



**Ngaruiya & another v Parkito (Environment & Land Case E047 of 2022)  
[2024] KEELC 13242 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13242 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE E047 OF 2022  
LC KOMINGOI, J  
NOVEMBER 14, 2024**

**BETWEEN**

**MUNGAI NGARUIYA ..... 1<sup>ST</sup> PLAINTIFF**

**ELIZABETH WANJIKU NGARUIYA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**DAVID NGATAIT OLE KANKOI PARKITO ..... DEFENDANT**

**JUDGMENT**

1. By the Plaint dated 7<sup>th</sup> June 2022, the Plaintiffs claim that they are the owners of property Kajiado/Kisaju/88 (hereinafter referred to as the “suit property”) having acquired it in March 2003. They aver that sometime in the year 2009, the Defendant informed them that the previous owner of the suit property, Mbwana Investments Limited, had not paid the entire purchase price. Consequently, the Defendant had apparently not transferred the entire suit property to them. The Plaintiffs claim that in the same year, 2009, they got a potential buyer of the suit property and asked them to visit the property. Upon visiting the land, the Defendant became hostile to the potential buyer and claimed that he was the owner of the suit property.
2. The Plaintiffs started investigating the allegation only to find that the Defendant had caused the records at Kajiado Lands registry with details of their transaction to be removed. It was replaced with another Green Card bearing the Defendant’s name and indicating that the suit property measured 46.11 hectares instead of 48 hectares. This removal of the green card was illegal, fraudulent, unprocedural and undertaken through a corrupt scheme.
3. The matter was reported to the Directorate of Criminal Investigations and the Defendant was arrested and arraigned in Court and the matter is still pending. On 19<sup>th</sup> October 2018, the Land Registrar placed an advertisement in the Kenya Gazette asking claimants of the suit property to present themselves at the registry within 60 days, after which the forged Green card would be cancelled. The Green Card



was then cancelled after the expiry of the 60 days. They also learnt that the Defendant had also forged a title deed of the suit property measuring 46.11 hectares.

4. The particulars of fraud against the Defendant are given as;
  - “a) Deceiving the Plaintiffs that the previous owner, Mbwana Investments Ltd failed to pay the entire purchase price between them and the Defendant;
  - b) Fraudulently and irrationally confiscating the original green card which contained the genuine transactions relating to the property;
  - c. Unlawfully and fraudulently replacing the original green card with the forged one;
  - d. Forging a title deed for the suit property in the Defendant’s name and causing the forged title deed to portray the suit property as being 46.11ha, instead of 48ha;
  - e. Making of and/or uttering a fake title deed for the same Kajiado/Kisaju 88 in his name.”
5. The Plaintiffs also claimed that the Defendant had trespassed onto the suit property by causing and/or allowing his livestock to graze on the land, obstructing/chasing away both potential investors and surveyors from the suit property.
6. Following this, the Plaintiffs claim that they had lost income from Rift Dairy Products Limited of Kshs. 5,400,000 from 1<sup>st</sup> January 2018 until June 2022 when this suit was filed. This is because Rift Dairy Products Limited wanted to purchase the suit property for Kshs. 600,000 or lease it for 8 years from 1<sup>st</sup> January 2018 for Kshs. 1,200,000 per annum. The Plaintiffs also claimed that they could not develop the property due to the Defendant’s interference. They thus sought for:
  - a. An order declaring that the plaintiffs are the legal proprietor and/or beneficial owners of property comprised of Kajiado/Kisaju/ 88;
  - b. An order of injunction prohibiting the Defendant by himself, servants, agents, assigns or whomsoever from intimidating, encroaching, trespassing, interfering with the user or laying claim over Kajiado/Kisaju/ 88, harassing and threatening the Plaintiffs or their representatives or in any other way interfering with the Plaintiffs’ proprietorship, possession, user and enjoyment of the suit property;
  - c. General damages for Trespass;
  - d. Loss of income from January 2018 to June 2022 being Kshs. 5,400,000;
  - e. Loss of income from July 2022 to December 2025 at Kshs. One Million Two Hundred Thousand (Ksh.1,200,000) per annum from and/or up to when the matter is determined
  - f. Costs of the suit;
  - g. Interests on (c) to (f) from the date of filing until payment in full;
  - h. Any other and further relief as this Honourable Court may deem just and fair to grant.
7. The Defendant in his statement of defence denied the Plaintiffs allegation but acknowledged that he sold only 100 acres of land to Mbwana Investment Limited but they transferred the whole land to the Plaintiffs. The Defendant also contested that the suit was time barred.



8. The Plaintiffs in their Reply to defence sought for dismissal of the defence and that judgement entered in their favour as prayed.

### **Evidence of the Plaintiffs**

9. PW1, Mungai Ngaruiya a retired engineer adopted his witness statement dated 9<sup>th</sup> June 2022 as part of his evidence in chief and produced his bundle of documents which were marked as P. Exhibit 1 to 20 respectively. He testified that he purchased the suit property in March 2003 from one Mbwana Investment Limited following a search that showed that they were the actual owners. He also visited the suit property accompanied by the seller and the surveyor who confirmed the position of the beacons of the 48 hectares of land. Upon being satisfied with the land and its description, they executed a sale agreement. He stated that the Defendant resides on the adjacent land and when they purchased it, he was friendly. It was until 2009, when the Defendant started being hostile whenever the Plaintiffs would send prospective buyers to view the property. Upon visiting the Defendant to find out the issue, the Defendant informed him that the land was his (Defendant's). This necessitated a visit to the Kajiado Lands registry where they found that the property's Green Card had been replaced with a new one which showed the Defendant as the owner of the suit property measuring 46.11 hectares. However, the presentation book reflected that the land had been sold to Mbwana Investment Limited by the Defendant and later to the Plaintiffs. PW1 informed the Land Registrar of this discrepancy and the Land Registrar confirmed that the Defendant's title deed was a forgery. PW1 then lodged a complaint with the Directorate of Criminal Investigations. The Defendant was arrested and charged with fraud. The case is still pending. He then filed a Statutory Declaration and all the entries were corrected to reflect the Plaintiffs as the lawful owners of the suit property. He thus prayed for declaration as the lawful owner, general damages of Kshs. 25,400,000 as well as costs of the suit.
10. On cross examination he indicated that the Green Card showed that the entries had been tampered with. He reaffirmed that he legally and procedurally purchased the suit property in 2003. However, the Defendant had denied his agents and surveyors from accessing the property as well as making use of it leading to loss of income.

### **Evidence of the Defendant**

11. DW1, Ngatait Ole Kankoi Parkito the Defendant adopted his witness statement dated 12<sup>th</sup> July 2022 as his evidence in chief.
12. On cross examination he stated that he sold the suit property in the year 1985 to one Mohamud for Kshs. 500,000. He was therefore not familiar with Mbwana Investments Limited. He however confirmed that the transfer form produced by the Plaintiffs showed that the land was transferred from him to Mbwana Investments Limited. He confirmed that he sold 100 acres to Mr. Mohamud who later sold to the Plaintiffs. As such, he was only claiming 12 acres of the suit property because he did not sell them. He confirmed that he neither sued Mohamud for the alleged extra acres nor seek to rectify the acreage or lodged a boundary complaint.
13. At the close of the oral testimonies parties tendered final written submissions.

### **The Plaintiffs' submissions**

14. On whether the Plaintiffs are the bona fide owners of the property Kajiado/Kisaju/88, Counsel submitted that the Plaintiffs title to the suit property which acquired legally and procedurally was protected by Sections 25 and 26 of the *Land Registration Act*. Counsel submitted that the Defendant had also acknowledged that he sold the suit property, but apparently only sold 100 acres and not



112 acres. However, this claim was not supported by evidence because all the transfer documents to Mbwana Investment Ltd consistently showed that the size of the property sold was 48 hectares, which is the size of the property the Plaintiffs purchased. As such, any issue of whether the previous owner had paid the whole purchase price was immaterial to the Plaintiffs and if at all there was any balance, the Defendant should pursue the same with the person he sold the property to and not the Plaintiffs. Counsel also submitted that any documents that showed a different acreage of the property was the fraudulent Green Card which had since been cancelled.

15. Therefore, the Plaintiffs having conducted due diligence before purchasing the suit property and with reliance on the information contained in the Lands Registry, they were the legal owners and validly held the title as was held in *Lawrence Mukiri vs Attorney General & 4 others* [2013] eKLR and *Elizabeth Wambui Githinji & 29 others vs Kenya Urban Roads Authority & 4 others* [2019] eKLR.
16. On whether the Defendant was liable for trespassing on the suit property, counsel submitted that the Plaintiffs having established that they are the legal owners of the suit property, any action of the Defendant on the suit property such as grazing his livestock and obstructing use of the property, was an act of trespass as outlined under Section 3 (1) of the *Trespass Act*. Counsel also submitted that by tampering with the Lands Registry documents of the suit property led the Plaintiffs to losing opportunities to sell or develop the property which was considered not genuine and they were entitled to the loss of income as indicated in the *Plaint*.
17. On the issue of statutory limitation as contested by the Defendant in his statement of defence, counsel submitted that the claim was incorrect. This is because from the year 2009, a lot had transpired such as cancellation of the fake title in the year 2018 and criminal charges being preferred against the Defendant. Therefore, the suit was not statutorily barred. In any case, it was the Defendant's claim that was time barred because having sold the land in the 1980s, his claim to it lapsed after the expiry of 12 years.
18. As such, the Plaintiffs were entitled to the reliefs sought together with costs of the suit.

### **The Defendant's submissions**

19. On the issue of trespass, counsel submitted that the Plaintiffs had not proved their claim because it was clear that they were never denied access to the suit property. That prayer should thus be dismissed. And so should the relief for general damages which was equally pegged on the claim of trespass. Counsel also submitted that the claim for loss of income was equally not proved because no evidence was tendered or witness called to support it. They thus prayed for dismissal of the suit against the Defendant.

### **Analysis and Determination**

20. I have considered the pleadings, the evidence on record, the rival submissions and the authorities cited. The issues for determination are:
  - i. Who is rightful owner of land Kajiado/Kisaju/88?
  - ii. Whether the Plaintiffs have proved the claim of trespass against the Defendant;
  - iii. Whether the Plaintiffs are entitled to the prayers sought;
  - iv. Who should bear costs of the suit?
21. The Plaintiffs claim ownership of the land parcel known as Kajiado/Kisaju/88 (the suit property) measuring approximately 48 hectares asserting that they legally purchased it from Mbwana Investments Limited in 2003. They produced the title deed issued on the 27<sup>th</sup> of March 2003 in their



- names. They also produced transfer documents of the same property from the Defendant to Mbwana Investments Limited on diverse dates in the year 1985. Also adduced as evidence was a certificate of official search dated 24<sup>th</sup> March 2003 which confirmed that the suit property measuring 48 hectares was registered to Mbwana Investments Limited.
22. In his part, the Defendant claims that he only sold 100 acres of his land to one Mr. Mahmood and not Mbwana Investments Limited. From the Plaintiffs' evidence, it is notable that the Transfer of Land dated 20<sup>th</sup> March 2003 from Mbwana Investments Limited to the Plaintiffs' shows that it was executed by its Directors Mahmood Mohamed and Asha Mahmood. This evidence supports the Defendant's testimony that he sold the land to Mahmood.
  23. Given the sequence of transactions presented by the Plaintiffs, the court finds that the Defendant sold the suit property. The history of the title acquired by the Plaintiff can be traced to Mbwana Investments Limited who acquired it from the Defendants.
  24. However, the Defendant disputes the acreage of the property sold claiming that he only sold 100 acres. And that he wanted his 12 acres back.
  25. The documents by PW1, show that the acreage of the suit property was 48 hectares. At no point was there a discrepancy in the acreage, nor is there evidence that the Defendant lodged any formal objections, or corrections regarding the extent of the property prior to this dispute. Furthermore, the Defendant's failure to initiate any action or claim under the *Limitation of Actions Act* within the statutory period of 12 years as per Section 7 of the *Limitation of Actions Act*, from the year 1985 when he sold it effectively extinguishes his right to make further claims on the property.
  26. This court is therefore satisfied that the Plaintiffs have demonstrated, through documentary evidence, that they legally, lawfully, and procedurally acquired the entire 48 hectares comprising the suit property in accordance with Section 26 (1) of the *Land registration Act* which provides that;

“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...”
  27. On whether the Plaintiffs have proved trespass against the Defendant, the Plaintiffs allege that the Defendant trespassed upon the suit property by permitting his livestock to graze on the land. He has also obstructed potential buyers and surveyors, and generally interfered with their use and enjoyment of the land. Section 3(1) of the *Trespass Act* defines trespass as unauthorized entry or interference with another's private land without the owner's consent.

“Section 3 (1) of the *Trespass Act* provides that; “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.”
  28. The burden of proof lies upon the Plaintiffs to establish trespass by showing, on a balance of probabilities that the Defendant unlawfully entered and interfered with his use of the suit property. Under Section 107 of the *Evidence Act*, a party alleging facts in support of a claim bears the onus to substantiate those facts. The Plaintiffs asserted that the Defendant interfered with their access and drove away prospective investors, but did not produce compelling evidence, such as testimony from



witnesses to corroborate these incidents. Additionally, PW1 conceded in his testimony that he was neither threatened nor denied entry to the suit property.

29. In light of the foregoing, the court finds that the Plaintiffs have not met the evidentiary standard required to prove trespass on the balance of probabilities. Consequently, the Plaintiffs' claim for trespass damages is declined.
30. On whether the Plaintiffs were entitled to loss of income from January 2018, the Plaintiffs allege that the Defendant's actions deterred prospective investors from engaging in leases or purchases from January 2018 onwards. However, the Plaintiffs provided no concrete evidence, such as signed agreements or affidavits from potential lessees demonstrating that interested parties declined to engage in leasing or purchasing due to the Defendant's interference. On the issue of loss of income Justice Wabwoto in the case of *Hardy Residents Association & another (Suing through its officials; Wainaina Kinyanjui Chairman, Karen Mclean Secretary and Neil McRae Treasurer) v Ng'ang'a* [2024] KEELC 5690 (KLR) held:

“In respect to damages for constructive trespass and loss of income that were pleaded and quantified at Kshs. 42,000,000/=. It is worth noting that the same is akin to special damages. In respect to special damages, it is trite law that special damages must be pleaded and strictly proved. Loss of income must be pleaded and proved as they are in the nature of special damages. Loss of income is compensated for real assessable loss which is proved by evidence.”
31. I agree with the Defendant's submissions that the claim for loss of income has not been proved as the Director of Plaintiff Dairy Products Limited was not called to testify to confirm its desire to buy or lease the suit property but was frustrated by the entries in the Green card.
32. No agreement was exhibited to confirm what had been agreed upon between the Plaintiffs and the said Company. I also rely on the case of *Sara Chepkemoi Bett Vs. Recho Koech* (2018) eKLR where the court quoted the case of *Hahn Vs. Singh* (1985) eKLR at page 717, where it was held; “Special damages must not only be specifically pleaded by also strictly proved for they are not the direct and natural probable consequence of the act complained of and may not be inferred from the act. The decree of certainty particularly of proof required depends on the circumstances and nature of acts....”
33. In the absence of such evidence, the claim for loss of income is speculative and fails to meet the required evidentiary threshold and is hereby declined.
34. While it is not in contention that the Green card and records of the suit property had been tampered with as per the letter dated 31<sup>st</sup> October 2016 from the Principal Land Registrar Kajiado to the Chief Land Registrar, there is no evidence of who caused the interference. This court was also been informed that the criminal case regarding the forgery and alteration of the land records is ongoing. I will therefore not make any determination regarding the claim for general damages until culpability regarding the tampering allegations is determined.
35. As per Section 27 of the *Civil Procedure Act*, costs follow the event. The Plaintiffs having proved their legality of ownership of the suit property are entitled to costs of the suit.
36. In conclusion I find that the Plaintiffs have proved their case against the Defendant on a balance of probabilities.
37. Accordingly Judgement is entered for the Plaintiff as against the Defendant as follows;
  - a. The Plaintiffs are hereby declared the legal proprietors of property Kajiado/Kisaju/88.



- b. That a Permanent Injunction is hereby issued restraining the Defendant by himself, his agents and/or servants, from intimidating, trespassing, meddling or in any way interfering with the Plaintiffs' possession and ownership of the property known as Kajiado/Kisaju/88.
- c. That Costs of the suit shall be borne by the Defendant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 14<sup>TH</sup> DAY OF NOVEMBER 2024.**

**L. KOMINGOI**

**JUDGE.**

In The Presence Of:

Ms. Wanja for the Plaintiffs.

N/A for the Defendant

Mutisya – Court Assistant.

