



REPUBLIC OF KENYA



**Mwania v Munyao & 3 others (Environment & Land Case 230 of 2017)
[2022] KEELC 14577 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14577 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 230 OF 2017
CA OCHIENG, J
NOVEMBER 3, 2022**

BETWEEN

KAMENE MWANIA PLAINTIFF

AND

MICHAEL MUASA MUNYAO 1ST DEFENDANT

FRANSCISCA SYOMBUA MUTUNGA 2ND DEFENDANT

JOSEPH MAINGI 3RD DEFENDANT

HOSEAH MUTHIWA 4TH DEFENDANT

JUDGMENT

1. Through a Plaintiff dated the May 9, 2017, the Plaintiff prays for Judgment against the Defendant for:
 - a. A declaration that the suit property herein, LR No Kithyoko/Kithyoko/4517 belongs to the Plaintiff.
 - b. A permanent order of injunction to issue against the Defendants herein, their agents, servants and/or any other person acting at their behest, barring them from entering the suit property herein and/or interfering with it in any way.
 - c. Costs of the suit.
 - d. Any other relief this Honourable Court may deem fit and just to grant in the circumstances.
2. The Defendants filed a Statement of Defence dated the July 12, 2017, where they denied the averments in the Plaintiff except the descriptive and jurisdiction of the court. They disputed that the Plaintiff is the registered proprietor of land parcel number Kithyoko/Kithyoko/4517 hereinafter referred to as the 'suit land'. They denied trespassing on the suit land or erecting structures thereon. They contended that they have resided on the suit land which is their ancestral land belonging to Nyambala Muinde for



over 50 years. They insisted that the Plaintiff had brought the present case through fraud and deceit which tainted the process, in a bid to dispossess them from the said land.

3. The matter proceeded for hearing where the Plaintiff called two witnesses but the Defendants including their Counsel failed to attend court.

Evidence of the Plaintiff

4. The Plaintiff as PW1 testified that she is the sole registered proprietor of the suit land, with a Title Deed to that effect issued to her on the November 3, 2014. It was her testimony that the Defendants had trespassed on the suit land without her permission and continue to do so, despite her protests. She explained that the 2nd and 3rd Defendants even erected some structures on the suit land, yet they have no right to do so. She sought for the court to preserve her proprietary interest in the suit land by restraining the Defendants from trespassing thereon.
5. PW2 Solomon Matheka Musyimi who was the former Assistant Chief of Miangeni sub location in Kithyoko confirmed he knew the Plaintiff herein as she was born and raised in his former area of jurisdiction. It was his testimony that the Plaintiff is the registered proprietor of the suit land but the Defendants had trespassed thereon, despite having no claim to it. He testified that previously in his capacity as an Assistant Chief, he warned the Defendant orally over their aforesaid actions, which warnings they have refused to heed. To support her case, the Plaintiff produced the following document as an exhibit: Title Deed for land Parcel No Kithyoko/Kithyoko/4517.

Submissions

The Plaintiff's Submission

6. The Plaintiff submitted that she had proved ownership of the suit land as evident in the Certificate of Title which she produced as an exhibit. She argued that the said Title document has never been challenged by the Defence. She further submitted that she had proved the Defendants had trespassed into the suit land without her express permission and had even gone further to erect structures thereon. She insisted that her evidence was never challenged nor rebutted by the Defendants. Further, that she was hence entitled to the orders as sought.
7. To support her arguments, she relied on sections 24, 25 and 26 of the *Land Registration Act* including Article 40 of the *Constitution* as well as the following decisions: *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR; *Nyangeri Obiye Thomas V Yunuke Sakagwa* Nyoiza ELC Case No 277 of 2018; *Elizabeth Chemutai Chepkwony v Janeth Chepkoech & Another* [2019] eKLR; *John Monyancha Ngoge V Marcela Kerubo Kebabe* [2019] eKLR and *Justine Magare Bosire V Isaac Omboga* [2018] eKLR.

Analysis and Determination

8. Upon consideration of the Plaintiff, Defence, Testimony of the Plaintiff's witnesses, exhibits and submissions, the following are the issues for determination: Whether the Plaintiff is the absolute proprietor of land parcel number Kithyoko/ Kithyoko/4517. Whether the Defendants have trespassed on land parcel number Kithyoko/ Kithyoko/4517 and should be restrained therefrom.



9. I note the Defendants despite filing their Statement of Defence failed to attend 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.”

10. As to the consequences where a party fails to adduce evidence as envisaged in Section 107 of the Evidence Act, I wish to refer to the decision of Motex Knitwear Limited vs Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No 834 of 2002, where Lesit, J (as she then was), while favourably citing the case of Autar Singh Babra and Another vs Raju Govindji, HCCC No 548 of 1998 held thus:

“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.”

11. In associating myself with the legal provisions I have cited above, as well as the quoted decision, I opine that since the Defendants failed to controvert the Plaintiff’s averments through *viva voce* evidence, the said Claim remains unchallenged.

12. As to whether the Plaintiff is the absolute proprietor of land parcel number Kithyoko/Kithyoko/4517.

13. The Plaintiff claims to be the proprietor of the suit land. PW1 and PW2 in their testimonies confirmed that the Plaintiff is the registered proprietor of the suit land. The Plaintiff further produced a Certificate of Title dated the November 3, 2014 which indeed confirmed she is the registered proprietor of the said land. The Defendants despite claiming in their Defence that the suit land belonged to a third party never produced any documents to that effect.

14. On proof of ownership to land as well as rights of an absolute proprietor, I wish to refer to Sections 24, 25 and 26 of the Land Registration Act which governs the same.

Section 24 of the Land Registration Act states that:

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

While Section 25(1) of the Land Registration Act provides *inter alia*:

“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 in 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 to any lawful encumbrances, set out in this section.”

Further, Section 26(1) of the Land Registration Act stipulates thus:

“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.”

15. On ownership of land, the Court of Appeal in the case of *Joseph NK Arap Ng'ok V Moiyo Ole Keiwua & 4 Others* [1997] eKLR, held that:

“Once one is registered as an owner of land, he has absolute and indefeasible title which can only be challenged on grounds of fraud or misrepresentation and such is the sanctity of the title bestowed upon the title holder.”

16. Further, in Civil Appeal No 246 of 2013 *Artbi Highway Developers Limited Vs West End Butchery Limited and Others*, the Court of Appeal expressly stated thus:

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

17. Based on my analysis above while relying on the quoted legal provisions and decisions, I find that the Plaintiff is indeed the absolute proprietor of land parcel number Kithyoko/Kithyoko/4517 as she has fulfilled the legal tenets to prove ownership of the said land since she holds a Certificate of Title to that effect, which has not been challenged.

18. 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.”

19. Further, *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.”



20. 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 described as follows:

“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.”

21. In this instance, both PW1 and PW2 confirmed that the Defendants had trespassed on the suit land. PW1 further testified that the Defendants had even put up some structures thereon. While PW2 testified that when he was an Assistant Chief, he tried to warn the Defendants from their acts of trespass but they declined to heed his call. The Defendants in their Defence denied trespassing on the suit land but failed to attend court to tender evidence to prove this position. Based on the evidence before Court, while relying on the cited decision, I find that the Defendants have indeed trespassed on the suit land which belongs to the Plaintiff.

22. 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 Plaintiff has indeed established a *prima facie* case as against the Defendants who have trespassed on her land and will make an order restraining them from doing so.

23. On the issue of costs, since the Plaintiff is the inconvenienced party, I will award her the costs of the suit.

24. It is against the foregoing that I find the plaintiff has proved her case on a balance of probability and will proceed to enter Judgment in her favour and make the following final orders:

- a. A declaration be and is hereby issued that the suit property herein, LR No Kithyoko/ Kithyoko/4517 belongs to the plaintiff.
- b. A permanent order of injunction be and is hereby issued against the Defendants herein, their agents, servants and/or any other person acting at their behest, barring them from entering the suit property herein and/or interfering with it in any way.
- c. Cost of the suit is awarded to the Plaintiffs

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 3RD DAY OF NOVEMBER, 2022

CHRISTINE OCHIENG

JUDGE

