



Ndumia v Savana Exporters Limited (Environment & Land Case E250 of 2023) [2024] KEELC 1618 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1618 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E250 OF 2023**

**EK WABWOTO, J
MARCH 20, 2024**

BETWEEN

PETER NDUMIA PLAINTIFF

AND

SAVANA EXPORTERS LIMITED DEFENDANT

JUDGMENT

1. This dispute is in respect to a parcel of land known as Land Reference No 209/14475 situated in Nairobi. The Plaintiff filed the subject suit vide a Plaint dated 30th June 2023 in which the following reliefs were sought;
 - a. A permanent injunction do issue restraining the Defendant whether by itself, agents, cronies, servants and/or person claiming under it from trespassing, accessing, leasing or in any manner whatsoever interfering with the Plaintiff’s parcel of land known as Land Reference. No. 209/14475 situated in Nairobi.
 - b. Costs of the suit be provided for.
2. Following the filing of the subject suit and upon service, the defendant herein filed a Statement of Defence and counterclaim dated 19th September 2023 in which the following orders were sought:
 - a. The Defendant’s (Plaintiff in the counterclaim) suit be dismissed with costs.
 - b. A declaration be and is hereby issued that the Plaintiff to the Counterclaim is the legitimate owner of all that parcel of land formerly known as Land Reference No. 209/14475 and sub divided into the Title Numbers LR 209/21278, 209/2179 and 209/21280.
 - c. A permanent injunction be and is hereby issued restraining the Defendant whether by himself, agents, servants or any person claiming through and/or under him from in any manner whatsoever interfering with the Plaintiff’s use, occupation and utilization of all that parcel



of land formerly known as Land Reference No. 209/14475 and sub divided into the Title Numbers LR 209/21278, 209/2179 and 209/21280.

- d. Costs of the suit and this counterclaim.
 - e. Interest at court rates on (d) above.
3. Subsequently, on 11th October 2023, the Court granted the parties an additional thirty (30) days to comply with Order 11 of the Civil Procedure Code. On 21st November 2023, in the presence of all parties, the matter was set down for hearing on 22nd February 2024.
 4. On 22nd February 2024, the Plaintiff did not attend the hearing and consequently the Plaintiff's case was marked as closed and the matter proceeded for the hearing of the Defendant's case. Although the counterclaim was undefended, the Defendant has a duty to formally prove its case on a balance of probabilities as is required by law.
 5. In the case of *Kirugi and Another Vs Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal held 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.”
 6. Similarly, in the case of *Gichinga Kibutha Vs Caroline Nduku* (2018) eKLR the Court held that;

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”
 7. Mr. Adan Alio Ibrahim testified as DW1. He stated that he was the as the director of the defendant company. He testified to having authority on behalf of the 1st Defendant to testify in the suit.
 8. He produced and adopted his witness statement and bundle of documents dated 17th November 2023 as evidence in chief. He further stated that Peter Ndumia was unknown to him until the time when he was served with the pleadings of this suit. He stated that the Defendant had title to the suit property and was currently in occupation of the same. It was on this premise that he sought for the Plaintiff's case to be dismissed and the counterclaim allowed.
 9. In submissions dated 4th March 2024, it was submitted that by the evidence adduced, ownership and possession of the suit property had been proven in favour of the Defendant. It was further submitted that the Defendant is undertaking construction on the suit property and unless the Plaintiff is restrained, the Defendant would suffer immensely. With regards to cost, it was submitted that the Defendant ought to be compensated for the inconvenience caused to it by the Plaintiff.
 10. The Court having considered the pleadings, written submissions and evidence tendered herein is of the view that the following main issue for determination is whether the Defendant's counterclaim is merited.
 11. According to the Defendant, the Plaintiff's root of title is questionable. I have considered that whereas the hearing date was taken on 21st November 2023, with consent of both parties and the Plaintiff failed to attend, no further evidence was produced to controvert or challenge the Defendant's title. In the Plaintiff's list of documents dated 15th November 2023, the copy of title relied upon by the Plaintiff is witnessed on 8th February 1905 yet the transfer is entered in the registration log on 9th



February 2006. This discrepancy in itself casts doubt as to the authenticity of the Plaintiff's title. The Defendant produced cogent evidence confirming its registration to the suit property and equally tendered evidence confirming that it is in possession and occupation of the same. In the absence of any controverting evidence, the court is satisfied that the Defendant has proved its case on a balance of probabilities in so far as its registration and ownership of the suit property is concerned.

12. As guided by Section 13(7) of the *Environment and Land Court Act*, this Court can grant several orders including: (a) interim or permanent preservation orders including injunctions; (b) prerogative orders; (c) award of damages; (d) compensation; (e) specific performance; (g) restitution; (h) declaration; or (i) costs.
13. Having arrived at the conclusion that the Defendant is the rightful owner of the suit property, I have no qualms in duly granting the reliefs sought in the counterclaim. I find that the Plaintiff is entitled to all the rights, interest and privileges that pertain to the land. The Plaintiff is therefore entitled to the reliefs sought.
14. On who should bear the costs of the suit, the general rule is that costs shall follow the event in accordance with Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court for good reason directs otherwise. In the instant case, the Defendant has diligently and successfully presented its claim. For this reason, I grant costs in favour of the Defendant.
15. From the foregoing analysis, the Defendant, has proven its case in the counterclaim on a balance of probabilities against the Plaintiff and in this regard, this Court makes the following final orders:
 - a. The Plaintiff's suit is hereby dismissed in its entirety.
 - b. A declaratory order is hereby issued in favour of the Defendant, being the legitimate owner of all that parcel of land formerly known as Land Reference No. 209/14475 and sub divided into the Title Numbers L. R 209/21278, 209/21279 and 209/21280.
 - c. A permanent order of injunction is hereby issued against the Plaintiff restraining the Plaintiff whether by himself, agents, servants or any person claiming through and/or under him from in any manner whatsoever interfering with the Defendant's use, occupation and utilization of all that parcel of land formerly known as Land Reference No. 209/14475 and sub divided into the Title Number LR 209/21278, 209/21279 and 209/21280.
 - d. The Defendant is awarded costs of the suit and counterclaim together with interest to be paid by the Plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF MARCH 2024.

E. K. WABWOTO

JUDGE

In the Presence of:

N/A for the Plaintiff.

Mr. Mwangi Kang'u for the Defendant.

Court Assistant: Caroline Nafuna.

