



REPUBLIC OF KENYA



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**Mokaya v Oim (Environment and Land Case 56 of 2015)
[2025] KEELC 5554 (KLR) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5554 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE 56 OF 2015**

**SO OKONG'O, J
JULY 24, 2025**

BETWEEN

DICKSON NYAKUNDI MOKAYA PLAINTIFF

AND

DAVID ADERA OIM DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit through a plaint dated 2nd March 2015. The Plaintiff averred that he was the sole owner of all that parcel of land known as Title No. Kisumu/Kogony/6895 (hereinafter referred to as “the suit property”). The Plaintiff averred that he acquired the suit property on 5th May 2014 from the original owner, one Stephen Kwama. The Plaintiff averred that he was issued with a title deed for the property on 14th May 2014.
2. The Plaintiff averred that after acquiring the suit property, he travelled to the United Arab Emirates. The Plaintiff averred that the Defendant was occupying the suit property and the Defendant was not known to him. The Plaintiff averred that despite numerous demands made by the Plaintiff upon the Defendant to vacate the suit property, the Defendant had refused to do so and had continued to occupy the property without the Plaintiff’s permission.
3. The Plaintiff averred that the Defendant had constructed a semi-permanent building on the suit property illegally. The Plaintiff averred that the Defendant had agreed to vacate the suit property through an agreement dated 20th August 2013 between the Defendant and the previous owner of the suit property, Stephen Kwama, but did not do so. The Plaintiff prayed for judgment against the Defendant for an order of eviction of the Defendant from the suit property with the assistance of the OCS Kisumu Police Station. The Plaintiff also prayed for the costs of the suit and any other or further relief the court may deem fit to grant.



4. The Defendant was served with Summons to Enter Appearance. The Defendant failed to enter an appearance or file a defence to the Plaintiff's claim. On 8th October 2015, the Defendant was granted leave to file a defence out of time, but again he failed to do so.
5. At the trial, the Plaintiff, Dickson Nyakundi Mokaya adopted his witness statement filed together with the plaint on 2nd March 2015 as part of his evidence in chief. He produced a copy of the title deed for the suit property as P.EXH 1. The Plaintiff stated that in 2013 the dispute over the suit property was taken to the area chief before whom the Defendant claimed that he was occupying land on Kisumu Kogony Map Sheet No. 18. The Plaintiff stated that the parties agreed before the chief that a survey be conducted and if it was found that the Defendant was occupying the land on Kisumu Kogony Map Sheet No. 9 where the suit property was situated, the Defendant would vacate the land.
6. The Plaintiff stated that a survey was conducted, which established that the Defendant was occupying the suit property on Kisumu Kogony Map Sheet No. 9. The Plaintiff stated that he gave the Defendant time to move out of the suit property. The Plaintiff stated that instead of doing so, the Defendant put up more structures on the suit property. The Plaintiff produced a copy of the agreement for sale of the suit property between him and Stephen Kwama as P.EXH.3 and a copy of the agreement the parties reached before the Chief as P.EXH. 2. The Plaintiff stated that the suit property was a subdivision of land parcel Kisumu/Kogony/4731. He produced a copy of the mutation form through which land parcel Kisumu/Kogony/4731 was subdivided to give rise to the suit property as P.EXH. 4 and a certificate of official search showing that he was the registered owner of the suit property as P.EXH. 5. The Plaintiff also produced the Registry Index Map Sheet No. 9 for Kisumu Kogony Registration Section as P.EXH. 6. The Plaintiff stated that he went to the suit property in December 2024 and found that the Defendant had vacated the suit property. He stated that the Defendant demolished his house and moved to a parcel of land on Kisumu Kogony Registration Section Map Sheet No. 18. He stated that the Defendant should stop inciting the local community against him.
7. On cross-examination by the Defendant, who was present at the trial, the Plaintiff stated as follows: Stephen Kwama sold him the whole of land parcel Kisumu/Kogony/4731 (Plot No. 4731). He subdivided Plot No. 4731, which gave rise to the suit property. The Defendant entered the suit property in 2014. The Defendant did not have a homestead on the property. The Defendant built a temporary structure on the suit property. He brought a surveyor to the suit property who surveyed the land in the presence of the Defendant. The parcels of land in Kisumu Kogony Map Sheet No. 9 and Map Sheet No. 18 border each other. As of December 2024, when he last visited the suit property, the Defendant was not on the suit property.
8. On examination by the court, the Plaintiff stated that he had sold land parcels Kisumu/Kogony/6893 and 6894, and was remaining with land parcel Kisumu/Kogony /6895(the suit property). He stated that the suit property was not developed.
9. The Plaintiff called one witness, Stephen Kwama (PW2). PW2 told the court that the Plaintiff and the Defendant were known to him. He stated that the Plaintiff was his neighbor while the Defendant was his uncle's grandchild. PW2 adopted his witness statement filed together with the plaint on 2nd March 2015 as part his evidence in chief. He stated that he sold the suit property to the Plaintiff. He stated that at that time, the Defendant was occupying the property. He stated that he asked the Defendant to vacate the suit property on several occasions, but he refused. He stated that he reported the matter to the chief, but the Defendant walked out of the meeting at the chief's office. He stated that the Defendant was still on the property.



10. On cross-examination by the Defendant, PW2 stated that the Defendant was occupying the Defendant's mother's homestead. PW2 stated that he could not remember the parcel number of the land that he sold to the Plaintiff. On examination by the court, PW2 stated that he was born in 1949. He stated that the Defendant built a house and constructed another house for his mother in his homestead, which was on the land that PW2 had sold to the Plaintiff. He stated that the Defendant and his mother occupied only a small portion of the land.
11. The Defendant did not give evidence since he did not file a defence. After the close of the Plaintiff's case, the court directed the parties to make closing submissions in writing.

The Plaintiff's submissions

12. The Plaintiff filed submissions dated 13th February 2025. The Plaintiff framed the following issues for determination;
 - (a) Whether the Plaintiff is the legal and registered proprietor of the suit property.
 - (b) Whether the Plaintiff is entitled to the orders sought.
13. The Plaintiff submitted that he was a purchaser of the suit property for value from Stephen Kwama (PW2). The Plaintiff submitted that he followed due process in acquiring the suit property; hence, he held an indefeasible title. In support of this submission, the Plaintiff cited Sections 24, 25(1) and 26 (1) of the *Land Registration Act* 2012. The Plaintiff submitted that he had proved his case against the Defendant. The Plaintiff submitted that the Defendant did not file a defence to the claim. The Plaintiff submitted that at the trial, the Defendant seemed to agree that he had put up structures on the suit property, some of which he had removed, while others were still on the property. The Plaintiff submitted that the Defendant had no defence to his claim. The Plaintiff submitted that he had proved on a balance of probabilities that the Defendant had trespassed on the suit property. The Plaintiff urged the court to grant the orders sought in the plaint as prayed. The Defendant did not file submissions.

Analysis and Determination

14. The only issues arising for determination in this suit are; whether the Defendant trespassed on the suit property, whether the Plaintiff is entitled to the orders sought in the plaint, and who is liable for the costs of the suit. I will consider these issues together. Although the suit was undefended, the Plaintiff still had a duty to prove his case on a balance of probabilities as required by the law. In *Kirugi and Another v Kabiya & 3 Others* [1987] KLR 347, the Court of Appeal stated 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. In *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, the court stated that:

“It is not automatic that (in) instances where the evidence is not controverted the Claimant shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”
16. The Plaintiff sued the Defendant for trespassing on the suit property. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, *Clerk & Lindsell on Torts*, 18th Edition, page 923, paragraph 18-01. In *Gitwany Investments Limited v Tajmal Limited & 3 others* [2006] eKLR, it was held that title to land carries with it legal possession. In the



Court of Appeal, Fourth District, Division 1, California, in *Ralphs Grocery Co. v Victory Consultants Inc.* [2017] 17Cal. App.5th 245, 261; CACI No. 2000, the court stated that:

“In the instant action, Appellants have sued Respondents for trespass. “Trespass is unlawful interference with possession of property.” (*Staples v Hoefke* [1987]189 Cal.App. 3d 1397,1406). The elements of trespass are: (1) the plaintiff’s ownership or control of the property; (2) the defendant’s intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of permission; (4) harm; and (5) the defendant’s conduct was substantial factor in causing the harm. (See CACI No. 2000).”

17. I am satisfied from the evidence on record that the Plaintiff proved that he was the registered owner of the suit property. The Defendant did not dispute the Plaintiff’s title, nor did he claim any interest in the suit property. The Defendant also did not deny that he had entered and occupied the suit property without the Plaintiff’s permission. As the owner of the suit property, the Plaintiff was entitled to quiet possession and enjoyment of the same. Since the Defendant had no legal or beneficial interest in the suit property, he had no reasonable excuse or justifiable cause for being on the suit property. The Defendant was therefore a trespasser on the suit property.
18. In his plaint, the Plaintiff sought an order for the eviction of the Defendant from the suit property. Since the Plaintiff has proved that the Defendant is a trespasser on the suit property, the Plaintiff is entitled to an order for the eviction of the Defendant from the suit property in case the Defendant is still in occupation of any portion thereof. According to the Plaintiff, the Defendant had vacated the suit property the last time the Plaintiff visited the property. However, PW2, who is related to the Defendant and who was his neighbour told the court that the Defendant was still in occupation of a small portion of the suit property.

Conclusion

20. It is my finding that the Plaintiff has proved his case against the Defendant to the required standard. I therefore enter judgment for the Plaintiff against the Defendant for;
 1. An order that the Defendant shall vacate and hand over to the Plaintiff possession of all that parcel of land known as Kisumu/Kogony/6895 or any portion thereof under his occupation within 60 days from the date hereof in default of which the Plaintiff shall be at liberty to apply for warrants for the Defendant’s forcible eviction from the suit property with the assistance of the police from the nearest Police Station.
 2. The Defendant shall pay to the Plaintiff the costs of the suit.

DELIVERED AND SIGNED AT KISUMU ON THIS 24TH DAY OF JULY 2025.

S. OKONG’O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Nyanduko h/b for Mr. Achura for the Plaintiff

N/A for the Defendant

Ms. J. Omondi-Court Assistant

