



**Kimani v Kimata (Enviromental and Land Originating Summons  
15 of 2021) [2024] KEELC 1626 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1626 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 15 OF 2021**

**A OMBWAYO, J  
MARCH 14, 2024**

**BETWEEN**

**JAMES NGIGI KIMANI ..... PLAINTIFF**

**AND**

**PETER WACHIRA KIMATA ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiff commenced this suit vide Originating Summons dated 29<sup>th</sup> July, 2021 against the Defendant for a claim of adverse possession over Dundori/mugwathi Block 2/84 (Koilel) (now Subdivided New Nos 3208-3218) for determination as follows:
  1. Whether the Plaintiff has been in adverse possession of the Defendant's Land formerly known as land Parcel No. Dundori/Mugwathi Block2/84 (Koilel) and (Now Subdivided NewNos 3208-3218) for a period of over 12 years.
  2. Whether the Plaintiff should be registered as the proprietor of parcel Nos ParcelNo. Dundori/ Mugwathi Block2/3208-3218 (Koilel) formerly Dundori/Mugwathi Block2/84 (Koilel).
  3. Whether the County Land Registrar, Nakurushould be directed by this Honourable court to register the Plaintiff as the proprietor of parcel Nos. Dundori/Mugwathi Block2/3208-3218 (Koilel)formerly Dundori/Mugwathi Block2/84 (Koilel) in place of the Defendant.
  4. Whether the Deputy Registrar of this honorable court should execute transfer documents to effect transfer to the Plaintiff herein in the event the Defendant refuses.
  5. Whether the Defendant should be restrained by an order of injunction from selling, transferring, entering or in any other manner however interfering with the Plaintiff's peaceful use, occupation and or enjoyment of parcel Nos. Dundori/Mugwathi Block2/3208-3218



(Koilel) formerly Dundori/Mugwathi Block2/84 (Koilel) both pending the hearing of this suit and after the determination hereof.

6. Who should pay the costs of this suit.
2. The Defendant/Respondent in response filed his Replying Affidavit dated 10<sup>th</sup> January, 2022.
3. He also filed an Amended Counterclaim dated 26<sup>th</sup> September, 2023 where he prayed for judgment against the Plaintiff/Applicant for:
  - a. An order for eviction against the Plaintiff, his servant, agents and/or anyone claiming through him from parcel of land known as Dundori/Mugwathi Block 2/3208.
  - b. A permanent injunction restraining the Plaintiff from occupying the Defendant's parcel of land known as Dundori/Mugwathi Block 2/3208.
  - c. Mesne profit at a rate of Kshs. 4,000 per annum.
  - d. Costs of the suit.
  - e. Interest on c and d above.
4. The Plaintiff/Applicant filed a Response to the Amended Counter claim where he prayed for the following orders:
  - a. The Defendant's (now Plaintiff) counterclaim be dismissed.
  - b. The Plaintiff (now Defendant) be registered be registered as the proprietor of parcel Nos. Dundori/Mugwathi Block 2/3208-3218 (Koilel) formerly Dundori/Mugwathi Block 2/48 (Koilel).
  - c. Any other orders that the honourable court may deem fit to grant.
  - d. Costs of this suit.
5. The Plaintiff's case was dismissed for non-attendance on 18<sup>th</sup> July, 2023 and the court proceeded to hear the Defendant's (Now Plaintiff) Counter claim.

### **Plaintiffs' Case**

6. Peter Wachira Kimata testified as PW1 and urged the court consider his replying affidavit dated 10/1/2022. He testified that he had documents in the replying affidavit plus annexures. The documents were marked as Dex 1- Dex 8. He added that he also had documents dated 29/10/2022 which were marked as Dex9(a) Dec 9(i).
7. It was his testimony that the suit land arose from the mother title where he subdivided it into 11 plots of 50 X120. He testified that he sold all save for plot no. 3208 which he had the title. He further testified that the Plaintiff/Applicant is in occupation. He urged the court to grant him the prayers in amended counter claim dated 26/9/2023.
8. Upon cross examination, PW1 stated his ID Number 056xxxx and confirmed that the suit property belonged to him. He further confirmed that the suit measured 50ft by 120 and that he knew the Plaintiff/Applicant. He also confirmed that he had never stayed on the land. PW1 stated that from 1973- 2021 the land was vacant. He stated that the Plaintiff/Applicant occupied in 1990 as a tenant. He admitted that he never told him to vacate or lease the suit land since 1990. He stated that he has been paying for the land through his aunt.



9. Upon reexamination, he stated that land no 2184 belonged to him and that the Plaintiff/Applicant occupied in 1990 as his wife's nephew. He also stated that he had rented him the land where he used to pay. He stated that he wanted him to vacate. He added that Block 2/3218 was in the name of Julius Maina Thuku, 3217 John Kanini Mureithi, 3216, 3215, 3214 and 3213 in the name of John Kanyagi Mureithi, 3212- David Kariuki Njuguna, 3210-Pauline Wambui Kimata, 3209- Ruth Wangui Kimata and 3208- himself.
10. Paulina Wambui testified as PW2. Her statement dated 21/6/2022 was adopted as her evidence in chief. She testified that the Plaintiff/Applicant is her nephew. She testified that the Defendant/Respondent Peter is her husband. PW2 further testified that the suit property is registered in the Defendant/Respondent's name. She added that the Plaintiff/Applicant had been leasing the land.
11. Upon cross examination, she admitted that she is illiterate. She confirmed that the Defendant/Respondent is her husband while the Plaintiff/Applicant is her nephew. She added that she did not have a marriage certificate and confirmed that she had the title to the suit property.
12. Patrick Maina Njoroge testified as PW3 but the court during his cross examination expunged his evidence from record as he admitted that the signature on the statement was not his.
13. This marked the close of the Plaintiff's Counterclaim case.

### **Submissions**

14. None of the parties filed their submissions.

### **Analysis and Determination**

15. I have considered the pleadings and the evidence on record and I am of the view that the sole issue for determination is whether the Defendant (now Plaintiff) is entitled to the orders sought in his Counterclaim.
16. It is not in dispute that the Defendant (now Plaintiff) is the registered proprietor of the suit property. He produced the Certificate of Title as proof of ownership which was never challenged. PW1 led evidence to show that he had leased part of the suit property to the Plaintiff (now Defendant). The said evidence was corroborated with that of PW2. PW1 testified that suit land arose from subdivision of the mother title Dundori/Mugwathi Block 2/84 (Koelel). He tendered evidence to prove that he sold all the subdivided plots save for Plot No. 3208 which the Plaintiff (now Defendant) was in occupation.
17. Section 26(1) of the *Land Registration Act* provides that:-

" 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."



18. Further, Section 24 (a) of the [Land Registration Act](#) states that:
- " Subject to this [Act](#), the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto..."
19. In the instant case, it is clear from the facts and evidence adduced that the Defendant (now Plaintiff) is the absolute proprietor of the suit land and therefore entitled to protection of the law as envisaged in sections 24, 25 and 26 of the [Land Registration Act](#). The Defendant (now Plaintiff) in his Replying Affidavit averred that it was his intention to sell to the Plaintiff (now Defendant) the said portion he was occupying but the same was not done.
20. Therefore, having established that the Defendant (now Plaintiff) is the absolute owner of the suit property, it therefore follows that the Plaintiff (now Defendant) has trespassed onto the Defendant (now Plaintiff)'s land.
21. The Defendant (now Plaintiff) has sought for *mesne profits* as against the Plaintiff (now Defendant) who he claimed that he has encroached on his land. Section 2 of the [Civil Procedure Act](#) Cap 21 of the Laws of Kenya defines *mesne profits* as follows: -
- " *mesne profits*", in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;"
22. The Court of Appeal in the case of [Peter Mwangi Mbutia & another v Samow Edin Osman](#) [2014] eKLR held that:
- " We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for *mesne profits* was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established."
23. In the instant case, the Defendant (now Plaintiff) led evidence to the fact that he leased the suit property to the Plaintiff (now Defendant) at an annual rate of Ksh. 3,000 which later increased to 4,000. He went further to adduce evidence of payment in the form of a statement confirming that he received the said payment.
24. The Defendant (now Plaintiff) testified that he leased the suit land to the Plaintiff (now Defendant) the suit land from the year 1990. However, this court noted that PW1 during cross examination admitted that the suit land was vacant between 1973- 2021.
25. In the upshot this court dismisses the Plaintiffs Amended Originating Summons dated 29<sup>th</sup> July, 2021.
26. Consequently, I find that the Defendant (now Plaintiff) has proved his case on a balance of probability and will proceed to make the following orders:
- a. The Plaintiff (now Defendant) be and is hereby directed to give vacant possession of LR. No. Dundori/Mugwathi Block 2/3208 to the Defendant (now Plaintiff) within 90 days from the date hereof, failure of which an eviction order will issue.
  - b. Mesne profits for Kshs. 8,000 is hereby granted to the Defendant (now Plaintiff).



c. Costs of the Counter claim.

It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NAKURU VIRTUALLY THIS 14<sup>TH</sup> DAY  
OF MARCH 2024.**

**A. O. OMBWAYO**

**JUDGE**

