



**Giturwa & another v Cittimark Investment Limited (Environment & Land
Case 23 of 2020) [2022] KEELC 14550 (KLR) (1 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14550 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 23 OF 2020
CA OCHIENG, J
NOVEMBER 1, 2022**

BETWEEN

JACK MATHENGE GITURWA 1ST PLAINTIFF

MARY MAKUNGU OKANGA 2ND PLAINTIFF

AND

CITTIMARK INVESTMENT LIMITED DEFENDANT

(Formerly Nairobi ELC. Case No. 1298 of 2016)

JUDGMENT

1. Through a plaint dated the October 21, 2016, the plaintiffs seek the following prayers as against the defendant:
 - i. A declaration that the plaintiffs are the sole joint owners of all that parcel of land being Title No Donyo Sabuk/Komarock Block 1/28136.
 - ii. An order of permanent injunction restraining the defendant by itself, it's servant, agent and or whomsoever in any means howsoever from continuing fencing, sub-dividing, placing new beacons, constructing, trespassing, encroaching, alienating and/or disposing off and in any other way interfering with the parcel of land being Title No Donyo Sabuk/Komarock Block 1/ 28136.
 - iii. An order that any structure and/or development made by the defendant and/or any other person in Title No Donyo Sabuk/Komarock Block 1/28136 be demolished at the defendant's cost and the defendant evicted therefrom.
 - iv. Cost and interest of this suit.
 - v. Any other relief that this honourable court may deem fit and just to grant.



2. The defendant filed its defence dated the May 3, 2018 denying the averments in the plaint except the descriptive and jurisdiction of the court. It averred that it entered into a sale agreement with the administrators of the estate of Mwangangi Muvu Nganga (deceased) as vendors on March 10, 2015 for a consideration of Kshs 7,040,000. Further, that upon execution of the said sale agreement, it paid a deposit of Kshs 704,000 to the vendor and the completion period was 90 days. It confirms parties were unable to complete the sale within 90 days as the vendors failed to obtain certificate of confirmation of grant to enable them transfer ownership to it. Further, that the vendors obtained certificate of confirmation of grant on February 4, 2016 and thereafter the completion notice was extended to enable it pay the balance. It claims before the vendors got the certificate of confirmation of grant, it paid a further sum of Kshs 2,000,000. It denied knowledge that the suit land was sold to the plaintiffs herein. Further, that the vendors never returned the purchase price culminating in their being charged in Kangundo SPMC Criminal Case No 1070 of 2016; *R V Peter Muange Mwangangi & 4 Others*, for obtaining money by false pretense.
3. Matter proceeded for hearing where the plaintiffs called one witness but the defendant nor its counsel failed to attend court, despite being duly served.

Evidence of the Plaintiff

4. PW1 Mary Makungu Okanga testified that sometimes on or about June 23, 2016, together with the 1st plaintiff, they purchased for valuable consideration all that parcel of land being Title No Donyo Sabuk/Komarock Block 1/28136 (hereinafter referred to as “the suit land”) from the previous joint owners, namely, Mather Mbather Wambua, Muvu Mwangangi Muvu, Rose Mbinya Leli and Peter Muage Mwangangi.
5. It was her testimony that they adhered to all due legal process after payment of the full purchase price and with the consent of the previous owners, the suit land was transferred to them. She explained that together with the 1st plaintiff, they had intentions to immediately commence developments thereon.
6. She testified that on visiting the suit land, they were surprised to find that another person, whom they later discovered was the defendant had trespassed thereon, wrongly took possession including occupation and proceeded to dig holes on it with an intention of putting a perimeter wall as well as sub-dividing it and placing new beacons.
7. She contended that they were apprehensive the defendant intends to dispose off the suit property to third parties.
8. She further testified that the defendant had no rights whatsoever to be in possession of the suit land as they held a title deed over it but the defendant has never produced any documents of title to prove ownership.
9. She reiterated that the defendant’s continued possession, occupation and use of the suit land is denying them, their rights to possess and use the suit land and is hence prejudicial to them as they are suffering irreparable loss including damage.
10. To support their case, the plaintiffs produced the following documents as exhibits: agreement for sale dated June 23, 2016; copy of title deed for Title No Donyo Sabuk/Komarock Block 1/28136 and bundle of payment cheque.



Submissions

Plaintiffs' submissions

11. The plaintiffs in their submissions contend that they are *bona fide* purchasers for value and have a valid title. They submitted that the sale agreement they entered into, with the vendors was in accordance with the provisions of section 3(3) [Law of Contract Act](#). They reiterated that the certificate of title shows that there are no encumbrances, easements, restrictions and/or conditions contained or endorsed on it. Further, the defendant has failed to prove that they obtained the title by fraudulent means, misrepresentation, illegally, unprocedurally and/or through a corrupt scheme as required under section 26 of the [Land Registration Act](#) No 3 of 2012. They argue that since the defendant did not challenge the validity of their title, they remain the absolute and indefeasible proprietors of the suit land. They contend that their title cannot be challenged with the defendant's sale agreement dated the March 10, 2015 as it was rescinded and it cannot hence seek rights over it. They further reiterated that the defendant had trespassed on the suit land, and they have sought for its eviction including compensation of Kshs 700,000 as general damages. To buttress their averments, they relied on the following decision: [Ochako Obinchi V Zachary Oyoti Nyamongo](#) [2018] eKLR and [John K Koeh V Peter Chepkwoy](#) [2019] eKLR.

The defendant though duly served did not file written submissions.

Analysis and Determination

12. Upon consideration of the plaint, defence, testimony of the plaintiff's witness, exhibits and submissions, the following are the issues for determination: Whether the plaintiffs are the sole joint owners of all that parcel of land being Title No Donyo Sabuk/Komarock Block 1/28136. Whether the defendant has trespassed on land Title No Donyo Sabuk/Komarock Block 1/28136 and should be restrained and evicted therefrom.
13. First and foremost, I wish to point out that the defendant only filed its statement of defence but never appeared in court to tender evidence to prove the averments therein. Section 107 of the [Evidence Act](#) provides that:

“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.”
14. In the case of [Motex Knitwear Limited vs Gopitex Knitwear Mills Limited](#) Nairobi (Milimani) HCCC No 834 of 2002, Lesiit, J favourably cited the case of [Autar Singh Babra and Another vs Raju Govindji](#), HCCC No548 of 1998 where it was held that:

“Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the defendant in his defence and counter-claim are unsubstantiated. In the circumstances, the counter-claim must fail.”
15. See also the decision of [Nelson Erick Mzee Vs Panal Freighters Limited](#) (2020) eKLR.
16. In associating myself with the legal provisions I have cited above as well as the quoted decisions, I find that since the defendant failed to controvert the plaintiffs' averments through *viva voce* evidence, the plaintiffs' claim remain unchallenged.



17. As to whether the plaintiffs are the sole joint owners of all that parcel of land being Title No Donyo Sabuk/Komarock Block 1/28136.
18. The plaintiffs' claim to be the proprietors of the suit land. PW1 in her testimony confirmed they bought the suit land in 2016 *vide* a sale agreement dated the June 23, 2016 and produced payment receipts including their certificate of title to confirm how they acquired it. They claimed the defendant had trespassed thereon, dug holes and had intention of subdividing it including putting fresh beacons. The defendant filed a defence insisting it initially bought the suit land but the sale was not concluded. However, it did not tender any evidence to controvert the plaintiffs' averments.

Section 26(1) of the [Land Registration Act](#) provides that:

“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, 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.”

19. In the case of [Willy Kipsongok Morogo V Albert K. Morogo](#) (2017) eKLR the court held as follows: -

“The evidence on record shows that the suit parcel of land is registered in the names of the plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the [Land Registration Act](#).”

20. Based on my analysis above while relying on the legal provisions quoted above as well associating myself with the cited decision, I find that since the plaintiffs are the registered proprietors of the suit land and hold a certificate of title to that effect, they are indeed entitled to protection of the law.

21. On the issue of trespass, [Clerk & Lindsell on Torts](#) 18th Edition at paragraph 18-01 defines the same 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.”

22. [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.”

Section 3 of the [Trespass Act](#) further provides that: -

- “(1) 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.”

23. In the case of *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] eKLR, the Court of Appeal favourably cited the case of *M’Mukanya v M’Mbijiwe* (1984) KLR 761, wherein the ingredients of the tort of trespass were stated as thus:

“Trespass is a 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 (See *Thomson v Ward*, (1953) 2QB 153.”

24. While in the case of *Eliud Njoroge Gachiri vs Stephen Kamau Nganga* ELC No 121 of 2017 it was held that: -

“However, in a case of 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 are aggregate form one indivisible harm.”

25. In this instance, the plaintiffs through PW1 confirmed that the defendant entered the suit land, dug holes, thereon and has intention of subdividing it including putting fresh beacons. The defendant in its defence confirmed that it took possession of the suit land as it had commenced buying it but did not complete. The plaintiffs further stated that they intended to develop the suit land but were unable to do so due to the defendant’s continued possession thereon. The plaintiffs in their submissions sought for damages for trespass amounting to Kshs 700,000.

26. From the evidence before court which was uncontroverted, it is evident, the defendant has continued to trespass on the plaintiffs’ land and denied them access.

27. In *Duncan Nderitu Ndegwa v KP& LC Limited & Another* (2013) eKLR P Nyamweya J (as she then was) held that: -

“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000 as compensation of the infringement of the plaintiff’s right to use and enjoy the suit property occasioned by the 1st and 2nd defendants’ trespass.”

28. See also the cases of *Ochako Obinchi V Zachary Oyoti Nyamongo* (2018) eKLR and *Nakuru Industries Limited Vs S S Mehta & Sons* (2016) eKLR.

29. In so far as the plaintiffs’ did not provide evidence on the loss they incurred due the defendant’s aforementioned acts but in associating myself with the above decisions, and the plaintiffs’ submissions, I find the plaintiffs’ have indeed suffered damages as a result of the defendant’s acts of trespass and will proceed to award them Kshs 300,000 as general damages.

30. On the prayer for a permanent injunction and in line with the principles established in the case of *Giella V Cassman Brown* (1973) EA 358, I find that the plaintiffs have indeed established a *prima facie* case as against the defendant who has trespassed on the suit land and will make an order to that effect.

31. On the issue of costs, since the plaintiffs are the inconvenienced parties, I will award them costs of the suit.

32. It is against the foregoing that I find the plaintiffs have proved their case on a balance of probability and will proceed to enter judgment in their favour and make the following final orders:



- a. A declaration be and is hereby issued that the plaintiffs are the sole joint owners of all that parcel of land being Title No Donyo Sabuk/Komarock Block 1/28136.
- b. An order of permanent injunction be and is hereby issued restraining the defendant by itself, it's servant, agent and or whomsoever in any means howsoever from continuing fencing, sub-dividing, placing new beacons, constructing, trespassing, encroaching, alienating and/or disposing off and in any other way interfering with the parcel of land being Title No Donyo Sabuk/Komarock Block 1/28136.
- c. The defendant be and is hereby directed grant vacant possession and to demolish any structures/developments in land parcel number Donyo Sabuk/Komarock Block 1/28136 within ninety (90) days from the date hereof, failure of which eviction order do issue.
- d. plaintiffs are awarded Kshs 300,000 as general damages for trespass.
- e. Cost of the suit is awarded to the plaintiffs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 1ST DAY OF NOVEMBER, 2022

CHRISTINE OCHIENG

JUDGE

