



REPUBLIC OF KENYA



**Ndumbuthi v Mainga (Environment & Land Case E009 of 2020)
[2024] KEELC 6136 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6136 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E009 OF 2020
TW MURIGI, J
SEPTEMBER 18, 2024**

BETWEEN

HARRISON MUTUA NDUMBUTHI PLAINTIFF

AND

KITHUKA MAINGA DEFENDANT

JUDGMENT

1. By an amended Plaintiff filed on 25th February 2022 the Plaintiff prays for judgment against the Defendant for:-
 - a. An order of eviction from all that parcel of land known as Nzai/Mumbuni/221 do issue against the Defendant, his agents, servants, family members and/or any other person claiming through and/or under him and the same be done by court bailiff or licensed auctioneer with the O.C.S and/or Ward Commander Makueni Police Station or any other officer in charge of a police station within whose jurisdiction the land is situate do provide security during the eviction.
 - b. A declaration that all that parcel of land Known as Nzai/Mumbuni/221 belongs to the Plaintiff.
 - c. A mandatory injunction order do issue compelling the Defendant whether by himself, his agents, servants, family members and/or other persons claiming under him from in any way at all entering into, trespassing, occupying, fencing, building or in any way at all engaging in any acts of possession, usage and wastage of all that parcel of land known as Nzai/Mumbuni/221.
 - d. Costs of the suit
 - e. Any other relief as the court may deem fit and just to grant.
2. The Defendant filed a statement of Defence dated 17th June 2021 denying the Plaintiff's claim.



3. The Defendant did not attend court for the hearing of this matter though he had been duly served with a hearing notice. The matter proceeded for hearing on 31/05/2023.

The Plaintiff's Case

4. The Plaintiff Harrison Mutua Ndumbuthi testified as the sole witness in support of his case. He adopted his witness statement dated 10th February 2022 as his evidence in chief. He also produced the list of documents filed on 15/02/2022 in support of his case.
5. The Plaintiff testified that he is the registered proprietor of land parcel No. Nzai/Mumbuni/221 while the Defendant is the registered proprietor of land parcel No. Nzai/Mumbuni/222. That arising from a boundary dispute between the two parcels of land, the District Survey personnel conducted a site visit on 6th August 2013 and redrew the boundary in the presence of both parties.
6. He further testified that upon identifying the boundary between the two parcels of land, he realized that the Defendant had unlawfully trespassed into his land, cleared the vegetation and put up structures thereon. He urged the court to grant the orders as sought in the Plaintiff.

The Plaintiff's Submissions

7. The Plaintiff filed his submissions on 3rd July 2023.
8. On his behalf, Counsel identified the following issues for the court's determination:-
 - a. Whether the Plaintiff is the registered owner of land parcel No. Nzai/Mumbuni/221?
 - b. Whether the Defendant ought to be evicted from land parcel No. Nzai/Mumbuni/221?
 - c. Whether a mandatory injunction order do issue to the Defendant to restrain him from engaging in any act of possession, usage and wastage of land parcel known as Nzai/Mumbuni/221?
9. On the first issue, Counsel submitted that the Plaintiff had adduced overwhelming evidence to demonstrate that he is the registered proprietor of the suit property. Counsel further submitted that the Plaintiff's title for the suit property has not been challenged in any way.
10. To buttress this point, Counsel relied on the provisions of Section 26 of the *Land Registration Act* and on the case of *Vijay Morjaria v Nansingh Madhusing Darbar & Another (2000)* eKLR where the court held that:-

“It is well established that fraud must be specifically pleaded and that all particulars of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must, of course, be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from facts”.

11. Counsel further relied on the case of *Kinyajui Kamau v George Kamau (2015)* eKLR where the court stated as follows:-

“.....Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases.....”



12. With regards to the second issue, Counsel submitted that the Defendant should be evicted from the suit property so as to safeguard the Plaintiff's right to property enshrined under Article 40 of *the Constitution*. To buttress this point, Counsel relied on the case of *Atik Omar Atik & 3 Others v Joseph Katana & Another* (2019) eKLR where the court set out the procedure to be followed in eviction of persons unlawfully occupying public, community and private land as follows:-

“In this regard, the first step in eviction is for the lawful owner to serve a notice of eviction in accordance with the law. The essence of serving an adequate and reasonable eviction notice lies in the need to give the persons affected an opportunity to seek relief in court. Under Section 152E of the *Land Act*, any person or persons served with such notice may apply to court for relief against the notice.”

13. Concluding his submissions, Counsel urged the court to grant a mandatory injunction as the Plaintiff had proved his case against the Defendant on a balance of probabilities as required by the law.

14. Counsel relied on the case of *Kenya Breweries Limited & Another v Washington O. Okeyo* (2002) eKLR and on the case of *Nation Media Group and 2 others v John Harun Mwau* (2014) eKLR where the Court of Appeal held as follows:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can easily be remedied, or if the Defendant attempted to steal a march on the Plaintiff a mandatory injunction will be granted on an interlocutory application”.

15. Finally, Counsel urged the court to grant the orders as sought in the Plaintiff.

Analysis and Determination

16. Having considered the pleadings, the evidence on record and the submissions by the Plaintiff, the only issue that arises for determination is whether the Plaintiff is entitled to the orders sought.

17. Although the Defendant did not attend court for the hearing of this matter, the Plaintiff has a duty to formally prove his case on a balance of probabilities as is required by the law.

18. In the case of *Kirugi and Another Vs Kabiya & 3 others* (1987) KLR 347 the Court of Appeal held that:-

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”

19. Similarly, in the case of *Gichinga Kibutha Vs Caroline Nduku* (2018) eKLR the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

20. The Plaintiff is seeking for a declaration that the suit property belongs to him. It was his testimony that he is the registered proprietor of the suit property. He produced a copy of the certificate of official search



dated 18th August 2020 (PEX1) to demonstrate that he is the registered proprietor of the suit property. The certificate of official search shows that the Plaintiff was issued with a title deed on 8/12/2014. He also produced a title deed for the suit property issued on 8/12/2014. Based on the evidence presented, I am satisfied that the Plaintiff is the registered proprietor of the suit property.

21. Section 24(a) of the *Land Registration Act* provides for the interest conferred by registration. It provides as follows:

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

22. Section 25 of the *Land Registration Act* provides for the rights of a proprietor. It provides that:-

a. “The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided by this Act and shall be held by the proprietor together with all the privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject...

23. 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 shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible owner 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.”

24. These provisions vest on the registered owner of land with rights and privileges and provides for instances when the rights can be taken away.

25. No evidence was adduced to show that the Plaintiff obtained the title through fraud or misrepresentation, illegally, unprocedurally or through a corrupt scheme. This court finds and holds that the suit property belongs to the Plaintiff herein.

26. The Plaintiff also seeks an order of eviction against the Defendant from land parcel No. Nzai/ Mumbuni/221. He informed the court that the Defendant had unlawfully trespassed into his land, cleared the vegetation and put up structures thereon.

27. Black’s Law Dictionary 10th Edition defines trespass to land as follows:

“A person’s unlawful entry on another’s land that is visibly enclosed.”

28. The Court of Appeal in the case of M’Mukanya Vs M’Mbijiwe (1984) KLR 761 set out the ingredients of the tort of trespass as follows:

“Trespass is the violation of the right to possession and a Plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership.”



29. To prove trespass, the Plaintiff relied on the particulars of unlawful trespass set out in paragraph 8A of the amended Plaint as follows:-
- a. Forcefully retaining the Plaintiff's land without authority
 - b. Remaining on the Plaintiff's land.
 - c. Clearing vegetation on the Plaintiff's land.
 - d. Constructing structures on the Plaintiff's land.
 - e. Trespassing on the Plaintiff's land.
30. The Plaintiff produced the Land Registrar's Report dated 21/09/2021 (PEX1) which states as follows in part:-
- “we noted that the issue on the ground is not that of a boundary dispute between parcels 221 and 222 but a claim on parcel 221. The boundary between the two parcels is known. From our records, a report on the boundary was prepared in 2013(the report is annexed)..... Two families are living on parcel No. 221 and they have adverse claim with regard to parcel No. 221. The issue for determination therefore is not the boundary dispute as between 221 and 222 but rather land ownership claim as between Harrison Mutua Ndumbuthi and the family of Musomba Kikwau”
31. It is clear from the Land Registrar's report that the boundary between the parcel No. 221 and 222 was known. The Plaintiff produced the District Surveyor's report dated 4/10/2013 (PEX4) together with the Surveyor's sketch maps (PEX5) to prove trespass.
32. The Defendant did not attend the hearing hence the Plaintiff's evidence is uncontroverted save for a defence which was not prosecuted. The Plaintiff has demonstrated to the satisfaction of this court that he is the registered proprietor of the suit property. In the circumstances, I find that the Plaintiff is entitled to an order of eviction as prayed.
33. The Plaintiff also sought for a mandatory injunction to restrain the Defendant his agents, servants or employees from encroaching, trespassing, or interfering with the suit property. The circumstances under which a court can grant a mandatory injunction was stated by the Court of Appeal in the case of Kenya Breweries Lt v Wahshinton Okeyo (2002 EA 109 as follows:-
- “A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can easily be remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application.”
34. The law is very clear on the position of a holder of a title in respect of the land.
35. No evidence was adduced to show that the Plaintiff's title has been revoked or challenged in any way.
36. Having found that the Plaintiff is the registered proprietor of the suit property, I find that he is entitled to a mandatory injunction to restrain the Defendant from trespassing, occupying, fencing, building or in any way engaging in any acts of possession, usage and wastage of the Plaintiff's land.



37. In the end, I find that the Plaintiff has proved his case against the Defendant on a balance of probabilities as required.

38. I therefore enter judgment for the Plaintiff against the Defendant in the following terms:-

- a. An order of eviction be and is hereby issued against the Defendant, his agents, servants, family members and/or any other person claiming through and/or under him and the same be done by court bailiff or licensed auctioneer with the O.C.S and/or Ward Commander Makueni Police Station or any other officer in charge of a police station within whose jurisdiction the land is situate do provide security during the eviction.
- b. A declaration be and is hereby issued that all that parcel of land Known as Nzai/ Mumbuni/221 belongs to the Plaintiff.
- c. An order of mandatory injunction be and is hereby issued compelling the Defendant whether by himself, his agents, servants, family members and/or other persons claiming under him from in any way at all entering into, trespassing, occupying, fencing, building or in any way at all engaging in any acts of possession, usage and wastage of all that parcel of land known as Nzai/Mumbuni/221.
- d. The Plaintiff is awarded costs of the suit.

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HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 18TH DAY OF SEPTEMBER, 2024.

In the presence of:

Ms. Nyabasi for the Plaintiff

Court assistant Stephen

