



**Swastic Holdings Limited v Kimani (Environment & Land Case  
E369 of 2021) [2023] KEELC 16296 (KLR) (27 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 16296 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E369 OF 2021  
JA MOGENI, J  
FEBRUARY 27, 2023**

**BETWEEN**

**SWASTIC HOLDINGS LIMITED ..... PLAINTIFF**

**AND**

**ANN NYAGUTHI KIMANI ..... DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 1/11/2021 and amended on 01/04/2022 the Plaintiff sought the following reliefs against the defendant: -
  - a. An order of permanent injunction restraining the Defendant whether by herself, her agents, employee, servants, officers or anybody or authority from interfering or whatsoever with the plaintiff's quiet use, occupation and possession of the parcel number LR 21080/26, IR No. 68327/75.
  - b. A declaration that the Plaintiff is the lawful registered proprietor of Land Reference Number 21080/26 IR No. 6827/75
  - c. A declaration that the Defendant's actions amount to illegal trespass onto the Plaintiff's suit land
  - d. General damages for trespass
  - e. Cost of this suit.
  - f. Any other or further relief as this court may deem just.
2. The Plaintiff's case was that sometime in 2018 he purchased the parcel of land from one Rose Mumbi Mobocho all that portion of land known as L.R. 20180/26 IR 68327/75 (hereinafter the suit property) and has been the registered, beneficial owner and in occupation of the suit property.



3. It was the Plaintiff's further case that some on 26/10/2021 the defendant trespassed onto the suit property and began to dig trenches around it with a view to fencing it off despite the plaintiff having bought the suit property from the original allottee and being therefore the legal and rightful owner bearing an indefeasible title.
4. It was the Plaintiff's contention that the defendant's actions are illegal and it is as a result of these actions that the plaintiff reported the matter to the Spring Valley Police Station and was issued with O.B No. 17/27/2021 and the defendant was summoned and she produced a Title Document to the suit property.
5. It was the plaintiff's case that the DCI wrote to the Ministry of Lands and Planning to verify the survey plans and location of the plot in dispute and the Ministry vide a letter dated 29/11/2021 responded stating that the survey plans and the title deeds produced by the defendant were fake.
6. The plaintiff has particularized the act of trespass by the defendant as:
  - a. The defendant and or their agents and servants entered the suit-land without prior authorization by the Plaintiff the legal owner and beneficial owner of the suit property
  - b. The Defendant and or their agents or servants started to fence and commenced construction on the suit-land and as such interfering with the Plaintiff's right to quiet enjoyment of the said property
  - c. The Defendant have proceeded to erect a construction board on the Plaintiff's property and intended with the Plaintiff's quiet possession of the suit-land
  - d. The Defendant is an encroacher, trespasser and grabber of the suit-land belonging to the Plaintiff having knowledge that the registered owner of the property having purchased the same from Rose Mumbi Mbocha.
7. The Plaintiff's case is that the purported entry onto the suit property by the Defendant and or his servants was illegal, unmerited and violated the plaintiff's right to exclusive and quiet possession guaranteed by the title to the suit property and due to the forceful entry the plaintiff claims general damages against the Defendant. was unlawful and without justifiable cause.
8. Despite being served through her advocates the defendant from the record did not enter appearance to the suit. The defendant however filed a statement of defence and counter-claim dated 19/04/2022 denying all allegations of trespass and stated that she is the registered proprietor of LR 21080/41.
9. In their Defence, the Defendants denied all the allegations made in the Amended Plaintiff and averred that they have been the lawful owners and occupiers of the suit property registration number LR 21080/41 from 1/10/2001 and have been in possession for over 20 years and that the Plaintiff is the one in breach of the law by encroaching and alleging that the said parcel of land belongs to it. Further that the plaintiff's invasion of the suit property caused abrupt stoppage of ongoing construction which has caused loss.
10. It is the defendant's case that LR 21080/26 is non-existent since that is the same space that is occupied by LR 21080/41 whose proprietorship is with the defendant.
11. The defendant stated that he purchased the suit property in 2001 from Jotech Limited as the registered proprietor of LR No. 21080 measuring 17.85 hectares as at 31/01/1996.



12. The defendant did not attend the hearing and therefore the authenticity of the pleadings could not be tested through cross-examination.
13. In the counter-claim the defendant reiterated the contents of the statement of defence stating that the plaintiff is a trespasser on LR No. 21080/41. seeks the following:
  - a. Eviction of the plaintiff, agents, servants and independent contractor from LR 21080/41
  - b. Special damages for trespass on suit property of Kesh 7,809,190
  - c. Exemplary damages for aggravated trespass
  - d. Costs of the suit.
14. At the same time the defendant has prayed for dismissal of the plaintiff's suit and judgment to be entered for the defendant on the counter-claim.
15. The Plaintiff filed a Further Affidavit dated 18/01/2022 where she averred that there was second survey referenced as F/R No. 273/94 for LR 21080/41 which according to the letter from the Ministry of Lands and Physical Planning dated 29/11/2021 did not take into consideration for first survey and this according to the Ministry may have led to the confusion that the two pieces of land were in the same place.
16. The Plaintiff averred from the further affidavit and the report by licensed surveyor Mr B.A Rabuku dated 13/11/1996 for LR 21080/26 was said to be authentic and the deed plan Number 209891 was issued for the survey of LR No. 21080/41 done by B.M. Okumu on 15/05/1997 though the letter does not indicate whether the survey was authentic the deed plan number 212257 was issued.
17. The defendant filed their defence and counter-claim but did not call any witnesses neither did they adduce any evidence at the hearing of the suit since she never attended court choosing instead to state in her submissions that the court changed the mode of hearing of the suit from physical open court hearing to a virtual hearing.
18. A brief history will be useful here, this matter was heard in open court on 28/11/2022 the date that was set by the court and communicated to all the parties and their advocates on 9/11/2022 when the court delivered its ruling setting aside the dismissal of the plaintiff/applicant's suit through the court order dated 12/07/2022.
19. Instructively the plaintiff testified via video link, the equipment was set up in court number 29 situated on the first floor at the Milimani Courts and the Counsel for the plaintiff was present in court.

### **Plaintiff's Case**

20. At the trial hereof, the Plaintiff as the Director of the Plaintiff Company testified that the Plaintiff is the registered owner of LR 21080/26 IR 68327/75 having purchased it from one Rose Mumbi Mbocha on 23/04/2018 and has been in possession since then.
21. That however the defendant has illegally started fencing the plaintiff's property in readiness for construction the plaintiff's property. The plaintiff testified on his own behalf but he did not call any witnesses. The Plaintiff adopted his witness statement dated 14/03/2021 as his sworn testimony.



22. It was his further evidence that the property was sold for Kesh 19 million which is stated clearly in the sale agreement dated 19/03/2018. Further that post registration search done on 18/05/2018 indicated that the plaintiff was the registered proprietor.
23. He testified that he served the hearing notice dated 19/10/2022 upon the defendant. Further that the Survey report dated 23/03/2018 confirmed that beacon relocation and boundary of LR 21080/26 and the transfer is dated 18/04/2028

### **The Issues for Determination**

24. I have analysed the pleadings, considered the viva voce evidence presented by the plaintiff and the submissions filed by both parties including the well-researched case law. The issues I see as arising for determination are as follows:
  - i. Who is the legally recognized owner of the suit property.
  - ii. Whether the court should issue a permanent injunction in this suit and in whose favour.
  - iii. Which party shall bear the costs of this suit.

### **Analysis and Determination**

25. On the first issue, both the Plaintiff and the Defendant in the original suit have laid claim to the suit property. The Plaintiff informed the court that it purchased the suit property from Rose Mumbi Mbocha who was the registered proprietor on 1/08/1995 IR 68327/75 for LR 21080/26. The deed plan No. 209891 which was approved on 19/11/1996.
26. On the other hand the Defendant through the counter-claim is claiming ownership of LR No. 21080/41 with a Deed Plan Number 212257 approved on 15/05/1997. As proof of this assertion, the Transfer of Certificate of Title belonging to Anne Kimani LR No. 21080/41 was presented which shows transfer from JOTECH LIMITED but there was no document that was presented to show.
27. The Plaintiff has produced a sale agreement among his documents marked SRP3 between himself and Rose Mumbi Mbocha dated 18/04/2018 and the the transfer which was registered on 23-04-2018. He has also attached an official search showing that the plaintiff is the rightful owner of LR 21080/26.
28. There is only one Sale Agreement that had been produced in court involved in the alleged purchase of the suit property by the Plaintiff. In order to determine whether a Sale Agreement for purchase of land is valid, the Court is required to interrogate whether it has met the threshold as envisaged under Section 3 (3) of the Contract Act.
29. The first consideration is that the said sale must be produced before this Court. Further that the same must have been reduced into writing and signed by all the parties. Section 3 (3) of the Contract Act provides that;

“

“3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;



(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust”.

30. The Court has carefully perused the sale agreement produced as Exhibit by the Plaintiff and noted that the same is in writing and signed by the parties. It thus met the requirements of Section 3(3) of the Contract Act. Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreements confirms that the same is a valid sale agreement which is enforceable by the parties. See the case of Nelson Kivuvani...Vs....Yuda Komora & Another, Nairobi HCCC No.956 of 1991, where the Court held that:-

“ the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.

31. The defendant asserts that he purchased the suit property from JOTECH Limited which transferred the suit property LR 21080/41 to the defendant. There is however no Sale Agreement produced before the Court to attest to the sale.

32. Further the Court notes that documentation provided by the defendant and the pleadings do not relate to the suit property LR 21080/26 and therefore there is no way that the Defendant could say that she was purchasing the instant suit property while being issued with parcel documents for a different property.

33. On the contrary, the Plaintiff produced a Sale Agreement that this Court has held and found is valid. Further it has also produced a transfer document and a certificate of title indicating that the said Rose Mumbi Mbocha was the registered proprietor of the suit land. The Plaintiff has also produced bank statements showing that the purchase price was duly paid. The vendor then transferred through registration the suit property LR 21080/26 to the Plaintiff.

34. The defendant from the pleadings filed contests the ownership to suit property by the plaintiff he avers that the plaintiff claims a parcel of land that is in the same place as LR 21080/41. He submits that he is the rightful owner of the parcel of land located where the suit property of the plaintiff is said to be located and that it is titled LR 21080/41 and NOT LR 21080/26.

35. The defendant submitted that the impugned parcel was subdivided from the larger parcel LR 21080. He filed a bundle of documents but never produced them since he never attended court.

36. I have perused the Transfer document presented in the bundle of documents and I note that there is a partial discharge of LR 21080/41 and a transfer to the Defendant Anne Kimani of 0.2059 hectares and the registration was done on 1/10/2001 vide IR 87445.

37. Unfortunately, the defendant did not attend court to allow for this information filed in court to be cross-examined and therefore the plaintiff's testimony went unchallenged and uncontroverted.



38. The situation is compounded by the testimony of the plaintiff who contradicted the pleadings filed by the Defendant clearly stating that he purchased the suit property presenting evidence of the purchase and the supporting documents.
39. I note that the acreage of the suit property claimed by the plaintiff which is 0.2508 hectares cannot be anywhere near the acreage claimed by the defendant as being the suit property which is 0.2059 hectares as per the transfer instrument entry no. 13 to Anne Kimani of LR 21080/41 IR 87445. From my perusal and reading of the documents it seems the parcel of land being claimed by the defendant is not the parcel of land where the plaintiff is situated.
40. I also note that the letter from the Ministry of Lands and Physical Planning dated 29/11/2021 referenced AC/CAD/78/VII/378 indicated that the survey undertaken by B.M Okumu created the confusion. The deed plan for LR 21080/26 is No. 209891. Whereas the deed plan for LR 21080/41 is No. 212257. The first survey was done on 13/11/1996, the second one was done on 15/05/1997. In his response Mr W. Kibichii on behalf of the Director of Survey stated that actually the Survey Plan for the parcel LR 21080/26 was authentic.
41. This information from the Ministry of Lands and Physical Planning is contrasted to the claim made by the defendant in the Counter-claim. Whereas the Certificate of Title produced by the plaintiff show that ownership of the suit property is in the name of Rose Mumbi Mbocha there is a transfer made on 23/04/2018.
42. The effect of Registration of Lands is founded in the Provisions of Section 24 of the [Land Registration Act](#) which 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 rights and privileges belonging or appurtenances thereto and;
43. Section 25 of the [Land Registration Act](#) provided as follows:-
- “The right 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 interest and claims whatsoever.....”
44. Both the Plaintiff and the Defendant had a conviction that the documents of registration held by each of them was testament to the ownership of the suit property LR 21080/26.
45. In order for the Court to effectively deal with this issue the provisions of Section 26(1) of the [Land Registration Act](#) would come into operation to wit:-
- The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon 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.
46. In the case of Joseph Komen Somek vs Patrick Kennedy Suter [2018] eKLR the court clearly spelt out the purpose of above Provisions of Section 26 (1) (b) which was to protect the genuine title holders from being deprived of their title by subsequent transactions.
47. To advance on this legal preposition, the efficacy, legitimacy and legality of the rights of the legal land proprietor is created through registration. The Certificate of Title and in this case, the Lease is deemed to be the prima facie evidence of the stated registration. In this case both the plaintiff and the defendant produced the Transfer on the Certificates of Title registered in their names.
48. From my perusal of documents presented and the evidence of the Plaintiff which remains unchallenged and the sale agreement, the letter from the Ministry of Lands and Physical Planning, this settles the argument of ownership.
49. The Defendant asserted that the plaintiff bought land that was non-existent knowing well that he was the owner of the suit property having acquired it through transfer from JOTECH Limited and residing on the parcel for over 20 years. To that assertion, I will be guided by Section 107 of the *Evidence Act* Cap 80 which provides that:
- “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.”
50. I have considered the statement by the Plaintiff and the Defendant and note that the Plaintiff has led evidence in support to show on a balance of probabilities that they own the suit property. The plaintiff property bought the suit property, paid the purchase price and transfer was effected, this court therefore finds no difficulty in holding that the Plaintiff is the registered propriety of the suit property because he has succeeded in proving that the transfer to his name is valid.
51. The Court has already held that the Sale Agreement for the plaintiff is valid. Consequently, the plaintiff’s claim of trespass by the defendant stands. The defendant on the other had stated that the plaintiff instituted the present suit 20 years of his being on the suit property. It is my view that the plaintiff’s claim against the defendant is an act of trespass. The *Trespass Act* Cap 403 defines a trespasser to mean 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.
52. The Black’s Law Dictionary defines a continuing trespass as follows:
- “A trespass in the nature of a permanent invasion on another’s rights, such as a sign that overhangs another’s property”.
53. In Clerk & Lindsell on Torts 16<sup>th</sup> Edition paragraph 23- 01 it is stated that:
- “Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues”.
54. The plaintiff’s claim is that the 1<sup>st</sup> defendant entered into and remained in occupation of land that belongs to him which is essentially trespass.



55. On the second issue, since the court has found in no. 1 above that the transfer of the suit property to the Plaintiff is valid, with this finding, it follows that the Plaintiff has the rights over the suit property as set out in section 24(a) of the *Land Registration Act* (supra)
56. I find that the Plaintiff is entitled to have vacant possession of the suit property to the exclusion of the Defendant and I do issue a permanent injunction as prayed in the Plaint.
57. On the third issue about costs. Section 27 of the *Civil Procedure Act* gives the Court the discretion to grant costs. It is trite that costs usually follow the events. In this instant case, the Plaintiff is the successful party and is therefore entitled to the costs of the suit.
58. Having carefully considered the pleadings herein, the available evidence, the exhibits produced in Court, the written submissions and the relevant provisions of the law, the Court finds that the Plaintiff has proved his case on the required standard of balance of probabilities.
59. Consequently, the Court enters Judgement for the Plaintiff against the Defendant as prayed in the Amended Plaint dated 1/04/2022. The Counter Claim is hereby dismissed. The court makes the finding that the defendant therefore has no right to enter the suit land or threaten the plaintiff with eviction. I also now issue an order of permanent injunction restraining the defendant from entering, being upon, or in any other way interfering with the plaintiff's quiet possession of the suit property. I also issue a declaration that as between the plaintiff and the defendant, it is the plaintiff who holds good title to the suit property and if the defendant has any sort of title document, the same is hereby declared to be null and void and the Land Registrar or other authority ought not to act on it. There is a claim for general damages and given the nature of the case I will award general damages of Ksh 50,000 for the trespass. The plaintiff will have costs of this suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**MOGENI J.**

**JUDGE**

In the virtual presence of :-

Mr Chumo holding brief for Mr Manwa for the Plaintiff

Mr Mwaura for the Defendant

