



**Ngugi v Kamau & another (Environment & Land Case E083 of 2021)
[2024] KEELC 24 (KLR) (15 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 24 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E083 OF 2021**

**BM EBOSO, J
JANUARY 15, 2024**

BETWEEN

LUCIA NYAMBURA NGUGI PLAINTIFF

AND

JOSEPH KAMAU ALIAS GITHAIGA 1ST DEFENDANT

WILSON TANUI ALIAS NGARE & 123 OTHERS 2ND DEFENDANT

JUDGMENT

1. One of the key issues to be determined in this suit relates to the question of the lawfulness of the defendants' occupation of what the plaintiff contends is Land Reference Number 30568 comprised in Certificate of Title Number IR 228053, dated 17/3/2021. The defendants contend that the said land is a road reserve forming part of the old Thika Road. The land is located in Juja in the South West of Thika Municipality. It measures approximately 0.6510 hectares. Before I dispose the issues that fall for determination in the suit, I will briefly outline the parties' respective cases, evidence and submissions. I will, in this Judgement, refer to the land in dispute as the "the suit land".

Plaintiff's Case

2. The plaintiff's case is contained in the amended plaint dated 23/3/2022 and in her written submissions dated 8/6/2023. In summary, her case is that she is the registered proprietor of the suit land. She adds that in 2019, the defendants cut off the fence of the suit land fronting Thika Highway and erected illegal temporary structures on the suit land. It is her case that the defendants illegally started operating small businesses on the land, including hotels and garages. She terms the alleged actions of the defendants as illegal, and contends that the said actions have denied her and her family the right to use the suit land.
3. Consequently, the plaintiff seeks the following reliefs against the defendants; (i) an order of permanent injunction restraining the defendants against interfering with or occupying the suit land; (ii) an eviction order; (iii) an order decreeing demolition of all structures or buildings erected on the suit



land; (iv) orders authorizing execution of the decree of the court by M/s Silverstein Auctioneers; and (v) an order directing the Area OCS to maintain law and order during the eviction and ensure compliance; (vi) general damages for loss of user (mesne profits); and (vii) damages occasioned during the occupation; and (viii) costs of the suit.

Defendants' Case

4. The defendants filed a joint statement of defence dated 21/6/2022. Their case is that the suit land belongs to the Government of Kenya, adding that the land is part of Thika Highway and was "left open after construction of the Thika Superhighway." They contend that the suit land was allocated to them for use as a market place by the then Area Member of Parliament, the late Hon Francis Munyua Waititu, adding that the land was at the time vacant and that their initial market place had been destroyed to give way for the construction of the Thika Superhighway. They add that this left them in need of a new parcel of land on which to carry out their businesses. It is the case of the defendants that the plaintiff does not have any proprietary right over the suit land. They contend that their occupation of the suit land is lawful. They urge the court to dismiss the plaintiff's suit with costs. They did not, however, bring a counterclaim to impeach the plaintiff's title. They also did not file written submissions after trial.

Plaintiff's Evidence

5. The plaintiff testified as PW1 and closed her case. She adopted her written witness statement dated 23/3/2022 as part of her sworn evidence-in-chief. She produced the following 12 exhibits: (i) Copy of Certificate of Title Number IR 228053; (ii) Copy of Demand Notice; (iii) Copy of the Power of Attorney; (iv) Letter dated 18/9/1987 from the Chief Engineer (Roads and Aerodromes) addressed to the Commissioner of Lands; (v) Letter of allotment dated 12/2/1999; (vi) Receipt dated 30/3/1999; (vii) Receipt dated 16/7/1999; (viii) Receipt dated 28/10/1999; (ix) Receipt dated 12/11/1999; (x) Receipt dated 2/6/1999; (xi) Deed Plan Number 389006; (xii) Search dated 11/5/2021.
6. In summary, the plaintiff's evidence was that, previously the suit land belonged to her late husband, Elijah Ngugi Njuguna, who died in 2005. Upon the death of her husband, she was appointed as the executrix of his will and she inherited the suit land from her late husband. She subsequently processed a Certificate of Title relating to the suit land, which was issued to her by the Department of Lands in 2021.
7. It was the evidence of the plaintiff that the suit land was allocated to the late Elijah Ngugi Njuguna in 1999 through a Letter of Allotment dated 12/2/1999, adding that a certificate of title relating to the suit land was subsequently issued to her on 17/3/2021. She added that the defendants illegally encroached onto the suit land in 2019. She urged the court to grant her the reliefs sought in the amended plaint.

Defendants' Evidence

8. The defendants led evidence by one witness, Joseph Kamau [the 1st defendant], who testified as DW1. He adopted his written witness statement dated 27/6/2022. He produced the following 9 exhibits: (i) copy of registration certificate dated 6th November 2018; (ii) copy of surveyor's report dated 31/1/2022; (iii) copies of maps; (iv) copy of letter dated 17th February 2022; (v) copy of letter dated 24/2/2022; (vi) copy of search;
9. In summary, DW1's evidence was that upon him and other small business owners being evicted by Kenya National Highways Authority (KENHA) from the road reserve where they used to operate, they contacted their then Area Member of Parliament, Honourable Francis Munyua Waititu (deceased) to assist them. The Member of Parliament settled them on the suit land, adding that the suit land is



Government land. DW1 stated that, given that the number of traders was large, Hon. Francis Munyua Waititu (deceased) appointed persons to be the group leaders of the Group, stating that the group leaders were to ensure that each of the traders got a place to carry out business within the suit land. DW1 added that he was among the key persons who corresponded with Hon. Francis Munyua Waititu (deceased) about the logistics of settling onto the suit land. DW1 further stated that upon them entering into the suit land, the plaintiff became known to them as the person who put the perimeter fence on the suit land and later removed the fence by herself. DW1 added that Francis Munyua Waititu (deceased) informed the plaintiff that the suit land was Government land.

10. DW1 stated that the traders contributed money to clear the bushes on the suit land and prepared the suit land for occupation. DW1 further stated that the suit land was subdivided into small portions and the portions were awarded through balloting, to traders who were members of the Group. It was the evidence of DW1 that he constructed a shade-like structure for his vegetable vendor business, where he had been operating until December 2021 when it became known to him that he had been sued together with others and injunctive orders had been given by this Court. DW1 stated that he was neither a tenant nor had he rented out his portion of the suit land. He urged the court to find that the plaintiff's ownership claim was unmerited.

Submissions

11. The plaintiff filed written submissions dated 8/6/2023 through M/s Millimo, Muthomi & Company Advocates. As observed above, the defendants did not file written submissions.
12. The plaintiff's counsel identified the following as the four issues that fell for determination in the suit: (i) Who the owner of Land Reference Number 30568 IR 228053 is; (ii) Whether the defendants have trespassed onto and have continued to trespass onto the plaintiff's land; (iii) Whether the plaintiff is entitled to damages; and (iv) Who should bear costs of this suit.
13. On who the owner of LR No. 30568 IR 228053 is, counsel submitted that the suit land was allocated to the plaintiff's husband, Elijah Ngugi Njuguna (deceased), through a Letter of Allotment dated 12/2/1999. Counsel added that the deceased applied for allocation of the suit land and his request was accepted by the Commissioner of Lands who allocated the land to him. Counsel contended that the late Juja Constituency Member of Parliament, Hon Francis Waititu lacked the authority to allocate the suit land to the defendants in the year 2019, observing that the suit land was private land. Counsel submitted that during trial, DW1 confirmed that they engaged a surveyor who advised them that the plaintiff was the registered owner of the suit land. Counsel faulted the defendants for not adducing evidence to show that the suit land belonged to the Government.
14. On whether the defendants had trespassed onto and continued to trespass onto the plaintiff's land, counsel submitted that the defendants broke the fence erected by the plaintiff, invaded the suit land, and put up temporary structures without the knowledge or the authority of the plaintiff. Counsel further submitted that the defendant's actions had infringed the plaintiff's right to quiet possession and enjoyment of the suit land. Counsel relied on the decision in the case of Eliud Njoroge Gachiri v Stephen Kamau Ng'ang'a in support of his submissions.
15. On whether the plaintiff is entitled to damages, counsel submitted that the defendants had vowed to continue trespassing on the suit land. Counsel contended that the suit land is situated in a prime area and is valued at Kshs 30,000,000. Counsel argued that the defendants admitted running income-generating businesses on the suit land to the detriment of the plaintiff. Counsel added that the defendants had continued to illegally occupy the suit land despite their surveyor informing them that the land belonged to the plaintiff. Counsel relied on the decisions in the cases of John Chumia



Nganga v Attorney General & Another [2019]eKLR, Stephen Olang Misigah v Lush Home Properties Limited[2021]eKLR, and Josephat Thuo Githachuri v Joseph Kibui Mwithiga[2020]eKLR. Counsel urged the court to grant the plaintiff general damages for trespass amounting to Kshs 2,000,000.

Analysis and Determination

16. I have considered the pleadings, evidence and submissions tendered in this case. The defendants elected not to tender submissions. The following are the three key issues that fall for determination in the suit: (i) Who is the owner of Land Reference Number 30568? (ii) Whether the defendants' occupation of the suit land is lawful; and (iii) Whether the plaintiff is entitled to the reliefs sought in the amended plaint. I will dispose the three issues sequentially in the above order.
17. On the issue of ownership of the suit land, the plaintiff's case is that the land was allocated to her late husband, Elijah Ngugi Njuguna, by the Government of Kenya in 1999 through a letter of allotment dated 12/2/1999. She subsequently inherited the land from her deceased husband. A certificate of lease was subsequently issued to her in 2021.
18. On their part, the defendants contest the plaintiff's claim of ownership and contend that the land forms part of Thika Highway. They further contend that upon their original business premises being demolished to pave way for the construction of Thika Superhighway, the then Area Member of Parliament allocated the suit land to them in 2018. It is their case that they are lawfully occupying the land.
19. The plaintiff produced a letter of allotment dated 12/2/1999, signed by one F. M. Mamwaka on behalf of the Commissioner of Lands. The said letter of allotment indicates that the late Elijah Ngugi Njuguna was allotted an unsurveyed industrial plot in Kalimoni, Juja, measuring 0.750 hectares. The plaintiff also produced a part-development plan indicating that the said land was replanned and that the alienation was based on the part development plan. Also produced as evidence were various receipts relating to payments that were made by the late Elijah Ngugi to the Department of Lands in pursuance of the allotment. Further, the plaintiff produced Deed Plan No. 389006 dated 23/3/2017, indicating that the land was subsequently surveyed as LR No. 30568. Lastly, she produced Certificate of Title No. IR 228053, indicating that the Department of Lands subsequently registered the land in the name of the plaintiff on 17/3/2021 and issued to her the said title.
20. The defendants did not bring a counterclaim to challenge the alienation and the title held by the plaintiff. They did not tender evidence to impeach the title that is held by the plaintiff. They did not tender any evidence to demonstrate that the then Area Member of Parliament had powers under the law to allocate them the land. They did not lead evidence from either the Physical Planning Directorate or the Department of Roads to demonstrate that the suit land is a road reserve forming part of Thika Highway as alleged.
21. Article 40(1) of *the Constitution* protects the right to property in the following terms:
 - “ 40.
 - (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property —
 - (a) of any description; and
 - (b) in any part of Kenya.”



22. Section 24 of the [Land Registration Act](#) protects the rights of a registered proprietor of land in the following terms:

“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.”

23. Section 26(1) of the [Land Registration Act](#) contains an unequivocal framework binding this court to accept, as prima facie evidence of ownership, a certificate of title issued by the Land Registrar. The Section spells out the grounds upon which a title may be impeached in the following terms:

“26.

- (1) 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.”

24. From the totality of the above evidence and legal frameworks, it is clear that the suit land was allocated to the late Elijah Ngugi Njuguna, and was subsequently registered in the name of the plaintiff in 2021. No counterclaim and no evidence were brought to impeach the allotment and the title. Consequently, it follows that the plaintiff is the registered proprietor of the suit land. That is the finding of the court on the first issue.

25. The second issue is whether the defendants’ occupation of the suit land is lawful. The defendants contend that the suit land was allocated to them by the then Area Member of Parliament, the late Francis Munyua Waititu, in 2018. They did not, however, tender evidence to demonstrate that the late Francis Munyua Waititu had land allocating mandate under any specific law. It is clear from the law that existed at all material times that a Member of Parliament did not have land allocating powers. If indeed the late Francis Munyua Waititu purported to allocate land to the defendants, the exercise was an illegality because he did not have powers to allocate land that had already been alienated and was held by the estate of the late Elijah Ngugi Njuguna as private land.



26. Secondly, whereas the defendants contend that the suit land is a road reserve, they did not tender evidence to prove the allegation. Neither did they bring a counterclaim to impeach the title held by the plaintiff. Consequently, it is the finding of this court that the defendants' occupation of the suit land is unlawful.
27. On the question as to whether the plaintiff is entitled to the reliefs sought in the amended plaint, the court has examined each of the prayers that were sought in the plaint against the background that the plaintiff has, for the reasons explained above, proved her case to the required standard of proof. The court is, in the circumstances, satisfied that the plaintiff is entitled to prayers (a), (b) and (c). Prayers (d) and (e) relate to enforcement of the decree of the court. The two prayers are available subject to appropriate wording.
28. On the plea for general damages for loss of user [mesne profits], the plaintiff did not tender evidence to assist the court arrive at an informed assessment and award of mesne profits. In the absence of evidence, the plea for mesne profits will not be awarded. Under the prevailing jurisprudence, nominal damages are awardable on account of unlawful occupation of land (trespass). I will, in the circumstances, assess and award nominal damages in terms of the second limb of prayer (f) in the sum of Kenya Shillings One Million [Kshs 1,000,000].
29. On costs, no special circumstances have been demonstrated to warrant a departure from the general principle spelt out in Section 27 of the [Civil Procedure Act](#). Consequently, the defendants shall bear costs of the suit.

Disposal Orders

30. In the end, the plaintiff's suit succeeds in the following terms:
 - a. An order of permanent injunction is hereby issued restraining the defendants, their agents, tenants, and or servants and or anybody else claiming under them from interfering in whatever manner with and or occupying all that parcel of land known as LR No. 30568 IR 228053 situated in Juja in the Southwest of Thika Municipality.
 - b. An order is hereby issued authorizing eviction of the defendants together with their servants and agents from Land Reference Number 30568 comprised in Title Number IR 228053 situated in Juja, Thika Municipality, Kiambu County.
 - c. An order is hereby issued authorizing demolition of all structures and/or buildings erected on LR No 30568 comprised in Title No IR 228053.
 - d. The eviction and demolition shall be effected by a duly licenced auctioneer.
 - e. The Officer Commanding the Area Police Station shall ensure law and order during enforcement of the Judgment.
 - f. The plaintiff is awarded nominal damages for the unlawful occupation of the land in the sum of Kshs 1,000,000 against the defendants jointly and severally.
 - g. The defendants shall bear costs of this suit jointly and severally.
 - h. To avoid unnecessary loss of property and income, there shall be a stay of execution of this Judgment for 90 days to enable the defendants find alternative premises and vacate the land peacefully.



DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 15TH DAY OF
JANUARY 2024

B M EBOSO

JUDGE

