



**Mwaura v Njeri & another (Environment & Land Case 382 of 2015)
[2024] KEELC 5072 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 5072 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 382 OF 2015
EK WABWOTO, J
JUNE 28, 2024**

BETWEEN

JAMES KAMAU MWAURA PLAINTIFF

AND

MARY NJERI 1ST DEFENDANT

EMBAKASI RANCHING LIMITED 2ND DEFENDANT

JUDGMENT

1. This suit was instituted by the Plaintiff vide a plaint dated 12th May 2015. The Plaintiff sought the following reliefs against the Defendants:-
 - a. Injunction to restrain the Defendants, by themselves, their servants, employees and/or agents from trespassing, disposing, transferring, charging or in any manner whatsoever interfering with the Plaintiff's rights of use and occupation of all that property known as Plot No. P2172B and P387B pending the full hearing and determination of this matter or the further orders of this court.
 - b. An order directing the cancellation of any other title the Defendants may have and a declaration that the property belongs to the Plaintiff.
 - c. Costs of the suit.
 - d. Interest at court rates.
 - e. Any other relief this Honourable court may deem fit and expedient to order.
2. The suit was contested by the Defendants. The 1st Defendant filed a Statement of Defence and Counterclaim dated 13th July 2017. The 1st Defendant denied the averments made in the plaint and sought the following reliefs in her counterclaim:-



- a. A declaration that Land Reference Number 10904/2 plots Numbers P1719B and P1720B belongs to the 1st Defendant.
- b. A permanent injunction restraining the Plaintiff, his servants, relatives, workmen and agents, from entering on and/or from erecting or causing to be erected thereon any structures, or from in any way interfering with the 1st Defendant's use and enjoyment of the 1st Defendant's property being Land Reference Number 10904/2 plots numbers P1719B and P1720B.
- c. An order to demolish any and all construction on the 1st Defendant's property Land Reference Number 10904/2 plots Numbers P1719B and P1720B at the Plaintiff's cost.
- d. An order of eviction of the Plaintiff from the 1st Defendants property Land Reference Number 10904/2 plots Numbers P1719B and P1720B.
- e. Damages and mesne profits.
- f. Interest thereon.
- g. Costs of this suit.
- h. Any other relief the court deems fit to grant.

The Plaintiff's case

3. It was the Plaintiff's case that at all material times to this suit, the Plaintiff was the lawful owner of all that property known as Plot No. P2172B and P387 the Plaintiff herein having been allocated the same by the 2nd Defendant. The said plots initially belonged to Henry Kimani Kagonye and Rahab Mumbi Kimani who were the original allottees for close to 17 years but the plots were sold and transferred legally to the Plaintiff in 2008. The Plaintiff entered into a sale agreement with Rahab Mumbi Kimani who sold the two plots to the Plaintiff through Reuben Kioni whom she had given Power of Attorney over her properties. The said properties were sold for a total sum of Kshs. 250,000 each which the Plaintiff paid in full.
4. It was also averred that the Plaintiff after having secured a credit facility from Equity Bank of over 2 Million shillings went ahead to construct a permanent stone circumference wall and a double storey house. Toward the end of December 2014, two individuals who were unknown to the Plaintiff made a claim on the two said plots and reported the matter to the DCIO Ruai who summoned the Plaintiff over the same. The Plaintiff was immediately ordered to stop any further developments on the said plots even though he produced the share certificates of the said plots as proof of ownership while the two individuals did not have any documentary proof of ownership.
5. It was also averred that following the advice of the DCIO Ruai, the Plaintiff took the share certificates to the Directors of Embakasi Ranching Company Limited who confirmed that all the documents were in order.
6. During trial, the Plaintiff testified as PW1 while Danson Ngururi Kimani testified as PW2. PW1 relied on his witness statement dated 12th May 2015 and the Plaintiff's bundle of record. It was his testimony that his father-in-law Henry Kimani was a member of Embakasi Ranching from 1974. Around 1993, he was allocated 2 plots P2172 and P387 which also had P2171B and P387B as bonus plots that were equally allocated to him. He also stated that when his father-in-law passed away his mother-in-law requested him to purchase the said plots for his son. He agreed, purchased the same and paid Kshs. 250,000/= per plot but her mother-in-law passed away before the transfer could be concluded. He then followed up with the 2nd Defendant and paid the requisite fees upon which the bonus plot was



- transferred to him and he moved into the plot and he put up a structure. Later two strangers came claiming ownership of the same. He reported the issue to DCI and was advised to file a case in court.
7. Later in 2022, the Government issued a notice of verification and he submitted his documents for verification which were confirmed to be genuine. The old documents were surrendered and he was issued with new numbers for the said property Plot 276 and 136/277.
 8. When cross-examined, he stated that when he purchased the bonus plots there was no sale agreement. He did not have letters of administration in court. The Surveyor would have known better the location of the plots. He did not settle on the 1st Defendant's plot. Only Surveyors would be able to know the current and correct numbers of the plot and that his grandson was in current occupation of the plot.
 9. Danson Kimani testified as PW2. He stated that his father had shares in Embakasi Ranching. The property was sold because his mother needed the money for medical care. There was no sale agreement because the same was a family matter.
 10. On cross-examination, he stated that Plot 387B and 2172B were the properties that were sold and he had only been to the site once. He did not engage Embakasi Ranching or their own Surveyor to show where the property was. He could not tell where the property is located on the survey map. He was not sure if any survey fees was paid. He was not aware which plots the Plaintiff went to occupy.
 11. When re-examined, he stated that when the family agreed to sale the property not the entire family participated.

The Defendants case

12. It was the 1st Defendant's case that she has no claim to the Plaintiff's properties Plot P2172 and P387B. It was averred that she is the bonafide owner of P1719B and P1720B being subdivisions of L.R No. 10904/2 which was bought and allotted by the 2nd Defendant to her. She stated that the Plaintiff trespassed on the said plots sometimes in December 2014.
13. During trial, two witnesses testified on behalf of the defence. John Muhia Karotha testified as DW1 while Edward James Thuo Mwangi testified as DW2. DW1 the Surveyor for the 2nd Defendant stated that he had been the 2nd Defendant's Resident Surveyor since 1992. He stated that the 1st Defendant paid for the site visit and surveyor's fees for the suit properties and that she was the owner of Plot 170B which is on 136/277 as its mother title. He also stated that he had a receipt for payment made in respect to site visit of Plot No. 1719B. He stated that he has been to the site several times and that the Plaintiff's plots are not the same as the 1st Defendant's plots. Plots 1719B and 1720B belong to the 1st Defendant who was its original owner.
14. When cross-examined. He stated that she was not at the site the first time the 1st Defendant was shown the plot for 1720B but was present when she was shown Plot 1719B. He also stated that the dispute is between the location of Plot 1719B and 1720B. The 1st Defendant is still a shareholder of Embakasi Ranching. He also stated that there was no way two plots could be allocated the same number and to two different people.
15. When re-examined, he stated that the Plaintiff's plots could be in the records of the 2nd Defendant even though he had not been shown any documents relating to the Plaintiff's plot.
16. Edward James Thuo Mwangi testified as DW2. He stated that he is a brother to the 1st Defendant and had a power of attorney which had been registered authorising her to testify on her behalf. He adopted the witness statement filed by the 1st Defendant in his evidence in chief.



17. On cross-examination, he stated that the 1st Defendant purchased the shares from the 2nd Defendant in 1978 and was issued with a Certificate of Ownership. In 1999 she was issued with the bonus plots. He stated that you cannot get a title if you have not cleared with the 2nd Defendant.
18. When re-examined, he stated that when the Plaintiff encroached on the 1st Defendant's properties, he reported the matter to Ruai DCI Offices. He also stated that the Plaintiff never stopped the construction when the instant suit was filed herein.

The Plaintiff's submissions

19. The Plaintiff filed written submissions dated 22nd March 2024. The Plaintiff submitted on the following issues; Whether the Plaintiff is the legal owner of the suit properties and entitled to the reliefs sought and who should pay the costs of the suit.
20. It was submitted that the Plaintiff has testified through PW1 how he legally acquired the said properties in 2008. The Plaintiff was the owner of P2172B and P387 and there was no evidence adduced disputing his ownership to the same.
21. In respect to the reliefs sought. It was submitted that the Plaintiff was entitled to mesne profits and had adduced evidence confirming the same. Reliance was placed on the case of *Karanja Mbugua & Another =Versus= Marybin Holdings Co. Ltd (2014) eKLR*.
22. In respect to exemplary damages, it was submitted that the 1st Defendant had not pleaded the same and hence the same cannot be granted to him. The case of *Rookes =Versus= Bernard (1964) AC 1129* was cited in support.
23. The Plaintiff also submitted that he was entitled to the costs of the suit which should be granted to him. The Plaintiff concluded his submissions by urging the court to find that the Plaintiff's suit had been proved to the required standard and grant the reliefs sought.

The Defendants' submissions

24. The 1st Defendant filed submissions dated 6th November 2023. No written submissions were filed by the 2nd Defendant.
25. The 1st Defendant submitted that in his evidence the 2nd Defendant's Resident Surveyor Mr. John Maina Kanotha said the disputed location on the ground were plot numbers P171B and P1720B belonging to the 1st Defendant which were pointed out to the owner after payment of the requisite survey fee in the sum of Kshs. 20,000/= for each plot which receipts were produced in court. The surveyor also confirmed the 1st Defendant's documents of ownership as genuine and having been issued by the 2nd Defendant. The Surveyor further stated that the Plots numbers P2172B and P387B claimed by the Plaintiff must be located elsewhere other than the suit property and the Plaintiff ought to engage the office of the 2nd Defendant in order to be shown where the alleged plot numbers P2117B and P387B were located after payment of the requisite surveyor's fee.
26. In respect to the prayers sought. It was submitted that the 1st Defendant was entitled to the reliefs sought including general, exemplary and aggravated damages. The 1st Defendant concluded her submissions by submitting that there was overwhelming evidence that her case had been proved to the required standard.



Analysis and Determination

27. The court has considered the pleadings filed, evidence adduced and written submissions filed by the parties and has outlined the following issues for determination:-
- i. Whether the Plaintiff's suit has been proved to the required standard.
 - ii. Whether the 1st Defendant's Counterclaim is merited.
 - iii. What are the appropriate reliefs to grant herein.
 - iv. What orders should issue as to costs of the suit and the 1st Defendant's counterclaim.
28. The court shall now proceed to analyse and address itself on all the issues sequentially.
- Issue No. i
- Whether the Plaintiff's suit has been proved to the required standard.
29. Article 40 of *the Constitution* of Kenya, 2010, elaborates on the right to own property in Kenya. It provides as follows; -
- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
 - (a) of any description; and
 - (b) in any part of Kenya.”
30. Both parties having laid claim to the property are deserving proprietary protection and to adequately donate this protection this Court must look into the root to its ownership. This approach was well appreciated in the case of *Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others* [2016] eKLR. Equally in the case of *Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v The City Council of Nairobi & another*, the court stated as follows:
- “We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.
31. As earlier stated both parties are laying claim to the suit property. It is trite law that It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the *Evidence Act*, which provides as follows:
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”



32. Sections 109 and 112 of the same Act states;

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

33. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea vs David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

34. With respect to the burden of proof, the learned Judges of Appeal in the case of *Palace Investments Limited vs Geoffrey Kariuki Mwenda & another* [2015] eKLR, posited thus:

“Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

35. The Court will be guided by the aforementioned provisions and cases. In the instant suit it was the Plaintiff’s case that the 1st Defendant had encroached and trespassed into her property which he acquired in 2008. The 1st Defendant on the other hand maintained that she acquired the said plots after buying shares from the second Defendant in 1978 and subsequently paying for the bonus plot in 1999.

36. Both parties claim to trace their root of ownership of the suit parcels from the 2nd Defendant. In view of the foregoing the court has considered the evidence tendered by DW1 who is the resident Surveyor of the 2nd Defendant. DW1 was able to demonstrate to the court how the 1st Defendant acquired the suit property P1719B and 1720B. He also confirmed that one was required to pay for the site visit and surveyor fees upon which he or she could be shown the properties. The 1st Defendant made the said



payment and produced evidence to support that during trial. No evidence was tendered confirming whether the Plaintiff had indeed made the said payment. The Plaintiff's witness conceded in cross-examination that they never involved the surveyor of the 2nd Defendant and neither was the Plaintiff taken to the site by the surveyors of the 2nd Defendant. The Plaintiff's witness equally conceded in cross-examination that only the surveyor could be able to confirm and ascertain the correct location of the suit parcels. The Plaintiff never called or availed any surveyor to support his case. In the circumstances, the court is not satisfied that the Plaintiff's case has been proved to the required standard.

Issue No. ii

Whether the 1st Defendant's counterclaim is merited.

37. The 1st Defendant sought for several orders in her counter-claim. It is worth noting that a Counterclaim just like any other suit ought to be proved to the required standard. During trial, the Defendants' witness were also able to demonstrate to this court how the 1st Defendant acquired her properties and how the same was allocated and shown to her after being pointed out to her by the 2nd Defendant's resident surveyor. DW1 also confirmed that he had visited the said properties several times and that he was certain that the plots 1719 and 1720B belong to the 1st Defendant. The said evidence was never challenged nor controverted by the Plaintiff and in the circumstances, this court finds merit in the 1st Defendant's counter claim.

Issue No. iii

What are the appropriate reliefs to grant herein.

38. This court having found earlier that the Plaintiff's claim as against the Defendants has not been proved to the required standard can only proceed to consider the reliefs sought by the 1st Defendant in her counterclaim.
39. The 1st Defendant also sought for an order of permanent injunction as against the Plaintiff. Regarding the prayer for permanent injunction, I align with the holding in the case of Kenya Power & Lightning Company Ltd –Vs- Sheriff Molana Habib (2018) eKLR, where the court made the following pronouncement as regards a perpetual permanent injunction;

“A permanent injunction also known as a perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits 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.”

In the instance case, the 1st Defendant has made a case for issuance of an order of Permanent injunction in her favour since she has been able to establish and trace a good root of her title to the satisfaction of this court.

40. In respect to the prayer for damages sought in the counterclaim, the 1st Defendant never submitted on any quantum to guide the court in respect to the relief of damages that were sought. The court would have expected the 1st Defendant to do so in her submissions but none was provided and in the circumstances this court shall only proceed to grant nominal damages of Kshs. 100,000/=

Issue No. iv

What orders should issue as to costs of the suit and the 1st Defendant's counterclaim.



41. In respect to costs, under Section 27 of the *Civil Procedure Act*, the same is a discretion of the court and ordinarily costs follow the event, unless otherwise stated. However, in the instant case, the court has considered that the Plaintiff's suit and the 1st Defendant's counterclaim herein involved a dispute between family members and in the circumstances this court directs each party to bear own costs of the suit and counterclaim.

Final orders

42. In conclusion, the suit by the Plaintiff and the 1st Defendant's counterclaim by are disposed as follows: -
- a. The Plaintiff's suit is dismissed.
 - b. The 1st Defendant's counterclaim is merited and the same is allowed in terms of prayers (a), (b), (c) and (d).
 - c. There shall be a grace period of 90 days in respect to prayers (c) and (d) of the 1st Defendant's counterclaim granted herein.
 - d. The 1st Defendant is awarded nominal damages of Kshs. 100,000/=
 - e. Each party to bear own costs of the suit.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF JUNE, 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Kaifa for the Plaintiff.

Mr. Kimamo for 1st Defendant.

No appearance for 2nd Defendant.

Court Assistant: Caroline Nafuna.

