



**Mushin v Ketuta (Environment & Land Case E008 of 2023)
[2024] KEELC 6291 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6291 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E008 OF 2023
LC KOMINGOI, J
SEPTEMBER 26, 2024**

BETWEEN

ABDUL BASIT SALEH MUSHIN PLAINTIFF

AND

GODFREY KETUTA DEFENDANT

JUDGMENT

1. By the Complaint dated 1st February 2023, the Plaintiff claims that he is the registered owner of property LR 28392 Kaputiei (IR No. 123889) measuring approximately 3.78 hectares. On 31st January 2023 the Defendant in company of others trespassed on it and hindered the plaintiff and his agents from peaceful use of the land and threatened to evict him from the property. He thus seeks:
 - a. A declaration that he is the absolute owner of parcel LR No. 28392 Kaputiei (IR No. 123889) measuring approximately 3.78 hectares.
 - b. A permanent injunction restraining the Defendant by himself or his authorised agents or servants from entering, dealing and or trespassing into land parcel LR No. 28392 Kaputiei (IR No. 123889) measuring approximately 3.78 hectares.
 - c. Costs of the suit.
2. Despite being served with Pleadings and Summons to enter appearance, the Defendant neither entered appearance nor filed a defence.

Evidence of the Plaintiff

3. PW1, Abdul Basit Saleh Mushin adopted his witness statement as part of his evidence in chief and produced documents marked as P. Exhibit 1-5. This marked the close of the Plaintiff's case.
4. At the close of the oral testimony, the plaintiff tendered final written submissions.



The Plaintiff's Submissions

5. On whether the Plaintiff was the legal owner of the suit property, counsel submitted that the Plaintiff had adduced evidence of ownership of the suit property including a copy of the certificate of title, allotment letter, application for registration and development approval among others. Therefore, he had acquired the property procedurally and was thus the indefeasible owner citing *Samwel Ambasa & 3 others vs Stella Ingasia* [2022] eKLR and *Dr. Joseph Arap Ngok vs Justice Moiwo Ole Keiwua & 5 others*. Counsel went on to submit that no person should be deprived of his property arbitrarily as espoused under Article 40 of *the Constitution*. As such, the Plaintiff was entitled to the injunctive orders sought together with costs of the suit.

Analysis and Determination

6. I have considered the pleadings, the evidence on record, the plaintiff's submissions and the authorities cited. The issues for determination are:
 - i. Whether the Plaintiff is the legal owner of parcel LR No. 28392 Kaputiei (IR No. 123889);
 - ii. Whether the Plaintiff is entitled to the reliefs sought;
 - iii. Who should bear costs of the suit?
7. The Plaintiff claims that he was allocated the suit property by the Government in the year 2010. He made the requisite payments and was thereafter issued a grant. To support this position, the Plaintiff produced a letter of allotment dated 30th March 2010, letter of acceptance from the Plaintiff, application for registration and copy of the Grant registration dated 1st July 2010 among others. He took possession and had been enjoying the land peacefully. In 2022 he sought approvals to subdivide the land and the same was granted. It is worth noting that the said approvals were not produced as evidence. In 2023 when he visited the property in the company of his surveyor and other employees, the Defendant mobilised a group of people who threatened to harm them should they attempt to subdivide the land necessitating the institution of this suit.
8. It is well established that he who alleges must prove as espoused under Sections 107, 108 and 109 of the *Evidence Act*. Section 107 (1): Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
9. It is also established under Section 26 of the *Land Registration Act* that The certificate of title issued by the Registrar upon registration, ... 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.
10. In this case, the Defendant neither entered appearance nor filed a defence to show that the Plaintiff's title was acquired illegally. I take cognisance that the Defendant was served the pleadings and hearing notice via the WhatsApp messaging medium as sworn in the Affidavit of Service. A photograph of the said message was annexed as evidence. In the said message, the Defendant responded and indicated that the land did not belong to him. The message reads: "This land does not belong me. Do your due diligence well. Sermon the owner."



11. Therefore, the Defendant having confirmed that suit property does not belong to him, he then has no reason to tamper or interfere with it or deny the registered owner peaceful enjoyment.
12. In light of the foregoing, I hereby issue a permanent injunction against the Defendant by himself, his agents and/or his servants from entering, dealing or trespassing on parcel LR No. 28392.
13. The Plaintiff shall have costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 26TH DAY OF SEPTEMBER 2024.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Mr. Muia for the Plaintiff.

N/A for the Defendant.

Court Assistant – Mutisya.

