



**Getambu & another v Katana (Environment & Land Case  
90 of 2012) [2024] KEELC 310 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 310 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 90 OF 2012  
NA MATHEKA, J  
JANUARY 31, 2024**

**BETWEEN**

**ANTHONY GETAMBU ..... 1<sup>ST</sup> PLAINTIFF**

**DR. ESTHER MUTHONI GETAMBU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**PAUL KATANA ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiffs aver that they are the registered owners of the parcels of land known as Kilifi/Roka/1237 and Kilifi/Roka/1238 measuring 3.16 Ha each. The Defendant has without any colour of right unlawfully encroached on the said plots and constructed thereon illegal structures and has denied the Plaintiffs access to the said plots thereby denying the Plaintiffs developing the plots. The Plaintiffs claim against the Defendant is an order of mandatory injunction to remove the 0 from Plots Nos. Kilifi/Roka/1237 and Kilifi/Roka/ 1238 mesne profits together with costs and interest. The Plaintiffs pray for judgement against the Defendant for;
  - a. A declaration that the Defendant is a trespasser on the Plaintiffs' land known as Kilifi/Roka/1237 and Kilifi/Roka/ 1238.
  - b. An order of mandatory injunction ordering the Defendant to vacate from the Plaintiffs' parcels of land known as Kilifi/Roka/1237 and Kilifi/Roka/ 1238 and demolish the illegal structures.
  - c. A permanent order of injunction restraining the Defendant either by himself, his agents or servants from interfering with the Plaintiffs' parcel of land known as Kilifi/Roka/1237 and Kilifi/Roka/1238 in any manner whatsoever.
  - d. Eviction of the Defendant from the parcels of land known as Kilifi/Roka/1237 and Kilifi/Roka/ 1238.



- e. General damages for trespass.
  - f. Costs of the suit and interest.
2. The Defendant maintains that in the year 1985, he settled on the suit premises. The Defendant avers that his occupation of the suit premises was with full knowledge of the Provincial Administration and the Government, time and again, promised to issue the Defendant with ownership documents. The Defendant avers that since the time he settled on the suit premises, nobody came to claim ownership and he thus had an uninterrupted and peaceful enjoyment of the suit premises. The Defendant shall further aver that he has since developed the suit premises by putting up permanent Houses and planting trees. The Defendant avers that he has only known the suit premises as his home and views the Plaintiff's suit herein as a scheme to deprive him of his rights.
  3. The Defendant prays that the Plaintiff's suit herein be dismissed with costs and judgment be entered in favour of the Defendant as against the Plaintiffs as follows;
    - a. The titles Kilifi/Roka/1237 and Kilifi/Roka/ 1238 consisting the suit premises herein be nullified.
    - b. Rectification of the Register and inclusion of the Defendant as the Registered proprietor of the suit premises.
    - c. Costs of the suit.
    - d. Any other relief that this Honourable court may deem fit to grant
  4. This court has considered the evidence and the submissions therein. The suit revolves around two parcels of land known as L.R No. Kilifi/Roka/1237 and Kilifi/Roka/ 1238 measuring 3.16 Ha hereafter known as the suit properties. The 1<sup>st</sup> Plaintiff states that he bought the suit properties from one Wycliffe Muga sometime in 1992 and followed all the due process in registering the same in both Plaintiffs' name. He left it vacant until sometime in 2009 when he found some excavation works on the suit properties and filed a suit in High Court Civil Case No. 194 of 2009 then before it was settled out of court where the company excavating on the suit properties paid compensation of Kshs 5,000,000 and left the suit property. On the Defendant's part, he claims that he moved into the suit properties sometime in 1985 and the government and local authorities had full knowledge. He claims the Plaintiffs were not in possession at that material time. He claims he improved the land and put up both permanent and semi-permanent structures.
  5. The Plaintiffs' case is that the 1<sup>st</sup> Plaintiff bought the suit and he produced a copy of title deeds for the suit properties (PEXh1), copy of sale agreement for Kilifi/Roka/282 (PEXh 4), copy of sale agreement for the Kilifi/Roka/1237 (PEXh 5), copy of consents for both suit properties (PEXh 6 & 7), copy of receipt by Musinga Advocates (PEXh 8), copy of transfer for Kilifi/Roka/1237 (PEXh 9) and an official search (PEXh10). Counsel for the Plaintiffs in their submissions demonstrated how the Plaintiff's produced documents in court showing how they acquired title (PEXh 1) in good faith without any notice of fraud and that the Defendant failed to prove fraud.
  6. Section 26 of the [Land Registration Act](#) provides that a certificate of title is conclusive proof of ownership unless inter alia fraud is proven. The burden of proving that the title of the Plaintiffs is not valid lies on the burden as provided by section 107 of the [Evidence Act](#);
    - “(1) 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.



(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

7. It is not disputed that the Plaintiffs are the registered owners of the suit properties. The Defendant testified that he had informed the chief of the area who had promised that he would be issued with title. In the case of *Kuria Kiarie & 2 Others v Sammy Magera* (2018) eKLR where the Court of Appeal stated that;

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “... We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases.. “..In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

8. From the above facts of the case it is clear that from the official search (PEXh 10) the title was registered on 2<sup>nd</sup> February 1993. The possession by the Defendant according to his testimony began in 1985 which is eight years prior. The Defendant’s case is that he moved onto the suit properties in 1985 and they were vacant. He also produced photos of the structures he has put up on the suit properties (DEXh 1) and claims that he has also grown coconut and casaurina trees. He also testified that he has shops there. DW2 testified that she sells mnazi there and the Defendant is a neighbor. Counsel for the Defendants submitted that the suit is time barred as per Section 7 of the *Limitation of Actions Act* i.e. over 12 years have passed between 1997 (when the Plaintiffs’ started trying to evict the Defendant) and 2012 (the time of filing this suit). Furthermore, Counsel relied on Section 30 of the *Registered Land Act* (repealed) that the occupation of the Defendants of the suit properties was an overriding interest which might not necessarily be registered. PW1 stated in his testimony that he started his attempts of evicting the Defendants in 1997. He filed a suit against the company excavating in 2009. I find that this suit is not time barred. The Defendant has failed to prove fraud on the part of the Plaintiffs. I find that the Defendant has failed to prove his counterclaim on a balance of probabilities and I dismiss it with costs.

9. On the issue of trespass, the Court of Appeal was of this opinion in *Jamal Salim v Yusuf Abdulabi Abdi & another* (2018) eKLR and stated that;

“In the text *Clerk & Lindsell on Torts*, Sweet & Maxwell, 18th Edition, at page 923, trespass to land is defined as follows :- “Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another.

At page 927 of the same text discusses who may sue for trespass and it states as follows:- “Trespass is actionable at the suit of the person in possession of land, who can claim damages or injunction, or both... Similarly, a person in possession can sue although he is neither owner nor derives title from the owner, and indeed may be in possession adverse to the owner.”

It is therefore not necessary for one to establish ownership of land to sustain a claim for trespass. It is enough that the person suing is in possession.”

10. It has not been disputed that the Defendant is on the suit properties. He also produced photos of the structures he has put up on the suit properties (DEXh 1) and claims that he has also grown coconut



and casaurina trees. The Plaintiff averred that the Defendant has unlawfully encroached on the said plots and constructed thereon illegal structures and has denied the Plaintiffs access to the said plots thereby denying the Plaintiffs developing the plot. In *Philip Ayaya Aluchio v Crispinus Ngayo* (2014) eKLR the court held that;

“The Defendant has constructed on the Plaintiff’s land. This in itself is damage and wastage of the Plaintiff’s land. The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage?. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff’s property immediately before and immediately after the trespass or the cost of restoration, whichever is less. See *Hostler v GreenPark Development Co.* 986 S. W 2d 500 (No. ct App. 1999).

The Plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass. There was no evidence adduced on the nature of house which the Defendant has constructed on the suit land. The court is at a disadvantaged position in reaching at a cost which might be reasonable for restoration of the property to its former state. However as I have found that the Plaintiff is entitled to general damages for trespass, I will award a nominal sum of Kshs. 100,000/= as general damages for trespass. This cost will go towards restoration of the suit land to its former state.”

11. Similarly, in this case, the Plaintiffs have not adduced evidence as to the status of their suit land before and after the trespass, they are entitled to general damages for trespass and the court will award a nominal sum of Kshs 150,000/= as damages. I find that the Plaintiffs claim that at the time of buying the suit properties it was vacant. I find that the Plaintiffs have proved their case on a balance of probabilities and I grant the following orders;

1. A declaration that the Defendant is a trespasser on the Plaintiffs’ land known as Kilif1/Roka/1237 and Kilif1/Roka/1238.
2. The Defendant either by himself, his agents or servants is to vacate the from the Plaintiffs parcels of land known as Kilifi/Roka/1237 and Kilifi/Roka/1238 and demolish the illegal structures in the next 60 days from the date of this judgement and in default eviction order to issue.
3. A permanent order of injunction restraining the Defendant either by himself, his agents or servants from interfering with the Plaintiffs’ parcel of land known as Kilif1/Roka/1237 and Kilif1/Roka/1238 in any manner whatsoever.
4. Kshs. 150,000/= General damages for trespass.
5. Costs of the suit.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**N.A. MATHEKA**

**JUDGE**

