



**Kariuki v Kamau (Being the legal administrator of the Estate of the
Late Joseph Mwiri Kamau) & another (Environment & Land Case
E275 of 2021) [2024] KEELC 4182 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4182 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E275 OF 2021**

JA MOGENI, J

MAY 9, 2024

BETWEEN

HANNAH MUMBI KARIUKI PLAINTIFF

AND

**MILCAH WANJIRU MWIRI KAMAU (BEING THE LEGAL ADMINISTRATOR
OF THE ESTATE OF THE LATE JOSEPH MWIRI KAMAU) 1ST DEFENDANT**

ELIJAH MWEGA 2ND DEFENDANT

JUDGMENT

Introduction

1. By a Complaint dated 22/07/2021 and Amended Complaint dated 21/03/2023, the Plaintiff herein sought for Judgment against the Defendants jointly and severally for the following orders: -
 - a. A declaration that the plaintiff is the sole rightful owner of all that parcel of land known as Plot No. Dagoretti/Riruta/378.
 - b. A declaration that the registered proprietor's title to plot number Dagoretti/Riruta/378 which devolved to his estate upon his demise be extinguished and it be registered in the name of the Plaintiff.
 - c. A permanent injunction restraining the 1st and 2nd Defendants, their servants, workmen and agents from entering on and/or from selling, offering for sale, transferring or from in any way interfering with the Plaintiff's use and enjoyment of the plaintiff's said property.
 - d. An order that a title deed to Plot No. Dagoretti/Riruta/378 be issued in favour of the plaintiff.
 - e. Costs of the suit.



- f. Interest on (d) above.
 - g. Any other or further relief that the honourable court may deem fit to grant.
2. The suit is opposed. The 2nd Defendant entered appearance on 19/10/2021 and filed a Defence dated 17/05/2022. The 1st Defendant entered appearance on 19/10/2021 and filed a Defence and Counterclaim dated 21/02/2022. In the counterclaim, the 1st Defendant sought for the following orders:
- a. The suit by Plaintiff dated 22/07/2021 against the Defendants be dismissed.
 - b. A mandatory injunction directing the Plaintiff to forthwith vacate the said land and give vacant possession to the 1st Defendant herein
 - c. Spent.
 - d. The court do issue eviction orders against the Plaintiff, her servants, agents, children, tenants or anyone staying on the land via her instructions to be forcefully evicted upon the determination of this suit.
 - e. Spent.
 - f. General damages against the 1st Defendant.
 - g. Costs of the suit and counterclaim.
3. Upon pleadings being closed, the suit proceeded by way of viva voce evidence. The Plaintiff called three witnesses who testified on 14/11/2023. The Defendants called four witnesses who testified on 14/11/2023.

PLAINTIFF'S CASE

4. The plaintiff asserts that she is the beneficial owner of the land known as Plot No. Dagoretti/Riruta/378, where she has resided for six decades. She applied to the National Lands Commission for regularization of the property, and the Nairobi City County recommended issuance of a title deed after confirming her possession. The defendants threatened her with eviction and intended to sell the property, offering her a share of the proceeds. However, she has not entered any agreements with them regarding the sale. She has never been in possession of a title for the property, and any title held by the defendants is irregular and fraudulent.
5. The plaintiff seeks a declaration of ownership, a permanent injunction against interference, and a mandatory injunction to prevent the defendants from selling or transferring the property. She also requests extinguishment of any title held by the defendants and registration of the property in her name.

EVIDENCE BY THE PLAINTIFF

6. PW1 – Grace Wambui testified that she stays in Riruta Satellite. She adopted her witness statement dated 10/03/2023 as her evidence in chief.
7. During cross-examination, PW1 testified that she knew the plaintiff since 1982 and has been in possession of the suit property with her children since then. She acknowledged that people rent out parcels of land but asserted that she was not lying about the plaintiff's ownership of the property. She emphasized her proximity to the plaintiff and her familiarity with the property since 1982.



8. In re-examination, she reiterated her relationship with the plaintiff and her assertion that the plaintiff claims ownership of the property rather than renting it out. She confirmed her knowledge of the plaintiff's late husband.
9. PW2 – Eunice Wambui Kiruri testified that she stays in Riruta Satellite. She adopted her witness statement dated 12/03/2023 as her evidence in chief.
10. During cross-examination, PW2, aged 61, stated she knew the plaintiff since 1982 but never saw any ownership documents for the suit property. She acknowledged seeing a land certificate dated 1976 in the name of Mwiri Kamau but did not agree that the land belonged to him. She believed the property belonged to the plaintiff's husband, although she never saw ownership documents. She agreed that if the plaintiff sought an allocation from the National Land Commission (NLC), it would align with her understanding.
11. In re-examination, she clarified that she never saw the title deed presented by the defendants and never inquired about the plaintiff's title deed. She reiterated her belief that the property belonged to the plaintiff due to her longstanding farming activity there. She also noted that the plaintiff was pursuing registration documents for the property from the NLC.
12. PW3 – Hannah Mumbi Kairuki testified that she stays in Satellite. She confirmed that she is the plaintiff in this case. She adopted her witness statement at page 6 as her evidence in chief. She also produced a bundle of documents as her exhibits dated 22/07/2021. PW.Exh. 1-6. She also produced and adopted a supplementary bundle dated 14/03/2022 which has one document.
13. During cross-examination, the plaintiff testified that she has lived on the suit property for 60 years, explaining that her husband purchased the land in 1958. She expressed her lack of knowledge regarding Joseph Mwiri Kamau but acknowledged knowing Milcah Wanjiru Mwiri Kamau. She recounted her efforts to acquire a title deed for the property, citing visits to various government offices for assistance. She sued Milcah because she claimed ownership of the land and stated she had sold it to the 2nd defendant. The plaintiff emphasized her desire for the court to settle the dispute.
14. In re-examination, the plaintiff reiterated her age and recounted Milcah's visits to her property, stating that Milcah claimed ownership of the suit property. She emphasized her lack of knowledge about the title of the property and her efforts to obtain a title deed with the assistance of the National Land Commission (NLC) and the City County. She prayed for the court's assistance in allowing her to continue living on the suit property and obtaining a title.
15. With that evidence, the Plaintiff closed her case.

DEFENDANTS' CASE

1st Defendant

16. The 1st Defendant refutes all allegations made by the Plaintiff, asserting that the Plaintiff's claims lack legal merit and are aimed at misleading the court. The 1st Defendant denies the Plaintiff's assertion of being the rightful owner of the land, stating that the property is registered in the name of Joseph Mwiri Kamau. She argues that the Plaintiff has lived on the land with the permission of the owner until his demise, and there have been no threats of eviction or sale of the land by the 1st Defendant's family. The 1st Defendant contests the Plaintiff's claim of peaceful possession, alleging that the Plaintiff trespassed on the land and only initiated the lawsuit after the registered owner's death. The 1st Defendant emphasize that the land already has a valid title deed, making the Plaintiff's claim baseless, and request the dismissal of the lawsuit with costs.



Counterclaim

17. The 1st Defendant contends that the property, Dagoretti/Riruta/S378, is registered in the name of her late husband, Joseph Mwiri Kamau. As the administrator of his estate, she asserts that the plaintiff constructed temporary structures on the land with permission but without a formal agreement or rent payment. In 2010, the defendant, along with their children, requested the plaintiff to vacate the land, resulting in a violent confrontation. Despite this, the plaintiff has not obtained any legal rights over the land.
18. The 1st defendant argues that the plaintiff is a trespasser and should leave the land voluntarily or face eviction. The 1st Defendant emphasized that they were the sole spouse of the late husband and did not sell the land to the plaintiff. Accusing the plaintiff of opportunism, the 1st defendant claims continuous trespassing by the plaintiff, disrupting their peaceful possession, and refusing to acknowledge the land's registration in the late husband's name.

2nd Defendant

19. The 2nd Defendant, who operates an NGO clinic called Karika Aging & HIV Aids Program in Dagoreti, Kawangware, denies all allegations made in the plaintiff's complaint. He asserts that he only knows the plaintiff and the 1st defendant as patients of his clinic, and he has no beneficial or proprietary interest in the suit property. The 2nd Defendant claims that the plaintiff's assertions about him are news to him, and he believes he has been mistakenly sued.
20. Furthermore, the 2nd Defendant states that he is not involved in any land transactions or property dealings and has not interfered with the suit property in any way. He clarifies that he does not reside on the property and has not threatened the plaintiff. The 2nd Defendant requests the dismissal of the suit against him or the removal of his name from the proceedings.

EVIDENCE BY THE DEFENDANTS

21. DW1- Milcah Wanjiru wa Joseph Mwiri testified that she filed a defence and counterclaim dated 21/04/2023. She adopted and produced her witness statement together with a list of documents dated 21/02/2022 as her evidence and exhibits DW1;1-8.
22. In cross-examination, DW1 stated that she has possessed the title to the property since 1976 and has known the plaintiff, Hannah, for 30 years. She clarified that there are two plots between her and Hannah's property. She testified that her husband permitted Hannah to farm on the property and never asked her to leave. DW1 mentioned a letter written after the suit was filed, indicating her knowledge of legal proceedings. She stated she had no knowledge of Hannah seeking title to the property and never complained because she possessed the title. She confirmed no written agreement existed allowing Hannah on the property and denied issuing an eviction notice or involving the police.
23. DW1 expressed her dislike for legal issues and requested the court to evict the plaintiff in her re-examination, emphasizing that they are not related with Hannah and that she was not involved in the succession matter. In her counterclaim, she emphasized her prayer for the plaintiff's eviction.
24. DW2- Elijah Mwega testified that he filed a defence dated 17/05/2022. He adopted and produced his witness statement dated 18/05/2022 as his evidence. He prays that the case against him is dismissed.
25. DW3- Sophia Abdul testified that she is the daughter of the late Joseph Mwiri Kamau. The 1st Defendant is her mother. She adopted and produced her witness statement dated 18/05/2022 as her evidence in chief.



26. In cross-examination, DW3 stated she was born in 1960 and they lived in Kericho. She clarified that her father did not attempt to evict the plaintiff but allowed her to enter the property. She recalled visiting Hannah's place with her mother, noting that no violence occurred. She referenced a letter from the NLC recommending the allocation of the property to Hannah and confirmed Hannah was farming on the property when she knew her.
27. In re-examination, it was her testimony that when she knew her, she was farming not staying on the suit property.
28. DW4- Leah Nyaroita Mweri testified that she is the 1st Defendant's daughter. She adopted and produced her witness statement dated 12/03/2022 as her evidence in chief.
29. In cross examination, she testified that when she knew Hannah, she was farming on the suit property. She knew her since 1998. They knew about the land after their father died. They went to Hannah's place in 2016 after her father passed away. They never reported to the police although in her statement it says they were threatened.
30. With that evidence, the Defendants closed their case.
31. At the close of the hearing, the Court gave directions on filing of written submissions, which counsels for the plaintiff and Defendants did and I have taken note of them. The Plaintiff's written submissions dated 28/03/2024 were filed on the even date. The Defendants' written submissions dated 18/12/2023 were filed on 19/12/2023.

ANALYSIS AND DETERMINATION

32. With the foregoing outline of the pleadings, litigation history, evidence, submissions and of course the relevant law, I must now decide the suit. The Court finds that the issues for determination are as follows:
 - a. Whether the Plaintiff can raise a new issue in submissions
 - b. Who is the lawful owner of the suit property?
 - c. Whether the Plaintiff proved her case to be entitled to the orders sought.
 - d. Whether the 1st Defendant is entitled to the orders sought in the counterclaim.
 - e. Who should bear the costs of this suit and the counterclaim?

Whether the Plaintiff can raise a new issue in submissions

33. The Plaintiff attempted to raise the issue of adverse possession in her submissions. The Plaintiff submitted that the issue for determination in this suit is whether the Applicant has met the threshold for grant of orders for adverse possession.
34. It is trite law that new issues cannot be raised in submissions. See Republic v Chairman Public Procurement Administrative Review Board & another Ex-Parte Zapkass Consulting and Training Limited & another [2014] eKLR.



35. The Court notes that the new issue was not pleaded in the Plaintiff's pleadings. In the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* [2013] eKLR, the Court stated as follows:

“It is established law that parties must confine themselves to their pleadings. ... The court is therefore not bound to render any opinion on any new issues raised in the submissions”.

36. I seek guidance of the holding of the Court of Appeal in the case of *Galaxy Paints Company Limited V. Falcon Guards Limited* Court of Appeal Case Number 219 of 1998, wherein it held that:

“Issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination”.

37. The issue for adverse possession having been raised only in the Plaintiff's final submissions and having not been specifically pleaded by the Plaintiff appears to be an afterthought. I opine that the new issue was not properly raised as the Plaintiff could have raised the same in her *Plaint* or *Amended Plaint* that were filed herein. I find that the new issue was not properly raised before this Court.

Who is the lawful owner of the suit property?

38. In this case, the dispute centers around the ownership of a piece of land known as *Dagoretti/Riruta/S.378*, with both the plaintiff and the 1st defendant claiming ownership. Proof of ownership in such cases relies heavily on documentary evidence establishing a clear chain of ownership, leading to the rightful owner. The court must be convinced beyond doubt of the validity of the documents presented.

39. The plaintiff claims to have lived on the property for 60 years, asserting that her late husband purchased it in 1958. However, she lacks concrete documentary evidence to support this, only presenting an affidavit and letters requesting allocation from the National Land Commission (NLC).

40. On the other hand, the 1st defendant asserts that the property is registered in her late husband's name since 1976, presenting a land certificate and official search certificates and payment of land rates for the suit property as seen on the various property rates payment requests dated 12/04/2019, 31/05/2017, 14/06/2017 and 10/04/2018 in support. She argues that the plaintiff, despite residing on the land with permission, has not acquired any proprietary rights. The defendant's evidence suggests that the plaintiff has not sought the revocation or cancellation of the title in question, undermining her claim to ownership.

41. Tracing ownership of unregistered land is more challenging than for registered land. Unlike registered land, where ownership is easily identified through the land register, unregistered land requires a thorough examination of documentary history to establish ownership. Unregistered titles exist only as chains of documentary records, and proving ownership relies on compiling deeds that create an unbroken chain leading to a clear title. This process is crucial for confirming ownership and establishing a valid claim to the property.

42. According to the evidence before this Court, the land is presently in the possession of the Plaintiff as she admitted and confirmed that during trial and in the pleadings filed by the parties herein. The Plaintiff contended that her late husband purchased the land in 1958 but she did not have documentary evidence to prove this. She also produced an Affidavit sworn on 22/09/2014 wherein she deposed that they were allocated the plot no. 378 when her husband Kariuki died on 22/09/1994 and that the document was lost and/or misplaced. She later contended that she wrote to NLC requesting to be allocated land known as *Dagoretti/Riruta/378*.



43. From the record, the Plaintiff's root of title is seen to be anchored on a letter requesting the NLC to allocate the suit property to her. She averred that her late husband had purchased the suit property in 1958. She later deponed that they were allocated the suit property in 1994 when her husband passed away. I note that the National Land Commission derives its mandate from *the Constitution* of Kenya 2010 among other Acts of Parliament. The broad mandate of the National Land Commission can be categorized as provided for in *the Constitution* to include but not limited to managing public land on behalf of the national and county governments. I am not persuaded that the NLC was the right organization to assist with the alleged allocation of the suit property as the Plaintiff did not adduce evidence demonstrating that the suit property was public land capable of being allocated by the City County or the NLC.
44. Unfortunately, the documents relied on by the Plaintiff to prove ownership have not established her beneficial interest in the property. She did not produce sale agreements or Plot cards or Lease agreements or allotment letters, payment receipts for outgoings, etc. She also claimed that she was told not to pay any land rents and rates. She was told to wait for a title deed but she failed to provide evidence to support this claim.
45. To this end, it is my considered view that the Plaintiff has not been able to show the root of her title. It therefore follows that the Plaintiff is not the lawful owner of the suit property known as Dagoretti/Riruta/S.378 as claimed.
46. Evidence before me demonstrates that the suit property is registered to Mwiiri Kamau. The 1st Defendant's case is that her late husband is the registered proprietor of the suit property and that even though the plaintiff erected temporary structures on the land with permission and without any formal agreement or payment of rent, this did not mean that the plaintiff has acquired any proprietary rights over the land. She produced and relied on a Land Certificate for Title No. Dagoretti/Riruta/S. 378 issued to Mwiiri Kamau on 2/03/1976, certificate of official search dated 2/09/2021 Title no. Dagoretti/Riruta/S.378 is registered to Mwiiri Kamau on 2/03/1976, application for official search and Payment of land rates for the suit property as seen on property rates payment requests dated 12/04/2019, 31/05/2017, 14/06/2017 and 10/04/2018 in support of her case. The Defendants submitted that it was uncontested that the suit property has a title deed already and is not available for allocation. They submitted that it is further uncontested that the title deed to the suit property has never been revoked nor annulled. That there was no sale between the Plaintiff and the registered proprietor one James Mwiri Kamau.
47. On whether the court can issue a title deed in replacing a valid title deed where already there is a title deed, the Defendants submitted that the law protects title to land. That the registration of person as a proprietor vest in them the absolute rights and privileges Section 26(1) of the *Land Registration Act*. It was their submission that the land in issue already has a title deed registered in the name of one Joseph Mwiri Kamau which fact has been admitted by the plaintiff in her pleadings. The plaintiff has not sought for revocation of title or cancellation of the said title to her favour she alleges that she has written to the National lands commission to issue her with a title deed and she has not brought forth the said institution to explain why they've not issued title to her. The *Environment and Land Court Act* no.19 of 2011 mandate this honourable court to hear and determine disputes relating to land and the environment but the said court cannot issue title to land the registrar of titles is mandate and bestowed with power to issue title to land.
48. On whether the plaintiff has made a case against the Defendants, it was the Defendants' counsel's submission that at the hearing of the case the plaintiff stated that she bought the land from the registered owner but did not produce the sale agreement. Further she stated that the said land was



allocated to her late husband and said that the adjacent land to the land in issue had no title deeds. For avoidance of doubt, the title which is in issue is Dagoretti/Riruta/s378 and not Dagoretti/Riruta/378. He who wants the court to believe in his or her testimony must produce evidence to that effect and prove the said facts. That the plaintiff has not called for cancellation or revocation of the title in issue. The plaintiff did not have a case against the defendants at all and in her pleadings, she does not even seek the court to declare her as an adverse possessor of the land.

49. The Court notes that the Plaintiff never contested the succession matter in Succession Cause No. 588 of 2017 wherein the Court listed the suit properties herein as among the properties belonging to the late Joseph Mwiiri Kamau.
50. I agree with the Defendant's submissions that the Plaintiff has not sought for revocation of title or cancellation of the said title to her favour. I also agree that the Plaintiff contended that she bought the land from the registered owner but did not produce the sale agreement. Further she stated that the said land was allocated to her late husband but did not produce evidence to demonstrate this either. It is trite law that he who alleges must prove. There is no evidence before me that the title issued to Joseph Mwiiri Kamau has been revoked or cancelled. I am inclined to find that the 1st Defendant has produced sufficient evidence to establish that the suit property is registered to Mwiiri Kamau.
51. To this end, I find and hold that the 1st Defendant stands in better stead. I am persuaded that the documents produced in support of the 1st Defendant's case have met the evidentiary threshold for proof of title to land. My final word in this regard is that the lawfully registered proprietor of Dagoretti/Riruta/S.378 is the 1st Defendant's late husband Mwiiri Kamau, for the reasons I have attempted to articulate above.

Whether the Plaintiff proved her case to be entitled to the orders sought.

52. Having found that the Plaintiff is not the lawful owner of the suit property, the Court finds and holds that the Plaintiff has failed to discharge the burden of proving her case on a balance of probabilities as required in law. It therefore follows that she is not entitled to the orders sought and her suit fails. The Amended Plaint dated 21/03/2023 lacks merit and is hereby dismissed.

Whether the 1st Defendant is entitled to the orders sought in the counterclaim.

53. The Counterclaim is not opposed. Having found that the 1st Defendant's husband is the lawfully registered owner of the suit property, I am inclined to find that the 1st Defendant has discharged the burden of proving her case on a balance of probabilities as required in law and is entitled to enjoy the rights of an absolute owner of the property as provided by Section 24 and 25 of the [Land Registration Act](#).
54. As there is no evidence adduced demonstrating that the late Mwiiri Kamau acquired his registration irregularly and/or fraudulently, then it is evident that the 1st Defendant is entitled to protection of her property as provided by Article 40 of [the Constitution](#) and therefore entitled to the mandatory Injunction orders sought. I shall therefore grant prayer (b) of the Counterclaim.
55. There was no evidence availed by the Plaintiff to prove that the 1st Defendant acquired the suit land illegally. Furthermore, the 1st Defendant has proved on the required standard what she had alleged – that the suit property is registered in the name of her late husband. Therefore, I find that the 1st Defendant is entitled to all the rights, interest and privileges that pertain to the suit property. The 1st Defendant is therefore entitled to prayers (a), (b), (d) and (g) as sought.



56. On the prayer for general damages for trespass, it is not in dispute that the Plaintiff has been in occupation and possession of the suit property for many years. PW1, PW2, DW3 and DW4 have all acknowledge that the Plaintiff has been on the suit property since 1982 and has been farming thereon. The 1st Defendant contended that the Plaintiff has been living on the suit property with the full blessings of the owner until his demise. The 1st Defendant admitted to knowing that the Plaintiff erected temporary structures on the land with permission from the 1st Defendant's late husband and without any formal agreement or payment of rent. All the Defendants' witness all testified and led evidence that the Plaintiff was never issued with an eviction notice. The 1st Defendant also never furnished the court with evidence on the damages she had suffered. It is for this reason that I will decline to award prayer (f) on general damages.

Who should bear the costs of this suit and the counterclaim?

57. Section 27 of the *Civil Procedure Act* gives the Court the discretion to grant costs. It is trite that costs usually follow the events. In this instant case, the 1st Defendant is the successful party and is therefore entitled to the costs of the suit and the counterclaim.

FINAL ORDERS

58. Having carefully considered the pleadings herein, the available evidence, the exhibits produced in Court, the written submissions and the relevant provisions of the law, the Court finds that in view of the fact that the Plaintiff has not been able to show the root of her title, it follows that the Plaintiff is not the lawful owner of the suit property known as Dagoretti/Riruta/S.378 as claimed and therefore her suit fails. Accordingly, the Plaintiff's Amended Plaint dated 21/03/2023 is hereby dismissed.

59. Having been satisfied that the 1st Defendant has proved her case to the required standard, I enter judgment for the 1st Defendant against the Plaintiff herein in the following terms: -

- a. The suit by Plaintiff dated 22/07/2021 and Amended Plaintiff dated 21/03/2023 against the Defendants is hereby dismissed.
- b. A mandatory injunction is hereby issued directing the Plaintiff to vacate the said land and give vacant possession to the 1st Defendant herein within the next six 6 months from the date of this judgment.
- c. In default of (b), an order of eviction is hereby issued against the Plaintiff, her servants, agents, children, tenants or anyone staying on the land via her instructions to be forcefully evicted forthwith.
- d. I award the 1st Defendant the costs of the suit and counterclaim.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF MAY 2024

MOGENI J.

JUDGE

In the virtual presence of:

Mr. Onkangi for 1st & 2nd Defendant and Plaintiff in Counter-claim

Mr. Kihara for Plaintiff in main suit and Defendant in Counter-claim

Caroline Sagina: Court Assistant



**MOGENI J.
JUDGE**

