



REPUBLIC OF KENYA



**M’Twerandu v M’Twerandu (Environment & Land Case
E012 of 2022) [2024] KEELC 4908 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4908 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E012 OF 2022**

CK NZILI, J

JUNE 19, 2024

BETWEEN

SIMON KABWI M’TWERANDU PLAINTIFF

AND

ISAACK KITHIA M’TWERANDU DEFENDANT

JUDGMENT

1. The plaintiff approached this court through a plaint dated 6.5.2022, seeking that the defendant be ordered to give vacant possession of L.R No. Nyaki/Munithu/433, payment of general damages, mesne profits and for the removal of a caution registered against the title register.
2. The defendant opposed the suit with a statement of defence and counterclaim dated 16.9.2022. He denied in toto the claim. By way of a counterclaim, the defendant averred that the defendant in the counterclaim was his brother. He further averred that the suitland initially belonged to their father, the late M’Twerandu M’Muthuri, where he was born, raised and settled alongside a family of over twenty children.
3. The plaintiff to the counterclaim averred that the land is held under customary trust by the defendant in the counterclaim; hence, he holds overriding interests over it, which his father had intended to be equally shared among the two parties. The plaintiff averred that there was also Meru CMCC No. 795 of 1995. He prayed for a declaration that there exists a customary trust over the land that he is entitled to half share of the land and an order that the land registrar registers him as the holder of half share of the land.
4. Through a reply to the defence and defence to the counterclaim dated 29.9.2022, the defendant to the counterclaim denied that the land initially belonged to their late father, M’Twerandu M’Muthuri or that it was held subject to any overriding interest or customary trust. Further, the defendant denied



- that the plaintiff to the counterclaim was born, brought up and or settled on the suit land as alleged or at all. He termed the counterclaim as res judicata in view of Meru CMCC No. 795 of 1995.
5. At the trial, Simon Kabwi M'Twerandu and Thomas Mwika testified as PW 1 and PW 2, adopting their witness statements dated 16.5.2022 as their evidence in chief. The plaintiff and his witness told the court that the defendant was a stepbrother. PW 1 said that his mother, Julia Kithinki, was the first wife, while the mother to the defendant was Hellen Karegi. PW 1 also stated that his late father, during his lifetime, subdivided his land into three portions for himself and the other houses.
 6. Further, PW 1 said that the issue was litigated, and L.R No. Nyaki/Munithu/433 was given to his mother, while L.R No. Nyaki/Munithu/425 was given to Hellen Karegi, which the is occupied by Stephen Miriti M'Twerandu brother of the defendant occupies called Stephen Miriti M'Twerandu. PW 1 said that the defendant could only stake his claim against the land belonging to his mother, now occupied by his brother and not this suit land.
 7. PW 1 said that the matter was determined in Civil Suit No. 195 of 1995 and Land Dispute Tribunal Case No. 78 of 2006. He produced copies of the proceedings/ruling in Land Dispute Tribunal No's. 78/2006 and CMC No's. 795/1995, green cards and official certificates of search for L.R No. Nyaki/Munithu/425 & 433 as P. Exh No. 1-5 respectively.
 8. Despite the opportunity given to participate in the hearing of the suit, the defendant failed to comply with a consent order issued by the court or participate in the hearing on 28.11.2023 and further comply with the court orders made by consent on 29.1.2021 and 14.3.2024. The defendant's case was, therefore, marked as closed on 8.5.2024.
 9. The plaintiff submitted that in Land Dispute Tribunal Case No. 78 of 2006, a finding was reached that the late Twerandu Muthuri had two wives, and 5 acres were given to each wife. Going by the award, the plaintiff submitted that the defendant was not justified in occupying his land, for his share should be over L.R No. Nyaki/Munithu/425. He urged the court to find the counterclaim res judicata in view of P. Exh No's. (1) & (2). Reliance was applied on Kuloba Richard Judicial Hints on Civil Procedure Law African Publishing (K) Ltd 2nd Edition Page 47.
 10. The plaintiff submitted that the failure by the defendant to attend court and call evidence in support left his statement of defence and counterclaim mere statements. Reliance was placed on Janet Kaphiphe Ouma and another vs Marie Stopes International (K) Kisumu H.C. No. 68 of 2007 and Inter Chemie E.A Ltd vs Nakuru Veterinary Centre Ltd NRB Milimani HCC No. 165B of 2000.
 11. The court has carefully gone through the pleadings, evidence tendered and the submissions and the law. The issues for determination are:
 - i. Whether the plaintiff is entitled to vacant possession.
 - ii. Whether the counterclaim is res judicata
 - iii. Whether the plaintiff to the counterclaim has proved customary trust.
 12. The plaintiff has pleaded that he acquired the suit land on 6.7.1992 as per P. Exh No's. 4 & 5. He gave the history of the land as per P. Exh No's. (1), (2) & (3), and hence, if the defendant has any claim, he should prefer it against his brother, who acquired the share of L.R No. Nyaki/Munithu/425. He terms the statement of defence and counterclaim as misplaced. Similarly, the plaintiff pleaded that the issues raised in the counterclaim are res judicata on account of previous suits and determinations as per P. Exh No's. (1) & (2).



13. Res judicata arises where a previous suit was between the same parties litigating under the same title over the same issues raised in the subsequent sit and that was determined to finality by a competent court. In *Maina Kiai & 2 others vs IEBC & 2 others* (2017) eKLR, the court observed that the purpose of res judicata is to ensure there is finality in litigation and that a party is not vexed twice over matters already determined.
14. In P. Exh No. (1), there is a history of determination of ownership of L.R No's. 425 and 433. The award determined to finality entitlement of the land between the children and the two wives of the plaintiffs and the defendant's father. It was after the award that the plaintiff pleaded and testified that he acquired his title deed following the share of his mother's house.
15. Therefore, the plaintiff takes the view that the counterclaim is against the wrong party and over the wrong title. In P. Exh No. (2), it appears that the defendant had sued his father for the land. In both exhibits the court has not been supplied with any court decrees showing that the issue of vacant possession and customary trust was determined to finality in the previous suits.
16. A cause of action is actioned by the defendants, which triggers a claim by a plaintiff. See *DT Dobie vs Muchina* (1982) KLR 1. In this suit, the plaintiff became the registered owner of the land in 1992. P. Exh No. (1) was made before 1992. I find no merits in the plea of res judicata.
17. Even though P. Exh No. (2) shows that the defendant had previously sued the plaintiff; the suit was dismissed for non-attendance on 19.3.2001. There is no evidence that the defendant revived the suit, and was determined on merits. The defendant cannot purport to revive such a suit through counterclaim after more than ten years. In any event, the same was not prosecuted. Its contents remain mere statements without substantiation.
18. The plaintiff has termed the occupation of his land by the defendant unjustified. Trespass refers to unjustified entry into and commission of adverse acts on private land without the consent or authority of the owner. See Section 3 (3) *Trespass Act* and *Kenya Power & Lighting Company vs Ringera* (2020) eKLR. In this suit, the defendant failed to attend court to ventilate his defence and counterclaim. As rightly submitted by the plaintiff relying on *Janet Kuphiphe Ouma & another vs Marie Stopes International* (supra), the statement of defence and counterclaim remain as mere allegations. See also *Interchemie E.A Ltd vs Nakuru Veterinary Centre Ltd* (supra).
19. The plaintiff, as a registered owner of the land, is entitled to proprietary rights under Sections 24, 25 & 26 of the *Land Registration Act* as read together with Article 40 of *the Constitution*. I find no evidence that the plaintiff's title was subject to any overriding rights by way of customary trust in favour of the defendant. The ingredients of finding customary trust were not proved by the defendants as laid down in the *Isaack M'Inanga Kiebia vs Isaaya Theuri Mlintari & another* (2018) eKLR. There was no intended trust in favour of the defendant; his occupation of the plaintiff's land is unjustified.
20. Consequently, I find the claim proved to the required standard. The notice shall be issued for the defendant to hand over vacant possession of the suit land by 19.9.2024, or else he shall be evicted at his own expense and costs in line with Section 152 A-F of the *Land Act*.
21. Costs to the plaintiff.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 19TH DAY OF JUNE, 2024**

HON. C K NZILI

JUDGE



In presence of

C.A Kananu

Parties

Mburugu for the plaintiff

Defendant

