



**Mwaura v Wahinya (Environment & Land Case E030 of 2021)
[2022] KEELC 3293 (KLR) (2 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3293 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E030 OF 2021**

LN GACHERU, J

JUNE 2, 2022

BETWEEN

MARY WAITHIRA MWAURA PLAINTIFF

AND

CATHERINE WAMBUI WAHINYA DEFENDANT

JUDGMENT

1. Vide a plaint dated September 28, 2021, the plaintiff sought for the following orders against the defendant herein.
 - a. An order directing the defendant to vacate land parcel number Loc5/Kabati/340, forthwith and the court do issue an eviction order if the defendant does not voluntarily vacate the suit land.
 - b. That the eviction order be directed and /or given to BernardM. Gaturukut/aBensure Auctioneersand be authorized to demolish all the buildings and structures thereon.
 - c. That the officer commanding station, kabati police station, or an officer in the rank of an Inspector and above and/or the officer in charge of administration police be authorized to supervise and enforce the eviction exercise to maintain law and order.
 - d. Costs of this suit and interest thereof.
 - e. Any other or better relief this honorable court may deem fit to grant.
2. It is the plaintiff's averment that she is the registered owner of the suit land known as Land Parcel No. LOC.5/Kabati/340, measuring approximately 2.38 Hectares. That the Defendant together with her father, Laban Wahinya Karani (deceased), and brother George Henry Irungu (deceased) have been in unlawful and unjustified occupation of the suit land, without the consent of the Plaintiff. That the Defendant's father Laban Wahinya Karani (deceased) and her said brother George Henry Irungu



(deceased) had filed Murang'a ELC Case No. 361 of 2017, against the estate of the Plaintiff's husband Francis Mwaura Nini (Deceased), claiming adverse possession, but the suit was dismissed by the Court on 2nd October 2018. That the Defendant's father Laban Wahinya Karani (deceased) is the registered proprietor of Land Parcel No. LOC. 5/Kabati/388, which is adjacent to the Plaintiff's land parcel number LOC. 5/Kabati/340, and the Defendant can reside there.

3. The suit was not contested by the Defendant as she neither entered appearance nor filed a Defence, within the requisite time even after service of summons. As a result, the Court on 7th December 2021, made an order for the same to proceed to formal proof hearing.
4. The matter proceeded for formal proof hearing by way of viva voce evidence on February 7, 2022, wherein the Plaintiff gave evidence for herself and called no witness.

Plaintiff's Case

5. PW1, Mary Waithera Mwaura, the Plaintiff herein adopted her witness statement dated 28th September 2021, as part of her evidence in chief. The Plaintiff also adopted the list of documents dated 28th September 2021, and produced the said documents as P.Exhibits 1-8 respectively.
6. She testified that she knew the defendant herein and they were not related. That the defendant had encroached on her land Parcel No. Loc.5/Kabati/340. That she had complained about the said encroachment to the area Chief in Gaichanjiru and she wanted the defendant ordered to vacate her land.
7. After viva voce evidence, the plaintiff closed her case and she filed her written submissions through the Law Firm of L. M. Kinuthia & Associates. The written submissions dated April 14, 2022, were filed on the same day and the plaintiff therein raised six issues for determination by this Court.
8. The plaintiff submits that she is entitled to the prayers sought in the Plaintiff because she has proved that she is the registered proprietor of the suit land and that the defendant had unlawfully encroached on the same. Further it is her submissions that an unlawful occupier is not entitled to relief under eviction proceedings and that upon refusal to vacate the suit property, after service of an eviction notice, he can be removed forcefully. The plaintiff urged the court to grant the prayers as prayed in the plaintiff dated September 28, 2021.
9. The court has carefully read and considered the pleadings by the Plaintiff, the evidence adduced, submissions, authorities cited and the relevant provisions of law and finds that the issue for determination is;

Whether the plaintiff is entitled to the orders sought in the plaintiff dated 28/9/2021?

i. Whether the Plaintiff is entitled to the Orders sought in the Plaintiff dated 28/9/2021

10. It is the Plaintiff's case that she is the exclusive registered owner of all that piece of land known as Land Parcel No. LOC. 5/Kabati/340. Further, that the Defendant who owns Land Parcel No. LOC. 5/Kabati/388, which is adjacent to her land has encroached on her land and is in illegal and unlawful occupation of the same. That the Defendant is cultivating her parcel of land and has erected structures there on which actions have infringed her guaranteed constitutional right to property. The burden of leading the Court to ascertaining this fall squarely with the Plaintiff.
11. The Court is aware of the fact that the instant suit was not contested and that the Defendant neither entered appearance nor filed a defence. However, the law requires of the court to look at the weight of



the evidence adduced by the plaintiff even where the same is uncontroverted. See the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, where the Court held as follows;

"The hearing referred to above is the one commonly known as "Formal proof". The Civil Procedure Rules do not define "Formal Proof". Black's Law Dictionary defines "Formal" as including "rules established by an institution according to certain processes". This particular hearing is for the claimant to prove his claim. It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest."

12. The burden of proof is placed on the person alleging the occurrence of an event and where there is no evidence to challenge the allegations, the standard of proof automatically is higher. Undoubtedly, owing to the nature and extent of orders for eviction, the burden is higher. The burden as stated above, lies on the plaintiff to demonstrate that she has met the requirements for the grant of an eviction order against the defendant herein. The plaintiff is the one who has alleged and must prove. (See sections 107 and 108 of the *Evidence Act*) which provide as follows;

"107 (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.

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

13. Having said that, this court will proceed to look at the issues outlined above. *Black's Law dictionary*, 9th Edition, defines encroachment as follows;

"To enter by gradual steps or stealth into possession or rights of another; to trespass or intrude. To gain or intrude unlawfully upon another's land property or authority "

14. On the other hand, Trespass is described under the *Trespass Act* cap 403, Laws of Kenya, to mean 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.

15. From the foregoing definitions, and the pleadings herein, it appears that the dispute between the parties herein is one involving boundaries.

16. It is trite law that the registration of a person as the owner of the land and the certificate of title held by such person as a proprietor of a property is conclusive proof that he/she is the owner of the property. However, the registration of such title is not absolute as the same may be impeached under certain circumstances as provided by section 26(1) of the *Land Registration Act* which provides that: -

"The certificate of title issued by the Registrar upon registration, or to a purchase of land upon a transfer 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: -

- 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.”
17. This Court has perused the Certificate of title for Land Parcel No. Loc. 5/Kabati/340 (suit land) marked P. EXB 2 and a copy of search for the same land dated 6th January 2021 P. EXB 3 and is satisfied that the plaintiff is the registered owner of the suit land having been issued with title for the same on December 15, 2008.
18. The law is very clear on the position of the holder of the title. The defendant did not adduce evidence to challenge the plaintiff’s certificate of title nor indicate that it was obtained by fraud, misrepresentation, illegally or unprocedurally or through a corrupt scheme. This court therefore finds that the plaintiff has established on the required standard that she is the absolute proprietor of Land Parcel No. Loc. 5/Kabati/340.
19. As to whether the defendant had trespassed and encroached on the plaintiff’s land, the plaintiff stated that the defendant’s father was the owner of the land adjacent to hers, which is Land Parcel No. LOC. 5/Kabati/388. That the Defendant had encroached on her land and was in occupation of the same. That the Defendant had filed an application for adverse possession in Murang’a ELC No. 361 of 2017, but the same was dismissed. In support of her case, the Plaintiff adduced a court order issued on 13th September 2019, and photographs which she alleged were evidence of the defendant’s occupation of the suit land. In addition, the plaintiff attached two letters, one being a demand letter dated July 1, 2021, and a letter dated January 28, 2009, addressed to the Assistant Chief by the District Officer of Kandara Division.
20. This Court notes that while the Plaintiff attached photographs, it was difficult to tell anything from the said photographs. The court could neither tell what land was captured in the photographs nor tell the boundaries allegedly trespassed and encroached by the defendant. In addition, the court notes that the plaintiff did not attach any maps, sketches and or surveyor’s report showing boundary demarcation and the extent if any of the defendant’s encroachment.
21. Based on the above, the Court finds that the Plaintiff has not led any evidence documentary or by way of oral evidence to prove encroachment on the suit land by the Defendant and the Court is unable to determine with certainty that indeed there is encroachment, trespass and or occupation of the suit land by the Defendant. It is trite law that “he who alleges must prove”. Even where the case of the Plaintiff is not controverted, he retains the cardinal duty to discharge the burden of proof. The Plaintiff has not discharged that cardinal duty.
22. From the above, it is this Courts findings that the Plaintiff has failed on a balance of probability to prove her case against the Defendant on the required standard.
23. However, even if the plaintiff had proved her case, this court would shy away from granting the orders prayed for, because the plaintiff has not proved that she had followed the procedure outlined in law, before filing the instant suit. Section 18 of the Land Registration Act No 3 of 2012, provides for how disputes regarding to boundaries, should be handled. It is common ground that the suit land is in a general boundary area (as opposed to a fixed boundary area). Resolution of disputes in a general boundary area is provided for under section 18 (supra) which states:
- (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.



(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:

Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the *Survey Act*, (cap. 299). (Emphasis added)

24. This means that under the aforesaid provisions, boundary disputes pertaining to lands falling within general boundary areas must be referred to the Land Registrar for resolution; while disputes pertaining to lands with fixed boundaries, may be investigated and possibly resolved simply through a surveyor. From this analysis of the law, it is clear that the dispute ought to have been heard by the Land Registrar as stated in the Statute. Jurisdiction is everything and without it, a Court has no powers to make one more step, irrespective of the strength and nature of evidence in the parties' possession. Further, it is trite that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in the case of *Speaker of National Assembly vs. Njenga Karume* [2008] 1 KLR 425, where it held that;

“Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure...In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions and statutory provisions.

25. In the instant case, and based on the foregoing, the plaintiff should have referred her dispute to the respective Land Registrar, before reference of the dispute to the Environment and Land Court, and on that account alone, the plaintiff's case is a nonstarter.

26. The net result is that this court finds and holds that the plaintiff has failed on a balance of probability to prove her case against the defendant on the required standard.

27. Consequently, the court finds that the plaintiff's claim is not merited and the same is dismissed entirely with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 2ND DAY OF JUNE, 2022.

L. GACHERU

JUDGE

Delivered virtually

In the presence of;

Kuiyaki - Court Assistant

Mr L M Kinuthia for the Plaintiff



No Appearance for the Defendant

L. GACHERU

JUDGE

