



**Igainya Co. Ltd v Mukuse (Environment & Land Case E02 of 2023)
[2024] KEELC 4586 (KLR) (10 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4586 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E02 OF 2023
CA OCHIENG, J
JUNE 10, 2024**

BETWEEN

IGAINYA CO. LTD PLAINTIFF

AND

JOHNSTONE MUKUSE DEFENDANT

JUDGMENT

1. By a Plaint dated the 20th July, 2023, the Plaintiff prays for Judgment against the Defendant for:-
 - a. A mandatory order of eviction of the Defendant and all the trespassers upon LR No. 12610/34, LR No. 12610/35 and demolition of building and/or structures erected on the said lands by the Defendant and his agents.
 - b. A declaration that the Plaintiff company is the absolute proprietor and/or owner of the said parcels of lands more specifically known as LR No. 12610/34 & LR No. 12610/35.
 - c. An injunction to issue to restrain the Tarpapers/Respondents either by himself or their agents, servants or employees or whomsoever is acting on their instructions/belief and from entering, trespassing, subdividing, selling and or in any way alienating or blocking the Plaintiff from freely accessing: LR No. 12610/34 Mavoko & LR No. 12610/35 Mavoko in the Mavoko area of Machakos Municipality.
 - d. An order to issue to direct the Mavoko Sub County Police Commander to provide security to the Applicant company and all its agents/servants to access the lands to replace the destroyed beacons, fence, the parcels of land more specifically known as LR No. 12610/34 & LR No. 12610/35, in the Machakos County and ensure that peace and tranquility prevails during the said process of fencing and replacing boundary beacons and eviction.
 - e. Costs of this cause be provided for.



2. The Defendant though duly served failed to enter appearance nor file a Defence. The matter proceeded for hearing where the Plaintiff called one witness.

Evidence of the Plaintiff

3. PW1 Isabella Nyaguthi confirmed that the Plaintiff is the registered proprietor of LR No. 12610/34 and LR No. 12610/35 which it purchased through a public auction. It was the Plaintiff's contention that the Defendant including his agents had trespassed on the suit lands, constructed temporary structures thereon and declined to vacate, despite being sent for a notice to do so. PW1 explained that whenever they attempted to access the suit lands, the Defendant including his agents turned violent. The Plaintiff hence sought for eviction orders against the Defendant. The Plaintiff produced the following documents as exhibits: Copies of Title Deeds for LR No. 12610/34 & LR No. 12610/35 respectively; Copy of Statutory notices; Copies of Newspaper Adverts of the Statutory Notices; Copy of OB report; Copy of the Affidavit of Service under section 152 E of the Land Act and Company Resolution.

Plaintiff's Submissions

4. The Plaintiff in its submissions reiterated its claim and confirmed being the registered proprietor of land parcel numbers LR No. 12610/34 and 12610/35 respectively, hereinafter referred to as the 'suit lands'. It submitted that it served notices of eviction upon the Defendant in accordance with section 152 E of the Land Act as amended vide Act No. 28 of 2016. It contended that the Defendant had trespassed on the suit lands. Further, that despite being duly served, the Defendant failed to file a Defence to controvert the Plaintiff's averments. To support its averments, it relied on the following decisions: Joseph Kipchirchir Koech v Philip Cheruiyot Sang (2018) eKLR and Salome Naliaka Wabwile v Alfred Okumu Musinaka (2022) eKLR.

Analysis and Determination

5. Upon consideration of the Plaintiff's testimony, exhibits and submissions, the following are the issues for determination:
 - a. Who is the registered proprietor of the suit lands?
 - b. Whether the Defendant has trespassed on the suit lands and should be evicted therefrom.

As to who is the registered proprietor of the suit lands.

6. The Plaintiff claims it is the registered proprietor of the suit lands. PW1 Isabella Nyaguthi in her testimony confirmed that they purchased the suit lands through a public auction. The Plaintiff produced Certificates of title to confirm ownership of the said suit lands. Since the Defendant never filed any Defence to controvert the Plaintiff's averments nor challenge the Certificates of Title presented, I have no reason to doubt them.
7. On validity of title, Section 26(1) of the Land Registration Act provides as follows:-

“The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except - (a) on the ground of fraud or misrepresentation to which the person is proved to



be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

8. While Section 24(a) of the [Land Registration Act](#) stipulates as follows:-

“Subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto...”

9. In the case of [Willy Kipsongok Morogo V Albert K. Morogo](#) (2017) eKLR the Court held as follows:-

“The evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the [Land Registration Act](#).”

10. From the facts before me while relying on the legal provisions cited above, as well as associating myself with the decision quoted, I find that since the Plaintiff had produced Certificates of Title to prove ownership of the suit lands, which titles have not been challenged by the Defendant, it is indeed the absolute proprietor of the said suit lands, hence entitled to all rights and privileges belonging or appurtenant thereto and to protection of the law as envisaged under Sections 24, 25 and 26 of the [Land Registration Act](#).

As to whether the Defendant has trespassed on the suit lands and should be evicted therefrom.

11. PW1 in her testimony stated that the Defendant including his agents had trespassed on the suit lands and put up structures thereon. Further, that efforts to evict him including his agents have proved futile. PW1 testified that they served the Defendant with notices to vacate. Further, that the Defendant and his agents are violent, have commenced subdividing the suit lands and selling to innocent purchasers. It was her further testimony that attempts to ask the Defendant including his agents to move out of the suit lands to enable the Plaintiff Company identify as well as replace destroyed beacons, has been met with violence. Further, he has attempted to lynch the Plaintiff’s directors including agents. The Plaintiff avers that the Defendant and his agents have uprooted the beacons delineating the boundaries.

12. I note the Plaintiff *vide* messrs T W Murage & Co. Advocates issued a Notice of Eviction dated the 11th March, 2022, to all the illegal occupants of the suit lands, which notice was placed in the Daily Nation Newspaper dated the 15th March, 2022. PW1 also testified that on 18th March, 2022, the process server including the Plaintiff’s employee served the Defendant and all trespassers on the suit lands’ with the eviction notices and posted the said notices in several conspicuous places.

13. On service of eviction notices, Section 152E of the [Land Act](#) provides that:-

(1) If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction. (2) The notice under subsection (1) shall - (a) be in writing and in a national and official language; (b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land; (c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and (d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.”



14. See the case of *Jacob Njeru Karuku v Njagi Njuguna* (2022) eKLR.
15. In relying on the legal provisions cited while associating myself with the quoted decision and applying them to the circumstances at hand, I find that the Defendant including his agents were validly served with eviction notices.
16. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, *Clerk & Lindsell on Torts*, 18th Edition, page 923, paragraph, 18-01. Section 3 of the *Trespass Act* provides that:-

“(1)Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.(2)Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”
17. In the case of *Eliud Njoroge Gachiri v. Stephen Kamau Ng'ang'a* (2018) eKLR, it was held that:-

“However in a case of continuing trespass, a trespass consists of a series acts done on consecutive days that are of the same nature and that are renewed or continued from day to day so that the acts are aggregate form one indivisible harm.”
18. From the evidence before court which was uncontroverted, it emerged that the Defendant including his agents had trespassed on the suit lands, erected structures thereon, and commenced subdividing and selling to innocent third parties. The Plaintiff presented various notices it had served upon the Defendant and his agents but they failed to allow Plaintiff take quiet possession of its land.
19. The Plaintiff claims the Defendant has constructed structures on the suit lands. Since the Defendant failed to controvert the Plaintiff's averments, I find that he is indeed a trespasser on the suit lands. Further, since he has been served with ample notice, I opine that he should hence be evicted therefrom. Further, in line with the principles established in the decision of *Giella v Cassman Brown & Company Limited* (1973) EA 358, I find that the Defendant including his agents should be permanently restrained from their acts of trespass.

Who should bear the costs of the suit
20. Since the Plaintiff has been inconvenienced with the Defendant's actions and occupation of the suit lands, I find that it is entitled to costs.
21. It is against the foregoing that I find that the Plaintiff has proved its case on a balance of probability and will proceed to enter judgement in its favour and make the following final orders:-
 - a. A declaration be and is hereby issued that the Plaintiff company is the absolute proprietor and/or owner of LR Nos. 12610/34 & LR No. 12610/35.
 - b. A mandatory order of eviction be and is hereby issued directed at the Defendant and all the trespassers upon LR No. 12610/34 including LR No. 12610/35 and demolition of building and/or structures erected on the said lands by the Defendant and his agents.
 - c. An injunction be and is hereby issued restraining the Defendant either by himself or his agents, servants or employees or whomsoever is acting on his instructions/belief and from entering, trespassing, subdividing, selling and or in any way alienating or blocking the Plaintiff



from freely accessing: LR No. 12610/34 Mavoko & LR No. 12610/35 in the Mavoko area of Machakos Municipality.

- d. An order be and is hereby issued directed to the Mavoko Sub County Police Commander to provide security to the Plaintiff company and all its agents/servants to access the lands to replace the destroyed beacons, fence, the parcels of land being LR No. 12610/34 & LR No. 12610/35, and ensure that peace and tranquility prevails during the said process of fencing and replacing boundary beacons and eviction.
- e. Costs of the suit is awarded to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 10TH DAY OF JUNE, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Mariaria holding brief for Murage for Plaintiff

No appearance for Respondent

Court Assistant – Simon

