



**Grandscope Ventures Limited v Mwalimu & 2 others (Environment & Land Case E007 of 2021) [2022] KEELC 14621 (KLR) (8 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14621 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE E007 OF 2021**

**AE DENA, J**

**NOVEMBER 8, 2022**

**BETWEEN**

**GRANDSCOPE VENTURES LIMITED ..... PLAINTIFF**

**AND**

**PATANI MWALIMU ..... 1<sup>ST</sup> DEFENDANT**

**MBEGA MWALIMU ..... 2<sup>ND</sup> DEFENDANT**

**KASSIM MOHAMED KASSIM ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. This suit was instituted by way of originating summons under the provisions of order 37 rule 3 of the [Civil Procedure Rules](#). The plaintiff seeks for the following verbatim reliefs;
  - a. A declaration that the plaintiff is the legal registered owner of the whole of that parcel of land known as Kwale/Ng'ombeni/2492 situate in Kwale County.
  - b. A declaration that the defendants are trespassers and have wrongfully encroached, trespassed and developed upon the plaintiff's parcel of land registered in the plaintiff's name being land reference no plot no Kwale/Ng'ombeni/2492 situate in Kwale County
  - c. An order of eviction and demolition be issued for the eviction of all the defendants from the plaintiff's parcel of land and demolition of the defendants structures erected on the plaintiff's parcel of land being land reference no plot no Kwale/Ng'ombeni/2492 situate in Kwale County
  - d. In default of the compliance with order [c] above, the plaintiff be at liberty without need for further proceedings to evict the defendants through the court bailiff and the officer commanding station Likoni and/or any nearest police station to provide security during eviction



- e. A permanent injunction to issue restraining the defendants, their agent's servant's relatives and or any person claiming under the defendants from trespassing encroaching developing taking possession and or further interfering in any manner whatsoever with land reference No Plot No Kwale/Ng'ombeni/2492 situate in Kwale County
  - f. The costs of this summons be paid by the defendants
  - g. Any such other relief as this honourable court may deem fit to grant.
2. The summon is premised on the supporting affidavit sworn by one Wambui Eileen Njoroge the director of the plaintiff on December 3, 2021. It is her averment that the plaintiff's company is the registered and beneficial owner of plot number Kwale/Ng'ombeni/2492 arising from subdivision of land parcel no Kwale/Ng'ombeni/672. That the suit parcel was acquired by the plaintiff sometime in the year 2016 through a sale agreement dated March 21, 2016. The land measures 0.84Ha (approximately 2 Acres). It was purchased from Juma Hassan Mwachuphi, Salim Hassan Mbhengo, Mohammed Hassan Mbhengo, Salimu Hamisi Bongo and Saidi Hamisi Bongo for a consideration of Kshs 2,600,000/-.
  3. It is the deponent's contention that it was a term of the agreement that the subject property was being sold in vacant possession free from any encumbrances. The plaintiff started the process of having the land transferred to its name from the vendors. That a transfer dated June 7, 2016 was prepared and registered at the Kwale District Lands Registry on June 16, 2016. A title deed was issued in favour of the plaintiff company.
  4. It is stated that at the time of acquisition of the suit property the defendants were not in occupation of the same but sometime in the year 2018 they trespassed and unlawfully erected temporary structures. The plaintiff has therefore been deprived off its rights to utilize the suit property. That the defendants were through a letter dated September 16, 2021 asked to demolish the illegal structures and vacate the suit property. They have however refused to heed to the plaintiffs request necessitating these proceedings.

### **The Plaintiff's Case**

5. In the plaintiff's evidence in chief, Njoroge Regeru a director to the plaintiff adopted his witness statement filed before court on March 10, 2022 as his evidence. The plaintiff further produced as evidence the documents listed in the list of documents filed before court on March 10, 2022 as listed from [1-11]. He told the court that the plaintiff is property developer and has never been able to access the land since the entry thereon by the defendants. He reiterated the averments raised in the affidavit in support of the originating summons. It was the plaintiff's evidence that the defendant's actions of illegally occupying the land amount to arbitrary deprivation of the plaintiff's rights and interests over the suit property as enshrined under article 40 of the Constitution of Kenya 2010. The plaintiff asked for judgement to be entered against the defendants as prayed in the originating summons.

### **defendants Case**

6. On February 15, 2022, I issued directions that the suit proceeds by way of viva voce evidence. On March 21, 2022 when the suit was listed for mention one Mwanamisi Mwalimu Mbega appeared before court to confirm filing of a response by the defendants. She intimated that she was the 1<sup>st</sup> defendant's sister and that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were well known to her. She stated that the 1<sup>st</sup> defendant was unwell and could not attend court. It was confirmed to court that the defendants were aware of the proceedings filed against them. The defendants were granted leave to respond and the matter was set for mention



to confirm the same on April 28, 2022. On April 28, 2022 the defendants did not attend court and neither was a representative sent on their behalf, hearing of the matter was then set for June 8, 2022.

The defendants did not file any response to the suit and neither did they enter appearance. The suit is therefore undefended.

### Submissions

7. The plaintiff submissions are filed before court on July 1, 2022 and identified four issues for determination. The first issue was whether the plaintiff has proved ownership of the suit property. It is submitted that a copy of the plaintiff's title deed to the suit property confirms that it is the duly registered owner of the same. That the plaintiff purchased the suit property for a consideration of Kshs 2,600,000/- which was paid in full and confirmed by the vendors at clause 1 of the transfer dated June 7, 2016. It is further stated that stamp duty was paid as per the documents annexed to the plaintiff's list of documents. The court is referred to the provisions of section 24 and 25 of the [Land Registration Act](#) on rights of a registered owner of a land parcel and the import of a title deed as conclusive proof of ownership of land.
8. On whether the plaintiff has proved that the defendants are trespassers, it is submitted that at the time of acquiring the suit property in 2016, the defendants were not in possession of the suit property. That they invaded the land from the year 2018 and efforts to have them vacate the land have proved futile. It is submitted that the defendant's actions amount to trespass as stipulated under section 3[1] of the [Trespass Act](#). The court is also referred to the holding in [Rhoda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited \[2019\] eKLR](#). On whether the orders sought should be granted it is submitted that the plaintiff has proved its case beyond reasonable doubt, the defendants have no legal right whatsoever to occupy or use the suit premises in any manner whatsoever and it is in the interest of justice that the orders sought be granted. As to costs it is urged that, costs follow the event as enshrined under section 27 of the [Civil Procedure Act](#), and the defendants should be condemned to bear the costs of the suit jointly and severally.

### Analysis And Determination

9. The court has carefully read and considered the pleadings, the evidence adduced, submissions, authorities cited and the relevant provisions of law and finds that the issues for determination are;
  - a. Whether the plaintiff has met the threshold for grant of the orders sought
  - b. Who should bear the cost of the suit?
10. Notwithstanding that the suit is undefended, the plaintiff is required to formally prove its case on a balance of probabilities as required by the law. This position was affirmed by the court of appeal in [Kirugi and Another v Kabiya & 3 others \[1987\] KLR 347 \[1983\] eKLR](#) where it was 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. The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended. The burden of proof is in no way lessened because the case is heard by way of formal proof.”
11. It is the plaintiff's testimony that it is the owner of the suit property Kwale/Ng'ombeni/2492. A copy of the search certificate has been produced before court by the plaintiff. The same is confirmation of the



fact that as per the records at the lands registry and who are the official record keepers of land ownership documents, the plaintiff is the registered proprietor of the suit property.

Section 35 of the [Land Registration Act](#) provides that;

- a) Every document purporting to be signed by the Registrar shall, in all proceedings, be presumed to have been so signed unless the contrary is proved.
- b) Every copy of or abstract from a document certified by the registrar to be a true copy or extract shall in all proceedings, be received as prima facie evidence of the contents of the document.
- c) Every entry or note in or on any register, cadastral map or filed plan shall be received in all proceedings as conclusive evidence of the matter or transaction that it records.
- d) No process for compelling the production of the register, or of the cadastral map, or of any filed instrument or plan, shall issue from any court except with the leave of that court, which leave shall not be granted if a certified copy or extract will suffice, and any such process, if issued shall bear thereon a statement that it is issued with the leave of the court.

12. The plaintiff further produced a copy of the title deed to the suit property in confirmation of ownership of the land. sections 24,25 and 26 of the [Land Registration Act](#) state the position of a holder of a title in respect of the land as follows;

- a. 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.”

Section 25 of the [Land Registration Act](#) provides for the rights of a proprietor. It provides as follows:

(I) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided by 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.....

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.”

13. The registration of the plaintiff as the owner of the suit parcel is also based on a valid agreement which was written, executed by the parties and witnessed as contemplated under section 3(3) of the [Contract](#)



Act. This is proved with a copy of the land sale agreement produced before court and the attendant transfer duly executed and registered. Evidence of ownership of the land is uncontroverted by the defendants despite them being aware of the suit before court. Article 40 of the Constitution guarantees the property rights of every person and provides under Article 40(3) that no person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property. It is the court's finding the plaintiff is the absolute proprietor of the suit property. It is therefore entitled to protection of the said title as provided for under the Constitution of Kenya 2010 and the Land Registration Act.

14. It is also pleaded that the defendants have unlawfully occupied the suit property and hence trespassed on the same. The court in the case of Nyangeri Obiye Thomas v Yunuke Sakagwa Nyoiza ELC Case No 277 of 2018 observed as follows on trespass:

'Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 defines trespass as follows: "Any unjustifiable intrusion by one person upon land in possession of another." .... Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession" Based on the evidence adduced before court and guided by the above excerpt from the judgement of my brother Okong'o J, it is my finding that the defendants have trespassed upon the suit property. The acts of putting up structures on the land and taking occupation of the same forcefully surely do amount to trespass.'

15. The plaintiffs seek for a permanent injunction against the defendants. The principles that guide the court in granting an order of injunction are set out in the celebrated case of Giella v Cassman Brown & Company Limited 1973 EA 358 as follows

"First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide it will decide the application on a balance of convenience."

16. It is my view that the plaintiffs case has met all the requirements as set out in the above case. A prima facie case has been established through the ownership documents that have been produced before court as evidence. The process of acquiring the suit parcel has been set out the same being a purchase and evidence of payment of consideration has been given. The plaintiff has also established the probability of suffering loss in the event that the orders sought are not granted. The balance of convenience automatically tilts towards the plaintiff. It is trite that a court in exercising discretion should always opt for the lower rather than the higher risk of injustice, See Suleiman v Amboseli Resort Limited [2004] 2KLR 589.

17. As to who will bear the costs of this suit it is trite that costs follow the event (see section 7 of the Civil Procedure Act). Clearly it is the defendant's unlawful entry into the property and their refusal to vacate the same that precipitated these proceedings and they must bear the costs of these proceedings.

## **Disposition**

18. Having established that the plaintiff is the lawful owner of the suit property and that the defendants have trespassed upon the same, I find that the plaintiff has proved its case on a balance of probabilities as required. I therefore enter judgement for the plaintiff against the defendants jointly and severally and make the following orders.



- a. A declaration be and is hereby made that the plaintiff is the legal registered owner of the whole of that parcel of land known as Kwale/Ng'ombeni/2492 situate in Kwale County.
- b. A permanent injunction be and is hereby issued restraining the defendants, their agent's, servant's, relatives and or any person claiming under the defendants from trespassing, encroaching, developing, taking possession and or further interfering in any manner whatsoever with Land Reference No Kwale/Ng'ombeni/2492 situate in Kwale County.
- c. An order is hereby issued directed to the defendants, their servants, agents and/or assigns to vacate all that parcel of land known Kwale/Ng'ombeni/2492 within 90 days failing which the plaintiff shall be at liberty to apply for an eviction order.
- d. The costs of this suit shall be borne by the defendants jointly and severally

Orders accordingly.

**DELIVERED AND DATED AT KWALE THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2022**

**A E DENA**

**JUDGE**

**Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:**

**No appearance for the plaintiff**

**Mr Denis Mwakina- Court Assistant.**

