vs Johnson Tibino (supra).
48. For purposes of the claim by the 1st Plaintiff for damages for trespass, the court notes from the judgement in PMCC NO. 379 of 2010 that the Defendant's father was claiming a portion of the suit land measuring 39 X 26 X 24 yards. It is not clear from the Plaintiff's testimony if the Defendant occupies the entire portion of land claimed by his father. However, from the 1st Defendant's evidence, his father had some construction on the portion he claimed. The Plaintiff submitted that he is entitled to general damages in the sum of Kshs 1,000,000.
49. To quantify damages, the court must consider several factors. In the case of Philip Ayaya Aluchio v Crispinus Ngayo [2014] eKLR relied upon by the Plaintiffs, the court found that:
- “It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately before and immediately after the trespass or the cost of restoration, whichever is less. See Hostler – VS – GreenPark Development Co. 986 S. W 2d 500 (No. ct App. 1999).”
50. The Court of Appeal in the case of Kenya Power & Lighting Company Ltd v Ringera & 2 others (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR) (4 February 2022) (Judgment) dealt exhaustively with considerations by a court when making an award of general and compensatory damages for continuing trespass. The Court stated as follows;
- “The principles both parties have relied upon in their invitation for the Court to decide either way are those enunciated by the predecessor of this Court and either crystallized or restated by this Court which we find prudent to distil and replicate as hereunder:
- i. Harlshurys Laws of England 4th Edition Vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner's land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.”



50. The court notes that the 1st Plaintiff did not provide evidence of the value of the land before the trespass and after the trespass or the cost of restoration to the condition before the trespass. That evidence would have enabled the court to assess the diminution in value of the land due to the acts of trespass.
51. The Court has considered that in the case of Philip Ayaya Aluchio v Crispinus Ngayo [2014] eKLR. The court awarded a nominal sum of Kshs 100,000/- for trespass. In the case of Nakuru Industries Limited v S S Mehta & Sons [2016] eKLR the court awarded general damages for trespass in the sum of Kshs 500,000 while in the case of Johnson Mainga Mogaka v Kenya Power and Lighting Company [2021] eKLR the court awarded damages in the sum of Kshs. 1,100,000/=. In the present case, doing the best with the evidence on record, the court will award the sum of Kshs 250,000/= being general damages for trespass.
52. From the foregoing, the court finds that the 1st Plaintiff's suit has merit and enters judgment in his favour against the 1st Defendant as follows;
- A. An order of permanent injunction be and is hereby issued restraining the 1st defendant, his agents and/or servants from cultivating, baking bricks, growing crops, grazing or in any other way interfering with Land Parcel Number Nzambani/Kyanika/1452.
 - B. A declaration that the land parcel Number Nzambani/Kyanika/1452 was lawfully transferred to the 1st Plaintiff by his father Mulei Wambua (deceased) the 2nd Plaintiff.
 - C. An order that the 1st Defendant is to give vacant possession of land parcel No. Nzambani/Kyanika/1452 to the 1st Plaintiff within thirty days from the date of this order in default of which the 1st Defendant be evicted from land parcel No. Nzambani/Kyanika/1452 and the 1st defendant's structure thereon be demolished.
 - D. General damages in the sum of Kshs 250,000.00
 - E. Costs of the suit are awarded to the 1st Plaintiff.
 - F. Interest on D and E above at court rates.

DELIVERED, DATED AND SIGNED AT KITUI THIS 3RD DAY OF OCTOBER, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgement read in open court and virtually in the presence of;

Musyoki - Court Assistant

Mwalimu for the Plaintiff

Morris Kimuli for the Defendant

