



REPUBLIC OF KENYA



KENYA LAW
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**Kirioba v Njomo & 9 others (Environment and Land Case Civil Suit
1510 of 2014) [2024] KEELC 3380 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3380 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1510 OF 2014**

LN MBUGUA, J

APRIL 24, 2024

BETWEEN

SAMSON MAISIBA KIRIOBA PLAINTIFF

AND

JAMES KAMORE NJOMO 1ST DEFENDANT

JULIUS JOSEPH KABUI GITAU 2ND DEFENDANT

MULI WAKYENDO 3RD DEFENDANT

ANNE KERU MULI 4TH DEFENDANT

JOYCE KANYUA MURITHI 5TH DEFENDANT

ALICE KIBERI 6TH DEFENDANT

GODFERY OYORO ODIDA 7TH DEFENDANT

LEAH WACHECHI KARIUKI 8TH DEFENDANT

ELIUD NG'ANG'A MURIMI 9TH DEFENDANT

FRANCIS OSUMA 10TH DEFENDANT

JUDGMENT

Background

1. The dispute herein traverses two suits namely HCCC No. 1281 of 1997 and HCCC 383 of 2001 which were consolidated on 26.9.2001. The files were given case number ELC 1510 of 2014 when they were transferred to the Environment and Land Court.



HCCC NO. 1281 OF 1997

2. Vide a plaint filed on 27.5.1997, the plaintiff SAMSON MAISIBA instituted a claim against 7 defendants namely; James Kamore Njomo, Julius Joseph Kabui Gitau, Livingstone Oguta Bwana, Muli Wakyendo, Anne Keru Muli, Joyce Kanyua Murithi, Alice Kiberi claiming that he was the registered owner of a parcel NAIROBI/BLOCK 32/212, where as the defendants owned adjoining properties namely NAIROBI /BLOCKS 32/144-150. He pleaded that sometime in early 1997, the defendants began to extend the boundaries of their parcels into plaintiff's land of which, the 1st defendant went ahead and put up a residential house thereon.
3. The plaintiff therefore sought the following orders;
 - a. A declaration that the parcel of Land known as L.R. Nairobi/Block 32/212 belongs to the plaintiff.
 - b. An order of injunction restraining the defendants by themselves, servants or agents or otherwise howsoever from trespassing, extending their boundaries erecting and/or in anyway interfering with the plaintiffs said parcel of land.
 - c. An order that the 1st defendant forthwith pulls down and remove so much of the said residential house erected on the plaintiff's said parcel of land.
 - d. An order to restrain the 1st defendant by himself, his servants or agents or otherwise from erecting or continuing to erect upon the plaintiff's said parcel of land.
 - e. Damages and interest for the wrongful interference with the plaintiff's parcel of land.
 - f. Cost of this suit and interest.
4. The 1st defendant filed a statement of defence and counterclaim on 10.9.1997. The contents there in are not discernible as the pleading is not only torn, but it is incomplete.
5. The 2nd defendant filed a defence dated 18.9.1997 where he generally denies the claim of the plaintiff.
6. The plaintiff's reply to defence and defence to the counter claim is dated 11.9.1998.
7. I did not come across any other pleading in this matter.

HCCC NO. 383 OF 2001

8. The plaintiff SAMSON MAISIBA filed this suit vide a plaint dated 12.3.2001 and amended on 15.3.2001. He avers that he is the owner of parcel NAIROBI/BLOCK 32/212. That sometime in the year 1996, the defendants entered the suit property and put up illegal structures and he was therefore unable to develop the said land.
9. The plaintiff seeks the following orders:
 - aa) An order to evict the defendants from the plaintiff's property known as NAIROBI/BLOCK 32/312.
 - a. An injunction restraining the defendants by themselves, their agents or servants or otherwise howsoever from trespassing, or putting up any structures on the plaintiff's property known as NAIROBI/BLOCK 32/212.
 - b. A declaration that the parcel of land known as L.R. NAIROBI/BLOCK 32/212 belongs to the plaintiff.



- c. General damages.
 - d. Kshs. 235,800/=
 - e. Kshs. 1.5 million.
 - f. Costs of this suit.
 - g. Interest on (c), (d), (e), and (f) above at commercial rates.
 - h. Any other relief that this Honourable Court may deem fit and just to grant.
10. The 1st defendant filed a memorandum of appearance on 24.3.2006 through the firm of King'oo Njagi & Company advocates, but no statement of defence was ever filed.
 11. The 2nd defendant filed a statement of defence on 7.12.2001 where he generally denied the claim of the plaintiff.
 12. The 3rd defendant did not file any pleading.
 13. The 4th defendant filed a statement of defence on 24.5.2002 where she denies ever occupying the plaintiff's land.
 14. The 5th defendant filed a statement of defence on 12.6.2001 where he contends that he was lawfully licensed by the City Counsel of Nairobi to occupy a road reserve along Mbaruk road next to plaintiff's land, but he was evicted on 22nd - 23rd December 2000.

The Records and Case management

15. The records particularly the older ones are in shambles but discernible. The order for consolidation of the two suits was made on 26.9.2001 in the file 383 of 2001, but the parties were not designated.
16. On 2.10.2017, the court proceeded to give further directions that proceedings were to be recorded in the older file, the consolidated file was designated as ELC 1510 of 2014, while the parties were designated as follows;

Samson Maisiba Kirioba – plaintiff

James Kamore Njomo – 1st defendant

Julius Joseph Kabui Gitau – 2nd defendant

Muli Wakyendo – 3rd defendant

Ann Keru Muli – 4th defendant

Joyce Kanyua Murithi – 5th defendant

Alice Kiberi – 6th defendant

Godfrey Oyoro Odida – 7th defendant

Eliud Nganga Murimi – 8th defendant

Francis Osuma – 9th defendant

Leah Wangeci Kariuki – 10th defendant

Kariuki Gitingiri – 10th defendant



17. The 1-6 defendants are the ones in the case 1281 of 1997, while 7th-11th defendants are the defendants in the case 383 of 2001.

Death of the parties

18. During the lifespan of the case, some parties apparently passed on, but no tangible evidence of death was tendered save for one party (ELIUD) the 8th Defendant. For instance, on 23.9.2008, it was averred that 1st and 3rd defendants in case No.1281 of 1997 were deceased. But on 7.2.2024, the plaintiff's counsel stated that 1st defendant died on 5.3.2018, adding that the only defendant remaining in case No.1281 of 1997 was Joseph Kabui Gitau. She was not clear as to who is alive in case No. 383/2001 save that the 8th defendant was duly substituted. On 5.7.2022, counsel for the 7th defendant averred that the child of 1st defendant approached him to take over the matter, but they disappeared, though he is sure that 1st defendant was dead, and so was his neighbor Leah Wangari!
19. I did stumble upon the death certificate of one Livingstone Oguta dated 23.4.1997. Thus, there is no case against this person as he was dead by the time the initial suit was filed in May 1997. Perhaps that is why he was omitted when the parties were designated on 2.10.2017. The other record relates to the 8th defendant, Eliud who was substituted on 23.1.2019. There are no other records relating to the death or substitution of the other parties.

Case management

20. The dispute herein has marked time in court for a record 25 years! of which, the courts would give a last adjournment (see records of 3.4.2006, 2.10.2017), but for one reason or another, the matter would not take off at the scheduled time. At some point from 23.9.2008, the matter silently went into slumber, a hiatus of 6 years until 26.11.2014!
21. On 2.10.2017, all parties were directed to file and serve their bound, paginated and indexed trial bundles within 45 days and the matter was given a hearing date of 14.3.2018. By then the parties who were actively represented in the matter were the plaintiff, 1st, 7th and 8th defendants. By the time the plaintiff eventually took to the stand on 7.11.2019 for the very first time, none of the defendants had filed any trial bundles as earlier directed by the court. This remained the position up to the end.
22. On 5.7.2022, plaintiff's case was closed and the matter was adjourned to enable Mr. Muhoro and Mr. Kinaro to call their witness in defence case. Subsequently, after a period of 1¹/₂ years on 7.2.2024, Mr. Muhoro stated that he would only rely on their defence and would not call any witnesses. The 7th defendant was allowed to tender his evidence vide a ruling delivered on 7.2.2024, even though he never filed any defence. He was apparently to adopt the defence statement of the 1st defendant. He however did not turn up for the hearing.

THE EVIDENCE

23. The evidence of the plaintiff was advanced by two witnesses, himself and a surveyor. The plaintiff SAMSON MAISIBA KIRIOBA (PW1) first took to the stand on 7.11.2019 after a hiatus of two decades!. He adopted his witness statement dated 26.11.2014 as his evidence. He also produced the 16 documents in his trial bundle dated 26.11.2014 as his exhibits. His testimony is that he is the registered owner of parcel Nairobi/ Block 32/212 and that he has been paying land rates and rent.



24. That in June 1996, he desired to develop his land, and to this end, he engaged a firm of contractors known as Ngoso General Contractors, and he also got a loan of 1.5 million from Kenya commercial bank to undertake the development.
25. However, the developments could not take off, as plaintiff realized that his neighbours (1st - 6th defendants) had encroached onto his land by building a boundary wall and putting up extensions. To ascertain the extent of the encroachment, the plaintiff engaged surveyors, who availed a report to that effect.
26. Plaintiff also did a search and established that indeed his neighbours owned the parcels which had encroached upon his land. The neighbours prevented the plaintiff from developing the land and even chased away his contractors.
27. The plaintiff engaged an advocate who alerted the city council about the illegal structures on plaintiff's land of which the city council acted and demolished the same. The plaintiff then managed to put up a temporary fence on his plot. However, his private guards were visited at night by armed unknown people in unmarked vehicles who threatened the guards and told them to leave, never to be seen.
28. Thereafter, the defendants rebuilt the extensions and more kiosks under the command of the 7th defendant who hired goons to guard the place. PW1 was threatened with death and he reported the matter to the police.
29. In cross examination, PW1 stated that he purchased the suit land from one Evans Mwamunga Masora on 30/5/1995 and he has the original certificate of lease.
30. That when he bought the land, there were houses which were far away from his plot and he could not identify the boundaries of his land. However, his land was occupied by people who were selling charcoal, chicken and had small kiosks, and some of the structures were temporary. However, there were some permanent structures like those of the 7th defendant (Godfrey) who was selling timber and furniture, as well as 6th defendant (Alice Kiberi). He apparently told them that they were to vacate the land at the time he was to commence development.
31. However, when he set out to develop the property, he met resistance from the kiosk owners whose leader was the 7th defendant and who had even become a land lord on plaintiff's land.
32. PW2 is one DAVID GACHANJA KAGU, who introduced himself as a licensed surveyor. He avers that their firm received instructions from the plaintiff who wanted the boundaries of his land to be identified. He produced the report dated 4.6.1999 at page 34 of plaintiff's bundle as an exhibit. The said report indicates that there are several kiosks built on the suit land, and there is a boundary wall built along the northern boundary which encroached upon plaintiff's land.
33. In cross examination, PW2 reiterated that the dispute was not a boundary one to be resolved by the Registrar under the [Land Registration Act](#), as the issue did not relate to general boundaries. Rather, this was a case where the boundaries were fixed, and there existed a survey plan, thus the extent of the encroachment could be discerned. To this end, PW2 was able to give the extent of encroachment by plots 144-150. He added that he is the one who obtained the survey map at page 53 of the bundle from the survey of Kenya. He procured the map after he got instructions from the plaintiff in the year 1999.

Submissions

34. The submissions of the plaintiff are dated 9.4.2024 where it is argued that from the documents availed by the plaintiff, as well as his evidence, there is sufficient evidence to prove that plaintiff is the registered



- owner of the suit property and that no evidence was advanced by the defendants to rebut plaintiff's case.
35. It was argued that as the lawfully registered owner of the suit property, the plaintiff was entitled to protection by this court in line with the provisions of Article 40 of *the constitution* and Section 24-26 of the *Land Registration Act*. To this end, it was submitted that trespass has been proved and the plaintiff deserves an award of ksh.500,000 as general damages. The plaintiff also seeks damages of ksh.235,800 for fencing the land and sh. 1,500,000 paid to contractors.
 36. In support of his case, the plaintiff relies on the cases of:
Gathenya Ngumi v Eric Kotut & 4 others [2022] eKLR, Shoneebal Limited v. County Government of Machakos [2018] eKLR, Trust Bank Limited v Paramount Universal Bank Limited & 2 others [2009] eKLR and Stephen Makau v Wilson Njeru Wega & 4 Others [2021] eKLR.
 37. The 8th defendant filed submissions dated 15.4.2024 where he brings to the attention of the court that at the close of plaintiff's case, they indicated that they would not call any witnesses but would rely on the provisions of order 18 rule 1 & 21 (3) of the Civil Procedure Rules.
 38. It was submitted that no evidence was advanced by the plaintiff to pray that any defendant has encroached on plaintiff's land or that there was any boundary interference. Thus the plaintiff never proved this case as against the 8th defendant. No other submissions were filed in this matter.

DETERMINATION

39. I have duly considered the pleadings, the evidence and the submissions so far filed in this matter.
40. The litigation odyssey in this matter traverses more than two decades and counting. The claim of the plaintiff is that he is the registered owner of the parcel known as NAIROBI / BLOCK 32/212 which he acquired sometime in year 1995, but he has never utilized the said land because the land was encroached upon by neighbors and also occupied by squatters. The issue falling for determination is whether the prayers sought in the two consolidated suits should be allowed, which in summary are; whether the plaintiff should be declared the owner of the suit land, whether there was trespass on the said land and if plaintiff is entitled to damages.
41. At the outset, it is pertinent to note that plaintiff's claim is uncontroverted as none of the defendants tendered any evidence. Nevertheless, the law requires that the plaintiff must discharge the burden of proof as set out at Section 107 and 108 of the *evidence Act*. To this end, I make reference to the case of Gichinga Kibutha v Caroline Nduku [2018] eKLR, where it was held that;

“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 proof his case however much the opponent has not made a presence in the contest.”
42. Should the plaintiff be declared the owner of parcel Nairobi/block 32/212?. The plaintiff has availed a lease dated 7.6.1995 as well as a Certificate of title dated 24.8.1995 indicating that he is the registered proprietor of the suit land. No pleadings or evidence were proffered to challenge these documents. It follows that in terms of the provisions of Section 25 of the *Land Registration Act*, the plaintiff is the lawful owner of the aforementioned land.



43. Was there trespass upon plaintiff's land?. According to BLACK'S LAW DICTIONARY 8 TH EDITION, trespass is defined, in the strictest sense as:

“An entry on another's ground, without a lawful authority, and doing some damage, however inconsiderable, to his real property”

44. Further a continuing trespass is defined as:

“A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property”

45. The provisions of Section 3 of the Trespass Act stipulates that:

“(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on , or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

46. The plaintiff has given an account of how he bought the suit land in year 1995. A year later, he was all set to commence development of his land. To this end, he acquired a loan and he engaged contractors to undertake the developments. He does admit that there were people on the land carrying out such business like selling charcoal, timber, food kiosks etc. He apparently told them that they would have to vacate that land at the time of commencing the development. When the time came for him to develop the land, he realized that his neighbours to the north had encroached upon his land by building a perimeter wall. In addition, the people occupying the land became hostile, so much so that he could not even engage guards to look after the land. He was apparently threatened with death.

47. PW2 has explained that he obtained the map of the area the one at page 53 of plaintiff's bundle from the survey of Kenya. The said document shows that on the northern part, plaintiff's land borders 8 parcels running from 144-151. However, on the ground the encroachment was relating to parcels 144-150. And the extent of encroachment is captured in the document at page 35. The owners of the parcels which encroached upon plaintiff's land are known as the documents of ownership have been availed in plaintiff's bundle (official searches). It is quite apparent that the owners of the said parcel are the ones who were sued as defendants in the case 1281 of 1997.

48. The same document, the one at page 35 of plaintiff's bundle shows that structures have been put up on the suit land. This is consistent with plaintiff's claim that there were squatters on the land. The documents at page 42-45 demonstrates the efforts that the plaintiff undertook to remove the squatters with the help of the Nairobi City Council. However, the letters at page 56 and 57 of the said bundle indicate that the 7th defendant (Godfery) resisted the demolition of the kiosks as he was apparently challenging plaintiff's ownership of the said land. This buttresses plaintiff's averments that the 7th defendant was the ring leader in preventing the plaintiff from developing his land.

49. It is not lost to this court that the said 7th defendant has never filed a statement of defence during the lengthy lifespan of this suit.

50. In the case of Paul Audi Ochuodho v Joshia Ombura Orwa [2014] eKLR, the court while dealing with the issue of trespass stated thus;

“The defendant did not defend this suit. The title of Onyango over the suit property is therefore not challenged on any of the grounds mentioned above or at all. In the absence of



such challenge, I am enjoined by law to take Onyango on the basis of the title deed that he placed before the court to be the absolute and indefeasible owner of the suit property. As the absolute proprietor of the suit property, Onyango is entitled to enjoy rights and privileges associated with such ownership which includes exclusive use, possession and enjoyment thereof without interference by any third party save with his consent. The plaintiff has accused the defendant of entering the suit property without the consent of Onyango and causing massive damage to the developments thereon. The defendant has also been accused of encroaching onto and annexing a portion of the suit property measuring 1 ha. 10. The plaintiff's evidence on these incidences has not been challenged. I am satisfied therefore that the plaintiff has proved that the defendant entered the suit property without Onyango's permission, caused the damage complained of and occupied a portion thereof measuring 1ha. The defendant having been proved to have entered the suit property without the permission of the proprietor or any lawful cause, the defendant is a trespasser on the suit property and the plaintiff is entitled to judgment against the defendant for an injunction to restrain the defendant from committing further acts of trespass".

51. Similarly, I find that the defendants had no justification in encroaching upon and using plaintiff's land, hence the said defendants are trespassers. I must add that the occupation of that land was through sheer brute force, actions which should not be allowed in a civilized society: see my decision in *Unity 45 Housing Co-operative Society Limited v Kamuyu & 3 others (As Chairman, Secretary, Treasurer & Patron of Maili Saba Mwengenyu Youth Self Help Group); Awuor (Suing on Behalf of Dorice Auma Owuor) & 2 others (Interested Parties) (Environment & Land Case 994 of 2014) [2024] KEELC 622 (KLR) (8 February 2024) (Judgment)*.
52. Having found that there was trespass upon plaintiff's land, then I find that he is entitled to damages. To this end, I make reference to the *Court of Appeal of Kenya Power & Lighting Company Limited vs. Fleetwood Enterprises Limited [2017] eKLR* where the court while upholding the decision of Judge Angote in *Fleetwood Enterprises Ltd vs. Kenya Power & Lighting Co. Ltd [2015] eKLR* stated that where trespass is proven, the affected party need not prove that it suffered damages or loss as a result of the trespass so as to be awarded damages because once the trespass is proved, the court is bound to assess and award damages on a case to case basis. To this end, plaintiff is awarded general damages for trespass to the tune of ksh. 500,000. The plaintiff is also awarded special damages of ksh.235,800 plus 1.5 million.

Final orders

53. In the final analysis, I proceed to enter judgment for the plaintiff against the defendants (who are alive or those dead but have duly been substituted) in the following terms;
 1. A declaration is hereby made that the parcel of Land known as L.R. Nairobi/Block 32/212 belongs to the plaintiff.
 2. An order of injunction is hereby issued restraining the defendants by themselves, servants or agents or otherwise howsoever from trespassing, extending their boundaries erecting and/or in anyway interfering with the plaintiff's said parcel of land.
 3. An order is hereby issued for the defendant's to forthwith pull down and remove any structures/houses/walls erected on the plaintiff's said parcel of land within 30 days failure to which, plaintiff is at liberty to pull down the structures/wall at defendant's costs.
 4. Damages for trespass are hereby awarded to the plaintiff against the defendants jointly and severally to the tune of Kshs.500,000.



5. Special damages are awarded to the plaintiff against the defendants jointly and severally to the tune of sh.1,735,800.
6. The plaintiff is awarded costs of the suit and interest thereof at court's rate as against the defendants jointly and severally.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Kimani holding brief for Mwangi for Plaintiff

Court assistant: Eddel

