



**Njogu v Sibashi (Environment & Land Case 12 of 2018)
[2024] KEELC 1643 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1643 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 12 OF 2018
LN GACHERU, J
MARCH 14, 2024**

BETWEEN

JOSEPH MUCHINA NJOGU PLAINTIFF

AND

FRANCIS MUCACIA SIBASHI DEFENDANT

JUDGMENT

1. By a Plaint dated 5th February 2018, the Plaintiff herein, brought this suit against the Defendant, wherein he sought for the following reliefs:
 - a. A Declaration that the Plaintiff is the lawful proprietor of Title No. Makuyu/Makuyu Block 1/7638.
 - b. An Order of eviction to be issued against the Defendant, his agents or servants from Title No. Makuyu/Makuyu Block 1/7638.
 - c. A Permanent Injunction restraining the Defendant from entering or trespassing on Title No. Makuyu/Makuyu Block 1/7638.
 - d. Costs of the suit.”
2. In his claim, the Plaintiff averred that he is the registered proprietor of land parcel No. Makuyu/Makuyu BLOCK 1/7638, (the suit property). He annexed in his bundle of documents a copy of the title deed thereof issued on 15th September 2016, to confirm such ownership. He alleged that the said title was unchallenged at the filing of the instant suit.
3. Further, the Plaintiff averred that the Defendant trespassed onto the suit land, settled thereon and then defied every effort to remove him from the said parcel of land, thus, necessitating the suit.



4. After an alleged service of Summons to Enter Appearance, as deponed on 6th March 2018, by Arthur Kimamo, a Process Server, the Defendant did not enter appearance nor file a Defence. Consequently, the matter proceeded as a formal proof wherein Judgment was delivered on 24th January 2019, in favour of the Plaintiff.
5. On being served with the Decree extracted from the Judgment dated 24th January 2019, the Defendant herein filed a Notice of Motion Application, 24th August 2022, and urged the Court to set aside its ex-parte Judgment, and that he be allowed to file his Defence. Being an ex-parte judgement, the court did set aside the same vide a Ruling issued on 2nd March 2023. Consequently, the Defendant was allowed to file his Defence and the matter was to be determined on merit.
6. Thereafter, the Defendant filed his defence and Counter claim dated 10th March 2023, and denied all the allegations made in the Plaint. He claimed that he bought the parcel of land on 16th August 2005, from one Mary Njoki Githuka.
7. He further claimed that the Plaintiff had been promised another parcel of land by a person from whom the Defendant had bought the suit land from; That is the said Mary Njoki Githaka. It was his allegations that he has been in occupation, possession and use of the suit land from 2005, and that from 2005, to the time of filing the suit, 12years had lapsed, and thus the doctrine of adverse possession had kicked in.
8. It was the Defendant's further allegations that his occupation of the suit land was with the Plaintiff's knowledge, and the said occupation was peaceful, continuous and therefore, the Plaintiff's title to the parcel of land has been extinguished, by virtual of adverse possession.
9. It was the Defendant's prayers that the Plaintiff's suit be dismissed with costs, judgement be entered in his favour, and that the Plaintiff's Certificate of title be cancelled, and the same be registered in the name of the Defendant, plus costs of the Counter claim.
10. The Plaintiff filed a Reply to Defence and Defence to Counter-claim on 21st March 2023, and denied all the allegations made in the Defence and Counter-claim. He averred that the said Mary Njoki Githuka, sold the disputed parcel of land to him, after obtaining the Land Control Board Consent, and thus legally transferred the parcel of land to him.
11. Further, the Plaintiff denied that the Defendant bought the suit land in vacant possession, but alleged that the Defendant has illegally trespassed on the suit land since 2017. He also denied that the Defendant has been in occupation of the suit land for over 12 years, and has thus acquired ownership of the same by adverse possession.
12. Consequently, the Plaintiff urged the court to dismiss the Defendant's Defence and Counter-claim with costs to the Plaintiff.
13. After complying with the Pre-trial directions by filing a bundle of documents, through Gori, Ombongi & Co Advocates, the Defendant failed to attend any of the Pre-trial conference, and consequently the matter was set down for hearing.
14. When the matter came up for hearing on 27th September 2023, Mr. Gatumuta, for the Plaintiff was present, and Mr. Gori, for the Defendant was also present. However, the Defendant was absent. Mr. Gori informed the court that his client, the Defendant had failed to facilitate him, and he was also not present in court. Without a proper reason for his absence, the Matter proceeded once more for hearing ex-parte, in the absence of the Defendant.



Plaintiff's Case

15. PW 1 Joseph Muchina Njogu, testified on 27th September 2023, and adopted his witness statement dated 5th February 2018, as his evidence in chief. He also produced the list of documents accompanying the witness statement as exhibits, marked P Exhibits 1-3. He also produced a further list of documents dated 3rd April 2023, as exhibits marked as P Exhibits 4-5.
16. It was the Plaintiff testimony that he lives in Kabati area, and that he purchased the suit land from Mary Njoki Githuka, through a land buying company known as Pundamilia Farmers CO-OP Society Ltd. It was his further testimony that he paid for the purchase of the suit land in full, and consequently Pundamilia Farmers Co-oP Society Ltd, facilitated the issuance of a title deed to the suit land in his name in 2016.
17. He also testified that he did not develop the suit land immediately upon acquiring the title deed in 2016, but he later discovered later that the Defendant was residing on the suit property. Further that upon his inquiry, the Defendant informed him that he had purchased the same parcel of land.
18. It was his further evidence that he issued a Demand Notice to the Defendant through his Advocates, for vacant possession of the suit land. However, the same was ignored by the Defendant leading to the filing of the current suit.
19. After the viva voce evidence, the Plaintiff filed written submissions dated 19th October 2023, through Gatumuta & Co Advocates, wherein he submitted that the Plaintiff is the registered owner of land as provided by Section 26(1) of the *Land Registration Act*, 2012. Therefore, the Plaintiff was vested with absolute ownership of the suit land together with all rights and privileges appurtenant thereto, to the exclusion of all third parties including the Defendant herein.
20. It was his further submissions that his title was not impeachable as no evidence of fraud or misrepresentation was adduced in the suit herein, to prove that his title was obtained illegally, corruptly or contrary to the established procedure pertaining to the acquisition of land.
21. Further, that as the registered owner of the suit land, his right to the exclusive possession of the said property has been violated by the Defendant herein, who is guilty of trespass. It was his further submissions that the Defendant's actions constitute trespass because he has directly interfered with the suit property without any authorization from the Plaintiff.
22. The above is the evidence contained in the Pleadings, the evidence adduced in court by the Plaintiff, the exhibits produced thereon and the written submissions, which this court has carefully considered. There is no doubt that both the Plaintiff and the Defendant are laying claim over ownership the suit property herein, Makuyu/ Makuyu/ Block 1/ 7638, which they both claim to have purchased from Mary Njoki Githuka.
23. Further, it is evident that none of them intended to call the said Mary Njoki Githuka as a witness. However, the Plaintiff is in possession of a title deed that was issued in his name on 15th September 2016, under the Land Registration Regime, 2012.
24. Under section 24 of the said *Land Registration Act*, a registered proprietor is deemed to be an absolute owner of the said land parcel with all rights and privileges appurtenant thereto. However, as provided by section 25, of the said Act, the rights of such proprietor can be defeated as provided by the Act.
25. Further, section 28 of the same Act provides instances when such proprietorship or ownership can be defeated. Such instances are prove of existence of overriding interests, and these are interests, which



attach to the land, and not title. See the case of Mary Wangari Macharia (Suing in her capacity as the administratrix of the estate of *Macharia Gutu Thungu(Deceased) v Edwin Onesmus Wanjau* (Suing in her capacity as the administrator of the estates of Kimingi Wariera (Deceased) and of Mwangi Kimingi (Deceased) [2022] eKLR, the court held;

“It is trite that a claim for adverse possession is attached to land and not title”.

26. Though the Defendant herein did not attend court to adduce evidence, he had alleged in his Defence and Counter-claim that he purchased the suit land from Mary Njoki Githuka, in 2005. That he has been in exclusive occupation of suit land since then, and therefore, he has acquired the suit property by virtue of adverse possession.

27. Having considered the Pleadings herein and with the available evidence, the court finds the issue for determination is whether the Plaintiff has proved his case on the required standard, or whether the Plaintiff is entitled to the prayers sought.

28. As stated above, the matter proceeded *ex parte* because even though the Defendant entered appearance and filed a Defence and Counter-claim after obtaining Orders on 2nd March 2023, of setting aside the Court’s *ex parte* Judgment issued on 24th September 2019, he again failed to attend court on the date set for inter-parties hearing.

29. Therefore, the matter proceeded in the absence of the Defendant in the nature of a formal proof. In the case of *Samson S. Maitai & Another v African Safari Club Ltd & Another* (2010) eKLR, the Court defined “formal proof” as follows:

“I have not seen judicial definition of the phrase formal proof. ‘Formal’ in its ordinary dictionary meaning refers to being ‘methodical’ according to rules of evidence. On the other hand, according to Halsbury’s Laws of England, Vol. 17 Paragraph 260, proof is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption”.

30. Even if the Defendant filed his Defence and Counter-claim, once he failed to attend court to adduce evidence, the said Defence and Counter-claim remained mere allegations and thus the court will not give much attention to them. See the case of *CMC Aviation Ltd. vs. Cruisair Ltd.* (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835, where the court held that;

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

31. Further, even if the Defendant did not adduce evidence, and thus the Plaintiff evidence remains uncontroverted, the court will not take his evidence as gospel truth. The Plaintiff still had the duty to



call sufficient evidence and prove his case on the required standard. For this, the court will be guided by the holding in the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, where the Court held as follows;

“The hearing referred to above is the one commonly known as “Formal proof”. The *Civil Procedure Rules* do not define “Formal Proof”. Black’s Law Dictionary defines “Formal” as including “rules established by an institution according to certain processes”. This particular hearing is for the claimant to prove his claim.

It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

32. It is evident that the Plaintiff has alleged that he purchased the suit property from one Mary Njoki Githuka, and after paying the full purchase price, Mary took him to Pundamilia Farmers CO-OP Society Ltd, who were the initial vendors. That after the transfer from Mary Njoki to the Plaintiff, the said Pundamilia Framers caused him to be registered as the proprietor of the suit land. He had in his possession the Certificate of title, in his name issued on 15th September 2016. There was no evidence of cancellation of the said certificate of title.
33. As was held in the case of *Ali Wanje Ziro v Abdulbasit Abeid Said & Another* [2022] eKLR, a Certificate of title issued by the Registrar upon registration, 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, and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. See also the holding in the case of *Wainaina v Kiguru & Another* (Environment & Land Case E023 of 2021) [2022] KEELC 3261 (KLR).
34. . Further, as the court alluded earlier, Section 24 of the *Land Registration Act*, 2012, states as follows:
 - 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.
35. The court also referred to Section 25 of the *Land Registration Act*, which states as follows:
 - “(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and



- b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

36. Therefore, from the above provisions of law, it is trite that the registration of a person and Certificate of title held by such a person as a proprietor of a property is the prima facie proof, that such person is the owner of the property. However, the holding of such title is not absolute, as the same may be impeached under certain circumstances. Section 26 (1) of the [Land Registration Act](#), 2012 provides as follows:

- (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.

37. In the case of [Elijah Makeri Nyangw'ra -vs- Stephen Mungai Njuguna & Another](#) (2013) eKLR, the Court set out the import of Section 26 (1) of the [Land Registration Act](#), 2012 in the following terms:

“the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.

38. However, if no evidence is availed to the contrary, then the court will deem such certificate of title as conclusive evidence of ownership of the said parcel of land. This Court holds and finds that the Plaintiff has established on a balance of probability the root of his title, and there is no cogent evidence adduced by the Defendant, or anyone else to controvert the Plaintiff's testimony. Accordingly, the Court finds and holds that the Plaintiff is the absolute and indefeasible owner of the suit land, and no evidence has been availed to defeat his proprietorship.

39. As the court observed above, the Defendant was granted an opportunity to avail his evidence, vide the court ruling of 2nd March 2023, wherein the earlier exparte judgement was set aside. However, the Defendant herein even after filing a Counter-claim to the effect that he has acquired the suit property by dint of being in exclusive possession of the suit land for 12 years, failed to attend court to advance his claim. His Counter-claim remains mere allegation which cannot sway the Plaintiff's evidence. See the case of [Nyota Tissue Products v Lawrence Lawi Kuboka & 4 others](#) (2020) eKRL, where the court held that;

“The Pleading in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually



given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents”

40. Having found that the Plaintiff is the absolute proprietor of the suit land, and a holder of a certificate of title, then this court finds that he has a right to enjoy the rights of such proprietor as provided by section 24 of the Land Registration Act. Such right include right of use, quiet possession and occupation of the said parcel of land.
41. The Defendant in his Pleadings, did admit to be in possession of the suit land. Given that the court has found that the suit land belongs to the Plaintiff, then the presence of the Defendant on the said land goes against his enjoyment of quiet possession, and thus the Defendant is a trespasser, and he has no legal right to remain on the said parcel of land. Consequently, the Defendant should give vacant possession to the Plaintiff herein, by vacating the suit land, and in default, eviction order to issue.
42. Further, the Plaintiff prayed for permanent injunction to restrain the Defendant from entering or trespassing on the suit land. It is trite that permanent injunction is issued after the rights of the parties have been determined. The said injunction is issued upon the merit of the case after evidence in support of and against the claim has been tendered.
43. It is trite that permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiffs to be protected. The court has held that the Plaintiff is the rightful owner of the suit property, thus his right should be protected by issuance of a permanent injunction. See the case of Free Pentecostal Fellowship in Kenya vs County Government of Nyamira (2021) Eklr, where the court while relying in the case of Kenya Power & Lighting Company Ltd vs Sheriff Molan Habib , held as follows with regard to Permanent injunction.

“It determines the rights of the parties before the court and

is thus a decree of the court. The injunction is granted upon the merit of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected.”
44. Having carefully considered the available evidence as above, the court finds that the Plaintiff herein has proved his case on the required standard of balance of probabilities. The upshot of the foregoing is that judgement is entered for the Plaintiff against the Defendant herein in terms of prayers No. a, b, & c, of the Plaint dated 5th February 2018.
45. On the issue of costs, it is trite that costs are granted at the discretion of the court. Section 27 of the Civil Procedure Act, is very clear on this. Further, costs normally follow the event, and are awarded to the successful litigant. The Plaintiff herein is the successful litigant and is awarded costs of this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 14TH DAY OF MARCH 2024

L. GACHERU

JUDGE

Delivered online in the presence of:

Joel Njonjo – Court Assistant.



Mr Gatumuta for the Plaintiff.

Absent for the Defendant

