

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC SUIT NO. E013 OF 2022

MICHAEL MUNENE MBUTU alias MBUTU

MUNENE.....

PLAINTIFF

-VERSUS-

IRENE WANJIRU GICIGO.....

DEFENDANT

JUDGEMENT

Introduction & Pleadings

1. The plaintiff - MICHAEL MUNENE MBUTU alias MBUTU MUNENE - impleaded the defendant - IRENE WANJIRU GICIGO - before this court by way of Plaint dated 17th March 2022. By that plaint the Plaintiff avers that he is the registered owner of Land title number Mbere/Wachoro/383 which the defendant has encroached or trespassed upon. The Plaintiff seeks for the following orders:

- a) Removal and/or eviction of the defendant, her family, her servants and/or agents from title number Mbeere/Wachoro/383.*
- b) General damages for trespass.*

c) A permanent injunction restraining the defendant, her family, servants and/or agents from entering, trespassing or interfering with the plaintiff's rights in respect of title number Mbeere/Wachoro/383.

d) Costs of the suit.

2. The Defendant filed a statement of defence dated 25th April 2022, disputing the contents of the Plaint, and further stating that she has the right and justification to be on the suit land as she has been there since the year 1971, a total of 51 years. She views herself as an adverse possessor.
3. The defendant had also raised a preliminary objection on the basis that the issues in this matter are in another case, Embu Petition No.6 of 2018, which the Magistrate in Wanguru in ELC 22 of 2020 recommended the plaintiff to join as an interested party. However, the preliminary objection was dismissed by this Court on 30th January 2024, for not meeting the criteria for grant of preliminary objection.

Evidence at the trial

4. The hearing stated on the 17th of January 2023, where PW 1, the Plaintiff, adopted his witness statement dated 17th March 2022 as evidence. Therein, he reiterated the contents of his Plaint, which among others, is that at all times material to

this suit, he has been the registered owner of L.R Mbere/Wachoro/383, which the defendant has trespassed upon and has refused to vacate even after being served with notice of intention to sue.

5. He also produced his bundle of documents as evidence.
6. Upon cross-examination by the Defence Counsel, the Plaintiff agreed that indeed he was a minor in 1978 when adjudication began, but that he was given the land as a minor by his father. His statement was that the defendant entered his land in 1994, after being incited by a local politician.
7. Upon re-examination, the Plaintiff stated that the land was processed by way of land adjudication. That the local area administration was involved but the defendant never raised an objection during the adjudication process. After the process, he was issued with a title deed. The plaintiff then closed his case.
8. Thereafter the defence case started with the defendant giving evidence as DW1. She stated that she is a farmer and that the suit land is her land, where she has settled since the year 1971. She further stated that she did not understand

why the Plaintiff wanted her to vacate the suit land. She averred that all her children were born on the suit land. The defendant adopted her witness statement dated 4th December 2022 as her evidence in chief.

9. In the statement she stated that she has been living on the suit land since 1971, and she has extensively developed it. She said that the plaintiff has never set foot on the land, despite knowing that she occupied it. She further said that the plaintiff has never objected to her occupation.

10. She also noted that there is a pending suit, Embu ELC Petition No. 6 of 2018, that seeks to thwart fraud and misdeeds by the parties named in the petition as respondents. The disputed land features as No.132 in the petition with her name shown therein. She said that the Plaintiff ought to feature in the petition as an interested party, since her position is that he was registered as the owner fraudulently.

11. She therefore prayed that the Court dismisses the plaintiff's suit and uphold the suit property as her own.

12. Upon cross-examination, DW 1 stated that no one gave her the land, since during those days one would just occupy

land and start using it. She acknowledged that the land belonged to the government at that time and was demarcated for adjudication in 1978 and they were settled.

13. The defendant denied knowing that the plaintiff had been given the land and therefore she did not challenge the decision as she was still occupying it.

14. She also acknowledged that she has not sued the plaintiff for fraud and noted that the plaintiff acquired title in the year 2017 after the adjudication process.

15. DW 2 Peter Mutuku Munyao adopted his witness statement dated 4th December 2022 as his evidence in chief. He stated therein that he has known the defendant for many years and that she has settled on the suit land since the year 1970 and further that she should have been the one who was allocated the suit land.

16. Upon cross-examination, DW 2 stated that he was born in the year 1942 and recalled that the Government through the Provincial Administration started allocating people land in the area around the year 1978. He stated that he did not know that one could appeal the decision and also that he got title for his own land in the year 2021.

17. DW 3 Samson Masiuki Kioko stated that the defendant is his immediate neighbour across a rural road and that she has been known to him since childhood. He stated that he later learnt that the defendant's land was subsequently reallocated to someone else. This is despite her living on the land for over four decades. He said that the suit land ought to be hers.

18. DW 4, Lydia Mweke Muchoki, also gave her testimony, and adopted her witness statement dated 20th December 2022 as her evidence. In it, she stated that when she came to Wachoro village in the year 1977, she found the defendant already there and utilizing the land she has settled on. She said that the defendant should be allocated the suit land.

19. On cross-examination, she confirmed that indeed the government was allocating the titles and that she has title to her land. She also said that there were people who did not get land. The defence then closed their case and parties filed written submissions.

Plaintiff's written submissions

20. Counsel for the Plaintiff summarized what transpired during the hearing and quoted from Sections 107, 108, 109, 110

and 112 of the Evidence Act, stating that that the Plaintiff has proven that he is the owner of the suit land because he has his title.

21. Counsel also quoted from Section 26 (1) of the Land Registration Act, submitting that the defendant did not challenge the plaintiff's acquisition of the suit land.

22. Secondly, Counsel relied on the defence exhibit No. 3 dated 26th October 2018, which laid down the chronological order of events from the year 1975, leading up to the issuance of the title deeds in the adjudication area of Wachoro. It was highlighted that if the Defendant had an interest over the suit land, she should have filed an objection at the adjudication stage. Alternatively, she could pursue the matter in court by way of judicial review if she was aggrieved.

23. Third, Counsel submitted that it is evident that the defendant has trespassed on his land. He then quoted the interests and rights of a title holder under Sections 24 and 25 of the Land Registration Act.

24. On the defendant's claim of adverse possession, Counsel submitted that the defendant did not file a counterclaim

with her defence. Further, since his title was issued on 16th May 2017, the claim of adverse possession cannot see the light of day as twelve (12) years have not expired or passed since then. He said he has now asserted his rights. He cited and relied on the case of **Purity Wangechi Mithamo -vs- Bernard Maina Nyaga (2017) KEHC 2380(KLR).**

25.It was also submitted that once trespass is proven, there is no need to prove damage. Relying on the cases of **Duncan Nderitu Ndegwa vs. KPLC Limited & Another (2013) eKLR** and **David Kimugun Koskei vs. Benjamin Tuwei & Another (2019) eKLR,** counsel quoted a sum of Kshs. 1,000,000/= which would be adequate compensation as general damages for trespass. He also asked for costs of the suit.

Defendant's submissions

26.The defendant submitted that she has been in possession and occupation of the suit land since the year 1971, having been allocated the same by the Land Adjudication and Settlement Officer in Kiritiri.

27. It is submitted that the defendant should not be deprived of her fundamental rights as provided for under the Constitution and the United Nations Declaration of the Rights of Indigenous people, upon alleged “*cultural settlement*” on the suit land.

28. She also submitted that by the principle of adverse possession, the land became her own twelve (12) years after the year 1971 and urged the court to declare the suit land as hers, contending that the plaintiff acquired the land through a fraudulent process.

29. The defendant submits that her defence and evidence were not challenged and that the three (3) defence witnesses gave evidence which was coherent and corroborative in support of her assertions. She urged the court to dismiss the plaintiff’s suit in its entirety.

Analysis & Disposition

30. Having gone through all the pleadings and evidence produced by the parties, I think that the following issues arise for determination:

- 1) *Is the plaintiff the bonafide owner of the suit land or does it belong to the defendant?*
- 2) *Has the Defendant trespassed onto the suit property?*

3) *What orders should be given by the Court?*

1) Is the plaintiff the bonafide owner of the suit land or does it belong to the defendant?

31. The Plaintiffs has claimed that he is the registered proprietor of the suit land, Mbere/Wachoro/383. To prove ownership, he has exhibited a copy of his title that was issued on 16th May 2017.

32. Section 26 of the Land Registration Act CAP provides that a Certificate of title is to be held as prima facie evidence of absolute and indefeasible proprietorship. It states 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”

33. The Defendant contends that she has been on the suit land since the year 1971 and that she is entitled to be the one registered as the proprietor. However, from the above statutory provision, it is clear that the only way to challenge a certificate of title is on the ground of fraud or misrepresentation or to prove that the certificate has been illegally or unprocedurally acquired through a corrupt scheme. This is something the defendant has neither claimed nor proved. Further, the defendant has claimed that she is entitled to the suit property by way of adverse possession, but she has not filed such claim either as a separate suit or by way of counterclaim. The averments relating adverse possession in a statement of defence do not constitute a claim against the plaintiff. It remains a response, not a claim.

34. It was held concerning fraud by the Court of Appeal in the case of **Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000]eKLR** that:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See Davy v Garrett (1878) 7 Ch. D 473 at 489.”

35. The courts have held that allegations of fraud are subject to a higher standard of proof. In **Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR** the court held that:

“Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities. No evidence was tendered to this end by the appellants. They did not call any witness

from the land office to verify their allegations.”

36. The Plaintiff stated that he acquired the suit property's title through the adjudication process. Indeed, he exhibited a letter dated 9th September 2011 from the District Land Adjudication and Settlement Mbeere South District Office, confirming that the Adjudicated Plot No.383 in Wachoro Adjudication section is recorded in his name. The land adjudication process is an elaborate one, with several levels of disputes resolution arising all culminating in the final Appeal to the Minister as provided for by Section 29 of the Land Adjudication Act CAP 284. It is a process where the rights and interests of the parties are ascertained and once those rights and interests in land are established, then the land becomes private land. The final step is issuance of the title deed. Section 28 of the Land Adjudication Act provides that:

“Upon receiving the adjudication register under section 27 of this Act, the Chief Land Registrar shall cause registrations to be effected in accordance with the adjudication register.”

37. Therefore, if the defendant indeed was meant to be the registered owner, she had recourse to challenge the decision to allocate the suit land to the plaintiff under the Land Adjudication Act, or to file a case before the Court to dispute how the process of adjudication was done.

38. The Learned Judges at the Court of Appeal in the case of **Athman Mbosio Mwakulu & another v National Land Commission & 4 others [2021]eKLR** observed thus:

“The purpose of declaring an area an adjudication section is to make it possible to ascertain and record individual interest in Trust land. The Act requires any person who has an interest in land in an adjudication section to lodge his claim to the recording officer.

Once the interest is ascertained and confirmed after determination of any objections, it is entered into the adjudication register, which when completed is open to the public for inspection. Throughout the entire adjudication process, the Act provides elaborate dispute resolution mechanisms, including appeals, if there are any competing claims. Once all the objections have been settled, the adjudication register is finalised and the Chief Land Registrar registers the

land in favour of the claimant in accordance with the adjudication register.”

39. The defendant has stated that there is a pending Embu Petition No.6 of 2018, which the plaintiff is not yet party to but should be joined as an interested party. The said suit is for the parties named in it and is still pending, therefore I decline to comment on it. In any case, you cannot force a party to join a suit. Further, if the defendant is claiming the disputed land in that petition, knowing well that the plaintiff is the registered owner, it is her who should be seeking joinder of the plaintiff in the matter instead of asking the plaintiff to join it. The defendant has therefore not succeeded to show that the plaintiff is not the bonafide owner of the land.

2) Has the Defendant trespassed onto the suit properties?

40. Having established that the Plaintiff is still the indefeasible proprietor of the suit property as it has not been proven otherwise, the second question is whether the Defendant has encroached trespassed upon the land.

41. This is a question that does not require much investigation as the defendant has already admitted to living on the suit land for a number of years, which is actually corroborated by the other defence witnesses.

42. Counsel for the Plaintiff relied on the case of **Duncan Nderitu Ndegwa -vs- Kenya Pipeline Company Limited & another [2013] KEHC 6408 (KLR)** where it was held that:

“On the issue and quantum of general damages, 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.”

3) What orders should be issued by the Court?

43. Having established that the Plaintiff has proven his case on a balance of probabilities, I am of the considered view that the suit has merit. The plaintiff has sought for an order of eviction of the defendant. He is entitled to that. He should be enabled to enjoy quiet ownership and/or possession of the land.

44. On quantum of general damages, I am of the opinion that the Kshs. 1,000,000/= that the Plaintiff has suggested is

excessive. In the case that they relied upon, **Duncan Nderitu Ndegwa v Kenya Pipeline Company Limited & Another** (Supra), the Court saw it fit to award a sum of Kshs.100,000 as general damages. In the other suit they relied upon, the case of **David Kimugun Koskei v Benjamin Tuwei & Another [2019] KEELC 3847 (KLR)**, the court awarded a sum of Kshs. 250,000/= as general damages for trespass.

45. Further, there is no dispute between the parties that the Defendant has been living on the suit land and has a home there. I am of the view that the defendant can be allowed some days like 90 days to remove herself from the land. After the ninety (90) days, the plaintiff should be given a thirty (30) days notice to vacate the land. If she does not vacate, eviction should follow. I also award the plaintiff Kshs. 100,000/= as general damages.

46. Lastly, the Plaintiff has also sought for a permanent injunction restraining the Defendant, her family, servants and or agents from the suit property. In **Watson Wahome Njuru -vs- Co-operative Bank of Kenya Ltd. HCC No. 67/2006, Nyeri [2010] eKLR**, the court held, *inter alia*,

that before granting an order of permanent injunction, the plaintiff must show first that he has a legal right to protect and secondly that there is likelihood of suffering a future serious injury. In my view the plaintiff has shown that his ownership is being interfered with. He is also likely to suffer if injunction is not granted. I therefore grant him an order of injunction as prayed for.

47.As regards the issue of costs, it is trite that costs follow the event – see Section 27 of Civil Procedure Rules, 2010. The plaintiff has won the case. I therefore award him costs of the case.

JUDGEMENT DATED, SIGNED and DELIVERED online at **KITUI** this **28th** day of **April, 2026** pursuant to notice dated **21/4/2026**.

In the presence of,

Munene for Ngige Gichoya for Plaintiff

Defendant - absent

Court Assistant - Musyoki

A. KANIARU

JUDGE- ENVIRONMENT & LAND COURT, KITUI