



**Matetai v Charo (Environment & Land Case 645 of 2013)  
[2023] KEELC 21367 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21367 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 645 OF 2013  
LC KOMINGOI, J  
NOVEMBER 9, 2023**

**BETWEEN**

**JUDY MATETAI ..... PLAINTIFF**

**AND**

**JAMES CHARO ..... DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 30<sup>th</sup> May,2023 the plaintiff seeks Judgement against the Defendant for;
  - a. A Permanent injunction restraining the Defendant by himself, servant, legal representatives, agents, or however from entering into, blocking the Plaintiff agents, erecting structures or in any other manner interfering with the Plaintiff peaceful possession and quite enjoyment of LR No 22383 situate in Nairobi
  - b. General damages for trespass
  - c. Costs of the suit plus interest
  - d. Any other relied that the court may deed fit and just to grant
  
2. It is the Plaintiff’s case that she is the registered proprietor of parcel LR No 22383. On 24<sup>th</sup> May, 2013, she erected a fence around the property to prevent animals from destroying her maize, beans and Irish potatoes crops. Unfortunately, the Defendant without any warning emerged and demanded that she stops the said activity. He also brought eight young men who pulled down the fence, dug holes and put the men on guard therefore denying her access to the property. It is the Plaintiff case that when she reported the matter to the police station, she was advised to seek redress against the Defendant in this court. It is her contention that the Defendant has not disclosed any interest on the disputed property. The Defendant’s case



3. The Defendant denies the Plaintiff's claim allegation through a defence dated 28<sup>th</sup> June, 2013 filed on 2<sup>nd</sup> July, 2013 where he pleads that he is a Government servant duly instructed to discharge managerial duties around LR No 189R. He urges the court not to issue the orders sought against him. He raises a preliminary objection on the grounds that the plaintiff suit ought to be struck out for being frivolous, vexatious and incurably defective because of the following reasons.
  - a. That the Defendant is a non-suitor and hence the suit is incompetent for misjoinder.
  - b. That the cause of action lies against the government.
  - c. That the Plaintiff is a trespasser.
  - d. That a government cannot be enjoined under the *Government Proceedings Act*.
4. According to him, LR No 189 R which is owned by the ministry of Agriculture, livestock and fisheries was allocated to Kabete Veterinary Farm. Taking into consideration, it is a government land, it would not have been allocated, transferred, sold or allocated to the plaintiff or any person. In this regard, if the Plaintiff holds any title, then it ought to be cancelled because it was obtained through fraud. In addition, the plaintiff has never occupied nor possessed the disputed property as she is not the registered owner. It is the Defendant's case that the alleged crops belong to Kabete Veterinary Farm workers namely Nathan Maweu, Jonathan Onyando and others who were legally allocated parcels adjacent to the staff houses. Further, the plaintiff has not relied on any criminal proceedings to prove malicious damage of the property.
5. Through the counterclaim, he reiterates that parcel 189.R is not a private land but public land and therefore its resultant subdivision of LR 22383 was illegally and fraudfully obtained through misrepresentation by the Plaintiff together with Kamwere & Associates-Licensed surveyors. For these reasons, they must bear the cost of resurvey and amending the survey map to LR No 189.R because the government of Kenya never authorized any survey or alienation to the plaintiff. Consequently, he prays that judgement against the Plaintiff be issued for the following orders;
  - a. That the title held by the Plaintiff be submitted for cancellation.
  - b. A declaration for declaration that the government is the sole owner of parcel LR189R.
  - c. Permanent injunction restraining the Plaintiff by herself, servant, legal representatives, agents or whomsoever from entering Kabete Veterinary Farm Laboratories strict quarantine area, interfering, trespassing and wasting the government land LR189E, fence crops and animals.
  - d. That the plaintiff be condemned to bear the costs of amending the survey map.
  - e. General damages
  - f. Costs of this suit plus interest from the date of filing the defence and counterclaim
  - g. Any other relief that this honorable court may deem fit and just to grant



## Reply to Defence and Counterclaim

6. On 4<sup>th</sup> September, 2013, the Plaintiff filed a reply to the Defendant's defence and counterclaim dated the same date urging that the defence and counterclaim be struck out and judgment be entered as prayed. She reiterates that she holds a valid title issued to her by the ministry of lands. In addition, the ministry of livestock development through a letter dated 31<sup>st</sup> August, 2022 certified that LR 22383 was outside Kabete Veterinary Service Land and therefore had no objection to her undertaking any development therein. According to the Plaintiff, the Defendant does not have the capacity to lodge a counterclaim. In addition, his accusations against Kamwere & Associates; Licensed Surveyors, cannot be sustained because they are not a party to this suit.

## Evidence of the Plaintiff.

7. PW1- Judy Matetai produced the title deed for LR 22383 and reiterated that the land belongs to her. It was her evidence that upon making an application to the commissioner of lands, she was issued with a Letter of allotment whose conditions she met. While putting up a fence in the property, the Defendant demanded that she stops. After thirty minutes, he came back with young men who chased her away and uprooted the fence. Subsequently, she reported the matter to the Kabete police station who advised her to seek redress in court. PW1 informed court that she never knew about LR 189R or its resultant subdivisions. She reiterates that her title was valid because no government entity has ever revoked it. A search conducted also revealed that the suit property did not have any encumbrances. It was her evidence that she sued the Defendant in his person capacity because he trespassed upon the suit property.
8. Even though she stated during cross examination that she was issued with an allotment letter after lodging an application through the commissioner of lands, she did not have any letter from the ministry of lands offering her the said land. She did not also have any receipts demonstrating that she paid Ksh 220, 000 in fulfillment of the conditions of the allotment letter. She never knew the previous owner of the suit property. According to her evidence, if at all the property belonged to Kabete Veterinary Laboratory, then it would not have been allocated to her. Notwithstanding that she swore that she made a report to the Police, she did not adduce any evidence to this effect. She produced photographs to show that she put up temporary structure house on the property because she was the lawful owner. PW1 informed court that she sued the Defendant because he trespassed upon her property by bringing eight men who chased her away together with her workers. In addition, the Defendant never stated whether he was the farm Manager. It was her evidence that she would occasionally visit the suit property as there was a care taker. In addition, she harvested maize, beans and potatoes from the suit property in 2013,
9. When she was re-examined, she informed court that she has never received any demand revoking her title deed neither was she aware of any persons from Kabete Veterinary laboratories undertaking farming on the suit property. Further, several searches conducted on the suit property revealed that she was the registered owner.
10. PW2 James Kamwere Muriuki, a licensed surveyor practicing under the name of Kamwere & Associates stated that he was instructed by the Director of Veterinary Services to conduct a survey and ascertain the size of land held by the parastatal. The contract also stipulated that he ought to undertake subdivision. According to him, the Plaintiff was the owner of LR 22383 because she was issued with a title deed after a survey was conducted. A deed plan was issued to her to support the said registration as demonstrated by a letter from the survey of Kenya. He produced a letter to the Commissioner of Lands indicating that the suit property was listed in 28 deed plans. According to him, this is what made



her to be issued with a Letter of allotment and copy of title deed. He produced a beacon certificate dated 24/05/2013 which he issued to the Plaintiff indicating that the boundaries of the suit land were defined. He maintained that the title to the suit property was also not among those collected by the officials from Director of veterinary Services. He stated stating that the suit property was not part of land he was instructed to survey, it was his testimony that the property was not within Kabete veterinary services. He admitted that he was instructed to survey LR No 189/R which was adjacent to LR No 2952/R. He also carried typographical survey on LR 2952/R which he was instructed to subdivide. He took the view that LR 22383 did not belong to Kenya Veterinary services.

11. PW3, Simon Ngumi Munyu, Principal Land Surveyor at Surveyor of Kenya stated that he was an employee of the ministry of land. He informed court that correspondences and computation file for amalgamated parcels LR 22347, 22389, 28928-23937, 23939-23945 were missing. Therefore, would not ascertain whether the slip issued to James Kamwere came from their office because it was not in their custody nor records. Consequently, he would not therefor certify it. The maps showing subdivision of these parcels would also not be traced in their office. It was his position that LR 22383 was on the map while the deed plan for 239920 also appeared on the map. In addition, the disputed property corresponded with what was contained in the map.
12. PW4 Wilson Kibichiy who worked at the Director of Survey stated that the documents in respect of LR No 22383 originated from their office. However, when he was cross examined, he reiterated that the documents produced by the Plaintiff to support her acquisition of the suit property were issued by their office.

#### **Evidence of the Defendants.**

13. DW1, James Charo stated that he worked at Kabete Veterinary Laboratories until his retirement in 16/2/2022. As at the time of retirement, he was the farm manager. He stated that on about 3/6/2013, he was informed that some people were fencing part of the farm. He maintained his position that the suit property belonged to Kabete Veterinary Services. Further, LR No 189.R was government land belonging to Veterinary services under the Ministry of Agriculture. Through his admission, he confirmed that James Kamwere was instructed to survey LR No 189/R and procure the title deed. He stated that at no point was he ever instructed to survey it and procure title deeds in favour or private individuals. In addition, he was paid for the services offered. It was his case that he filed a counterclaim because the Plaintiff sued him in his personal capacity yet he was executing his official duties of protecting the veterinary farm as the manager. When he informed the police about the plaintiff's claim over the suit property, he was advised to report the matter to Director of Criminal Investigations Kabete.
14. DW2, Arthur K. Mbathia, the Principal Physical Planner stated that testified on 19<sup>th</sup> July 2022. He adopted his witness statement as part of his evidence in chief. He stated that the Director of Physical Planning has never prepared a physical development Plan for alienation of public land to private individuals. He further stated that the alleged sub division plan dated 11<sup>th</sup> April 1997 is neither signed by the Director of Physical Planning nor approved and/or forwarded. He stated that the document does not constitute a physical development plan.
15. On cross-examination by the Plaintiff's counsel he stated that he was not a registered physical planner. He also admitted that he did not have authority from the Department of Physical Planning at the Ministry of Lands to testify on their behalf.
16. At the close of the oral testimonies parties were directed to put in final written submissions.



## The Plaintiff's Submissions

17. Although parties were directed to file submission after the conclusion of the hearing, only the Plaintiff counsel filed submission dated 23<sup>rd</sup> June, 2023 on 27<sup>th</sup> June, 2023 raising the following issues for determination
  - a. Whether the plaintiff is the registered owner, acquired and holds an indefeasible title over LR No 22383?
  - b. Whether the Defendant trespassed on the plaintiff property?
  - c. Whether the Defendant counterclaim is sustainable?
  - d. Whether the Plaintiff is entitled to the prayers in the plaint?
18. On the first issue, the Plaintiff maintains that she is the registered proprietor of the suit as demonstrated by PW2 testimony. A search conducted also revealed that she was the registered owner of the suit property. The Plaintiff counsel cites Section 24(a and 26(1) of the *Land Registration Act* and the authorities of *Esther Ndegi Njiru & Another vs Leonard Gatei* (2014) eKLR and *Emmanuel Ngala Anzaya v Elkana Epiche Aura* (2020) eKLR to submit that the court ought to take prima facie evidence that the Plaintiff is the registered proprietor of the suit land as evidenced by the certificate of title and therefor her title cannot be impeached. According to the counsel, the Defendant defence and witnesses did not produce any evidence to demonstrate that the Plaintiff title was illegally procured. Reliance is place on the court of Appeal decisions of *Joseph Arap Ng'ok v Justice Moiwo Ole Keiwua* Nai Civil Application No 60 of 1997 and *Wreck Motor Enterprises v Commissioner of Lands & 3 Others* (1997) eKLR, to submit that the Plaintiff is the registered propriety of the suit land because her title has never been revoked neither did the Commissioner of Lands refund her the monies she paid after allocation of the suit land.
19. With regards to the second issue, it is argued that the Defendant admitted in his testimony that he trespassed on the Plaintiff suit property. He also pulled down the fence and structures therein and destroyed the cultivated crops without the Plaintiffs authority. To support these arguments , Section 3(1) of the *Trespass Act* and the decision of *Gladys Koskey v Benjamin Mutai*(2017) eKLR and *Eliud Njoroge Gachiri v Stephen Kamau Ng'ang'a* (2018) eKLR are put forward.
20. According to the Plaintiff counsel, the Defendant counterclaim cannot be maintained because it did not have a verifying affidavit neither was leave sought to introduce it as required by Order 4 Rule (1) (2) and Order (7) Rule (50(a)of the *Civil Procedure Rules*, 2010. These arguments are supported by the decision of *Kenya Power & Lighting Co. LTD v Sheriff Molana Habid*(2018) eKLR
21. The court is urged to issue the orders sought because the Plaintiff has proved her case on a balance of probability that she legally and procedurally acquired the suit property title and therefor she should be granted the orders sought.
22. By the time of writing this Judgement, the defendant's Submissions had not been filed.

## Analysis and Determination.

23. I have considered the pleadings, the evidence on record, the submissions and the authorities cited. The issues for determination are;
  - i. Whether the plaintiff is the registered owner, acquired and holds an indefeasible title over LR No 22383?



- ii. Whether the Defendant trespassed on the plaintiff property?
  - iii. Whether the Defendant counterclaim is sustainable?
  - iv. Whether the Plaintiff is entitled to the prayers in the plaint?
  - v. Who should bear costs of this suit?
24. The gist of the Plaintiff claim is that she is the absolute property of LR 22383 allocated to her by the Commissioner of Land. She produced an allotment letter dated 17<sup>th</sup> May, 1999 to prove her claim. Upon allocation, the Plaintiff was required to pay the stand premium of Ksh 170, 000/= and annual rent of Ksh 34.000/=. She testified that her title for the suit property is valid because it has never been revoked. The Plaintiff has not produced any documents to prove that she paid the said monies even though she claimed it has never been refunded to her. In addition, her title for the suit property has never been revoked by any government entity.
25. The Plaintiff's claim is refuted by the Defendant who asserts that she illegally and unprocedurely acquired the suit property. This is because, suit property upon which her claim is premised on belonged to veterinary services. To support this position he confirmed that PW2 was instructed to undertake cadastral survey No 189R and facilitate issuance of title to government entitles. According to the contract whose services he was paid for, its terms did not indicate that he was to facilitate issuance of title to private entities.
26. The plaintiff called a Licenced Surveyor (PW2) who was tasked to survey and subdivide LR No 189R. The witness gave a detailed account of how the plaintiff's parcel of land LR No 22383 came about and that her land was one of many that arose from survey and subdivision of LR No 189R.
27. The Plaintiff even conducted a search on her land during the pendency of this suit which confirmed that she was still the registered owner of LR No 22383.
28. PW2 was clear that LR No 189R no did not exist any longer following its subdivision and demonstrated that the Ministry of Livestock had collected their resultant Titles and that they had no claim over the Plaintiff's LR No 22383.
29. It is not in dispute that the plaintiff is the registered owner of the suit property.

Section 26 (1) of the [Land Registration Act](#), provides 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, 19 Cap. 300 Land Registration [Rev. 2020] 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.

In the case of [Emmanuel Nyala Anzaya v Elkaria Epiche Aura](#) (2020) eKLR the court stated;

“The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as the proprietor of



the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

30. The evidence of DW 2 did not rebut the Plaintiff’s evidence and her assertion that she acquired the title regularly.

I agree with the plaintiff’s submissions that no evidence was led by the Defendants to show that the Plaintiff was a party to any fraud in acquisition of the said title.

In the case of *Joseph Arap Nyok v Justice Moiwo Ole Keiwua* Civil Application No 60 of 1997 the Court of Appeal thus;

“It is trite that such a title to landed property can only come into existence after issuance of the letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of the title document pursuant to the provision of the Act under which the property is held.”

31. I find that the title held by the Plaintiff is indefeasible. She acquired it legally and procedurally.
32. On the second issue, DW1 James Charo confirmed that he was the farm manager at Kabete Veterinary Laboratories. He told the court that he has worked at the farm since the year 2003. He told the court that part of his duties was to protect public land.

PW2 in her testimony stated that DW2 accompanied by eight young men, uprooted the fence and chased her away.

33. She however stated that the young men were under the direction of DW1.
34. He does not deny that he was at the scene. It is undisputed that the fence was brought down. I find that the DW1 trespassed on the plaintiff’s suit property though he did so as the farm manager and not in his personal capacity. He also does not state whether he had been given authority by his seniors to do so.

In the case of *Eliud Njoroge Gachiri v Stephen Kamau Ng’ang’a* (201)eKLR the court stated;

“However, in a case of a continuing trespass, a trespass consists of a series acts done on consecutive days that are of the same nature and that are renewed or continued from day to day so that the acts in the aggregate from one indivisible harm.”

In the circumstances I will award normal damages in respect of the trespass of Kshs 300,000/=

35. The Counter – Claim filed by the Defendant lacked a Verifying Affidavit and no leave was sought to introduce the same at any stage of the proceedings.

36. Order 4 Rule (1) (2) of the *Civil Procedure Rules* provides that:-

“(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1) (f) above.

3. Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit on behalf of the others.
4. Where the plaintiff is a corporation the verifying affidavit shall be sworn by an officer of the Company duly authorized under the seal of the company to do so.



5. The provisions of sub-rule (3) and (4) shall apply mutatis mutandis to counter-claims.
6. The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3) (4) and (5) of this rule”

37. Order 7 rule 5(a) of the *Civil Procedure Rules* provide as follows:

- “5. The defence and counter-claim filed under rule 1 and 2 shall be accompanied by-
  - a. An affidavit under Order 4 rule 1(2) where there is a counter-claim.”

38. In the case of *Kenya Women Microfinance Ltd v Martha Wangari Kamau* (2021) eKLR , the Court held in part as follows:

“The counterclaim contained averments that the appellant was to verify through a verifying affidavit as required by the rules but did not. In the circumstances, I am unable to agree with the appellant that the trial court was wrong when it struck out its counterclaim for failing to comply with the rules. I find not fault on the part of the trial court and dismiss the appellant’s complaint.”

39. For this reasons and the evidence adduced by the plaintiffs I find that the defendants counterclaim is unmerited and the same is dismissed.
40. Having stated that the plaintiff has demonstrated that she acquired the title legally and procedurally, I find that she is entitled to the reliefs sought in the plaint.
41. Under Section 27 (1) of the *Civil Procedure Act*, costs to follow the event.

**The Costs shall be awarded to the Plaintiff.**

42. I find that the plaintiff has proved her case as against the defendant on a balance of probabilities.
43. I enter Judgement in her favour as follows:
  - a. A Permanent injunction restraining the Defendant by himself, servant, legal representatives, agents, or however from entering into, blocking the Plaintiff agents, erecting structures or in any other manner interfering with the Plaintiff peaceful possession and quite enjoyment of LR No 22383 situate in Nairobi
  - b. General damages for trespass Kshs 300,000/=
  - c. Costs of the suit and interest.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS DAY OF 9<sup>TH</sup> NOVEMBER 2023.**

**L. KOMINGOI**  
**JUDGE.**

In the presence of:



Mr. Wachira for the Plaintiff.

Mr. Motari for the Defendant.

Court Assistant - Mutisya

