



Mukula & another (Suing as the personal legal representative of the Estate of Ndambuki Kalei) v Mutiva & 3 others (Environment & Land Case 82 of 2017) [2024] KEELC 5698 (KLR) (24 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5698 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 82 OF 2017**

**A NYUKURI, J
JULY 24, 2024**

BETWEEN

**MARY SYOKAU MUKULA 1ST PLAINTIFF
LUCY MUENI MULELA 2ND PLAINTIFF
SUING AS THE PERSONAL LEGAL REPRESENTATIVE OF THE ESTATE OF
NDAMBUKI KALEI**

AND

**MUTEI MUTIVA 1ST DEFENDANT
MUTUA MUTIVA 2ND DEFENDANT
MUSYOKI KILONZO 3RD DEFENDANT
KILOTA KATUNGA 4TH DEFENDANT**

JUDGMENT

1. By a plaint dated 1st March 2017 and amended on 21st October 2022, the plaintiffs in this case sued the defendants seeking the following orders;
 - a. Orders of permanent and mandatory injunction to respectively restrain the defendants whether, by themselves, their servants and/or agents or others whomsoever, from continuing with the acts of trespass complained of or in any manner howsoever from interfering with the family of the late Ndambuki Kalei's peaceful occupation of his parcel Number Mitaboni/Mbee/78 and to compel the defendants to remove any structures and/or crops from the plaintiff's land.



- b. An order that the defendants demolish and remove the illegal structures on title Number Mitaboni/Mbee/78 at their own cost and in default, the plaintiffs be at liberty to remove the illegal structures on the suit property at the defendants' cost.
 - c. An order of possession and eviction of the defendants from the family of the late Ndambuki Kalei's parcel Title Number Mitaboni/Mbee/78.
 - d. General damages for trespass into the family of the late Ndambuki Kalei's parcel title Number Mitaboni/Mbee/78.
 - e. Cost of this suit and/with interests thereof of (b), (c) at the court rates from the date of judgment until payment in full.
2. The plaintiffs stated that the late Ndambuki Kalei is the registered proprietor of the parcel of land known as Mitamboni/Mbee/78. That this property was previously owned by the father of the late Ndambuki Kalei who had had two wives and that the suit property was part of a larger plot number 78 which belonged to the polygamous father of the late Ndambuki Kalei, which property had been subject of litigation while still under the adjudication process.
 3. They stated that in objection No. 176, the Land Disputes Tribunal ordered that Plot No. 78 to be subdivided into two portions which was done resulting in the family of the late Ndambuki Kalei getting Plot No. 78 while the defendants were given Plot No. 3280. They maintained that this decision was upheld by the Minister in respect of Appeal Case No. 135 of 2005. That the registration of the late Ndambuki as proprietor of the suit property was based on the Minister's decision hence he became the first registered proprietor thereof.
 4. They complained that since 2011, the defendants have unlawfully been trespassing and occupying the suit property without the owner's consent.
 5. Despite service, the defendants did not enter appearance or file defence.
 6. This suit proceeded to hearing by way of viva voce evidence. The 1st plaintiff testified in support of their case.

Plaintiffs' evidence

7. PW1 was Mary Syokau Mukula, the daughter of Ndambuki Kalei. She adopted her witness statement dated 14th February 2023 as her evidence in chief. It was her testimony that she was one of the administrators of the estate of the late Ndambuki Kalei and had authority to plead on behalf of Lucy Mueni Mulela, her co-administrator.
8. It was her testimony that the deceased was her father and that she knows the defendants since they come from the same family. She stated that her late father was the registered proprietor of the suit property measuring 1.95 hectares and that before he got this title, it was part of a larger Plot No. 78 which belonged to her grandfather Kalei Munyao. Further that her grandfather had two wives, Ndumba and Kavenge. She claimed that after the death of her grandfather, the deceased lodged an objection No. 176 for Plot 78 before the Land Disputes Tribunal Mbee Adjudication Section so that Plot No. 78 could be subdivided between two houses (wives) of her grandfather, in accordance with Kamba Customary Law.
9. She stated that the respondents in objection were Kilonzo Kalei, Simon Katunga Kalei, Mutiva Kalei and Muthoka Kalei, who are parents and husband to one of the defendants. She averred that in the decision of the Tribunal, Plot No. 78 was subdivided into two portions. That the portion of Kavenge



(her grandmother) was to be recorded in her father's name since her uncle and brother of her father Muthoka Kalei died without a family. That therefore, her father retained the original number Plot No. 78. That on the other hand, the portion for Ndumba (the 2nd wife) was to be recorded in the name of Kilonzo Kalei Nduti, Simon Katunga Kalei, and Mutiva Kalei and was given a new number being Plot No. 3280.

10. It was her evidence that the respondents were dissatisfied with the decision aforesaid and appealed to the Minister *vide Appeal Case No. 135 of 2005* and that the Minister upheld the aforesaid decision, whereof her late father became the first registered proprietor of the suit property on the strength of the Minister's decision.
11. She stated that the defendants continue to occupy the suit property and have refused to give the plaintiffs vacant possession thereof. She argued that the defendants' actions amount to trespass, and that she has suffered great loss and damage as a result.
12. She produced a title deed for the suit property; objection proceedings and decision for Objection No. 176 dated 23rd April 2004; part of the proceedings in Appeal Case No. 135 of 2005 dated 27th October 2011; letters dated 15th May 2013 and 26th July 2013 from F. Mulwa & Co. Adorates; letter dated 15th July 2013 from Andrew Makundi & Co. Advocates; Limited Grant letters of administration ad litem and certificate of death. That marked the close of the plaintiffs' case.
13. The plaintiffs' counsel filed written submissions dated 6th December 2023 in support of the plaintiffs' case.

Plaintiffs' submissions

14. Counsel for the plaintiffs submitted that the plaintiffs had proved their case on a balance of probability, citing Section 107 of the *Evidence Act*. Reliance was placed on Section 26 of the *Land Registration Act* and counsel submitted that the plaintiffs had demonstrated that the late Ndambuki Kalei is the legal owner of the suit property.
15. It was further submitted for the plaintiff that Section 24 of the *Land Registration Act* vests absolute ownership of property in the registered proprietor. The court was also referred to the case of Paul Ngashema Kamau v. Halima Said [2020] eKLR, for the proposition that where there is evidence that the suit property is registered in the name of a claimant, that entitles them to protection under Sections 24, 25 and 26 of the *Land Registration Act*. On costs, reliance was placed on Section 27 of the *Civil Procedure Act* for the proposition that costs follow the event and therefore the defendants should pay costs.

Analysis and determination

16. The court has carefully considered the pleadings, evidence and submissions. Two issues arise for the court's determination namely;
 - a. Whether the plaintiff is the lawful owner of the suit property.
 - b. Whether the plaintiff is entitled to the orders sought.
17. Section 26 of the *Land Registration Act* provides for the conclusiveness of the title as follows;
 1. 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.
2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

18. Therefore, a registered proprietor's rights are protected in law, unless the title was obtained by fraud, misrepresentation, illegality, want of procedure or corruption. In the case of *Elijah Makeri Nyang'ra v. Stephen Mungai Njuguna & Another* [2013] eKLR, the court as follows;

The law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate has been acquired through a corrupt scheme.

19. In this case, the plaintiffs have demonstrated by production of title that the suit property is registered in the name of the late Ndambuki Kalei. The defendants did not file defence to challenge the said registration and therefore, I find and hold that the plaintiffs' certificate of title is evidence of absolute and indefeasible ownership thereof by the deceased.
20. Sections 24 and 25 of the *Land Registration Act* provides legal protection to rights vested in a registered proprietor. A registered proprietor is entitled to quiet possession of property registered in their name to the exclusion of everyone else.
21. Trespass is an unlawful entry on another's land. The plaintiff testified that the defendants have been in unlawful occupation of the suit property by being on the said land without the consent or authority of the registered proprietor or his estate since the year 2011. The same was not controverted by the defendants. As the deceased is the registered proprietor of the suit property, and the defendants having no consent from the deceased's estate to be on the suit property, their occupation is therefore unlawful and amounts to trespass.
22. Therefore the plaintiffs are entitled to orders sought of permanent injunction to restrain the defendants from interfering with the suit property and orders for removal of their structures on the suit property and eviction orders against the defendants. The plaintiffs also sought for damages for trespass. It is trite that trespass is actionable per se without proof of actual loss.
23. In this case, the plaintiffs stated that the defendants have occupied the suit property. They did not specify if the occupation is on the entire parcel of land or on part thereof. Considering that the trespass has substituted since 2011 which is now 13 years but the plaintiffs have been slow in prosecuting this undefended suit, I make an award of Kshs. 600,000/= for damages for trespass.
24. In the premises, I find and hold that the plaintiffs have proved their claim on the required standard and I enter judgment for them against the defendants in the following terms;
- a. An order of permanent injunction be and is hereby issued restraining the defendants by themselves, their servants and or agents or others whomsoever from continuing with acts of trespass or in any manner howsoever from interfering with the family of the late Ndambuki Kalei's peaceful occupation of the parcel of land known as Mitaboni/Mbee/78.



- b. I order the defendants to demolish their structures on parcel Mitaboni/Mbee/78 and vacate the same within 90 days of service of this judgment on them, and in default, eviction orders to issue against them.
- c. General damages for trespass are awarded to the plaintiffs in the sum of Kshs. 600,000/=.
- d. The costs of the suit shall be borne by the defendants.

25. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24TH DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

A. NYUKURI

JUDGE

In the presence of;

Mr. Langalanga for plaintiffs

No appearance for defendants

Court assistant – Josephine

