



Kuria (Suing as the legal administrator of the Estate of Howard Thuo Kuria - Deceased) v Mwangi alias Paul Mundia & 2 others (Environment & Land Case E122 of 2023) [2024] KEELC 202 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELC 202 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E122 OF 2023
JO MBOYA, J
JANUARY 25, 2024**

BETWEEN

JAMES THUO KURIA (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF HOWARD THUO KURIA - DECEASED) PLAINTIFF

AND

PAUL MUNDIA MWANGI ALIAS PAUL MUNDIA 1ST DEFENDANT

TERESIAH MUTHONI KIMANI ALIAS WA GERALD 2ND DEFENDANT

JOSEPH MAINA ALIAS JOSE 3RD DEFENDANT

JUDGMENT

Introduction And Background

1. The Plaintiff, who is the Legal administrator of the Estate of Howard Thuo Kuria, now deceased, has filed the Plaintiff dated the 17th October 2023; and in respect of which same has sought for the following reliefs;[verbatim];
 - i. A declaration that parcel of land known as L.R 209/11373/78 belongs to Howard Kuria Thuo alias Howard Thuo Kuria alias Kuria Thuo, deceased.
 - ii. The 1st, 2nd and 3rd Defendants, their agents, servants, heirs and dependents or any one residing thereon without the permission of the Plaintiff do vacate the suit land know as L.R 209/11373/78.
 - iii. The honorable court do issue an eviction order against the 1st, 2nd and 3rd Defendants, their agents, servants, heirs and dependents or any one residing thereon without the permission of the Plaintiff do vacate the suit land know as L.R 209/11373/78.



- iv. The OCS Huruma Police Station do supervise the said Eviction.
 - v. An order of Permanent Injunction be issued restraining the 1st, 2nd and 3rd Defendants and any other person acting for or under them from interfering with the title to the parcel of land known as L.R 209/11373/78 or otherwise interfering with the deceased Estate enjoyment and possession of the suit property.
 - vi. The 1st, 2nd and 3rd Defendants to jointly and/or severally bear the costs of this litigation from the date of filing the suit herein.
2. The Plaint and summons to enter appearance were duly served upon the Defendants vide substituted mode, namely, advertisement in the daily Nation Newspaper of the 16th November 2023, pursuant to and order of the court allowing substituted service by dint of the Provisions of Order 5 Rules 17 and 22 of the Civil Procedure Rules, 2010 [as amended]
 3. Nevertheless, despite having been duly served with the Plaint and summons to enter appearance, [details in terms of the preceding paragraph], the Defendants herein neither entered appearance nor filed any Statement of Defense.
 4. Arising from the foregoing, the subject matter was thereafter fixed for Formal proof whereupon the Plaintiff herein tendered evidence and thereafter produced assorted documentary Exhibits, in support of the Plaintiff's case.

Evidence By The Parties':

Plaintiff's Case:

5. The Plaintiff's case revolves around the Evidence of one witness, namely, James Thuo Kuria, who testified as PW1.
6. It was the evidence of the witness that same (witness) is the duly appointed and constituted Legal Administrator of the Estate of Howard Thuo Kuria, now deceased. In this respect, the witness tendered and produced before the court a copy of the Certificate of Confirmation of Grant issued on the 8th May 2018.
7. Furthermore, the witness averred that Howard Thuo Kuria was a shareholder and member of Muchokaniriria Company Ltd and by virtue of being such a shareholder, the deceased was entitled to a portion of the property hitherto belonging and registered in the name of the said company.
8. It was the further testimony of the witness that on or about the 22nd January 1992, the land which was hitherto registered in the name of the company was sub-divided and thereafter the suit property was transferred and registered in the name of the deceased. In this regard, the witness referred to the Instrument of conveyance dated the 22nd January 1992, which duly lodged with the Land Registry and thereafter registered.
9. Additionally, the witness averred that upon the registration of the conveyance, the deceased was duly issued with a Certificate of title and thus the deceased became the lawful proprietor of the suit property.
10. Be that as it may, the witness averred that the Defendants herein entered upon and took possession of the suit property albeit without the permission and or consent of the Estate of the deceased. In respect, the witness averred that the actions by and on behalf of the Defendants constitutes and/or amounts to trespass.



11. Other than the foregoing, the witness alluded to the witness statement dated the 17th October 2023 and thereby sought to adopt and rely on same. Instructively, the witness statement dated the 17th October 2023, was thereafter adopted and constituted as the Evidence in chief of the witness.
12. On the other hand, the witness also alluded to a List and Bundle of documents dated the 27th October 2023; and similarly sought to tender and produce same before the Honourable Court. Suffice it to point out that the documents at the foot of the List dated the 17th October 2023, were thereafter admitted and produced in evidence as Exhibits P1 to P7.
13. Additionally, the witness referred to the Plaint dated the 17th October 2023; and similarly sought to adopt and reiterate the contents thereof. In this regard, the witness implored the Honourable court to find and hold that the Defendants are indeed trespassers and thus deserving to be evicted from the suit property.
14. With the foregoing testimony, the Plaintiff's case was duly closed.

Defendants' Case:

15. The Defendants herein were duly served with the Plaint and summons to enter appearance vide substituted means, namely, advertisement in the Daily Nation, but despite being served, same neither entered appearance nor filed any statement of defense.
16. Furthermore, the Defendants herein also did not attend court and/or participated in the proceedings.
17. Owing to the foregoing, the subject matter proceeded on the basis of a Formal proof and the Plaintiff's evidence was neither challenged nor controverted in any manner whatsoever.

The Parties' Submissions:

18. At the close of the Plaintiff's case, Learned counsel for the Plaintiff informed the court that same shall not be making any submissions in respect of the instant matter. Furthermore, Learned counsel pointed out that same shall be adopting and relying on the evidence, which was tendered before the court.

Issues For Determination:

19. Having reviewed the pleadings filed and upon taking into account the evidence tendered [both oral and documentary], the following issues do arise and are thus worthy of determination;
 - i. Whether the suit property lawfully belongs to the Estate of Howard Thuo Kuria, now deceased and if so, whether the administrator is entitled to exclusive possession.
 - ii. Whether the Defendants have any lawful rights to and in respect of the suit property and whether the impugned activities constitutes trespass.

Analysis And Determination:

Issue Number 1 Whether the suit property lawfully belongs to the Estate of Howard Thuo Kuria, now deceased and if so, whether the administrator is entitled to exclusive possession.

20. It was the evidence of PW1 that the suit property was lawfully transferred to and thereafter registered in the name of Howard Thuo Kuria, now deceased. Furthermore, the witness added that upon the registration of the suit property in the name of the deceased, same was duly issued with a certificate of title denoting his ownership rights.



21. On the other hand, the witness averred that following the death of the deceased, same (witness) took out succession proceedings and was thereafter issued with the Grant of Letters of administration. In any event, the witness added that the Grant of Letters of administration, which were issued in his favor, have since been confirmed.
22. Owing to the foregoing, the witness pointed out that same is therefore the duly appointed and constituted Legal administrator of the Estate of the deceased and thus authorized/mandated to take charge of the assets belonging to the deceased, inter-alia the suit property.
23. Arising from the fact that the suit property belonged to and was registered in the name of the deceased, there is no gainsaying that the registration of the suit property and the subsequent issuance of the Certificate of title to and in favor of the deceased, conferred and vested upon the deceased the legal right to the suit property.
24. To this end, it is imperative to take cognizance of the holding in the case of Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 others [1997] eKLR, where the court held as hereunder;

Section 23(1) of the Act 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.

25. Other than the foregoing decision, the legal import and significance attendant to a certificate of title, was highlighted and amplified by the Court of Appeal in the case of Elizabeth Wambui Githinji & 29 Others vs Kenya Urban Roads Authority (2019)eKLR, where the court stated and held thus;

“If a certificate of lease duly issued by the Registrar is prima facie evidence of ownership and if the owner is proved to have exercised due diligence at the point of acquisition, on what basis could the appellants’ petition for protection under Article 40 be defeated?

It has long been accepted beyond debate that the land registration process in Kenya is a product of the Torrens system. This was acknowledged in, among a long line of decided cases, this Court’s judgments in Dr. Joseph Arap Ngok V. Justice Moijo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997 and Charles Karathe Kiarie & 2 Others V Administrators of Estate of John Wallance Muthare (deceased) & 5 others, Civil Appeal 225 of 2006.

Under that system, the title of a bona fide purchaser for value without notice of fraud cannot be impeached; that the land register must mirror all currently active registrable interests that affect a particular parcel of land; that the Government, as the keeper of the master record of all land in Kenya and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world; and that in case of loss arising from an error in registration, the Government guarantees the person affected of compensation. Finally, the statutory presumption of indefeasibility and conclusiveness of title based on the register can be rebutted only by proof of fraud or misrepresentation which the buyer is himself shown to have been involved.



26. Premised on the foregoing and taking into account that the certificate of title which was issued to and in favor of the deceased, has neither been challenged and/or impugned, it suffices to find and hold that the suit property truly belongs to and forms part of the Estate of the deceased.
27. Consequently and in view of the foregoing, the suit property falls within the purview and/or mandate of the Plaintiff herein, who has since been constituted and appointed as the legal administrator of the Estate of the deceased.
28. From the foregoing, my answer to issue number one [1] is to the effect that the suit property belongs to and forms part of the Estate of the deceased.

Issue Number 2: Whether the Defendants have any lawful rights to and in respect of the suit property and whether the impugned activities constitutes trespass.

29. By virtue of the fact that the suit property belongs to and constitutes part of the Estate of the deceased, it is common ground that the Estate of the deceased and in particular, the legal administrator thereof is vested with absolute and exclusive rights thereto.
30. To the extent that the suit property falls within the administration of the Plaintiff, there is therefore no gainsaying that the Plaintiff herein is by law entitled to partake of and benefit from the statutory rights and privileges underpinned by the provisions of Section 24 and 25 of the [Land Registration Act](#).
31. Notably, the rights that vest and/or inhere in the legal owner of a property and by extension the legal administrator of the Estate of a deceased owner, entail the rights to exclusive possession, occupation and use, to the exclusion of all and sundry.
32. Without belaboring the point, the scope, tenor and extent of the rights of a land owner were delineated and espoused in the case of *Moya Drift Farm Ltd. v. Theuri* (1973) EA 114; where the Eastern Africa Court of Appeal [EACA]; Spry, V-P at 116, considered the effect of section 23 of the Registration of Titles Act and held –

“I cannot see how a person could possibly be described as “the absolute and indefeasible owner” of land if he could not cause a trespasser to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has physical possession.”

Furthermore, Sir William Duffus, P. *ibid* at p.117 agreed with Spry, JA as follows:

“In any even I agree with the Vice-President that the fact that the appellant was the registered proprietor as owner in fee simple under the Registration of Titles Act, and as such vested with the absolute and indefeasible ownership of the land, was sufficient to vest legal possession of the land in the appellant and that this possession would be sufficient to support the action of trespass against a trespasser wrongly on the land.”

33. Additionally, the extent of the rights that vests in the land owner and by extension, the Legal administrator/Administratrix thereof, were also articulated in the case of *WAAS Enterprises Limited v City Council of Nairobi & another* [2014] eKLR, where the Honorable court stated as hereunder;

“As a registered proprietor, the plaintiff is entitled to enjoy all proprietary rights to the exclusion of all others. This includes the right to exclusive possession of the suit land. The rights of a proprietor of land are set out in Sections 24 and 25 of the [Land Registration Act](#) which provide as follows :-



24. Subject to this Act—
- (a) 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; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of 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—
 - 1. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - 2. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

It therefore follows from the above that only the plaintiff is entitled to enjoy proprietary rights over the suit land. The 2nd defendant had no right to the suit land. She must therefore vacate the suit land and hand over possession to the plaintiff.

- 34. Flowing from the holding in the decision cited in the preceding paragraphs, it is common ground that a person vested with the certificate of title is entitled to, inter-alia, the right to legal occupation of the designated property. In this case, the Plaintiff should have unhindered access to and possession of the suit property.
- 35. Nevertheless, the Plaintiff has contended that despite having the lawful and legitimate rights to and in respect of the suit property, the Defendants herein have entered upon and taken possession of the suit property albeit without his permissions and/or consent.
- 36. Suffice it to point out that any action or activity taken on a parcel of land with a known owner, but without the consent and/or permission of such known owner, constitutes and/or amounts to trespass.
- 37. Remarkably, the term trespass has been variously defined and elaborated upon by various Courts, inter-alia, the Court of Appeal. In this respect, it suffices to take cognizance of the definition supplied vide



the decision in the case of *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] eKLR, where the court held thus;

35. In *M'Mukanya v M'Mbijiwe* (1984) KLR 761, the ingredients of the tort of trespass were revisited by this Court and restated 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.”

36. Further, in *Winfield & Jolowic on Tort*, Sweet & Maxwell, 19th Edition at page 428 states as follows:

“Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land.” [Emphasis supplied].

38. Having taken cognizance of the ingredients that underpin the tort of trespass, I find no difficulty in coming to the conclusion the actions and/or activities by and on behalf of the Defendants, which are complained of, truly constitutes and amounts to trespass.

39. Furthermore, the impugned actions/activities, have certainly impacted on the Plaintiff's ability to enter upon, take possession of and most importantly, to benefit from the ownership rights underpinned by the provisions of Section 24 and 25 of the *Land Registration Act*, 2012.

40. In a nutshell, the Defendants are trespassers and thus have no right to continue in occupation and/or possession of the suit property, whatsoever and/or howsoever. Consequently and in this regard, the plea for, inter-alia, eviction of the Defendants from the suit property is meritorious.

Final Disposition:

41. Having appraised the various issues that were highlighted herein before, there is no gainsaying that the Plaintiff has been able to tender before the Honourable court cogent, credible and plausible evidence to warrant a positive finding in his favor.

42. In a nutshell, the Plaintiff's suit is truly meritorious and consequently, the court proceeds to and do hereby enter Judgment in favor of the Plaintiff on the following terms;

- i. A declaration be and is hereby issued that the parcel of land known as L.R 209/11373/78 belongs to and forms part of the Estate of Howard Kuria Thuo alias Howard Thuo Kuria alias Kuria Thuo, deceased.



- ii. The Defendants, their agents, servants, heirs and dependents or any one residing thereon without the permission of the Plaintiff, be and are hereby ordered to vacate the property and hand over vacant possession of the suit property to the Plaintiff within 90 days.
- iii. In default by the Defendants to vacate the suit property in terms of clause (ii) herein, an order of Eviction shall and the Defendants shall be evicted to the suit property without any further notice of at all.
- iv. In the event that the Defendants are forcefully and forcibly evicted in terms of clause (iii) hereof, the expenses incurred towards levying the eviction shall be certified by the Deputy Registrar of the court and thereafter same shall be recoverable from the Defendants as part of costs.
- v. An order of Permanent injunction be and is hereby issued restraining the 1st, 2nd and 3rd Defendants and any other person acting for or under them from interfering with the title to the parcel of land known as L.R 209/11373/78 or otherwise interfering with the deceased Estate enjoyment and possession of the suit property.
 - vi. Trespass is actionable per se and in this regard, an award of General damages is hereby granted in the sum of Kes.500, 000/= only as against the Defendants.
 - vii. Costs of the suit shall be borne by the Defendants.
- viii. The Plaintiff shall be at liberty to apply if and where necessary.

43. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson - Court Assistant.

Mr. Andati for the Plaintiff.

N/A for the Defendants.

