



Bondeni Properties Company Ltd v Director, Ministry of Housing & 3 others (Environment and Land Case Civil Suit 774 of 2012) [2023] KEELC 21465 (KLR) (9 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21465 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 774 OF 2012
OA ANGOTE, J
NOVEMBER 9, 2023**

BETWEEN

BONDENI PROPERTIES COMPANY LTD PLAINTIFF

AND

DIRECTOR, MINISTRY OF HOUSING 1ST DEFENDANT

HON ATTORNEY GENERAL 2ND DEFENDANT

STAREHE CONSTITUENCY DEVELOPMENT FUND 3RD DEFENDANT

NAIROBI COUNTY GOVERNMENT 4TH DEFENDANT

JUDGMENT

Background

1. Vide an Amended Complaint dated 30th November, 2017, the Plaintiff seeks the following reliefs against the Defendants jointly and severally;
 - i. The Defendants do deliver vacant possession of the suit premises namely L.R No 209/11770, L.R No 209/11771, L.R 209/11772 and L.R 209/11773 in the alternative payment to the Plaintiff monies commensurate to the market value of the suit property.
 - ii. Mesne profit.
 - iii. The Officer Commanding Station(OCS) Pangani Police Station do supervise the said eviction.
 - iv. Damages for trespass to land, costs of the suit and interest.



2. It is the Plaintiff's case that it has at all material times, and still is the owner of four (4) plots, to wit, L.R No 209/11770, 11771, 11772 and 11773 situated in Nairobi area (hereinafter the suit property) which it acquired through an Indenture dated 5th April, 1995, the particulars of which are well within the Defendants' knowledge.
3. The Plaintiff averred that sometimes in 2009, the Ministry of Housing, through its Director, trespassed into the suit property without the its knowledge and/or consent; that upon discovery of the said trespass, it reported the matter to Kasarani Criminal Investigation(CID) and that the Police, who pursuant thereto, opened an investigation file being Chief Magistrates -Makadara, Miscellaneous No 74 of 2011.
4. According to the Plaintiff, despite the foregoing, the 1st Defendant arrogantly proceeded to construct the illegal structures on its plots; that the 1st Defendant, acting in cahoots with the 3rd and 4th Defendants, are guilty of trespass and illegal acquisition of the land and that the 2nd Defendant should be held vicariously liable.
5. The 1st and 2nd Defendants filed an Amended Defence on 24th April, 2017 in which they denied the assertions as set out in the Plaint. It is their case that the Plaintiff is not entitled to any claim whatsoever because it cannot prove ownership of the suit property.
6. It was averred by the 1st and 2nd Defendants that nonetheless, the Plaintiff has no claim against the 1st and 2nd Defendants as alleged or at all as the 1st and 2nd Defendants merely funded the project and were not involved in the identification of the project site and that the site identification for the project was undertaken by the 3rd and 4th Defendants.
7. It was averred by the 1st and 2nd Defendants that there have been previous proceedings in Court between the same parties in HCC Misc Application No 554 of 2009 which matter was dismissed and that the suit herein is res judicata.
8. The 4th Defendant filed its Defence on 16th March, 2016. It denied the assertions as set out in the Plaint stating that no documentary evidence has been adduced proving the existence of the suit property; that the assertions that it is in cahoots with the 3rd Defendant to trespass and acquire the suit property illegally are baseless and slanderous and that another suit exists with respect to the same matter as indicated in the Plaint.

Hearing and Evidence

9. The matter proceeded for hearing on 21st February, 2022. PW1 was Anne Wangari Kinyanjui, the Director of the Plaintiff. She adopted her witness statement dated 4th March, 2020 as her evidence in chief and produced the documents at pages 16-40 of the bundle of documents dated 28th September, 2021 as PEXHB1 and the Certificate of Search as PEXB 2.
10. It was her evidence that sometime in 2009, she was informed by one of their former Directors, Isaac Thomas Kinyanjui, deceased, that some people were constructing structures on their plots at Eastleigh; that her, together with the said Isaac Thomas and Francis Mbugua, also deceased, went to the suit property and confirmed the same; that they reported the matter at Kasarani Police Station and investigations commenced and that it was discovered that the 1st Defendant's Ministry had put up houses on the suit property for the Government.
11. According to PW1, the Director of the 1st Defendant was charged at Makadara in Misc No 74 of 2011 and upon being requested to produce documents of ownership of the property was unable to do so and that they were advised by the Police to file a civil suit for eviction of the Defendants.



12. It was the further testimony of PW1 that the Plaintiff was incorporated in 1994; that the Plaintiff buys and sells land; that the suit property has four toilets constructed thereon by the CDF without their consent and that people have now developed the land and attempts to have them vacate have been futile.
13. On cross-examination, PW1 stated that they purchased the entire parcel of the suit property comprising of four plots being the suit properties; that the entire parcel was known as 367/AXI/1913; that they sub-divided it into many plots; that they have the names of the Allotees and that the Allotees refused to take up the plots because they had been developed on.
14. According to PW1, the sub-divisions have been registered; that the four plots are still in the Plaintiff's names as they were never fully paid up for; that the suit property does not have houses but toilets which are what she is referring to as houses; that the City Council has never owned the land and that they stopped paying rent and rates in 1994 because the parties who took up the portions of land were paying rent and rates, and because of the present dispute.
15. On re-examination, PW1 stated that upon sub-division of the plot in 1994, they had 46 plots; that out of the 46 plots, the four suit plots remained vacant; that the four are not in the official search as titles have never been issued.
16. PW2 was James Muhia Kabita, a registered and practicing valuer who testified that he authored a report in 2017 having received instructions from one of the Directors of the Plaintiff to value the suit properties; that he proceeded to the suit property and having not found any title deeds, he relied on the Deed Plans and that there were no developments on the site other than public toilets.
17. It was the evidence of PW2 that the plots are worth Kshs 2,000,000; that the valuation was undertaken in 2017 and with the passing of time, the value of the land has increased and that the estimate value should be around 15% more. PW2 produced the valuation report as PEXHB 3.
18. On cross-examination, PW2 stated that he did not have a search and that the suit properties were not registered; that he relied on Deed Plans which he annexed to the report; that the Deed Plans were given to them by the Client and that with respect to vacant plots, they are valued taking into consideration the recent sales within the areas.
19. On re-examination, he stated that he is in possession of his annual practicing certificate showing his qualifications; that the report indicates the value of the property to be Kshs 2,000,000 and that there is an error in the value indicated in words.
20. DW1 was John Njoroge Kimani, an assistant Director at the State Department of the Ministry of Housing and Urban Planning Development. DW1 adopted his witness statement as his evidence in chief and produced the documents filed on 30th May, 2017 as DEXHB1. It was his evidence that the dispute is with respect to toilets constructed on the suit plots and that they only funded the constructions on the plots but the identification of the property was undertaken by CDF.
21. On cross-examination, DW1 stated that they received a request from Starehe CDF to fund projects in the constituency, one of which is the subject of the present dispute; that they carried out all the constructions; that they had a partnership with the Nairobi City County and that they never ascertained the owner of the suit property and believed that it belonged to the City Council.
22. It was the evidence of DW1 that if the land belongs to the Plaintiff, the party liable is the County Government of Nairobi who identified the same; that they did not have any intentions to build the toilets on the suit property until they received a request from the Starehe CDF; that the Ministry



catered for the construction costs and that it was not a requirement for them to confirm ownership of the suit property.

Submissions

23. The Plaintiff's advocate submitted that in view of the pleadings and evidence, it is undisputed that the Plaintiff is the owner of the suit property which the 1st Defendant in cahoots with the 3rd and 4th Defendants has constructed thereon and that the Plaintiff is entitled to the orders sought.
24. The 1st and 2nd Defendants' advocate submitted that the Plaintiff did not produce either the original and/or certified copy of title as envisaged under section 26(2) of the [Land Registration Act](#); that the certificate of official search and the copy of Indenture produced during hearing of the suit are not sufficient proof of ownership and that both the Certificate of Official Search and the Indenture make reference to Plot No.15 A Section One and that there is no evidence that the suit properties emanated therefrom.
25. According to Counsel, the claim for mesne profits by the Plaintiff is not sustainable having been premised on the allegation that the Defendants trespassed on the suit properties thus denying them the use of the land from which they allege to have lost revenue and that the 1st and 2nd Defendant's entry on the suit property was with the express permission of the 4th Defendant who stated that it had ownership rights to the suit properties.
26. Reliance in this regard was placed on the case of Rajan Shah T/A Rajan S. Shah & Partners vs Bipin P. Shah [2016] eKLR, where the Court defined mesne profits as the pecuniary benefits deemed to be lost to the person entitled to possession of land, or to rents and profits, by reason of his being wrongly excluded there from.
27. Counsel submitted that whereas they maintain that the Plaintiff has not proven ownership of the property, in the event the Court was to hold otherwise, the 1st and 2nd Defendants are not liable for any damages; that they had no part to play in site identification and other than funding the project, they have no ownership claims on the parcels upon which the project was constructed.
28. It was averred that having not denied that they were responsible for site identification, the 3rd and 4th Defendants should be held to account for any liabilities suffered by the Plaintiff. Counsel cited the case of Margaret Wairimu Warima vs Phylis Wanjiru Thairu & 2 Others [2017] eKLR in which the Court held that Order 2 Rule 11 of the Civil Procedure Rules has been construed to mean that failure to traverse or sufficiently traverse a pleading amounts to admission of those facts.
29. The 4th Defendant's counsel submitted that pursuant to Section 107 of the [Evidence Act](#), whoever asserts the existence of a legal right has the burden of proving the same and that Section 108 further provides that the burden of proof lies on the person who would fail if no evidence at all was given by either side.
30. As regards ownership of the suit property, Section 26(2) of the [Land Registration Act](#) is instructive and states that the Certificate of Title is conclusive proof of ownership of the suit property and shall not be subjected to challenge except on account of fraud or misrepresentation to which the person is proved to be a party and where the Certificate of Title has been acquired illegally, unprocedurally or through a corrupt scheme.
31. It was submitted that despite the Plaintiffs' allegation of ownership of the suit property, no evidence has been adduced of the same and that as a result thereof, the Plaintiff is not entitled to the orders sought. The Plaintiff filed further submissions on 4th October, 2023 which I have considered.



Analysis and Determination

32. Having carefully considered the pleadings, testimonies and submissions herein, the issues that arise for determination are;
- i. Whether the Plaintiff has established its case on a balance of probabilities?
 - ii. What are the appropriate reliefs to issue?
33. The Plaintiff seek, inter alia, an order that the Defendants deliver to it vacant possession of the suit property. In the alternative, it seeks to be refunded the amount of monies commensurate to the market value of the suit property. The Plaintiff has also sought for mesne profits.
34. It is the Plaintiff's case that it is and has at all material times been the owner of the suit property; that the Defendants have trespassed onto the suit property and carried out constructions thereon and that the Defendants' actions are tantamount to illegal acquisition of property.
35. In support of its case, the Plaintiff adduced into evidence the certificate of incorporation; the list of shareholders allocated plots; the notice of intention to sue; Deed Plan numbers 186383, 186384, 186385 and 186386 for the suit property; Indenture of Conveyance dated 5th April, 1995; proceedings in Chief Magistrate Makadara Miscellaneous No. 74 of 2011; photos of the suit property; certificate of postal search from the Registrar of Companies and a valuation report from Amazon Limited.
36. The 1st and 2nd Defendants assert that they have no claim over the suit property and whereas they did indeed carry out the constructions thereon, they did so at the request of the 3rd and 4th Defendants who identified the site and that consequently, any claim by the Plaintiff should be met by the 3rd and 4th Defendants, if at all.
37. The 1st and 2nd Defendants adduced into evidence the letters dated 14th April, 2009 from the 3rd Defendant to the Ministry; a letter dated 11th May, 2009 from the Town Clerk to the Ministry; and a letter dated 22nd May, 2009 from the Ministry to the Constituency Development Fund (CDF). The 3rd Defendant did not participate in the proceedings.
38. The 4th Defendant denied the existence of the suit properties as alleged by the Plaintiff stating that the above notwithstanding, the Plaintiff is in illegal possession of the suit property. The 4th Defendant did not adduce any documents nor participate in the hearing.
39. As aforesaid, the Plaintiff herein seeks to assert proprietorship of the suit property. It is as such obligated to prove its case on the required standard proof, the balance of probabilities. This principle is succinctly captured in Sections 107, 109 and 112 of the Evidence Act. Section 107 provides as follows:
- “(1) 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 that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”



40. While Sections 109 and 112 of the same Act states as follows:

“ 109. 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 that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

41. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea vs David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

““Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

42. Statutorily, sanctity of title to land is assured and protected under Sections 24, 25 and 26 of the *Land Registration Act*. Section 24 stipulates as follows:

“Subject to this Act-

(a) 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; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

43. Section 25 of the Act provides that:

“(1) The rights of a proprietor, whether acquired on 1st registration or subsequently for valuable consideration or by an order of 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, but subject-

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and



- (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
 - (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”
44. Section 26, under the head, “Certificate of Title to be held as conclusive evidence of proprietorship” is to the effect that;
- “(1) 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, un-procedurally or through a corrupt scheme.”
45. The Plaintiff adduced into evidence the Indenture dated 5th April, 1995 issued under the Government Lands Act, Cap 280(now repealed). The Indenture is with respect to all the land known as Number 15 A Section One registered at the registration of documents department as 367/AXI/1913.
46. The Plaintiff also adduced into evidence a certificate of postal search which indicates that as at 9th November, 2017, the Plaintiff was the registered owner of L.R 367/AXI/1913.
47. The Plaintiff asserts that the suit plots emanate from parcel 367/AXI/1913, being a sub-division thereof. The question is whether the Plaintiff has substantiated this claim.
48. Considering the evidence, both the Indenture and the certificate of postal search make reference to L.R 367/AXI/1913. The certificate of postal search also makes reference to several parcels of land being registered sub-divisions of L.R 367/AXI/1913. The suit properties are not indicated therein.
49. PW1 adduced a Deed Plan in evidence. A Deed Plan is a signed plan by the Director of Surveys showing the precise particulars of a surveyed piece of land. It shows details such as the location, size and shape of the plot, the land reference number, among others. While the Deed Plan affirms the existence of the suit properties, it does not prove ownership.
50. The Deed Plans exhibited by the Plaintiff indicates that the suit property is located within (Orig No 36/v/15) which has indeed been identified as one of the registered sub-divisions emanating from L.R No 367/AXI/1913 whose ownership is undisputed. It belongs to the Plaintiff.
51. In view of the foregoing, and there being no evidence to the contrary, the Court finds that the Plaintiff has, on a balance of probabilities established its proprietorship of the suit properties, being sub divisions of L.R No 367/AXI/1913.
52. As aforesaid, the Plaintiff seeks vacant possession of the suit property. In the alternative, he seeks to be compensated for the value of the land. The Plaintiff also claims for mesne profits.



53. The suit property herein has public toilets constructed on by the Defendants. This is a utility that benefits the public. As the Plaintiff is amenable to an alternative remedy for compensation, the Court will consider the same.
54. The Plaintiff seeks to be compensated the value of the suit property. PW2 adduced into evidence a valuation report which sets the value of each of the suit properties at Kshs 2,000,000. PW2 indicated that the report had been undertaken in 2017 and posited that the value of the properties must have increased over time. He estimated that the increase to be about 15% of the value therein.
55. With respect to mesne profits, the same is defined in Section 2 of the *Civil Procedure Act* as follows:
- “mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;”
56. Order 21 Rule 13 of the Civil Procedure Rules provides as follows:
- “ 13. Where a suit is for the recovery of possession of immovable property and for
- (1) rent or mesne profits, the court may pass a decree—
- (a) for the possession of the property;
- (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
- (c) directing an inquiry as to rent or mesne profits from the institution of such suit until—
- (i) the delivery of possession to the decree-holder;
- (ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or
- (iii) the expiration of three years from the date of the decree, whichever event first occurs.
- (2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.
57. From the above reading and as posited by the Court of Appeal in the case of Attorney General vs Halal Meat Products Limited [2016] eKLR, mesne profits are profits accrued during the time the rightful owner was excluded from his land. A claim for mesne profits being one in the nature of special damages must be specifically proven and pleaded.
58. It was incumbent upon the Plaintiff to place material before the court to demonstrate how the amount that was claimed as mesne profits was arrived at. Other than simply claiming for mesne profits, the same has not been substantiated by the Plaintiff. This claims fails.
59. The 1st and 2nd Defendants maintain that they are not liable to answer any claim by the Plaintiff as they were not involved in the identification of the site areas for the construction of the toilets. They maintain that their role was limited to funding the constructions. They have adduced correspondence from the



3rd and 4th Defendants in this respect which has not been rebutted. Ultimately the Court agrees that the 1st and 2nd Defendants are not liable to compensate the Plaintiff for the land.

60. In the end, the Court finds that the Plaintiff has established its case on a balance of probabilities and proceeds to make the following determination;

- a. The 3rd and 4th Defendants are hereby jointly and severally directed to compensate the Plaintiff for the value of the suit properties to the tune of Kshs 9,200,000 made up as follows:
 - i. Kshs 2,000,000 4 plots – Kshs 8,000,000
 - ii. Add 15% - Kshs 1,200,000.
- b. Interest on the above amount at court rates from the date of filing the suit until payment in full.
- c. The 3rd and 4th Defendants shall bear jointly and severally the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF NOVEMBER, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for Plaintiff

Ms Njeri Kariuki for 4th Defendant

Court Assistant - Tracy

