



Kahonge (Suing Thro' the Legal Representative of Joseph Kahonge Muthoni (Deceased)) v Macharia (Environment & Land Case 57 of 2019) [2022] KEELC 12768 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12768 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 57 OF 2019
YM ANGIMA, J
SEPTEMBER 22, 2022**

BETWEEN

**ELIZABETH MUTHONI KAHONGE PLAINTIFF
SUING THRO' THE LEGAL REPRESENTATIVE OF JOSEPH KAHONGE
MUTHONI (DECEASED)**

AND

JOHN THUO MACHARIA DEFENDANT

JUDGMENT

A. The Plaintiff's claim

1. By a plaint dated June 26, 2003 and amended on December 17, 2019 the plaintiff sought the following reliefs against the defendant:
 - a. Judgment against the defendant to vacate the suit premises being title No Nyandarua/Silanga/28 and to give vacant possession of the same to the plaintiff and in default he be evicted therefrom together with members of his family and all those who claim through him.
 - b. A permanent injunction against the defendant, his agents and or servants restraining him from interfering with the plaintiff's title to the suit premises in any way whatsoever.
 - c. Special damages for the value:
 - i. 6 dairy cows worth - Kshs 4,000/=
 - ii. House - Kshs 2,000/=
 - iii. 1 Bull worth - Kshs 200/=



- iv. 1 Heifer worth - Kshs 600/=
 - v. 6 sheep worth - Kshs 350/=
 - vi. Fence worth - Kshs 3,000/=
 - vii. Pyrethrum crop then worth - Kshs 300/=
 - viii. Value of household goods - Kshs 2,000/=
- d. Interest on special damages with effect from 1983 at commercial rates.
 - e. General damages for fraudulent transfer and alienation of the suit premises.
 - f. Mesne profits at the rate of Kshs 10,000/= per acre per annum with effect from 1983.
 - g. costs of the suit.
 - h. Any other relief this honourable court may deem fit to grant.
2. The plaintiff was suing as the personal representative of the estate of the late Joseph Kahonge Muthondu the (deceased) and she pleaded that at all material times the deceased was the legitimate owner of plot No 28 Silanga which was later on registered as Title No Nyandarua/Silanga/28 (the suit property). It was further pleaded that when the deceased acquired the suit property in 1963 he took possession thereof and settled thereon with his family. The plaintiff pleaded further that in 1971 the deceased left for Tanzania leaving his wife and daughter in occupation of the suit property and they continued in possession until 1983 when the defendant forcibly evicted them and proceeded to have the suit property fraudulently registered in his name. The plaintiff pleaded 4 particulars of fraud against the defendant in paragraph 7 of the amended plaint.
 3. The plaintiff further pleaded that as a result of the defendant's said fraud, he was arrested, tried and convicted of various criminal offences in Nyahururu PM's criminal Case No 2164 of 1999 and that his title to the suit property was cancelled by the High Court in Nakuru High Court Criminal Appeal No 209 of 2001 on April 22, 2004. It was further pleaded that despite the defendant's conviction and cancellation of his title he had failed to vacate the suit property hence the suit and the reliefs sought.
 4. It was the plaintiff's case that a result of the aforesaid unlawful eviction the deceased had suffered special damages particulars whereof were particularized in paragraph 9 of the amended plaint.

B. The defendant's response

5. The defendant filed a statement of defence dated August 15, 2003 denying the plaintiff's claim in its entirety. The defendant denied that the deceased was the legitimate owner of the suit property. He denied that the deceased had ever taken possession of the suit property and denied that he ever evicted his family therefrom. The defendant further denied any fraud in his acquisition of the suit property. He also denied being prosecuted and convicted as pleaded by the plaintiff or at all.
6. The defendant denied all the other allegations in the plaint including the particulars of special damages and put the plaintiff to strict proof thereof. He also denied the jurisdiction of this court to entertain the suit and put the plaintiff to strict proof thereof. Finally, the defendant contended that the instant suit was misconceived, incompetent and bad in law hence the same ought to be struck out with costs.



C. Summary of evidence at the trial

(a) The plaintiff's evidence

7. At the trial hereof, the plaintiff testified as the sole witness and closed her case. She adopted her witness statement dated June 22, 2020 as her evidence in-chief and produced the documents in the plaintiff's list of documents and supplementary list as exhibits. The plaintiff's evidence essentially mirrored the contents of the amended plaint and she relied heavily upon the defendant's conviction for forgery and uttering false documents in obtaining registration of the suit property. It was her evidence that the High Court had cancelled the defendant's registration in the criminal appeal hence he should be evicted from the suit property.

(b) The defendant's evidence

8. The defendant did not tender any evidence at the trial since he did not attend court on the material date. His advocate's application for adjournment was rejected since the court was not satisfied that there was a good reason to adjourn a suit which has been pending in court for nearly 20 years. Accordingly, the defendant's case was closed without evidence being tendered on his behalf.

D. Directions on submissions

9. Upon conclusion of the trial, the parties were given timelines within which to file and exchange their respective submissions. The record shows that although the plaintiff's submissions were filed on October 25, 2021 the defendant's submissions were not on record by the time of preparation of the judgment.

E. The issues for determination

10. The court has noted that the parties did not file an agreed statement of issues in this matter. Accordingly, the court shall frame the issues for determination as provided for under the law. Under order 15 rule 2 of the *Civil Procedure Rules*, a court may frame issues from the following:
 - a. The allegations contained the pleadings.
 - b. The contents of documents produced by the parties.
 - c. The statements made on oath by or on behalf of the parties.
11. The court has considered the pleadings, documents and evidence on record in this matter. The court is of the opinion that the following issues arise for determination in this suit:
 - a. Whether the suit is misconceived, incompetent and bad in law.
 - b. Whether the defendant obtained registration of the suit property through fraudulent means.
 - c. Whether the defendant's registration as the proprietor of the suit property was cancelled by the High Court.
 - d. Whether the plaintiff is entitled to an eviction order against the defendant.
 - e. Whether the plaintiff is entitled to the rest of the reliefs sought in the amended plaint.
 - f. Who shall bear costs of the suit.



F. Analysis and determination

(a) Whether the suit is misconceived, incompetent and bad in law

12. The court has considered the pleadings and material on record on this issue. This issue was raised by the defendant in his statement of defence. He did not, however, provide any particulars of the alleged misconception, incompetence or violation of the law. It is also noteworthy that the defendant did not tender any evidence at the trial hereof to demonstrate his said allegations. Accordingly, the court finds that the defendant has failed to demonstrate that the instant suit is misconceived, incompetent and bad in law.

(b) Whether the defendant obtained registration of the suit property through fraudulent means

13. The court has considered the material and evidence on record on this issue. The court is aware that making an allegation of fraud against another party is a serious matter which ought to be proved to a standard higher than a balance of probabilities although not as high as beyond reasonable doubt. See *Ratilal Gordhanbhai Patel –vs- Lalji Makanji [1957] EA 314*. The plaintiff has heavily relied upon the defendant’s conviction for forgery and uttering false documents in Nyahururu PM’s Criminal Case No 2164 of 1999 – Republic –vs- John Thuo Macharia (the criminal case) and Nakuru High Court Criminal Appeal No 209 of 2001 (the criminal appeal) to demonstrate the fraud alleged against the defendant.
14. It is evident from the material on record that in the said criminal case the defendant was convicted of various counts of forgery, uttering false documents and obtaining registration of land by false pretences in relation to his acquisition of the suit property and sentenced accordingly. It is also evident that his appeal against conviction in the criminal appeal was dismissed and, in addition, the High Court ordered cancellation of his title deed and the registration of the deceased as the legitimate owner of the suit property on April 27, 2004. There is no indication on record that the defendant ever lodged a further appeal to the Court of Appeal challenging his conviction and cancellation of his title.
15. The plaintiff relied upon section 47A of the *Evidence Act* (Cap.80) which stipulates as follows:
- ‘ A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence.’
16. The plaintiff in her written submissions referred the court to the decision of Platt JA in the case of *Philip K Chemwolo & Another –vs- Augustine Kubende [1986] eKLR* whereby the judge affirmed the application of section 47A of the *Evidence Act* to civil disputes. The court finds that since the defendant did not attend court to dispute the genuineness of the judgment in the criminal case and that of the criminal appeal then his conviction for forgery and fraud is conclusive evidence that he acquired registration of the suit property fraudulently. The second issue is thus answered in the affirmative.

(c) Whether the plaintiff is entitled to an eviction order against the defendant

17. The court has considered the material and evidence on record. Although the defendant denied that his registration as proprietor of the suit property was cancelled by the High Court in the criminal appeal



the documentary evidence on record shows otherwise. In his judgment dated April 27, 2004 Kimaru AgJ (as he then was) ordered as follows:

' I noted that the appellant, by an oversight on the part of the trial magistrate, may actually (after the finding that he had fraudulently obtained the transfer of the said parcel of land to him) benefit from his criminal actions. This court will rectify this anomaly under the provisions to section 177 of the Criminal Procedure Code. It is hereby ordered that the land certificate issued to the appellant in respect of Nyandarua/Silanga/28 on the January 25, 1983 is hereby cancelled. If there are any other subsequent transactions the same are hereby cancelled. The said parcel of land shall be registered in the name of the genuine owner Kahonge Muthondu, the complainant.'

18. The court has further noted that upon extraction of the said orders in the criminal appeal, the defendant challenged the same in Nakuru High Court Judicial Review Case No 85 of 2010 on the basis that the deputy registrar had no jurisdiction to extract such orders. According to the material on record, the said application for judicial review was dismissed by Hon Justice Anyara Emukule on September 17, 2013. The material on record further shows that he orders made by Justice Kimaru in the criminal appeal were implemented on August 25, 2010 whereby the land registrar cancelled the defendant's registration and registered the deceased as the proprietor. This is confirmed by the copy of the land registrar which was produced by the plaintiff at the trial.
19. The court is thus satisfied that the defendant's fraudulent registration was lawfully cancelled pursuant to a court order in the criminal appeal. The court is further satisfied that the suit property is currently registered in the name of the deceased. In the premises, the plaintiff as the administrator of the estate of the deceased is entitled to an eviction order against the defendant who has no legal interest in the suit property. Accordingly, the third issue is answered in the affirmative.

(d) Whether the plaintiff is entitled to the rest of the reliefs sought in the amended plaint

20. It is apparent from the amended plaint that the plaintiff also sought special damages; mesne profits; damages for fraud; general damages for trespass as well as a permanent injunction. The court shall deal with the issue of injunction first before handling the issue of damages. Although it is not usual for a court of law to grant an eviction order as well as a restraining injunction, the circumstances of this case call for such a measure. The evidence on record reveals that the defendant has been in unlawful occupation of the suit property since 1983. Despite being convicted of fraud and forgery in his acquisition of the suit property in 2001 and despite his appeal against conviction having been dismissed in 2004 he has continued in occupation of the suit property. It is pertinent to note that the defendant's registration was cancelled in 2010 and the deceased registered as proprietor in 2010 but the defendant has persisted in his unlawful occupation of the suit property. This court is thus of the opinion that upon eviction of the defendant he should also be restrained from interfering with the suit property thereafter.
21. The court has considered the plaintiff's claim for special damages. Although the plaintiff pleaded 8 particulars of special damages totaling Kshs 12,450/= the court is unable to find any evidence on record to prove the special damages claimed. There was no valuation report tendered at the trial on the value of the lost animals and other things. It has been held that special damages must not only be pleaded with specificity but they must also be strictly proved. See Ouma -vs- Nairobi City Council [1976] KLR 297. The court is thus not satisfied that on the basis of the material on record the plaintiff has proved the particulars of special damages pleaded in the amended plaint to the required standard.



22. The court has considered the material and submissions on record on the other heads of damages sought. It would appear that the plaintiff combined the claim for mesne profits together with damages for trespass and sought damages in the sum of Kshs 15 million. The court is of the opinion that whereas an aggrieved plaintiff may recover general damages for trespass without proof of any specific loss or damages, mesne profits have to be proved to the required standard. The court is further of the opinion that where a successful party recovers mesne profits for loss of user, he is not entitled to damages for trespass arising from the same cause of action since that may amount to double compensation. See [*Kenya Hotel Properties Ltd -vs- Willesden Investments Ltd \[2009\] eKLR*](#).
23. The court has noted that the defendant has been in occupation of the suit property since 1983. The court has taken note of the fact that size of the suit party is 16.0 ha. The court has taken into account the fact that the defendant has failed to vacate the suit property for many years after cancellation of his title and the registration of the deceased as the legitimate owner. The plaintiff's advocate referred the court to the case of [*Stalco Properties Ltd & Another -vs- Njugi Ventures Ltd & Another \[2021\] eKLR*](#) whereby the trial court awarded Kshs 2,000,000/= as general damages for trespass for a parcel of land measuring approximately 6.5 acres. The court is of the opinion that an award of Kshs 5 million shall be adequate compensation as general damages. The court shall not award the plaintiff any exemplary damage since no such damages were specifically sought in the award plaint.

(e) Who shall bear costs of the suit

24. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the [*Civil Procedure Act*](#) (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See [*Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd \[1967\] EA 287*](#). The court finds no good reason why the successful litigant should be deprived of costs. Accordingly, the plaintiff shall be awarded costs of the suit to be borne by the defendant.

G. Conclusion and disposal

25. The upshot of the foregoing is that the court is satisfied that the plaintiff has proved her claim against the defendant to the required standard. Accordingly, judgment is hereby entered for the plaintiff against the defendant in the following terms:
- a. The defendant shall hand over vacant possession of Title No Nyandarua/Silanga/28 within 30 days from the date hereof in default of which he shall be forcibly evicted together with his family members any persons claiming through him.
 - b. A permanent injunction be and is hereby granted against the defendant by himself, his agents, servants or any person claiming through him restraining him or them from howsoever interfering with the suit property.
 - c. The plaintiff is hereby awarded Kshs 5,000,000/= as general damages for trespass against the defendant.
 - d. The plaintiff is hereby awarded costs of the suit to be borne by the defendant.
 - e. Any relief sought and not specifically granted is deemed to have been declined.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 22ND DAY OF SEPTEMBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.



In the presence of:

Mr Gakuhi Chege for the Plaintiff

Mr Mathenge for the Defendant

C/A - Carol

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YM ANGIMA

JUDGE

