



Sammy (Suing as personal representative to the Estate of Sammy Maitha Muoki alias Sammy Maithya) v Kioko (Environment & Land Case 220 of 2015) [2024] KEELC 7037 (KLR) (23 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7037 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 220 OF 2015
A NYUKURI, J
OCTOBER 23, 2024**

BETWEEN

SYOMBUA SAMMY (SUING AS PERSONAL REPRESENTATIVE TO THE ESTATE OF SAMMY MAITHA MUOKI ALIAS SAMMY MAITHYA) PLAINTIFF

AND

NANCY KAVINYA KIOKO DEFENDANT

JUDGMENT

1. By a plaint dated 29th September 2015, the plaintiff sought the following orders against the defendant;
 - a. A declaration that the defendant’s act of encroaching and trespassing on to the deceased’s Land Parcel No. Ndalani/Mavoloni Block 1/357 is wrongful and unlawful.
 - b. An order that the defendant be evicted from the deceased’s land parcel No. Ndalani/Mavoloni Block 1/357, and any structures that she may have constructed thereon be demolished.
 - c. General damages for trespass and non-user of land Parcel No. Ndalani/Mavoloni Block 1/357.
 - d. Costs of the suit.
 - e. Interest on (c) and (d) above at court rates.
2. The plaintiff averred that Samuel Maitha Muoki alias Sammy Maithya (now deceased) was the registered proprietor of the parcel of land known as Ndalani/Mavoloni Block 1/357 measuring 2.142 Hectares (Suit property) having been allocated the same by Mavoloni Company Limited as a shareholder thereof. She further stated that the defendant was settled on the parcel of land known as Ndalani/Mavoloni Block 1/357 which abuts the suit property.



3. She stated that in 2010, the defendant wrongfully and unlawfully encroached on a small portion of the suit property, cleared bushes and cultivated the same, planting few mango and orange trees; despite the plaintiff's protests.
4. That despite reporting the defendant to Mavoloni Company Limited as well as the area chief, the defendant continued planting mango and orange trees on the plaintiff's property. The plaintiff maintained that the defendant has no interest whatsoever whether legal or otherwise in the suit property and that her presence thereon amounts to trespass.
5. By a statement of defence dated 12th November 2015, the defendant denied the plaintiff's claim in its entirety and averred that there was Case No. 193 of 2015 claiming the suit property under the doctrine of adverse possession, hence this suit was an abuse of the court process and contravened Section 6 of the *Civil Procedure Act*.
6. The defendant further stated that she had occupied the suit property continuously since 1988 and had acquired the same under the doctrine of adverse possession. She stated that in 1988, she purchased the suit property from Mavoloni Company Limited and was issued with a title deed being L.R. No. Ndalani/Mavoloni Block 1/357. She stated that in 1989, she constructed an ultra modern three bedroom house worth Kshs. 4 million. She also stated that she had grown 300 mango trees and 20 orange trees and other tree species since 1989.
7. The defendant further averred that in 2014, the area chief informed her that she was occupying land that did not belong to her. She stated that she conducted due diligence and confirmed that the suit property which she was issued with title on 11th November 2010 was hers. She maintained that she had been in uninterrupted occupation of the suit property for a period of over 12 years and therefore had acquired rights as an adverse possessor. She particularized the prayers he had sought in Machakos ELC No. 193 of 2015.
8. The defendant sought the dismissal of the plaintiff's claim and sought that a declaration be made that the defendant is entitled to the suit property under the doctrine of adverse possession.
9. The plaintiff filed reply to defence and defence to counterclaim dated 27th November 2015. She joined issues with the defendant and denied the defendant's claim of having been on the suit property by dint of purchase since 1989, and reiterated the contents of the plaint. He also stated that as Sammy Maitha died in 2008, any suit filed against him in 2014 was incompetent and frivolous. He stated that having issued a demand letter on the defendant on 30th July 2015 requiring her to vacate the suit property, the defendant hurriedly filed Machakos ELC No. 193 of 2015, (which the plaintiff had not been made aware) for purposes of circumventing the plaintiff's imminent suit. He sought for the dismissal of the defence for being a sham and not disclosing a cause of action against him.
10. The suit proceeded by way of viva voce evidence. On the hearing date, the plaintiff presented two witnesses while the defendant failed to attend court for hearing, despite service which resulted in the dismissal of her counterclaim for want of prosecution.

The plaintiff's evidence

11. PW1 was Nicholas Maitha the plaintiff's son. He adopted his witness statement dated 10th September 2020 as his evidence in chief. It was his testimony that the plaintiff was the administrator of the estate of the deceased who died on 14th September 2008. He stated that during the deceased's lifetime, the deceased purchased shares from Mavoloni Company Limited in 1974 and was allocated 5 acres which was eventually registered as parcel Number Ndalani/Mavoloni Block 1/ 357.



12. He further stated that on several occasions, he would represent the deceased at Mavoloni Company's AGMs and that during the deceased's lifetime, they did not know the defendant by meeting her or knowing that she owned an adjacent parcel of land. He stated that it was in 2014 when he found that the defendant had cleared a portion of the suit property prompting them to report the matter to Mavoloni Company Limited and that the latter assured them that the suit property was in their father's name. He maintained that to date, the defendant had not exhibited any title document regarding her interest in Mavoloni/Ndalani Block 1/357 and that she has no claim in the suit property. He stated that the defendant was a trespasser and stranger to the family.
13. PW2 was Syombua Sammy the plaintiff in this case. She stated that she was the deceased's widow. She adopted her witness statement dated 19th March 2019 as her evidence in chief and produced documents attached to the list of documents dated 29th September 2015. Her testimony being that the suit property was registered in the deceased's name and borders Parcel No. Ndalani/Mavoloni Block 1/356 belonging to the defendant. Further that in 2010, the defendant unlawfully entered part of the suit property, cleared bushes thereon and planted mango and orange trees despite the plaintiff's family's protests. She also stated that she reported the trespass to the area chief and Mavoloni Company Limited but that the defendant hurriedly cleared more bushes and continued to plant more mango and orange trees.
14. She further testified that she issued a demand notice dated 30th July 2015 demanding that the defendant vacates the suit property but she did not comply. She took the view that the defence and counterclaim were a sham and did not disclose any claim and or defence against her. She sought orders sought in the plaint.
15. The plaintiff produced copies of title deed and official search of the suit property; share certificate No. 0998 dated 16th June 1974 issued to Sammy Maitha by Mavoloni Company Limited; notices of AGM by Mavoloni Company Ltd; receipts for payments made to Mavoloni Company Ltd in 2011; letter dated 8th June 2012 from Mavoloni Company Limited to Land Registrar Machakos; grant of letters of administration intestate for the deceased; letter dated 10th March 2015 by Kibunja advocates to Mavoloni Company Ltd; letter dated 11th April 2015 from Mavoloni Company Ltd to Kibunja advocates; letter dated 4th April 2015 by area Assistant Chief of Mavoloni Sub-Location and letter dated 30th July 2015 by counsel for the plaintiff herein.
16. That marked the close of the plaintiff's case. Subsequently, parties were directed to file and serve written submissions in support of their cases. On record are the plaintiff's submissions dated 20th February 2022.

Plaintiff's submissions

17. Counsel for the plaintiff rehashed the plaintiff's pleadings and submitted that the plaintiff had proved her case that the defendant had encroached on the suit property. It was further argued for the plaintiff that she had demonstrated that the defendant had no interest or right whatsoever over the suit property and therefore her claim ought to be allowed as she proved that the defendant was a trespasser.

Analysis and determination

18. The court has carefully considered the pleadings, evidence and submissions filed and the issues that arise for determination are;
 - a. Whether the suit property belongs to the deceased.



- b. Whether the defendant is a trespasser on the suit property.
19. Section 107 of the *Evidence Act* places the burden of proof in a case on the plaintiff whether or not the suit is defended. Therefore in this case, although the defence and counterclaim were dismissed for want of prosecution, the burden of proof of the claim herein still rests on the plaintiff.
20. Section 26 of the *Land Registration Act* provides for conclusiveness of 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.
21. Therefore, registration of title vests in the registered proprietor, indefeasible and absolute ownership rights unless it is proved that the acquisition of registration was obtained by fraud, misrepresentation, lack of proper procedure or through a corrupt scheme.
22. It is not disputed herein that the suit property is registered in the deceased's name. In this case, there was no allegation on the part of the defendant that the registration of the suit property in the deceased's name was through fraud, misrepresentation, want of procedure or by a corrupt scheme. Therefore, the title and official search produced by the plaintiff proves indefeasible and absolute ownership of the suit property, by the plaintiff.
23. Although the defendant indicated in her defence and counterclaim that she had been on the suit property for over 12 years, since 1988 to date, she never filed witness statement or list of documents or testified in court to back up her allegations and therefore, her defence remain mere allegations without proof.
24. Therefore, there is no evidence of any unregistered overriding interest against the plaintiff's title and I therefore find and hold that the plaintiff is the lawful owner of the suit property.
25. Trespass is described in the Black's Law Dictionary to mean unlawful entry in another's property. The defendant having not demonstrated any right, legal, equitable or otherwise in regard to the suit property, has no right over the same. In addition, although the defendant indicated in the defence that she owned Parcel No. Ndalani/Mavoloni Block 1/357, she did not file any search or title or any other evidence to support that position, and therefore it is the finding of this court that the defendant has no right whatsoever to be on the plaintiff's property.
26. The fact that the defendant encroached on the suit property was not denied by the defendant who confirmed in the defence as having been in possession of the suit property.
27. Sections 24 and 25 of the *Land Registration Act* provides for the interest and rights of a registered proprietor respectively as follows;



Section 24 provides as follows;

- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 25 provides as follows;

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

SUBPARA a.

to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

SUBPARA b.

to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

2. Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
28. It is therefore clear that a registered proprietor is in law entitled to quiet possession and enjoyment of their land to the exclusion of all other persons. The act of trespass interferes with the owner's quiet possession. In the premises, the defendant has to be stopped from interfering with the plaintiff's rights as she is a trespasser on the suit property.
29. It is trite that trespass is actionable per se without proof of actual loss or damage.
30. In this case the defendant in their defence confirmed being in possession of the suit property by constructing a house and planting oranges and mangoes thereon. The plaintiff stated that trespass occurred on the entire land measuring about 5 acres and that trespass occurred in 2010 upto date. Considering the acreage of the land and the duration of the trespass, I find and hold that an award of general damages for trespass in the sum of Kshs. 1,000,000/- shall be reasonable compensation in the circumstances of this suit.
31. In the premises, I am satisfied that the plaintiff has proved her case as against the defendant on the required standard and I hereby enter judgment in her favour against the defendant as follows;
 - a. A declaration be and is hereby made that the defendant's act of encroaching and trespassing on the deceased's land Parcel No. Ndalani/Mavoloni Block 1/357 is wrongful and unlawful.
 - b. An order be and is hereby made that the defendant is ordered to vacate the plaintiff's parcel of land known as Ndalani/Mavoloni Block 1/357 and demolish structures thereon within 90 days from the date hereof and in default, eviction orders to issue.



- c. General damages for trespass on the suit property are awarded to the plaintiff in the sum of Kshs. 1,000,000/-.
- d. The costs of this suit and interest on general damages at court rates are awarded to the plaintiff.

32. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 23RD DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Ruto holding brief for Mr. Wachira for defendant

Mr. Nzei for plaintiff

Court assistant – Abdisalam

