



REPUBLIC OF KENYA



Thiribi alias Karinguri v Thimangu & another (Environment and Land Appeal E002 of 2022) [2024] KEELC 1772 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1772 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E002 OF 2022**

CK NZILI, J

MARCH 20, 2024

BETWEEN

JULIUS MUTI THIRIBI ALIAS KARINGURI APPELLANT

AND

STANLEY THIMANGU 1ST RESPONDENT

JACOB MUGAMBI 2ND RESPONDENT

(Being an appeal from the judgment of (Hon. P.M Wechuli – SPM) in Tigania ELC case No. 37 of 2021 delivered on 7.12.2021)

JUDGMENT

1. The appellant, who was the 1st defendant at the lower court, had been sued by the respondents as then the plaintiffs, with the County Government of Meru as the interested party for trespass into the respondent's Plot No: 115 Kianjai and the construction of semi-permanent structures on it. The respondent had sought eviction and or removal of all structures erected thereon, permanent injunction and mesne profits.
2. The appellant opposed the suit by a statement of defense dated 10.5.2021. He denied the claim and averred that there was an ending Meru H.C Petition No. 1 of 2020 between him and the interested party over the subject matter.
3. By a reply of defense dated 17.6.2021, the respondents denied the contents of the statement of defense. Other than a memorandum of appearance filed on 14.6.2021, the interested party did not file any pleadings.
4. At the trial, Stanley Thimangu and Mugambi Jacob, the respondents herein, adopted the witness statement dated 9.4.2021 as their joint evidence in chief. Stanley Thimangu, the 1st respondent is the one who testified as PW 1. Their testimony was that they were legally allocated the plot by the defunct



- County Council of Nyambene in a meeting held in 1996 vide Minutes No. NCCF/C (68) (95)B (1) (3). They said that the appellant trespassed into the plot and usurped the whole of it, despite evidence of payment of land rates. They said that despite notices to vacate, the appellant became adamant and has exposed them to immense loss and damage for lack of user of the plot. The respondents prayed for an eviction order and mesne profits. The respondents produced a provisional letter of allotment, the survey fee, plot rent receipts, confirmation of allotment/indication note rates, receipts, demand letter, and proceedings and judgment in Civil Case No. 488 of 1997 as P. Exh No. 1-9, respectively.
5. In cross-examination, PW 1 told the court they acquired the plot in 1996 through Mr. Batholomew Akwalu, the area council at the time, after making an application for it and approval as per the council minutes. Thereafter that he said they erected a structure in it following the erection of beacons. He said all that the appellant had was a business permit and not payment for land rates.
 6. Julius Kariguri alias Thiauri Thiribi testified as DW 1. He said his market stall was No. 49, which was issued to him in 1991, and he constructed the same in 1992 and has been living therein until the County Government Meru changed its map and inserted other people on it leading to a petition at the High Court Meru. He said he has been paying rates at Kshs.300/= per annum, to the County Government of Meru. The appellant produced an application to the defunct County Council of Nyambene, receipts, minutes extract number 20/92/C(B) 49, a bundle of business licenses and an original map for Kianjai market stalls as D. Exh No. 1-6 respectively. In cross-examination, DW 1 admitted that his receipt D. Exh No. (2) was for a market stall but not for a plot. He also admitted the pendency of the petition at the High Court. The appellant said a plot and a market stall were almost the same thing, save that a plot is usually 20ft by 80 ft. He said there were permanent structures on the suit land.
 7. Francis Muthui Ithagata testified as DW 2. After adopting a witness statement filed on 10.5.2021 as his evidence in chief, he told the court that as a former councilor of the Kianjai ward from 1988 to 1993 and later from 2002 to 2007, he was aware that the defunct Meru County Council planned the Kianjai market to include plots, barter market, cattle shed area, veterinary area and market stalls as per the market plan. He said those who had been on the land before the market plan were given priority, and that is how one Zakayo Mberia, who had a semi-permanent building on his plot now represented by DW 1, through filled application forms, applied to vide application number 4137. He said the application was permitted, authorized, and licensed after developing the plot to carry out his business on the suit land. DW 1 said he paid all the licenses and has been paying rates and licenses to date.
 8. D.W. 2 said that after the county government of Meru was established, other people started claiming the plots. He said that he was a specific owner of plot No. A17 issued vide Minutes No. T.P. & M 16/OS A (a) 17 and Plot No. B 49 vide Minutes No. 20/92/C (B) 49. The said documents were not availed as exhibits in cross-examination. He also informed the court that D. Exh No. 2 were receipts for a market stall as opposed to a plot.
 9. The appellant faults the judgment that was made by the trial court on 7.12.2021 for granting injunctive orders that the respondents did not deserve, for finding the respondents as the registered owner of the plot, for not finding that Plot No. 115 Kianjai and Plot No. B49 Kianjai were distinct and separate for failing to consider his evidence on occupation, use, and ownership of plot No. B49 Kianjai market, for failing to enter liability against the interested party and lastly, for failing to consider the status of Meru H.C Petition No. 1 of 2020.
 10. With leave of court, parties were directed to canvass the appeal by way of written submissions to be filed within 30 days from 4.12.2023. The appellant relied on written submissions dated 15.12.2023. The ones by the respondent were filed on 12.2.2024 outside the timelines, raising technical aspects. It



is the appellant's submission that the evidence at the lower court did not link the respondent with the ownership of market stall Plot No. B49, since they only had a provisional letter of ownership with no minutes allocating them the plot or applications for it showing its size, acreage and locality, unlike him, who has been in use and occupation of the suit land.

11. The appellant submitted that he produced documents to sustain his defense as per his list of documents dated 10.5.2021. Therefore, the appellant submitted that his right to ownership of land under Article 40 of *the Constitution* should not be infringed or violated by the respondent, who did not adduce evidence to impeach his ownership documents to the suit property under Section 26 of the *Land Registration Act*.
12. An appellate court of the first instance is mandated in law to re-hear, rehearse, and re-appraise the lower court record and come up with independent findings of facts and law while giving credence to the trial court, which observed the demeanor of the witnesses. See *Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates* (2013) eKLR, *Gitobu Imanyara & others vs A.G.* (2013) eKLR.
13. In this appeal, the primary pleadings before the trial court were the plaint dated 9.4.2021, the appellant's statement of defense dated 10.5.2021 and a reply to the defense dated 17.6.2021. The respondents' claim was for trespass to Plot No 115 Kianjai market, measuring 30ft by 80 ft.
14. To sustain their claim, the respondents produced P. Exh No's. 1-2. On the other hand, the statement of defense by the appellant was a mere denial other than stating there was a pending Meru H.C. Petition No. 1 of 2020. The appellant did not plead that he had made an application for a market stall or plot in the Kianjai market, which was eventually approved and allocated to him, followed by the taking of possession, use, development, and occupation of market stall Plot No. B 49 vide minutes No 20/92. Additionally, there were no pleadings on the payments of market fees, licenses, or rates to the defunct Nyambene County Council and its predecessors in title. In support of his statement of defense, the appellant produced D. Exh No's. 1-6.
15. The single issue for my determination in this appeal based on the pleadings and evidence at the lower court is whether the respondents had proved trespass to their plot by the appellant to be entitled to the reliefs sought. Trespass refers to unlawful or unjustified entry into private land and committing acts of wastage or destruction. See Section 3 (a) (3) of *Trespass Act* (Cap 294).
16. Two elements must be proved for a claim of trespass to be sustained: ownership and illegal intrusion. The manner of the acquisition of land in Kenya is governed by Section 7 of the *Land Act*, Sections 24 – 26 of the *Land Registration Act*, and Article 40 of *the Constitution*. The burden is on he who alleges ownership under Section 107 – 112 of the *Evidence Act* to prove the fact of ownership. In *Park Towers Ltd vs John Mithamo Njika & others* (2014) eKLR, the court said that where trespass is proved, a party need not prove any loss or damage, for it is actionable per se.
17. In this appeal, the onus was on the respondent to prove the root of its title or ownership documents. The documents supplied at the lower court were not certified or originals. The makers of the documents were not called to testify and prove their authenticity. PW 2, who was the co-owner, was not called to testify. His evidence was adopted by consent. His witness statement is lacking. No officer from the County Government of Meru, the successor in title of the defunct County Council of Nyambene, was called to authenticate, verify and or ascertain that the respondents were the genuine allottees of Plot No. 115 Kianjai market, which was distinct from the appellant's market Stall No. B49.
18. Trespass is an injury to a possessory right, and therefore, a claimant must plead and prove the legality of ownership through authentic documents issued in line with the law governing the allocation of the



land. See Charles Ogejo Ochieng vs Geoffrey Okumu (1995) eKLR. The question of title to the land and the exclusive possession must be proved with tangible evidence. It was not enough for both the appellant and the respondents to avail documents that were not certified to the trial court and assume the proof of the facts of ownership.

19. The evidence of the issuing authority of the documents was critical, especially since there was apparent disagreement on whether the alleged suit land was a plot or a market stall. Either of the parties had to show and prove a better title. A court of law must pronounce on the validity or otherwise of documents of title tendered in evidence by the parties in arriving at a decision. See Michael Gaiko Ngure and another vs Peter Njoroge Kinyanjui (2022) eKLR, Justin Gatumuta vs Kenya Power and Lighting Company (2018) eKLR and Eliud Njoroge Gachiri vs Stephen Kamau Ng'ang'a (2018) eKLR.
20. The process of allocating county plots was governed by Section 11 of the Government Land Act, (now repealed). A part development plan had to be drawn and approved by the Commissioner of Land or the Minister of Lands, followed by an allotment letter. See Nelson Kazungu Chai & others vs Pwani University (2014) eKLR, Gladys Wanjiru Ngacha vs Teresa Chepsat & others Nyeri CC No. 182/1992 and Dr. Joseph Ngok Arap Ngop vs Justice Moiijo Ole Keiwua C.A No. 60 of 1997 and Mbau Saw Mills Ltd vs Attorney General & others (2014) eKLR.
21. Planning in land matters comes first under standard rule then followed by surveying. See Africa Line Transport Co. Ltd vs Hon. Attorney General Mombasa HCCC No. 276 of 2013. In Redcliff Holdings Ltd vs Registrar of Titles and Others (2017) eKLR, the court said that Article 40 of the Constitution only protects a lawfully acquired title. The appellant had raised the issue of double allocation. Therefore, the trial court should have been careful in scrutinizing the root of the respondents' title documents.
22. My findings are that the respondents failed to prove both ownership and invasion of their Plot No. 115 Kianjai market by the appellant. The evidence of a county land surveyor and planner was critical. Similarly, the appellant did not prove that Plot No. 115 Kianjai was in the same locality as Plot No. B49 market stall, duly allocated to him.
23. The upshot is that I find the appeal with merits. The same is allowed with costs to the appellants.
24. Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 20th DAY OF MARCH, 2024

HON. C K NZILI

JUDGE

In presence of

C.A Kananu

No appearance

