



**Kipkai Enterprises Limited v Hussein (Environment & Land Case E212 of 2023) [2024] KEELC 6638 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 6638 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E212 OF 2023**

**MD MWANGI, J  
JUNE 27, 2024**

**BETWEEN**

**KIPKAI ENTERPRISES LIMITED ..... PLAINTIFF**

**AND**

**ABDRAHIM CHERUIYOT HUSSEIN ..... DEFENDANT**

**JUDGMENT**

**Background**

1. The Plaintiff in this case filed its suit vide the Plaint dated 13<sup>th</sup> June, 2023 accompanied by the witness statement of Jane Nyaboke Njagi and the list and bundle of documents of even date. The Plaintiff pleaded that it was at all material times, the registered proprietor/beneficial owner of all that parcel of land known as L.R. No. 12507/5 measuring 2.023 ha comprising of the grant registered as I.R. 40679 (hereinafter referred to as ‘the suit property’). The Plaintiff averred that it acquired the suit property in the month of May, 1993 and has since then enjoyed quiet, continuous and peaceful possession of it.
2. The Plaintiff further averred that the Defendant had purported to lay a claim of ownership over the suit property on the strength of a false Certificate of title comprised in a grant number I.R. 234920. The Plaintiff terms the alleged title fictitious. It affirms that the Defendant has no valid and or lawful claim against the suit property and his actions amount to an infringement of the Plaintiff’s Constitutional rights to exclusive and peaceful enjoyment of its property.
3. The Plaintiff prays for judgment against the Defendant for:
  - i. A permanent injunction restraining the Defendant whether by himself, his servants, agents or any other person(s) claiming under from dealing with or continuing to deal with, use, dispose of, part with, charge, alienate, lease or otherwise in any manner whatsoever interfering with the Plaintiff’s ownership, control and proprietorship over all that parcel of land to wit Land



Reference No. 12507/5 situated in Nairobi County, measuring 2.023 hectares or thereabouts and being the premises comprised in Grant registered as Number I.R. 40679.

- ii. A declaration that the Plaintiff is the lawful proprietor of that all parcel of land to wit Land Reference No. 12507/5 situated in Nairobi County, measuring 2.023 hectares or thereabouts and being the premises comprised in Grant registered as Number I.R. 40679.
  - iii. General and exemplary Damages
  - iv. Costs of the suit and interest.
  - v. Any other further relief as this Honourable court may deem fit to grant.
4. The Defendant did not participate in the proceedings. The Defendant was served by way of substituted service pursuant to the directions of the court after the Court allowed the Plaintiff's application for Service of the summons to enter appearance by way of substituted service and directed the same by way of a prominent advertisement in a newspaper of nationwide circulation on a weekday. The Plaintiff duly complied with the directions on service of the summons to enter appearance.

#### **Evidence Adduced:**

5. Having confirmed service, the case was set down for hearing in terms of the provisions of order 10 rule 9 of the Civil Procedure Rules. The Plaintiff called 1 witness who testified on its behalf.
6. The witness, Jane Nyaboke Njagi adopted her witness statement dated 13<sup>th</sup> June, 2023 together with the Plaintiff's list and bundle of documents as her evidence in chief. The documents were produced in court and marked as PE 1-9 in the order in which they were listed respectively.
7. PW1 confirmed being one of the directors of the Plaintiff Company and the holder of the majority shares of the Plaintiff Company.
8. PW1 alleged that the title to the suit property, L.R. No. 12507/5 (I.R. No. 40679) (subject matter of this case), is registered in the name of the Plaintiff Company, having acquired it for valuable consideration as per the transfer document (PE.3), registered on 25<sup>th</sup> May, 1993.
9. According to PW 1, the size of the suit property is five (5) acres and is situated in Karen, Nairobi where PW1 has built her home. She is in actual possession of the suit property and has been enjoying quiet possession of the suit property since she acquired it.
10. PW 1 claims to have the original title to the suit property and that she has been paying land rates and land rents as evidenced in her receipts exhibit (PE.4). The Court took note of original title No. 12507/5 (I.R. 40679) registered in the name of the Plaintiff Company on 25<sup>th</sup> May, 1993 and the original transfer also dated 25<sup>th</sup> May, 1993, duly stamped by the collector of stamp duty and received by the Department of Land, Central Registry on 25<sup>th</sup> May, 1993, transferring the suit property from Peter Vincent Chiera Gicheru to Kipkai Enterprises Limited.
11. PW 1 averred that sometime in 2023, she received information while in a funeral in Kisii County that her Kai-apple fence around the suit property had been cut-off by some unknown people; about 40 in number. A report was made at Karen Police Station where a few of the trespassers were arrested. It was at the police station where it was established that the Defendant was responsible for the trespass when he showed up with a fake document (PE.6), claiming ownership of the suit property.



12. According to PW 1, the document produced by the Defendant had a different I.R. No. from the Plaintiff's original title. The Defendant was given time to bring in the 'lawful documents' which he claimed were in Eldoret but he has never returned since then.
13. The Director of Surveys through a letter dated 22<sup>nd</sup> June 2023, marked as PE 10 also confirmed the documents by the Plaintiff as the lawful documents. A search conducted on the title by the Plaintiff in June 2023 also confirmed that the suit is registered in the name of the Plaintiff Company.
14. PW 1 alleged that she spent over 10 million to construct a stone wall after the destruction of her Kai-apple fence by the Defendant and therefore urged the court to allow her case and grant the orders as prayed in her plaint.

### **Court's Directions**

15. The Court directed the Plaintiff to file written submissions upon the close of the hearing. The Plaintiff complied; its submissions are dated 9<sup>th</sup> May, 2024. I have had the opportunity to read and consider the submissions which now form a part of the record of this Court.

### **Issues for determination**

16. I agree with the issues identified by the Plaintiff in its submissions being:
  - a. Whether the plaintiff is the lawful owner of the suit property;
  - b. Whether the Plaintiff is entitled to the reliefs sought;
  - c. What orders should issue in regard to costs.

### **Analysis and Determination:**

#### **A. Whether the Plaintiff is the Lawful Owner of the suit property.**

17. Amongst the exhibits that the Plaintiff's witness produced as exhibits before the Court is the Copy of the grant, and the official search of the title confirming ownership of the suit property by the Plaintiff Company.
18. The Court in the case of Andrew Mwangi Chui t/a Mariani Auto Nursery -vs- Leonard Njoroge Kariuki [2018] eKLR, which has been cited by the Plaintiff in its submissions rightly held that the Certificate of title issued by the Registrar upon registration, or to a purchaser of Land upon a transfer, is to be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner of the Land.
19. The Plaintiff's witness showed the Court the original grant. She too produced as exhibit number 10, a letter from the Director of Survey, dated 22<sup>nd</sup> June, 2023 which further supports her case. The letter is categorical that the Plaintiff is the genuine owner of the suit property; its grant is the original and authentic grant. The search produced in evidence affirms the position.
20. Considering all the evidence presented before the Court, the Plaintiff has proved its ownership of the suit property.

#### **B. Whether the Plaintiff is entitled to the relief sought.**

21. Section 24 of the *Land Registration Act* provides that registration of a person as a proprietor of Land vests in that person the absolute ownership of the Land together with all rights and privileges belonging



or appurtenant thereto. Off course, the reference to a 'person' includes a 'juristic person' as the Plaintiff Company in this matter.

22. Having found that the Plaintiff has established its legal ownership of the suit property, it is entitled to an order of permanent injunction as sought in the plaint restraining the Defendant by himself, his servant, agents, employees or any other person claiming through him from interfering with the Plaintiff's ownership, control and proprietorship over all that parcel of land to wit Land Reference No. 12507/5 situated in Nairobi County, measuring 2.023 hectares or thereabouts and being the premises comprised in Grant registered as Number I.R. 40679.
23. I have elsewhere pointed to a worrying trend in Nairobi of criminals in cahoots with a few corrupt officials in the Lands office who create parallel fraudulent titles over targeted parcels of land and then lay claims over such parcels of land before eventually selling the parcels to 3<sup>rd</sup> parties of course behind the backs of the Lawful owners. Considering the evidence presented before me, this appears to be one such case.
24. PW 1 testified that she reported the case to the police but no action was taken. The police must up their game and confront this issue of land fraud head on.
25. The Plaintiff additionally prayed for general and exemplary damages.
26. In her testimony, PW1 testified that the Defendant had invaded the suit property with goons trespassing therein and in the process destroyed the life fence around the suit property. The Plaintiff allegedly spent Kshs 10,000,000/= to put up a concrete perimeter fence in place of the destroyed life fence around the suit property. She however did not produce evidence before the Court to support the alleged expenditure.
27. The Court agrees with the Plaintiff's submissions that trespass is actionable per se. Nyamweya, J, (as she then was) in the case of Duncan Nderitu Ndegwa -vs- KPLC Limited & Another [2013] eKLR held that:

“Once trespass to Land is established, it is actionable per se, and indeed no proof of damage is necessary for the Court to award general damages.”
28. In this case, the Plaintiff has indeed established trespass into its land on a balance of probabilities. The trespass was augmented by the destruction of the life fence around the suit property. The Plaintiff is therefore entitled not only to general damages but also to exemplary damages. The Plaintiff has proposed a figure of Kshs 7.5 million for both general and exemplary damages. It has further prayed for the costs of the construction of the perimeter fence at Kshs 10,000,000/=.
29. In respect to general damages for trespass, this Court considers the figure of Kshs 2.0 million fair and reasonable compensation with an addition of Kshs 1 million as exemplary damages.
30. In respect to the costs of construction of the perimeter fence, the amount of Kshs 10,000,000/= was not pleaded in the Plaint. I must add, as I have already pointed out earlier on that it was also not proved. The claim for the costs of construction of the perimeter wall is a claim for special damages. It is trite that special damages must not only be specifically pleaded but also specifically proved.
31. The Plaintiff is not therefore entitled to the claim for the cost of construction of the perimeter fence for want of proof.
32. Finally, on the issue of costs, the law is well spelt out that costs follow the cause. I do find and accordingly award the Plaintiff the costs of this suit.



33. The conclusion is that judgement is entered in favour of the Plaintiff against the Defendant in the following terms;
- A. A declaration be and is hereby issued that the Plaintiff is the lawful proprietor of that all parcel of land to wit Land Reference No. 12507/5 situated in Nairobi County, measuring 2.023 hectares or thereabouts and being the premises comprised in Grant registered as Number I.R. 40679.
  - B. A permanent injunction be and is hereby issued restraining the Defendant whether by himself, his servants, agents or any other person(s) claiming under from dealing with or continuing to deal with, use, dispose of, part with, charge, alienate, lease or otherwise in any manner whatsoever interfering with the Plaintiff's ownership, control and proprietorship over all that parcel of land to wit Land Reference No. 12507/5 situated in Nairobi County, measuring 2.023 hectares or thereabouts and being the premises comprised in Grant registered as Number I.R. 40679.
  - C. The Plaintiff is awarded General and exemplary Damages of Ksh. 2.0 Million and Ksh. 1.0 Million respectively making a total of Ksh. 3.0 Million as damages with interest at court rates from the date of this judgement until payment in full.
  - D. The Plaintiff shall have the Costs of the suit and interest at court rates from the date of assessment of the costs until payment in full.

It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27<sup>th</sup> DAY OF JUNE 2024.**

**M.D. MWANGI**

**JUDGE.**

**In the virtual presence of:**

N/A by the parties

Yvette: Court Assistant

**M.D. MWANGI**

**JUDGE.**

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