



REPUBLIC OF KENYA



**Jiwa v Abdrihaman (Environment & Land Case 25 of 2019)
[2024] KEELC 1243 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1243 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 25 OF 2019
EC CHERONO, J
MARCH 7, 2024**

BETWEEN

SHAIWAZ SADRUDIN JIWA PLAINTIFF

AND

ABDILLAHI HASSAN ABDRIHAMAN DEFENDANT

JUDGMENT

a. Introduction And Pleadings

1. By way of a plaint dated 31st January, 2017 the Plaintiff sought for the following orders against the Defendant;
 - i. A permanent injunction restraining the Defendant by himself, his agents, servants and workers howsoever from entering, invading and or interfering in any manner whatsoever with the plaintiff's land parcel numbers.
 - ii. Damages.
 - iii. Costs.
 - iv. Interest.
 - v. Any other relief.
2. It is the plaintiff's case that he is the sole registered owner of Malakisi/township/375,413 and 419. He avers that on 28th May, 2018 the defendant without any colour of right or lawful excuse invaded the suit land and threatened to close his business the result of which he lost 176 chicken, 40 eggs and books of records. It is stated that the incident was reported at Malakasi Police Station vide OB No. 22/28/5/18 but the defendant continued with his illegal acts.



3. The defendant filed his statement of defence dated 4th June, 2018 where he avers that he procured the certificates of title of the suit properties for the plaintiff as his agent and he still retains the original title deeds. He denied invading the suit properties and/or threatening the plaintiff in any way and denies knowledge of the disappearance of the 176 chicken and 40 eggs as alleged by the plaintiff. The defendant further avers that he is the originator of the poultry project on the suit property having invested heavily on the same and the current claim is aimed at defeating his claim filed in Bungoma High Court I.e Bungoma Hccc No. 2 Of 2018
4. It is also the defendant's case that he has never been arrested as alleged and that the current suit is sub judice since there is a similar case between him and the defendant being Bungoma Hccc No. 2 Of 2018. He prayed to have this suit dismissed with costs.
5. After Close of pleadings, this suit was fixed for directions where the parties agreed to proceed by way of viva voce evidence. During the hearing of this case, the plaintiff called two witnesses while the defendant called one witness and thereafter closed their respective cases.
 - b. Plaintiff's Summary Of Facts;
6. Shaiwaz Sadrudin Jiwa (PW1) Was sworn and referred his witness statement dated 30th May, 2018 which he sought to be adopted as his testimony-in-chief. He was also referred a list of documents of even date which contains 3 items produced as P-Exhibit 1-3. He stated that the caretaker of the suit properties is namely Rodgers Simiyu and that it was not true that the defendant was his caretaker. He denied granting the defendant permission to enter the suit land and sought to have him permanently restrained from entering the suit parcels of land.
7. In cross-examination, he stated that since the year 2001, the caretakers of the suit properties were Rodger and one Cosmas who had been employed by his father. When referred to D-Exhibit 4, the plaintiff stated that indeed he authored the letter but the same was terminated in the year 2016 and the said Rodgers Simiyu took over. He stated that even though the incident was reported to the Malakasi Police Station, the defendant was never arrested or arraigned in Court. It was the plaintiff's testimony that the processing of the titles on his behalf was being followed up by his friend Shukri Omari.
8. In re-examination, the plaintiff stated that the agency relationship between him and the defendant terminated on 4th September, 2016 and when the defendant invaded his property, there was no agreement between them at the time.
9. Rodgers Khaemba Simiyu (PW2) was also sworn and referred to his witness statement dated 28th May, 2018 which he sought to be adopted as his evidence- in -chief. It was further his testimony that on the fateful day, the defendant entered into the suit land without permission accompanied by two men namely Hassan Barasa Mombasa and Rajab Barasa. It was his testimony that the defendant pushed him and forced his way in through a wooden gate. He testified that he then called PW1 who instructed him to report the incident to Malakasi Police Station which he did vide O.B No. 22/28/5/2018.The witness went on and stated that when he returned from Malakisi police Station, he found that 176 Chicken and 40 eggs were missing.
10. On cross-examination, he testified that before he was employed, the caretaker of the property was one namely Cosmas and the late Shukri Omari. He stated that initially, he had worked in the suit properties between the years 1992-1998 and came back in the year 2014. The witness testified that it is after the defendant was summoned at the police station that he (PW2) went back to the suit premises and found the said 176 chicken and 40 eggs missing. It was his testimony that when the defendant was summoned, he did not have the chicken with him. In re-examination, he reiterated his earlier testimony.



Defendants Summary Of Facts

11. DW1 Abdillahi Hassan Abdirahman The defendant was sworn and referred his witness statement dated 4th June, 2018 and sought to adopt as his evidence in chief. He also produced into evidence documents contained in his list of documents dated 12th June, 2018 as D-Exhibit 1-4. He testified that on the fateful day, he went to Malakasi to inspect the plaintiff's poultry farm as his agent. He testified that he never touched anything in the farm and that after 4 days, he was called by the O.C.S Malaksi where he recorded a statement but nothing was recovered from him. It was his testimony that the plaintiff signed an authorization letter allowing him to enter and work in the suit properties and that he has never received any letter terminating the said authority. The witness testified that he is the one in possession of the certificates of titles of the suit properties having held them since the year 2016.
12. In cross-examination, he stated that he had sued the plaintiff and his brother for unpaid salary arrears in HCCC No. 2 of 2018. He further stated that he did not notify the plaintiff of his visit to the suit properties on the day he had gone to check for the incubation machines and the fencing. He confirmed that he had no share in the suit land. It was his testimony that he had already sued the plaintiff prior to the date of the alleged incident in issue. He testified that since there was no document revoking his authority to enter the suit properties as an agent, he shall continue entering and performing his duties in the suit property. It was further his testimony that the project was managed by one Shukri Mohammed. In re-examination, he reiterated his earlier evidence.

Plaintiffs Written Submissions

13. The plaintiff filed submissions dated 3rd December, 2023 where he reiterated his testimony that he was the registered owner of the suit properties. It was submitted that the defendant's assignment was determined and the defendant even moved to the employment and labour court for redress (Bungoma HCCA No. 2 of 2018) and therefore, he had no permission to be on the suit properties. The plaintiff also submitted that the authorization documents relied on by the defendant were not properly legalized and the same cannot be relied on. Reliance was placed in the case of Tecno Services Limited vs. Nokia International OY-Kenya & 3 others (2020) eKLR, Paul Ngashema Kamau vs. Halima Said (2020) eKLR and Willy Kipsongok Morogo vs. Albert K. Morogo(2017) eKLR. The plaintiff urged the court to find that the defendant did not have permission to enter the suit properties on 28th May, as he did.
14. Further, the plaintiff claimed for Kshs.3,000,000/= as general damages for the loss of the 176 chicken and 40 eggs. The witness cited the case of Joseph Kipchirchir Koech vs. Philip Cheruiyot Sang (2018) eKLR, Njue vs. Matiabe & 3 others (ELC Case no. E050 & E010 OF 2021 (Consolidated) (2023) KEELC 1736 (KLR). Lastly the plaintiff also urged the court to find the defendant liable to pay costs of this suit.

Defendants Written Submissions

The defendant did not file and serve written submissions within the agreed timelines as directed by this Honourable court

d) Analysis And Determination

15. The Court has considered the pleadings, Exhibits, submissions and authorities cited by the parties. From the pleadings and materials placed before me, the issues for determination in my view are;
 - i. whether the plaintiff is entitled to the order of injunction;
 - ii. Whether the plaintiff has proved the award of damages as sought and



iii. Who shall bear the costs of the suit?

16. There is no dispute that the Plaintiff is the registered owner of the suit properties having been so registered on 17th August, 2016 and title issued on 6th February, 2018. It is also not in contention that the defendant entered into the suit properties on 28th May, 2018. The defendant however contends that he entered into the suit properties with permission of the plaintiff who had appointed him as his agent vide an agreement dated 8th September, 2014.

One of the prayers sought by the plaintiff is for a permanent injunction against the defendant. The Court of Appeal has on numerous decisions restated the pre-requisites for granting an equitable relief including a permanent injunction. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Superior court stated as follows:

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. establish his case only at a prima facie level,
 - b. demonstrate irreparable injury if a temporary injunction is not granted, and
 - c. if any doubts as to (b) by showing that the balance of convenience is in his favour.
17. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is now settled that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

A permanent Injunction is a perpetual order and issued after a suit has been heard and finally determined. A permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010 if it finds that the right of a Party has been fringed, violated and/or threatened. The Court has a duty and obligation to safeguard the sanctity of title and cannot just seat, wait and watch where it is satisfied that those rights have either been violated breached or threatened.

I have mentioned elsewhere in this judgment that it is not in contention that the plaintiff is the registered owner of the suit properties. The [Land Registration Act](#) is very clear on issues of ownership of land and in a particular, Section 26(1) provides as follows;

‘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...’

18. Section 24 (a) of the [Land Registration Act](#) also provides as follows;

‘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 case of *Willy Kipsongok Morogo V Albert K. Morogo* (2017) eKLR the Court held as follows: ‘the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the [Land Registration Act](#).’

The defendant claims that he was on the land with permission from the plaintiff since he was an agent having been authorized as such. I have had the chance to look at the agreement signed by the plaintiff on 8th September, 2014. Notably, paragraph (A) of the said instrument refers to the relevant property therein as Malakisi Siaya while the properties in question are land parcels no. Malakasi/township/ 375, 413 and 419.

20. Secondly, the said instrument has only been signed by the plaintiff who is the alleged principal while the defendant who is the alleged agent has not appended his signature. In fact, there is no slot for the said agent to sign. Without delving into the arena of a valid contract/agreement, the instrument presented seems to me more of an offer which has not been accepted by the defendant who is ideally supposed to append his signature as a sign of accepting the terms of the agreement. Section 3(3) of the [Law of Contract Act](#) provides as follows:-

3 (3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

- (a) the contract upon which the suit is founded:
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
 - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party; provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the [Auctioneers Act](#) (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust”
- iv. The above notwithstanding and from the evidence presented in court, it can be inferred from the conduct that the plaintiff had on previous occasions consented to the defendant entering the suit land and the invalidated agreement indicates the intention to allow the defendant into the suit property. Indeed, the plaintiff has not denied the above position and I am inclined to agree with the defendant that the same authorization which in my view is a license that can be revoked by the licensor on notice. I am therefore not convinced that the defendant was a trespasser.
- v. However, the plaintiff having revoked the license and being the legal proprietor of the suit properties is entitled to approach the court for orders barring defendant from re-entering the suit properties. I therefore find that the element of a prima facies case has been established. Having found as above, I see no need to delve into the other elements of granting a permanent injunction as the prayer succeeds.

21. The plaintiff has also sought for damages allegedly for the loss of his property. Having found that the defendant was a licensee and not a trespasser, this prayer becomes a cropper.

Costs ordinarily follow the event and since the Plaintiff has succeeded in the main prayer for permanent injunction and has also been inconvenienced, I find that he is entitled to costs of this suit.



The upshot of the above is that the Plaintiff has proved his claim on the required standard of a balance of probabilities and I therefore enter judgement for the Plaintiff against the Defendant in the following terms:

- a. Permanent Injunction restraining the Defendant either by himself, agents, servants and workers howsoever from entering, invading and or interfering in any manner whatsoever with the plaintiff's land parcels no. Malakasi/township/ 375, 413 and 419.
- b. Costs of this suit to be borne by the defendant.

DATED, SIGNED AND DELIVERD AT BUNGOMA THIS 7TH DAY OF MARCH, 2024 .

.....

HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Bwonchiri for plaintiff
2. Mr. Wanjala for defendant
3. Bett C/A

