



REPUBLIC OF KENYA



**Wahome v Gichana (Environment & Land Case 160 of 2017)
[2024] KEELC 871 (KLR) (26 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 871 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 160 OF 2017
MN GICHERU, J
FEBRUARY 26, 2024**

BETWEEN

PRISCILLA WAIRIMU WAHOME PLAINTIFF

AND

SIMEON GICHANA DEFENDANT

JUDGMENT

1. The plaintiff seeks the following reliefs against the defendant.
 - a. A permanent injunction restraining the defendant either by himself, his agent and/or servant from constructing or in any other manner interfering with the plaintiff's quiet possession of all that property known as Plot Number 122/Business Noonkopir T. Centre within Olkejuado County Council.
 - b. That this court do issue an order declaring that the plaintiff is the rightful owner of plot number 122/Business Noonkopir T. Centre, suit property.
 - c. An order that the defendant do at his own cost pull down the structure that has been erected on the suit property failing which the plaintiff be at liberty to do so and costs to be borne by the defendant.
 - d. Costs of the suit be borne by the defendant.

This is as per the plaint dated 30/5/2011.
2. The plaintiff's case is as follows. She is the owner of the suit property which she bought from the original allottee J.S. Ole Matura in the year 1993. Ole Matura transferred the land to the plaintiff and she paid the requisite transfer fees. Immediately on purchasing the suit land, the plaintiff took possession and continued paying the annual rates.



3. In the year 2006, the defendant purported to lay unfounded claims to the suit property even though he owned a different property which was number 560. The dispute was reported to the officers of Olkejuado County Council who heard the dispute and resolved that the plaintiff, not the defendant, was the owner of the suit property. The defendant was warned in writing from interfering with the suit land but he ignored the warning and in the year 2008 started constructing a storeyed building thereon. The plaintiff through her sister, one Wakini Wakonyu Kariuki, tried all that she could to have the matter resolved amicably through the Olkejuado County Council but the defendant persisted in disobeying the warning of the council and continued with the illegal construction on her land. Having no other option to stop the illegal trespass on her land by the defendant, the plaintiff filed this suit.
4. In support of her case, the plaintiff filed the following evidence.
 - a. Copy of letter dated 8/7/2010 confirming that the suit property belongs to the plaintiff.
 - b. Copy of letter dated 1/4/2011 warning the defendant to stop construction on the suit premises.
 - c. Copy of letter dated 30/8/2010 further warning the defendant to stop construction.
 - d. Copy of letter by the plaintiff's sister Wakini Wakonyu Kariuki to the clerk to the council.
 - e. Copy of letter dated 28/5/2008 addressed to the defendant warning him to stop construction.
 - f. Copy of letter dated 16/7/2008 calling the defendant to attend a dispute resolution meeting.
 - g. Copy of letter of transfer of the suit land to the plaintiff dated 22/12/1993.
 - h. Copy of receipt for transfer fees 2/12/1993.
 - i. Copy of letter dated 16/10/2008 inviting the plaintiff and the defendant for a dispute resolution meeting.
 - j. Copy of letter of complaint to the Permanent Secretary Ministry of Local Government dated 17/8/2009.
 - k. Copy of letter from the Ministry of Local Government dated 3/5/2010.
 - l. Copy of power of attorney issued by the plaintiff to her sister Wakini Wakonyu Kariuki.
 - m. Copy of map dated 12/1/1991.
 - n. Copy of certificate of official search dated 28/5/2008.
 - o. Photographs showing constructions as the case was pending in court.
 - p. Copy of map.
 - q. Validation exercise program.
5. The defendant, through counsel on record, filed a written statement of defence and counterclaim dated 28/11/2011. In the defence he denies the plaintiff's claim against him. He then avers that he is the sole and lawful owner of L.R. 560 situated Noonkopir (Kitengela) Trading Centre which he bought from Koipaton Ole Karani in the year 2003.

In the year 2008, he submitted a building/development plan which was approved by Olkejuado County Council and since then he has developed the property whose value, as at 28/11/2011, was Kshs. 8, 930,000/-.



Secondly, the plaintiff has never occupied L.R. No. 560 and has no developments thereon.

Thirdly, he prays that an order of permanent injunction be issued restraining the plaintiff either by herself or any other person claiming through her from entering L.R. 560 Noonkopir and demolishing the defendant's buildings thereon or in any other manner interfering with his land.

6. In support of his case, the defendant filed the following evidence.
 - a. A copy of letter of transfer of Plot No. 560 Business Noonkopi T. Centre dated 8/12/2003.
 - b. Copy of letter dated 17/10/2005 confirming that the defendant owns plot no. 560.
 - c. Copy of public notice in the Daily Nation Newspaper of 5th June 2009.
 - d. Copy of application for development permission dated 19/6/2008.
 - e. Copy of approved building plan for plot No. 560 and letter of approval dated 3/7/2008.
 - f. Copy of bank statement for the defendant running from 18/10/2008 to 31/7/2009.
 - g. Copy of letter dated 28/5/2009 confirming the defendant as the owner of Plot No. 560 which also says that the plaintiff, owner of Plot No. 122/Business would be shown an alternative site.
 - h. Copy of valuation report for plot no. 560 dated 17/10/2011.
 - i. 3 copies of photographs showing developments on plot no. 560.
 - j. Copies of water and electricity bills and receipts for Plot No. 560.
 - k. Copy of property search certificate for plot No. 560 dated 14/7/2017.
 - l. Receipts showing payment of plot rates for plot no. 560.
7. At the trial on 11/7/2018 and 22/11/2018 both parties testified and produced their various documents as exhibits. They were then subjected to cross-examination by the adverse party's counsel.
8. The plaintiff's counsel filed written submissions dated 25/9/2023 and identified three issues for determination as follows.
 - a. Whether the plaintiff is the registered owner of Plot No. 122/Business Noonkopir Trading Center?
 - b. Whether the defendant has encroached on the plaintiff's property and if so whether he is a trespasser?
 - c. Whether the plaintiff is entitled to the prayers sought in the plaint.

On the other hand, the defendant's counsel in submissions dated 29/8/2023 identified the following issues.

 - i. Whether the plaintiff has any cause of action against the defendant.
 - ii. Whether this is a case of double allocation, and if so, what are the available remedies.
 - iii. Whether the plaintiff is entitled to the prayers sought in her pleadings.
 - iv. Whether the defendant is entitled to the orders sought in the counterclaim.
 - v. Who should bear the costs.



9. I have carefully considered all the evidence adduced in this case by the parties including the witness statements, documents, and testimony at the trial. I have also considered the written submissions by the learned counsel for the parties, the issues raised in the submissions and the case law cited therein.

I find that the identified issues will resolve the dispute. I make the following findings on the issues raised.

10. On the first issue, I find that the plaintiff is the registered owner of the Plot No. 122 Business Noonkopir Trading Centre. In reaching this conclusion, I have relied on following documents, letter dated 8/7/2010 confirming that plot no. 112 belongs to the plaintiff and copy of certificate of official search dated 28/5/2008. These two documents are prima facie evidence to prove ownership of plot no. 112 by the plaintiff. No evidence has been adduced to the contrary.

11. On the second of the plaintiff's issues, I find no evidence to prove that the defendant has encroached on the plaintiff's property. Even though the plaintiff in her evidence including documents and witness statements says that there is encroachment, there is no tangible evidence by an official of the allocating authority identifying the precise location of her land. By the time the plaintiff closed her case on 11/7/2018, no witness had testified in court proving the precise location of plot no. 122 on the ground.

There is evidence in form of the letter dated 28/5/2019 written by Isaac Keen Parashina, clerk to the county council of Olkejuado saying that the defendant should continue developing plot no. 560 and the plaintiff will be shown an alternative site. It is not certain to me if plot numbers 560 and 112 business Noonkopir Trading Center are one and the same plot or two different plots. Though there was a consent by counsel for the parties dated 7/2/2023 to have the County Surveyor and the County Physical Planner testify in this case to resolve that issue, they did not testify. This is because on 27/4/2023, counsel for the parties, again by consent, decided to do away with this evidence. For the above reasons, encroachment is not proved.

12. On the first of the defendant's issues, I find that that the plaintiff has a cause of action against the defendant. She has adduced credible evidence to show that the defendant has constructed on land that she bought from J.S. Ole Matura and for which she has official documents of ownership. She was justified to file the suit against the defendant.

13. Regarding the second of the defendant's issues, it is not possible, without official evidence, to know if this is a case of double allocation. It could be. It could also be a case of trespass by the defendant on the plaintiff's plot. It could also be a case of the plaintiff having been shown the wrong plot. As I said earlier, only official evidence from the allocating authority could have resolved this issue but both parties chose not to adduce this crucial evidence.

14. Regarding whether the plaintiff and the defendant are entitled to the orders that they seek in the plaint and in the counterclaim, I find that they have not proved that they are entitled to the said orders for reasons already given. The absence of the evidence by the allocating authority on the precise location of the two plots leaves each of the two claims unproved.

For the above stated reasons, I dismiss the plaintiff's suit and the defendant's counterclaim with no orders as to costs.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 26TH DAY OF FEBRUARY 2024.

M.N. GICHERU

JUDGE



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