



**Mwagiru v Gachuhi (Environment & Land Case 934 of 2013)
[2022] KEELC 2372 (KLR) (7 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2372 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 934 OF 2013**

EK WABWOTO, J

JULY 7, 2022

BETWEEN

HUMPHREY NJAU MWAGIRU PLAINTIFF

AND

MWANGI GILBERT GACHUHI DEFENDANT

JUDGMENT

1. This suit was instituted by the plaintiff vide a plaint dated 10th of September 2008 originally filed at Chief Magistrates court in Thika CMCC No. 761 of 2008 before it was transferred to this court. The defendant upon being served filed a statement of defence and an amended counter claim dated 9th of November 2010. On 18th of February 2022, the plaintiff's suit was dismissed for non-attendance thus necessitating the matter to proceed with the hearing of the defendant's counter claim. In the counter claim the defendant's sought for the following reliefs against the plaintiff.
 - a. A declaration that Land parcel known as Ruiru East/Block 1/1990 & Ruiru/East Block 1 2548 solely and absolutely belonged to the defendant.
 - b. Vacant possession and/or the plaintiff be evicted there from land parcel Number Ruiru East/block 1/1990 & Ruiru/Ruiru/East Block 1 2548
 - c. Cost of the suit and counter claim with interest.
 - d. Any other relief this honourable court may deem fit to grant.
2. During the hearing the defendant Mwangi Gilbert Gachuhi testified as DW1. He adopted his witness statement dated 14th of February 2011 and 1st of March 2011 as his evidence in chief. He also referred to the list and bundle of documents dated February 14, 2011 together with the supplementary list of documents dated 5th of January 2022. He stated that his father who is now deceased owned a parcel of land known as Ruiru/Ruiru/East Block1/Githunguri 440. The plaintiff Humphery Njau Mwangiru



- was the owner of parcel of land known as Ruiru/Ruiru/EAST Block1/Githunguri 441 which was next to 440. Sometimes in the year 1990 he noted that the plaintiff had developed parcel no 440 instead of his plot 441.
3. He further testified that in a bid to resolve the issue before the area chief they agreed to swap the parcels of land. However, the plaintiff had taken a loan using 441 as collateral. Subsequently thereafter, the plaintiff cleared the loan and he went to the lands office to try and change the details and the change was effected.
 4. He further stated that Plot No. 441 was subdivided into Plots No. 1990 and Plot No. 1991, then he got Plot No. 1990 and Plot No. 1991 went to the other family since his dad had 2 wives. The Plaintiff then subdivided Plot No. 440 into 9 plots. In the meantime, there was a problem with the entire Block 1 Githunguri in that as people kept developing their parcel of land at different times they kept interfering with beacons, uprooting some and fencing off more land than what they were entitled to. Some people had title documents but they had no land on the ground and some people settled on other people's land.
 5. It was the defendant's further testimony that one Grace Wachinga Kamande who had occupied land which the Anglican church laid a claim. Several people lodged complaints with the then office of the District Officer who after listening to the parties made an award in respect to Do Case No. 42 Of 2004.
 6. The defendant also testified that after the re-survey, the beacons were returned to the original places and all plots were available on the ground. He also stated that people were forced to adjust themselves on the ground and this meant shift of the false boundaries to the actual one. In the process his plot Ruiru/Ruiru East Block 1/2548 which he had bought from the Plaintiff moved and occupied the area which was Ruiru/Ruiru East Block 1/ 2547.
 7. It was also the plaintiff's testimony that he carried out the survey that his land Ruiru/Ruiru East Block 1/2548 landed on what was Block 1/2547. His plot No Ruiru/Ruiru East 1990 moved and part of it landed on the Plaintiff's parcel Ruiru/Ruiru East Block 1/ 2552 and this was what the Plaintiff was referring to as trespass.
 8. The defendant reiterated that the plaintiff is still laying claim to his land which he has trespassed into. The defendant concluded his testimony by urging the court to grant him the reliefs sought in his counter claim.
 9. During the hearing of the counterclaim, the defendant also called Samson Kimathi Mberia, who testified as the surveyor. He stated that he had been a surveyor for 7 years and was contacted by the defendant herein to investigate the encroachment onto the defendant's property and prepare a report for consideration by the court.
 10. It was his testimony that he undertook the survey on September 21, 2021 and he prepared a report dated December 21, 2021. In his report, it was established that there was encroachment on the defendant's property Ruiru East/Block 1/1990 to the extent of 11.3 meters to 26.2 metres wherein the Plaintiff had put up a permanent structure.
 11. Having looked at the pleadings filed herein, the bundle of documents, witness statement and the defendant's evidence that was adduced during the hearing and of course the relevant law, I must now decide the suit.
 12. The main issue for determination is whether the defendant has proved his case as set out in the counterclaim against the plaintiff to the required standard to warrant the granting of the prayers sought.



13. Although the suit was undefended, the defendant has a duty to formally prove his counterclaim to the required standard as is required by law.
14. In the case of *Kirugi and another v Kabiya & 3 others* (1987) KLR 347 the Court of Appeal held that;
“The burden was always on the plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. likewise, failure by the defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”
15. Similarly, in the case of *Gichinga Kibutha v Caroline Nduku* (2018) eKLR the court held that;
“It is not automatic that instances where the evidence is not controverted the claimants shall have his way in court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”
16. The defendant stated that the he was the registered owner of the suit properties Ruiru East/Block1/1990 and Ruiru/Ruiru East Block1/2548. From the documentary evidence vide the copy of the title deeds that were produced as defendant’ exhibits, it is evident that all indeed the defendant is registered as the proprietors of the said properties.
17. The law is very clear on the position of a holder of a title in respect to the land. Section 24(a) of the *Land Registration Act* provides for the interest conferred by registration. It provides;
“Subject to this act the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or apparent thereto.”
18. Section 26(1) of the *Land Registration Act* provides as follows:
“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is 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.”
19. To this extend, the defendant has proved that he is indeed the registered owner of the suit property and therefore the rightful owner.
20. It was also the defendant’s case that the plaintiff had trespassed into his properties Ruiru East/Block1/1990 and Ruiru/Ruiru East Block 1/2548. Trespass has been defined by *Clerk and Lindsel on Torts*, 18th edition at Pg.23 as;
“any unjustifiable intrusion by one person upon the land in possession.”
Section 3 (1) of the Trespass Act, cap 294 provides that:



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

21. Trespass to land occurs "when a person makes an unauthorized entry upon land, and thereby interfering, or portends to interfere, with another person's lawful possession of that land". The tort is committed not against the land, but against person who is in actual or constructive possession of the land. In order to succeed in this case, the Court of Appeal in Uganda in the case of *Sheikh Muhammed Lubowa v Kitara Enterprises Ltd* CA No 4 of 1987 observed that one must prove;
 - i. That the disputed land belonged to the registered owner
 - ii. That the trespasser had entered upon it, and
 - iii. That entry was unlawful in that it was made without permission of the registered owner.
22. In the instance case, the evidence of the surveyor through his report that was produced in court only confirmed encroachment by the plaintiff onto the defendant's property Ruiru/East/Block1/1990 and as such the defendant's claim of trespass against the Plaintiff has only been proven in respect to Ruiru/East/Block1/1990.
23. Having considered the evidence, I find that the defendant's claim as set out in his counterclaim partly succeeds and judgment is hereby entered in favour of the defendant against the plaintiff in the following terms: -
 - i. A declaration that land parcel known as Ruiru East/Block 1/1990 & Ruiru/Ruiru East Block 1 2548 belong to the defendant.
 - ii. The plaintiff be and is hereby ordered to vacate and deliver vacant possession of land parcel known as Ruiru East/Block 1/1990 within 90 days from the date of service of the decree herein upon him.
 - iii. In default of compliance with (ii) above as aforesaid the defendant shall be entitled to an order of eviction for the forcible removal of the plaintiff from land parcel Ruiru East/Block 1/1990 upon application.
 - iv. Each party to bear their own costs of the counterclaim.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF JULY 2022

E. K. WABWOTO

JUDGE

In the presence of: -

N/A for the Plaintiff

Mr. Wambua for the Defendant

Court Assistant; Caroline Nafuna

E. K. WABWOTO

JUDGE

