



Mutinda alias Mwang'a Mutinda Mundia v Ndeleva & 5 others (Environment & Land Case 47 of 2018) [2023] KEELC 21568 (KLR) (8 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21568 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 47 OF 2018**

TW MURIGI, J

NOVEMBER 8, 2023

BETWEEN

MWANG'A MUTINDA ALIAS MWANG'A MUTINDA MUNDIA PLAINTIFF

AND

MAWILI NDELEVA 1ST DEFENDANT

FRANCIS MUTUA MWAU 2ND DEFENDANT

KITHOME KIILI 3RD DEFENDANT

NYAMAI MUANGE 4TH DEFENDANT

MWONGELI MUTHAMA 5TH DEFENDANT

DAVID MAKOSI 6TH DEFENDANT

JUDGMENT

1. By a Plaint dated 5th December, 2016 the Plaintiff seeks the following reliefs against the Defendants: -
 1. An order of permanent injunction restraining the Defendants from encroaching upon and trespassing into the property being land known as Title No Nzau/Kalamba/418 and further interfering with the Plaintiff's use, enjoyment and possession of the said property.
 2. An order of permanent injunction restraining the Defendants, their servants, agents and/or anyone claiming under them or through them from selling, transferring, alienating or in any way dealing with the suit premises in a manner calculated to deprive the Plaintiff of the said parcel of land Nzau/Kalamba/418.
 3. Costs of this suit.
 4. Any other or further relief as this Honourable Court may deem fit and just to grant.



2. The Defendants filed a Statement of Defence on 17th July, 2018 and denied the Plaintiff's claim. They urged the court to dismiss the Plaintiff's suit with costs.

The Plaintiff's Case

3. The Plaintiff Mwang'a Mutinda Mundia testified as PW1 and called a total of three witnesses in support of his case. He adopted his statement dated 05/12/2016 as his evidence in chief. He also produced the documents in the list and bundle of documents as PEX Nos 1 - 6 respectively.
4. The Plaintiff testified that he is the legal and bona fide owner of Land Parcel No Nzai/Kalamba/418 (the suit property herein), having been issued with the Title deed thereof in the year 1976. It was his testimony that the Defendants have encroached and built shops on 0.2 hectares of his land. He urged the court to grant him the orders as sought in the Plaint.
5. In cross-examination he testified that he had never sold his land to any of the Defendants. He testified that the shops owned by the 2nd and 4th Defendants had been built in the 1960s.
6. PW2, Kyeveo Kilungu Kavita, adopted his statement dated 04/08/2017 as his evidence in chief. He informed the court that the suit property belongs to the Plaintiff and that the Defendants had trespassed into the suit property.
7. In cross-examination, he testified that the 1st Defendant's shop was built in the year 1969 by the person who had sold the plot to him while the 2nd, 3rd, 4th and 5th Defendants shops were built in the year 1973, 1971, 1969 and 2011 respectively. He testified that the 5th Defendant's plot was allocated to her by the County Council of Makueni in the year 2011. He confirmed that the 6th Defendant has a plot within the site but could not verify the year when he purchased the same. It was his evidence that the Defendants have encroached into the Plaintiff's land.
8. PW3, Caren Nyakundi, the former Land Registrar of Makueni County testified that she visited the suit property in the company of the County's Land Surveyor and the Physical Planner and that she compiled a report with regards to the dispute herein.
9. It was her testimony that the Surveyor established that there was encroachment by the Defendants into the suit property which comprised of permanent business structures. She produced the report dated 10/03/2020 as PEX No 7.
10. In cross-examination, she testified that the Plaintiff and the Defendants were present when they conducted the site visit. She added that she did not know the exact time frame when the Defendants' business structures had been in existence though they seemed to be quite old. It was her testimony that the Surveyor relied on the Area map during the site visit which she supervised.
11. Upon re-examination, she reiterated that there was encroachment on the suit property.

The Defence Case

12. The first Defendant Mawili Fredrick Ndeleva testified as the sole witness in support of his case. He adopted his statement dated 17/07/2018 as his evidence in chief.
13. He also produced the documents in his list and bundle of documents as DEX Nos 1-6 respectively. He informed the court that he purchased Plot No 16 Kalamba Market from one Dickson Munguti in the year 1988. He testified that he had only laid the foundation on the plot. It was his testimony that the County Council of Makueni had confirmed the size of his plot as 40ft by 100ft.



14. According to the 1st Defendant, the Plaintiff's land does not neighbour his plot since there is a road that is 3 meters wide between his plot and the Plaintiff's land. He urged the Court to dismiss the Plaintiff's case with costs.
15. In cross-examination, he confirmed that the Land Registrar visited the site but was not aware of the contents of the Land Registrar's report. It was his testimony that he did not have any evidence to counter the Land Registrar's report. He testified that he was aware that the Plaintiff is the registered owner of the suit property.
16. He told the court that he had a letter from the County demanding for payment of rates for his plot. He added that his plot was fenced and that the foundation therein was laid by the person who had sold the plot to him. He stated that his plot and the plots belonging to his Co-defendants were all on the same line.
17. In re-examination, he testified that he has never been summoned by the area Chief with regards to a land dispute between him and the Plaintiff. He added that even though he was indebted to the County Government of Makueni, he used to pay property rates for Plot No 16 prior to the year 2016.
18. The 2nd Defendant Francis Mutua Mwau testified as the sole witness in support of his case. He adopted his statement dated 17/07/2018 as his evidence in chief. He also produced the documents in the list and bundle of documents as exhibits in support of his evidence. It was his testimony that he is the owner of Plot No 33 Kalamba Market and that he had developed the same. He informed the court that his plot is adjacent to the Plaintiff's land. He denied that he had encroached onto the Plaintiff's land.
19. In cross-examination, he testified that he was not aware that the Plaintiff obtained the Title deed of the suit property in the year 1976. He added that he was not aware that the Land Registrar's report indicated that his plot had encroached into the Plaintiff's land.
20. The 3rd Defendant Kithome Kiili testified as the sole witness in support of his case. He adopted his statement dated 17/07/2018 as his evidence in chief. He also produced the documents in his list and bundle of documents as DEX Nos 1 – 5 respectively.
21. In cross-examination, he testified that he was allocated Plot No 31 by the County Council of Makueni in the year 1971.
22. The 4th Defendant James Nyamai Muange testified as the sole witness in support of his case. He adopted his statement dated 17/07/2018 as his evidence in chief. He also produced the documents in the list and bundle of documents as exhibits in support of his evidence. He informed the court that he is the owner of Plot No 13 at Kalamba Market. He testified that he acquired the plot from the County Council of Makueni in the year 1969 and that he pays property rates for the same. He told the court that his plot is within the County Government's parcel of land and denied encroaching onto the Plaintiff's land. He testified that it is impossible to encroach into the Plaintiff's land because there is road which separates his plot and the Plaintiff's land.
23. In cross-examination, he testified that the payment receipts from the County Council of Makueni do not indicate the size of his plot. He testified that he did not have a letter from the County Government to prove that his plot had not encroached into the Plaintiff's land. He claimed that he was not informed of the findings contained in the Land Registrar's report.
24. In re-examination, he testified that there was a butchery, a barbershop and a bank within his plot and denied encroaching into the Plaintiff's land.



25. He asserted that the demand notices and payment receipts clearly show that he is the owner of the plot. He testified that he could not recall seeing the Land Registrar, the Town Planner or the Surveyor at the suit property and denied that he had encroached into the Plaintiff's land.
26. The 5th Defendant Mwangeli Muthama, testified as the sole witness in support of her case. She adopted her statement dated 17/07/2018, as her evidence in chief. She also produced the documents in her list and bundle of documents as DEX Nos 1-6. She informed the court that she is the owner of Plot No 72 Kalamba Market which initially belonged to her father. She testified that she was issued with an allotment letter by the County Council of Makueni. She urged the Court to dismiss the Plaintiff's case with costs.
27. In cross-examination, she testified that Plot No 72 Kalamba market initially belonged to her father as far back as in the year 1974. She denied that her shop had encroached into the suit property herein.
28. She confirmed that the Land Registrar and other government personnel visited the suit property but she did not know outcome of the site visit.
29. In re-examination, she reiterated that her shop is situated within the plot that was allocated to her by Makueni County Council and not within the suit property. She reiterated that she was involved in the survey exercise that was conducted by the Land Registrar.
30. The 6th Defendant David Mutua Makosi testified as the sole witness in support of his case. He adopted his statement dated 17/07/2018 as his evidence in chief. He produced the documents in his list and bundle of documents as exhibits in support of his evidence. He testified that he is the owner of Plot No 26. He further testified that his plot was developed in the year 1967 and that it borders the Plaintiff's land. It was his testimony that the plots belonging to his Co-Defendants also border the Plaintiff's land. He denied that he had encroached into the Plaintiff's land or changed the size of his plot.
31. In cross-examination, he testified that he was aware that the Town Planner, the Land Registrar and the Surveyor visited the suit property but was not aware of the contents of the Land Registrar's report. It was his testimony that the County Government of Makueni had identified the plot to him.
32. After the close of the hearing the parties agreed to file written submissions of their respective cases.

The Plaintiff's Submissions

33. The Plaintiff's submissions were filed on 28/03/2023.
34. On his behalf, Counsel identified the following issues for the court's determination: -
 - i. Whether the Plaintiff has proper and indefeasible title to land Parcel No Nzai/Kalamba/418;
 - ii. Whether the Defendants have encroached into the Plaintiff's land Parcel No Nzai/Kalamba/418; and
 - iii. If the Plaintiff has fulfilled the requirements for granting a permanent injunction.
35. On the first issue, Counsel submitted that the Plaintiff has an indefeasible title to the suit property since he was registered as the owner of the suit property on 08/07/1976 and a Title deed was issued to him on 03/08/2016.



36. On the second issue, Counsel contended that the Land Registrar's report clearly indicates that the Defendants have encroached into the Plaintiff's parcel of land. Counsel further submitted that the Plaintiff had not sold any portion of the suit property to the Defendants.
37. It was submitted that no evidence was presented by the Defendants to defeat the Plaintiff's title to the suit property and thus his title to the suit property enjoys the protection of Section 26 of the [Land Registration Act](#), 2012. On that score, Counsel argued that the Plaintiff is entitled to a permanent injunction against the Defendants.
38. Counsel further argued that the Plaintiff had proved a case of a continuing trespass against the Defendants based on the evidence of the permanent structures in their respective plots. Counsel urged the Court to grant the orders sought in the Plaintiff.
39. To buttress her submissions, Counsel relied on the following authorities: -
 - i. *Kenyatta University & 1699 others v Kimani Mbugua & 78 others* [2021] eKLR.
 - ii. *Joseph N.K. Arap Ng'ok v Moiyo Ole Keiwua & 4 Others* [1997] eKLR.
 - iii. *Eliud Njoroge Gachiri v Stephen Kamau Ng'ang'a* [2018] eKLR.

The Defendants Submissions

40. The Defendants submissions were filed on 14/04/2023.
41. On their behalf, Counsel contended that the Plaintiff's suit ought to fail because the date of action was not indicated in the Plaintiff's witness statement or by the Plaintiff's evidence in so far as Sections 5 and 19 of the [Civil Procedure Act](#) are concerned. Counsel insisted that the date of action was not supplied in so far as Order 2 Rules 3 and 10 of the [Civil Procedure Rules](#) are concerned. Counsel argued that in a claim for trespass such as the Plaintiff's, the alleged date of trespass for each Defendant is a necessary particular which had not been supplied rendering the claim unjustifiable.
42. Counsel further argued that the Plaintiff's claim of trespass is statute barred by dint of Section 4 (2) of the [Limitation of Actions Act](#). Counsel also submitted that by dint of Section 7 of the [Limitation of Actions Act](#), the Plaintiff cannot bring an action for the recovery of land after 12 years from the date on which the right of action accrued. Counsel submitted that the Defendants' respective plots were allocated between the years 1950 up to 1987 yet the Plaintiff's suit was filed in the year 2016.
43. Counsel submitted that the Defendants had proved that they had leasehold titles for their plots which were allocated to them by the County Government. It was further argued that the Plaintiff ought to have compelled the Land Registrar to define the boundaries to his land before instituting the instant suit.
44. Counsel argued that the Plaintiff had not availed a survey plan for the area that covers the suit property since what the Land Registrar had presented was a tracing diagram. That on the strength of the Land Registrar's admission that there were professional errors on the disputed area, then there ought not to be a claim against the Defendants.
45. Counsel contended that Plaintiff had not furnished the Court and the Defendants with material facts and the necessary particulars to enable the Court to adjudicate the matter conclusively. Counsel submitted that the Plaintiff had failed to prove his claim on a balance of probabilities and urged the Court to dismiss the suit with costs.



Analysis and Determination

46. Having considered the pleadings, the evidence on record and the respective submissions, the following issues arise determination: -
- i. Whether the Plaintiff has established a case of trespass to land against the Defendants?
 - ii. Whether the Defendants have any legal interest in the suit property?
 - iii. Whether the Plaintiff is entitled to orders of permanent injunction as sought?
47. From a disposition of the facts of the case, the following issues are not in dispute: -
- i. The suit property, land Parcel No Nzai/Kalamba/418, is registered in the name of the Plaintiff;
 - ii. The Title deed of the property was first issued on 21/9/1979 and later reissued on 3/8/2016;
 - iii. The suit property measures approximately 9.2 hectares;
 - iv. The suit property was surveyed and a beacon certificate was issued by the District Survey Office on 26/10/2016;
 - v. Pursuant to the Court Order dated 18/12/2019, the District Land Registrar undertook a site visit of the suit property and prepared a report determining the boundary of the suit property and the extent of encroachment;
 - vi. The Defendants are the owners of the respective plots adjoining the suit property.
48. At the onset, the Defendants have raised an objection on the Plaint herein over non-compliance with Order 2 Rule 3 (1) of the [Civil Procedure Rules](#) which provides as follows:-
- (1) Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.
49. The Defendants contended that the Plaint did not provide material facts as to the date of the cause of action. In paragraph 4 of the Plaint, the Plaintiff alleged as follows: -
- “4. On diverse dates, the Defendants herein maliciously and without any cause and/or authority encroached upon and trespassed on the Plaintiff’s property being land known as Title number Nzai/Kalamba/418 measuring 9.2 Ha and have started building shops and threatened to sell the said property therein interfering with the quiet enjoyment, use and possession of the said property by the said Plaintiff.”
50. The Defendants filed their Statement of defence on 17/07/2018 where under paragraphs 4 and 5, it was alleged as follows: -
- “4. The Defendants further state the County Council of Masaku allocated plots to the Defendants or their predecessors since 1950 and the Defendants have been paying rent and rates since then.



5. The Defendants state that in pursuance to the respective allocation, the Defendants fully and/or partially developed their plots and have been living on the plots since then.”

51. Evidently, the Defendants understood the substance of the Plaintiff’s claim and responded accordingly. Besides, Order 2 Rule 1 (2) of the [Civil Procedure Rules](#) provides as follows;

(2) In such proceedings if the defendant considers that the pleading does not contain sufficient information as aforesaid, the defendant may, at any time before the time limited by the summons for appearance has expired, by notice in writing to the plaintiff, request further information as specified in the notice.

52. The Defendants resolved not to call for more particulars to the Plaintiff’s claim and as a consequence, the above objection is an afterthought with negligible weight to it.

Whether the Plaintiff has established a Case of Trespass against the Defendants

53. [Black’s Law Dictionary](#) 10th Edition defines trespass to land as follows;

“A person’s unlawful entry on another’s land that is visibly enclosed.”

54. The Court of Appeal in the case of [M’Mukanya v M’Mbijiwe](#) (1984) KLR 761 set out the ingredients of the tort of trespass as follows;

“Trespass is the violation of the right to possession and a Plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership.

55. The ownership of the suit property is not in contest. The dispute herein concerns where the boundary between the Plaintiff’s parcel of land and the Defendants’ properties is located.

56. The law governing determination of boundary disputes is found in Sections 18, 19, 20 and 21 of the [Land Registration Act](#), 2012. Sections 18 (2) and (3) of the [Act](#), provides as follows:-

(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary.

57. The District Land Registrar, Makueni conducted a site visit of the suit property and determined the boundary thereof. The 1st, 4th, 5th and 6th Defendants testified that they were present when the Land Registrar conducted the site visit. The Land Registrar produced the report dated 10/03/2020. In her findings the Land Registrar stated as follows:-

“Upon rigorous measurements, it was found that some plots on that line had encroached on the parcel No Nzau/Kalamba/418 as shown on the tracing diagram. The total acreage was 9.0 Ha. The encroachment and remaining acreage was 8.8 Ha.

...



Many of the shops have leasehold titles and have encroached freehold land. The encroachment area is build up whereby some plots are wholly on P/No 418 and others are partly in P/No 418.

Conclusion

1. Since the encroachment is built up area, the solution is either eviction or demolition of the buildings and compensation to the affected persons.”

58. The totality of the evidence points to the fact that the trespass subject of the complaint herein comprises the shops and other permanent structures that have been put up on the Plaintiff’s land by the Defendants. The Court of Appeal defined what a continuing trespass entails and the limitation period for claims based on continuing trespass.

59. In the case of *Muthiora v Marion Muthama Kiara (Suing on behalf of the Estate of Erastus Muthamia Kiara - Deceased)* (Civil Appeal 43 of 2017) [2022] KECA 28 (KLR) (4 February 2022) (Judgment) the Court of appeal aptly held as follows: -

“ 52. Section 4(2) of the *Limitation of Actions Act* provides that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. This presupposes a case of a one-time trespass. The term “accrue” in the context of a cause of action means to arrive, to commence, to come into existence or to become a present enforceable demand or right. The time of accrual of a cause of action is a question of fact (see *Black’s Law dictionary* at Page 23). However, in a case of a continuing trespass, a trespass consists of a series of 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 form one indivisible harm.

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In this case, it is indeed common ground that the appellant entered into and has remained in occupation of the suit property. The appellant’s continued occupation of the said property from the 1st date of entry in so far as it is unauthorized by the respondent amounts to trespass and remains as such to date. The respondent’s claim for trespass being a continued tort is, therefore, not time barred. We find no fault with that finding by the trial court.”

60. In the case of *Peter Mwangi Kabui v Rural Electrification Authority* [2016] eKLR the court observed as follows: -

“ However, it is clear that for as long as an alleged trespasser continues to occupy another’s land unlawfully, such occupation of land remains a continuing trespass which is actionable



from day to day so long as the trespasser remains on the land. In the circumstances of this case therefore, and since the defendant's occupation of the suit plots is a continuing act which is not denied save that the defendant pleads that it has the plaintiff's consent to occupy, I am not persuaded that this suit is statute barred. The Preliminary Objection premised on the *Limitation of Actions Act* is therefore dismissed."

61. The Plaintiff produced the beacon certificate for the suit property as PEX No 3. In addition, the Land Registrar defined where the boundary of the suit property was and the extent of encroachment by the Defendants. Conversely, the Defendants did not produce any evidence to show the extent of their properties in accordance with the official documentation that gives them entitlement to their plots. The Defendants did not avail beacon certificates or official survey reports showing the delimitation of their plots.
62. From the evidence on record, the Plaintiff has demonstrated that the Defendants' shops have either been fully or partially constructed in the suit property. Accordingly, this court finds that the Plaintiff has established that the Defendant have trespassed onto the suit property.

Whether the Defendants have any Legal Interest in the Suit Property

63. The Plaintiff testified that he has never sold any land to the Defendants herein. None of the Defendants have transfer documents or ownership documents emanating from the Plaintiff. Accordingly, this court finds and holds that the Defendants have no legal interest in the suit property.

Whether the Plaintiff is Entitled to an Order of Permanent Injunction

64. The Plaintiff sought for an order of permanent injunction restraining the Defendants from selling, transferring, alienating or in any way dealing with the suit property in a manner calculated to deprive him of his land.

In the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR it was held as follows: -

"A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected."

65. In *Josphat Kuria Gathoni v James Maina Njoroge & 3 Others* [2019] eKLR, the court held that: -

"Whichever way I look at it, I do not see how the plaintiff can fail in his suit. He is the title holder and the defendants have not demonstrated any right over the suit land...the defendants have no right to be on the land without the permission of the plaintiff. The plaintiff is otherwise entitled to the orders of eviction and permanent injunction as prayed against the defendants. I will give the defendants 30 days to vacate the land and if they do not do so, the plaintiff is at liberty to apply for their eviction."

66. Having established that the Plaintiff is registered owner of the suit property and that the Defendants have no legal rights to any portion thereof, the Plaintiff must inevitably succeed on his claim for a permanent injunction.



67. In light of the foregoing, I find that the Plaintiff has proved his case against the Defendants on a balance of probabilities.
68. Accordingly, I enter judgment for Plaintiff against the Defendants in the following terms:-
1. An order of permanent injunction be and is hereby issued restraining the Defendants from encroaching upon and trespassing into the property being land known as Title No Nzaiu/Kalamba/418 and further interfering with the Plaintiff's use, enjoyment and possession of the said property.
 2. An order of permanent injunction be and is hereby issued restraining the Defendants, their servants, agents and/or anyone claiming under them or through them from selling, transferring, alienating or in any way dealing with the suit premises in a manner calculated to deprive the Plaintiff of the said parcel of land Nzaiu/Kalamba/418.
 3. The Plaintiff is awarded costs of the suit.

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HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 8TH DAY OF NOVEMBER, 2023.

In the presence of:-

Court assistant - Mr. Kwemboi.

Kavita for the Plaintiff.

Ms Kaloki holding brief for P.M. Mutuku for the Defendants.

