



Wanjiri & another v Nyachio & another (Environment & Land Case 239 of 2006) [2024] KEELC 4757 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4757 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 239 OF 2006**

**AA OMOLLO, J
JUNE 13, 2024**

BETWEEN

JOSEPH NDEMI WANJIRI 1ST PLAINTIFF

ANASTACIA WANJIKU MWANGI 2ND PLAINTIFF

AND

ABINAH MONG'ARE NYACHIEO 1ST DEFENDANT

MWANA MUKIA HOUSING CO-OP SOCIETY 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs filed this suit against the 1st and 2nd Defendants vide plaint dated 10th March 2006 seeking for the following orders;
 - a. A permanent injunction do issue restraining the 1st Defendant, by himself, his agents, servants, workmen, fundis or otherwise howsoever from trespassing upon, dealing in or with, selling, erecting any structure upon, taking away any soil, rock or sediment from, or otherwise howsoever interfering with the 1st Plaintiff's plot number 1334 within L.R 8469/7/8 and the 2nd Plaintiff's plot number 1335 within L.R 8469/7/8.
 - b. A permanent injunction do issue restraining the 2nd Defendant from dealing in, selling to the 1st Defendant or any other person, allocating, leasing or otherwise howsoever interfering with the 1st Plaintiff's plot number 1334 within L.R 8469/7/8 or the 2nd Plaintiff's plot number 1335 within L.R 8469/7/8.
 - c. A mandatory injunction issue, compelling the 1st Defendant, at his expense, to forthwith remove all structures, debris, construction stones, steel rods, building sand and other materials he has deposited, stored, or placed upon the 1st Plaintiff's plot Number 1334 within



LR8469/7/8 and the 2nd's Plaintiff's plot number 1335 within LR 8469/7/8 and to restore to their original state the Plaintiffs' cited plots.

- d. Costs of the suit.
 - e. Any other relief as may be necessitated in the circumstances of the suit.
2. The 1st and 2nd Plaintiffs stated that at all material times they were and remain the lawful proprietors of plot number 1334 and 1335 respectively within LR.8469/7/8 which are registered in the name of the 2nd Defendant as a land buying entity for the benefit of its shareholders. They further plead that at the date of filing this suit, they had fully paid all dues, subscriptions and all payments due to the 2nd Defendant in consideration for the ownership of the said plots.
 3. It is their case that on 29/8/1988, the 2nd Defendant issued the 1st Plaintiff with a certificate confirming ownership of his plot which he has been in possession and which certificate the 2nd Defendant has never rescinded the said allocation. The 2nd Plaintiff was on 30/3/2000, the 2nd Defendant issued her with a certificate confirming her ownership of Plot 1335 on LR.8469/7/8 where she remains to date as such lawful proprietor and in possession.
 4. The Plaintiffs case that the 1st Defendant without their authority trespassed on their plots and commenced digging up a foundation in anticipation of erecting a storeyed building in complete disregard of their rights and ownership. That they lodged a complaint and on 9/11/2005 the 2nd Defendant's director was summoned by the Kasarani area Chief after the 1st Defendant purported to fence off the Plaintiffs' plots alleging that his plot No.1336 was in fact situate where the Plaintiffs' plots are. The Plaintiffs explained that the 1st Defendant was admonished to cease any further fencing or interference with the suit plots pending the 2nd Defendant's verification of the exact ground location of his plot No.1336
 5. The Defendants filed a joint statement of defence dated 6/4/2006 denying the Plaintiffs averments in the Plaint. They stated that the 1st Defendant is developing his plot number 1336 falling within LR.8469/7/8/9 which belong and was issued with a certificate confirming his ownership on 23/8/2005. That he purchased the same from a previous allottee Mary Nyakio, paid all dues to the 2nd Defendant and satisfied all laid down terms and conditions.
 6. The 1st Defendant contended that the Plaintiffs' plots 1334 and 1335 exist distinctively and separate from his Plot 1336. That after the 2nd Defendant's director was summoned by the Chief Kasarani, he did explain the right position and even visited the disputed plots when parties were shown the beacons for their respective plots on the ground.
 7. In support of the Plaintiffs' case, PW1 testified, adopting her affidavit sworn on 10/3/2016 in support of the Chamber Summons dated 10/3/2006, witness statement filed on 30/4/2018, her affidavit sworn on 21/3/2007 in response to an application by the defendants as evidence in chief. She also produced a bundle of documents dated 22/11/2007 as PExh1-11- which include; Mwana Mukia Housing Co-operative Society Ltd receipt dated 24th August 1988 for 12,000/,Mwana Mukia Housing Co-operative Society Ltd Share Certificate dated 29th August 1988, Copy of identity card of Joseph Ndemi Wanjiri, Petty Cash Voucher dated 22/1/2003 for Ksh.3,000/,Share Certificate Anastacia Wanjiku Mwangi,Copy of ID of Anastacia Wanjiku Mwangi, Letter from Kasarani Location Chief to the Director Mwana Mukia Housing Co-operative Society Ltd dated 9/11/2005,summons from the Kasarani Location Chief to Anastacia Wanjiku Mwangi,Mwana mukia Housing Co-operative Society ltd map for the plots,Mwana Mukia Housing Co-operative Society Ltd receipt dated 24/8/1988 for 12,000/ and photos as at the time of construction.



8. PW1 stated that at page 10 in the bundle of documents filed on 30/4/2018 is her share certificate issued by the 2nd Defendant, at page 11 is her identity card while page 12 is a letter from the chief to the 2nd Defendant and at page 13 is summons taken out by the Chief to the 1st Defendant. The witness referred to the second map which shows plot numbers 1333,1334,1335 and 1336 (at page 14) and which map according to her shows that plot number 1336 has eaten into plot number 1335 and 1334 owned by the Plaintiffs.
9. Further, the witness asserted that the original map that was used when the plots were initially allocated to them is the one produced at page 15 which map shows that plot 1335 is a big corner plot while plot number 1336 is not a corner plot. It is her evidence that a portion of plot 1335 has been curved out and added to plot 1336.
10. During cross examination, the witness stated that the first map at page 15 was issued by the surveyor of the 2nd Defendant when the plots were being allocated and the same was handed over to her by the 2nd Defendant's director, Robert Waireri. That he is the same person (DW2) who came up with the second map at page 14 that was created by land grabbers. The witness testified that she went to the site together with the surveyor who confirmed that the plot 1336 is not in the place shown in the original map and that on the ground it is where plot 1337 is located.
11. She added that during the site visit in the company of the chief and the 2nd Defendant, they did not have a surveyor with them but a subsequent visit a surveyor was present. She asserted that the impugned plot 1336 was not found on the ground. The witness also pointed out that in a replying affidavit sworn by the 2nd Defendant's director, (DW2) and filed in court on 15/3/2006, she annexed a map whose chronological numbering of plots is not flowing compared to the numbering in the original map (page 15) which flows. PW1 stated that she entered her plot in 1988 while the 1st Defendant appeared at the scene in 2005.
12. During examination by the court, PW1 stated that the 1st Plaintiff is one of her neighbors who was allocated plot 1333 and 1334 and another neighbor Kezia Muthoni owned plot 1332, while plot 1336 and 1337 were owned by two sisters who sold their plots and that there was no dispute between the neighbours. Her complaint is the creation of plot 1336 between 1334 and 1335. That her plot 1335 was a corner plot served with two access roads, the main road and another road separating the 2nd Defendant's land with that of the initial party.
13. PW2, Joseph Ndegwa Wanjiri testified adopting his witness statement dated 30/4/2018 as evidence in chief. He stated that he had purchased the land in 1988 when plot numbers 1334 and 1335 followed each other. That there was no plot 1336 between them and it was only in 2005 when there was a trench being done that he was informed about the existence of the impugned plot. He reported the matter to the chief Kasarani who then summoned the person developing it and directed the developments be stopped. The witness stated that the Ministry of lands cannot create plot 1336 which appears between plot 1334 and 1335 noting that the same map has plot 1403 between 1254 and 1321.
14. DW1, the 1st Defendant adopted his witness statement dated 15/6/2012 testified in support of his case and produced documents in the list dated 3/5/2017 as evidence. They included; Sale agreement dated 23/8/2005, copy of Register from the 2nd Defendant, Transfer receipts from 2nd Defendant, share certificate in the name of the 1st Defendant, copy of letter dated 9/11/2005 from Kasarani Area Chief and an office copy of the survey map for LR.8469/7/8.
15. He stated that during summon from the chief, the 2nd Defendant took them to the ground and confirmed that there was plot 1334,1335 and 1336. He testified that he bought the plot 1336 from



one Mary Nyakio, a member of the 2nd Defendant and that he learnt from the 2nd Defendant that she had purchased the same from Mr.Gakuo.

16. DW1 stated that the plot is approximately 40*60 feet, was shown the same by a surveyor who also gave him the subdivision scheme and confirmed that the surveyor did not call the neighboring plot owners during this beacon identification. DW2, who is the secretary of the 2nd Defendant at the time the dispute arose testified and adopted his witness statement filed on 15/6/2012 as evidence in chief. He stated that his work involved keeping records and carrying out transfers where there was a sale.
17. He stated that a physical planner cannot approve a subdivision if one of the number's plot is bigger than the others and that there has been no change in size which was 60*40 per plot. He added that there is only one plot 1336 and does not know the source of the map at Page 15 of the Plaintiff's bundle.
18. During cross examination he confirmed that plot 1334 and 1335 are following each other as per the map at page 15 and that the size of plot 1335 is bigger in size that on Map at page 14. He confirmed that the subdivision sketch from the city council in the replying affidavit of the 1st Defendant annexure AMW-11, the map is certified by the 2nd Defendant and not the Nairobi City County. That AWM-11 and the map at page 14 is the same and was approved by the Nairobi County on 13/10/2010. That the approval by Commissioner of lands was done on 21/6/2010, four years after filing of this suit.
19. The witness confirmed that there was a previous map where plots 1338, 1337, 1335 boundary lines are not straight and access road is given as 9M wide but in the new map the said boundary lines are straight and the access road is 6M wide. He added that in the previous map, there was a provision of a primary school which is also in the new map but in a different location and addition provision of ACK church and community centre. Further, that the location of plot 1119 in the previous map is adjacent to 1116 on the left and 1120 on the right but in the 2010 map plot 1119 is adjacent to 116 and 1538.
20. He stated that the first map was drawn in 1989 where the three plots were present and the Director of survey made some amendment to include certain amenities but still the said plots remained.

Submissions

21. The Plaintiff and Defendants filed submissions dated 25th February 2024 and 8th March 2024 respectively. The Plaintiff submitted that the ownership of the plot No. 1334 and 1335 within L.R 8469/7/9 is not in dispute evidenced by the Share Certificates issued by the 2nd Defendant on 29th August 1988 and 30th March 2000 as well as the admission of the Defendants through their Statement of Defense dated 6th April 2006 under paragraph 2.
22. That the 1st Defendant came to the said plots, dug holes to fence off the plot, erected steel rods on the foundation in readiness to put up a storeyed building as evidenced in the copy of photos tendered as evidence. These actions they aver amounted to trespass because there was no authority nor consent from them (Plaintiffs). In support the Plaintiffs relied on the provisions of section 3(1) of the [Trespass Act](#) on what entails trespass and cited the case of Charles Ogejo Ochieng v Geoffrey Okumu (1995) eKLR and Amakor —vs- Obiejuna, (1974) S.C.
23. The Plaintiffs further submitted that they produced a sub-division plan that is the true and original plan forwarded to the City Council Directorate of City Planning by the 2nd Defendant for the City Council's approval as is required under Section 32 of the [Survey Act](#). They aver that instead of using this original plan, the Defendants produced an altered subdivision plan with the Plaintiffs countering that if indeed the land was resurveyed, then the 2nd Defendant ought to have informed all the owners of the sub-plots.



24. That from the evidence of DW2, it was also clear the maps in respect of the land had been amended time and again without the involvement and consultation of the beneficial owners with the most recent amendment of the map being done while this matter pending in court. They stated that their Share Certificates were issued on 29th August 1988 and 30th March 2000 whereas the 1st Defendant share certificate is alleged to have been issued in 2005. They cited the case of Davis Mwashao Jome v Damaris Karanja & another [2021] eKLR on double allocation of land arguing that their ownership is the valid one.
25. The Plaintiffs submitted that there is no explanation as to why plots from number 1322 should consecutively follow each other up to plot 1326 with Plot number 1312 sandwiched in between, and the plots from 1327, consecutively line up to Plot 1334 with the suspect plot 1336 being sandwiched between 1334 and 1335 as per the second plan.
26. That plot number 1334 and 1335 have always been consecutively numbered and there is no plot 1336 as alleged by the 2nd Defendant. The Plaintiffs submitted that despite the Defendants being given enough opportunities to call their resident surveyor to testify he never came to testify. Also, they submit that in a meeting where all parties had been summoned by the Kasarani Area chief, the 2nd Defendant's Director and surveyor acknowledged that indeed there was an encroachment but the Director denied any role in the encroachment.
27. For their part, the defendants submitted that while the Plaintiffs' allege trespass, they have failed to prove the same on a balance of probabilities. In support of this argument, they cited the case of court in Muranga CA 17/2020 (Kihara Kiunjuri Vs Harrison Macharia Waithaka & Others on standard of proof and William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 & Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR on what amounts to balance of probabilities.
28. The Defendants relying to the case of CA 106/2015, Eldoret - Municipal Council of Eldoret Vs Titus Gatitu Njau and M'Mukanya v M'Mbijiwe (1984) KLR 761 on trespass submitted that based on the evidence given, trespass does not arise as each of the parties is occupying their respective plots. The 1st defendant explained that he was informed by brokers that there were plots on sale at the 2nd Defendant's Society and was introduced to Mary Nyakio Muniu, the owner of plot 1336. That he proceeded to the offices of the 2nd Defendant who confirmed the records and ownership of the plot in the presence of the officials. Accompanied by their surveyors, the 2nd Defendant proceeded to the site and pointed out the suit plot 1336 and the beacons to the 2nd Defendant.
29. The 1st Defendant added that on 23/8/2005, they entered into a sale agreement with Mary Nyakio Muniu having checked with the 2nd defendant and verified that the plot and shares were in the names of the seller. That after their purchase, the seller surrendered her certificate which was cancelled, a transfer was drawn to that effect with the transfer now reflected in the 2nd defendant's records.
30. The Defendants submitted that the dispute revolved around the survey maps as produced by the parties. That the defendants produced 2 survey maps; initial map and approved map at page 14 of the Plaintiffs' documents with the approved plans by the Nairobi City Council and Ministry of Lands both having the three plots 1334,1335 and 1336 thus trespass is out of question in the circumstances.
31. The Defendants also submitted that the plaintiffs wanted to lead a theory that the plot numbers were not following each other consecutively which theory has been explained that mix up in numbers was spread all over and identified several instances. Further, as stated by the 2nd Defendant's secretary, the



numbering was the work of the Director of Lands. They stated that there is no other plot No. 1336 elsewhere in the survey map and disowned the survey map at page 15 of the Plaintiffs' documents.

Analysis and Determination:

32. From the evidence adduced and the submissions rendered, this court frames only one issue for determination:
 - a. Whether or not plot number 1336 comprises part of the Plaintiffs plot numbers 1334 and 1335
 - b. Who bears the costs of this suit?
33. There is no dispute between the parties that the original land comprised in title L.R 8469/7/8 was owned by the 2nd Defendant. There is also no dispute that the 2nd Defendant subdivided this whole land into plots and sold the resulting subplots to several people including the Plaintiffs and Mary Nyakeo who later sold her plot to the 1st Defendant. The dispute arises when the Plaintiffs claim that plot 1336 was curved from the two plots (1334 & 1335) This argument is premised that there cannot be a plot between 1334 and 1335 as the two numbers follow each other sequentially.
34. In supporting their case, the Plaintiffs produced copies of receipts and certificates of ownership issued by the 2nd Defendant. PW1 also produced some map at page 15 of the Plaintiffs' bundle which according to them showed that plot 1336 did not exist. I note that the documents adduced by the Plaintiffs did not indicate the sizes of the plots sold nor did the state the sizes of their plot allegedly hived off to create plot 1336 (i.e what size each was hived from 1334 and 1335).
35. The 1st Defendant denied encroaching on the Plaintiffs land, stating that when the Chief summoned the 2nd Defendant, the 2nd Defendant took them to the ground and confirmed the existence of the three plots. That plot number 1335 is developed with a church. Although PW1 admitted that a surveyor from the 2nd Defendant visited the suit premises but denied that there was an agreement during that visit. In explaining the discrepancies in numbering, the 1st Defendant gave other instances on the same document i.e 1292, 1295 and 1301.
36. The evidence of the 1st Defendant was corroborated by Robert Waireri who gave evidence on behalf of the 2nd Defendant. DW2 confirmed that he took the Plaintiffs and the 1st Defendant to the ground and identified each of the plots and was equally present during the site visit ordered by the court. It was the evidence of DW2 that all the plots were of the same size measuring 60 by 40. He denied that the map produced by the Plaintiff at page 15 of the bundle was prepared by the 2nd Defendant. He admitted that the map at page 14 of the Plaintiffs' bundle originated from their office and he added was the map approved by the Nairobi City Council on 13.10.2010.
37. The burden of proof was on the Plaintiffs as dictated by the provisions of section 109 of the [Evidence Act](#) which states thus;
38. Counsel for the Plaintiffs while cross-examining DW2 dwelt more on comparison of the two maps at pages 14 and 15 of the Plaintiffs bundle of documents. First, this court is of the opinion and so hold that the burden which the Plaintiffs ought to have discharged was whether their plot sizes sold to them had reduced been on the ground because of the creation of the impugned plot no.1336. Secondly, the Defendants brought the defence that the numbering sequence did not affect only the Plaintiffs as the dis-joint was also visible for numbers 1292 neighbouring 1295. The Plaintiffs needed to show that indeed there was never a plot 1336.
39. I have perused the map at page 15 which the Plaintiffs wholly relies on and note that the plots falling below the part marked road from one end as you peruse towards plots 1334 & 1335 read plot numbers



1345, 1344, 1343, 1342, 1341, 1340, 1339, 1338, and 1337. The inference drawn from this sequence and taking note of the Plaintiffs plot numbers 1334 and 1335 that there exists a plot 1336. As pointed out by the Defendants that plot 1336 appears only once in their map (produced at page 14) which map the Plaintiffs alleged was altered. For this court to believe the Plaintiff's evidence of alteration, they ought to have identified the location of plot 1336 on their original map

40. In both instances, it is my considered opinion and I so hold that the Plaintiffs failed to discharge this burden and therefore I find no basis to grant the prayers sought in the plaint. Consequently, I dismiss the Plaintiffs case as not proved with costs to the Defendants.

JUDGEMENT DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE, 2024

A. OMOLLO

JUDGE

