



REPUBLIC OF KENYA



**Musaki & 3 others v Omar (Environment & Land Case E055 of 2022)
[2024] KEELC 7182 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7182 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E055 OF 2022
A NYUKURI, J
OCTOBER 30, 2024**

BETWEEN

**HENRY NGALYUKA MUSAKI 1ST PLAINTIFF
GEORGINA APONDI ODUORI 2ND PLAINTIFF
RUTH WACEKE WANG'OMBE 3RD PLAINTIFF
MARGARET WANGARI MUTUA (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF THE LATE TIMOTHY MUTUA MONI) 4TH PLAINTIFF
AND
HASSAN ADAN OMAR DEFENDANT**

JUDGMENT

Introduction

1. Vide a plaint dated 7th July 2015, the plaintiffs sued the defendant seeking the following orders;
 - a. A declaration that the plaintiffs are the beneficial and lawful owners of un-surveyed residential Plot No. 286 situated at Athi River Mulinge Scheme.
 - b. An eviction order to issue against the defendant herein and/or his licensees, servants, agents and/or employees and to forthwith remove all structures he has erected on the suit property.
 - c. A permanent injunction restraining the defendant by himself, his servants, legal representatives, agents or howsoever from trespassing, encroaching, constructing, further constructing or in any other manner interfering with or wasting the plaintiffs' property being unsurveyed residential Plot No. 286 situated at Athi River, Mulinge scheme.
 - d. Damages for trespass and waste.



- e. Costs and interest.
2. The plaintiffs averred that they were owners of all that piece of land known as un-surveyed residential Plot No. 286 situated at Mulinge Scheme in Athi River (suit property), having purchased it on 23rd November 2011 at a consideration of Kshs. 2,400,000/- from Immaculate Mueni Ngonzo and George Manga David Nziu, the original allottees. They stated that the original allottees were allocated the land by the Commissioner of Lands on 2nd March 1995 and accepted the allocation offer vide their acceptance letter dated 7th July 1995 and also paid the sum of Kshs. 22,887/- vide cheque Number 24000 dated 17th July 1995.
3. They stated that in July 2022, they learnt that the defendant had trespassed on the suit property, and was putting up a wall thereon, prompting them to report the matter to the authorities. They also alleged that there exists a suit being Machakos ELC No. 77 of 2017 over the same suit property between the plaintiffs and Movies For You Limited, which is pending before the court. They averred that in complete disregard of the doctrine of lis pendens, the defendant herein had purported to enter the suit property and erect a fence thereon, despite the fact that he was aware of the above suit. Further that the defendant is a trespasser and has not demonstrated his title documents to the suit property and failed to vacate the same.
4. Despite service, the defendant did not enter appearance or file defence and therefore the matter proceeded for hearing ex parte.
5. The matter was heard by way of viva voce evidence. The plaintiffs presented one witness.

Plaintiffs' evidence

6. PW1 was Henry Ngalyuka Musaki, the 1st plaintiff in this matter. He adopted his witness statement dated 28th July 2022 as his evidence in chief. His testimony was that on 23rd November 2011, the plaintiffs entered into an agreement for sale of the suit property with Dr. Immaculate Mueni Ngonzo and George Manga David Nziu (the vendors) at a consideration of Kshs. 2,400,000/-, which they paid in full. He further averred that the sale of the suit property was by way of assignment by the vendors, comprised in a letter of allotment dated 2nd March 1995 issued by the Commissioner of Lands, which was accepted by the vendors on 7th July 1995.
7. He added that the vendors provided them with the following documents as evidence of ownership including;
 - a. Letter of allotment dated 2nd July 1995.
 - b. Letter of acceptance dated 7th July 1995.
 - c. Bankers cheque No. 239406 for Kshs. 22,887/- dated 10th July 1995.
 - d. Receipt No. 240000 for Kshs. 22,887/- issued by the Commissioner of Lands in settlement of stand premium conveyancing fees, stamp duty and other charges set out in the letter of allotment.
8. The witness further stated that sometime in July 2022, the plaintiffs received information that the defendant had trespassed on the suit property and was putting up a wall prompting them to report the matter to the authorities. He stated that there is a suit being Machakos ELC Case No. 77 of 2017 between the plaintiffs herein and Movies For You, which is still pending. Further that the defendant has refused to vacate the suit property despite demands from the plaintiffs.



9. He produced the following documents in support of the plaintiffs' case;
 - a. Agreement for sale dated 23rd November 2007
 - b. Banker's cheque for payment of Kshs. 2,400,000/-
 - c. Letter of allotment dated 2nd March 1995
 - d. Letter of acceptance dated 7th July 1995
 - e. Cheque no.239406 dated 10th July 1995 for Kshs. 22,887/-
 - f. Receipt No.240000 00 dated 17th July 1995 for the sum of Kshs. 22,887/-
 - g. Photographs of a fence on the suit property
 - h. A copy of OB Report No. 29/15/7/2022
 - i. Copies of pleadings in Machakos ELC Case No. 77 of 2017 between the plaintiffs and Movies For You.
10. That marked the close of the plaintiffs' case. The defendant did not attend court or present any evidence. The plaintiffs filed their submissions dated 6th June 2024, in support of their case.

Plaintiffs' submissions

11. The plaintiffs' counsel submitted that the plaintiffs had proved ownership of the suit property and that the defendant failed to provide evidence in support of their occupation of the suit property.
12. On trespass, counsel relied on Section 3 of the *Trespass Act* and Articles 42, 60 and 68 of *the Constitution* of Kenya and submitted that the defendant had not demonstrated ownership and could not undertake development of the suit property without complying with the Environment Management and Coordination Act of 1999. Further, counsel placed reliance on the case of Philip Ayaya Aluchio v Crispinus Ngayo [2014] eKLR and contended that the plaintiffs were entitled to damages for trespass which is the cost of restoration before and after trespass. The court was also referred to the case of Duncan Ndegwa v Kenya Pipeline HCC No. 2577 of 1990 to buttress the plaintiffs' arguments. Counsel proposed payment of Kshs. 2,000,000/- as damages for trespass.

Analysis and determination

13. The court has carefully considered the pleadings, evidence and submissions presented by the plaintiffs. Three issues arise for this court's determination, namely;
 - a. Whether the plaintiffs have proved ownership of the suit property;
 - b. Whether the defendant trespassed on the suit property, and;
 - c. Whether the plaintiffs are entitled to the orders sought.
14. Section 107 of the *Evidence Act* places the burden of proof in a suit on the plaintiff, whether or not the suit is defended. Article 40 (6) of *the Constitution* of Kenya provides legal protection only to property that is lawfully acquired. In this case, PW1 narrated how the plaintiffs acquired the suit property by purchase from Dr. Immaculate Mueni Ngonzo and George Manga David Nziu. He also stated that the vendors had earlier been allocated the suit property by the Commissioner of Land vide a letter of allotment dated 2nd July 1995 which they accepted vide their letter dated 7th July 1995 and complied



with the terms thereof by paying the stand premium and other charges vide their Bankers cheque dated 10th July 1995 for the sum of Kshs. 22,887/-.

15. The court has considered the plaintiffs' evidence. It clearly demonstrates that Dr. Immaculate Mueni Ngonzo and George Manga David Nziu were lawfully allocated the suit property, which they accepted and complied with the terms of the allotment. The plaintiffs having demonstrated lawful acquisition by purchase, and there being no challenge from the defendant regarding the legality of the plaintiffs' acquisition of the suit property, I am convinced that the plaintiffs lawfully acquired the suit property and I find and hold that they are the lawful owners thereof.
16. The Black's Law Dictionary 11th Edition defines "Trespass" as wrongful entry on another's real property. Therefore, trespass occurs when a person enters another person's land without the owner's authority or consent.
17. Section 3 of the *Trespass Act* defines trespass as follows;
 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.
18. In the instant matter, the plaintiffs have demonstrated lawful ownership of the suit property, and the fact that the defendant has entered thereon without the plaintiffs' consent or authority. Since the defendant has not filed any pleading and or given any evidence demonstrating lawful justification for their entry on the suit property, I find and hold that the defendant's entry on the suit property amounts to trespass.
19. Although the plaintiffs' counsel submitted that the plaintiffs were entitled to damages for trespass to be calculated on the value before and after trespass, no valuations in that regard were availed to the court. However, it is trite that trespass is actionable per se, without proof of actual loss. In this matter, PW1 testified that the defendant entered the suit property in July 2022. It is now two years, since the trespass occurred. Considering the value of the land, the acreage thereof and the duration of the trespass, my view is that a sum of Kshs. 400,000/- shall be reasonable compensation.
20. The upshot is that I find and hold that the plaintiffs have proved their case on the required standard against the defendant and I enter judgment for them as follows;
 - a. A declaration be and is hereby made that the plaintiffs are the beneficial and lawful owners of un-surveyed residential Plot No. 286 situated at Athi River Mulinge Scheme.
 - b. The defendant is ordered to vacate the suit property and to forthwith remove all structures he has erected thereon in 90 days of this judgment and in default eviction orders to issue against the defendant herein and/or his licensees, servants, agents and/or employees.
 - c. A permanent injunction be and is hereby granted restraining the defendant by himself, his servants, legal representatives, agents or howsoever from trespassing, encroaching, constructing, further constructing or in any other manner interfering with or wasting the plaintiffs' property being unsurveyed residential Plot No. 286 situated at Athi River, Mulinge scheme.
 - d. Damages for trespass in the sum of Kshs. 400,000/- is awarded to the plaintiffs. Interest thereon to run at court rates from the date of this judgment till payment in full.



e. The costs of the suit shall be borne by the defendant.

21. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 30th DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

No appearance for the plaintiffs

No appearance for the defendant

Court assistant – Josephine

