



**Hasgeman Company Limited & 2 others v Patel & 5 others
 (Environment & Land Case 131 of 2015 & 1201 of 2016 (Consolidated))
 [2023] KEELC 16037 (KLR) (27 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 16037 (KLR)

**REPUBLIC OF KENYA
 IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
 ENVIRONMENT & LAND CASE 131 OF 2015 & 1201 OF 2016 (CONSOLIDATED)
 EK WABWOTO, J
 FEBRUARY 27, 2023**

BETWEEN

HASGEMAN COMPANY LIMITED PLAINTIFF

AND

MAHENDRA G PATEL 1ST DEFENDANT

REGISTRAR OF TITLES 2ND DEFENDANT

NATIONAL LAND COMMISSION 3RD DEFENDANT

**AS CONSOLIDATED WITH
 ENVIRONMENT & LAND CASE 1201 OF 2016**

BETWEEN

MARIAM AHMED 1ST PLAINTIFF

**RAJAB AHMED KARUME (SUING AS ADMINISTRATORS OF THE ESTATE
 OF AZIZ AHMED KARUME (DECEASED)) 2ND PLAINTIFF**

AND

HASGEMAN COMPANY LIMITED 1ST DEFENDANT

ALPHA GRAIN MILLERS LIMITED 2ND DEFENDANT

FIRST COMMUNITY BANK LIMITED 3RD DEFENDANT



JUDGMENT

1. This suit relates to a dispute on ownership of property known as LR No 20750 and LR No 20699 between the Plaintiffs and the Defendants herein in the consolidated suits.
2. By an amended plaint dated February 27, 2015, the Plaintiff in ELC No 131 of 2015 sought inter alia injunctive orders and an order directing the Registrar of Titles and National Land Commission to cancel Mahendra G Patel's documents in respect to the suit property. The 1st Defendant Mahendra G. Patel upon being served filed a Statement of Defence contesting the Plaintiff's allegations and also filed a counterclaim dated March 13, 2015 wherein he sought for cancellation of the plaintiff's documents in respect to suit property and also injunctive orders against the Plaintiff therein.
3. In suit ELC No 1201 of 2016, the Plaintiff filed an amended Plaint dated October 3, 2016 seeking for the following reliefs;
 - a) A permanent injunction to restrain the Defendant by itself or through its employees, servants or agents from entering, trespassing, upon, pulling down and or removing structures or in any way interfering with the boundary wall, gate house and the suit property registered as LR No 20750 or in any way interfering with the Plaintiffs' quiet possession of the suit property.
 - b) A declaration that Aziz Ahmed Karume (deceased) is the registered and lawful owner of LR No 20750.
 - c) Special damages.
 - d) Exemplary and aggravated damages for trespass.
 - e) Costs and interest.
4. I will summarize the parties' respective cases in the two suits. Thereafter, I will summarize the parties' respective evidence and submissions. My brief analysis and findings on the issues falling for determination in the two consolidated suits will follow. Lastly, I will make appropriate disposal orders.

The case of the Plaintiff in ELC 131 of 2015

5. The Plaintiff in ELC Case No 131 of 2015 is Hasegama Company Limited. Its Case is that the Plaintiff has title and ownership of document to the suit property LR No 20750 IR 159427 and are indeed the actual occupiers of the suit property and that the 1st Defendant are not in occupation of the same. It was pleaded by the Plaintiff that the 1st Defendant have continued to use an armed gang in interfering with the Plaintiff's peaceful occupation of the said property.
6. It was also averred that the Plaintiff has on several occasion demanded the 1st Defendant to desist from trespassing or in any way interfering with the Plaintiff's quiet possession of the suit property but the same has been futile. In view of the foregoing, the Plaintiff therefore sought for several reliefs as were pleaded in the amended plaint dated February 27, 2015.

The 1st Defendant's case in ELC Case No 131 of 2015

7. Mahendra G Patel is the 1st Defendant in ELC Case No 131 of 2015. He filed a statement of defence and counterclaim dated March 13, 2015. He asserted his rights to the property namely LR No 20699



and counterclaimed for the cancellation of Hasegman's suit property documents of title (which is LR No 20750, IR No 159427 and not Mahendra's suit property, being LR No 20699) by the Registrar of titles and the National Land Commission. The following reliefs by way of counterclaim were sought:

1. A permanent injunction against the 1st Defendant restraining by itself, its servants, agents, employees, directors or otherwise howsoever from trespassing, entering, interfering in any manner with the Plaintiffs quiet and vacant possession in respect of LR No 20669 and which the 1st Defendant claims is LR No 20756 or in any manner whatsoever purporting that the said property is theirs.
2. An order directing the 2nd and 3rd Defendant to cancel the 1st Defendant in the counterclaim title.
3. General damages for fraud/illegality.
4. Punitive damages for fraud/illegality.
5. Costs
6. Any other and further relief that this Honourable Court may be pleased to grant.

The case of the Plaintiffs in ELC Case No 1201 of 2016

8. The Plaintiffs in ELC Case No 1201 of 2016 are Miriam Ahmed and Rajab Ahmed Karume (suing as administrators of the Estate of Aziz Ahmed Karume (Deceased). In summary their case was that they are administrators of the Estate of the late Aziz Ahmed Karume pursuant to a limited grant of letters of Administration made to them on April 20, 2016 in Nairobi Succession Case No 2941 of 2015. That the deceased was the registered owner of LR No 20750 as delineated on Land Survey Plan Number 309639.
9. It was averred that the Defendant on or about September 2016 through hired goons invaded and trespassed onto the suit property and demolished the gate house that had been erected therein and hence the Plaintiffs sought against the Defendant the reliefs sought in their plaint dated October 3, 2016.
10. In the said case, the Defendant did not participate during the hearing of the suit.

The evidence of the 1st Defendant (Mahendra G Patel) the Consolidated Cases.

11. The 1st Defendant in his case during trial presented two witnesses being Mahendra G. Patel the 1st Defendant in ELC Case No 131 of 2015 and Robert Simiyu, Assistant Director, Land Administration from the Ministry of Lands.
12. Mahendra G Patel testified on May 26, 2022. He relied on his witness statement and bundle of documents dated March 16, 2015 as his Evidence in chief and urged the court to grant the prayers sought in his counterclaim.
13. In cross-examination, he stated that the title affiliated to Rajab is different and that the deed plan in his document appears to be missing. He also stated that the grant number in the title document he produced is IR 67207 while for the other title was IR 142797.



14. He further stated that he did not know how much premium was paid. He stated that the names of signatories in both his document and the document by the Plaintiff in ELC Case No 1201 of 2016 are different. He added that the Plaintiff's title survey plan appears as number 309639 and that his sale agreement refers to 20699. He stated that the size of his title is 1.600 Hectares while that affiliated to Rajab is 1.626 Hectares.

The evidence of Rajab Karume in ELC No 1201 of 2016

15. He testified on May 26, 2022. He adopted his witness statement dated October 3, 2016 as well as his list and bundle of documents dated October 3, 2016 as his Evidence in chief.
16. During cross-examination, he stated that Mariam Ahmed passed away sometimes in 2018 and they had not substituted her as the Plaintiff neither did he file any authority to plead on her behalf. He also stated that the grant ad litem was rectified, though he was not aware of its rectification. The deceased Aziz Ahmed Karume was his brother and that he did not have a family.
17. He started being aware of an application for allotment made by his late brother but he conceded of not having the said application in court.
18. On further cross-examination, he also stated that he was not aware if he had made any payment of premium within the stipulated 30 days.
19. He also stated that he has never met Mahendra G. Patel and that the land they have is different from the one referred to in ELC Case No 131/2015, the case involving Hasgeman. His evidence was that they had been denied access to the land by Hasgeman. He stated that he was not aware of any case filed in 2006 between Hasgeman Company Limited and Patel and neither was he aware if Patel was in possession of this property.
20. He added that Hasgeman was the one who had hired goons to bar him from accessing the land.

The Evidence of Robert Simiyu

21. Robert Simiyu, an Assistant Director testified in support of the case of Mahendra G. Patel. During hearing, he produced the records from Ministry of Lands and stated that the transfer made to Mahendra G. Patel dated 30th January 2004 is genuine.
22. On cross-examination, he stated that the Director of Survey confirmed that the two surveys were issued on the same site. This was evident in the letter dated January 29, 2009. He also stated that there was no record of any title of LR No 20699.
23. He also added that pursuant to a letter by the Director of Surveys dated January 29, 2009, an investigation was conducted but no title was cancelled. The investigation report was also never forwarded to the Director of Surveys. It was in the form of an internal memorandum. He also stated that the letter of allotment for LR No 20699 was issued to Mulu Mutisya on September 1, 1994 who later transferred the property to Mbevo Investments Limited and Mulu Mutisya paid the stand premium on January 9, 1995.
24. In re-examination, he stated that there was a report by the Deputy Commissioner of Lands inquiring about the two plots. There are two LR numbers to the same plot. He attributed the problem to the office of the Director of Survey and stated that could have been an oversight on their part.
25. He added that the 1st survey done in 1995 and the first allottee was Mulu Mutisya and he transferred to Mbevo Investment Limited and later transferred to Mahendra G Patel.



The 1st Defendant's submissions in ELC Case No 131 of 2015

26. The 1st Defendant's filed written submissions dated November 23, 2022. The 1st Defendant explained the dispute before the court and the parties respective cases.
27. It was submitted that according to the respective parties material placed before the court, it can be said that on the required balance of proof Mahendra has shown that he is in possession of his suit premises, namely LR No 20699 and the court should hold as such.
28. The 1st Defendant submitted that the evidence of Mahendra G Patel and Robert Simiyu has not been challenged by Hasegman who has failed to ventilate its defence nor challenged by Rajab.
29. It was also submitted that the 1st Defendant had demonstrated that:
 - a) The letter of allotment upon which Mahandra's property is premised upon was issued to Mulu Mutisya on 1st September 1994 who then transferred it to Mbevo Investments in 1995 and who subsequently transferred it to Mahandra. On January 30, 2004, whilst that to Hasegman was issued on July 1, 1998, while that Aziz Karume on whose behalf Rajab was sued was issued on the January 24, 2013.
 - b) There is no record of Hasegman and or Rajab's property to cut LR No 20750 at the Lands Office.
 - c) By the time a Survey plan was being developed in respect of LR No 20750 there already existed a deed plan with respect to LR No 20699
 - d) No deed plan has ever issued in respect to LR No 20750
30. The cases of *Swaleh Mohamed Waziri & 3 others v Houd Mohamoud Athman & another* [2020] eKLR, *Kamau James Njendu v Serah Wanjiru* [2018] eKLR, *Samuel Odhiambo Oludhe & 2 others v Jubilee Jumbo Hardware Limited & another* [2018] eKLR, *Hubet L Matin & 2 others v Margaret J Kamar & 5 others* [2016] eKLR and *Benja Properties Limited v Syendna Mohamed Burhanmudin & 4 others* [2015] eKLR were cited in support.
31. It was further submitted that the suit by Rajab was a non-starter since the grant being confirmed was issued to Miriam who died in 2018. The case of *Standard Chartered Bank Limited v Intercom Services Limited & others* Civil Appeal No 37 of 2003 was cited in support of this position.
32. In conclusion, the 1st Defendant urged the court to make a finding that the 1st Defendant had proved his counter claim to the required standard and dismiss Rajab's suit with costs.

The submissions of Rajab Ahmed Karume, the Plaintiff in ELC Case No 1201 of 2016

33. Written Submissions dated November 14, 2022 were filed in support. Counsel submitted under the following three issues: -
 - i. Whether the Plaintiff has a valid title to the suit property.
 - ii. Whether the 1st Defendant in ELC No 131 of 2015 has any proprietary interest in the suit property.
 - iii. What orders should be made in this suit.



34. It was submitted that Aziz Ahmed Karume (deceased) acquired the suit property lawfully and from the evidence on record, it is clear that the process that led to the deceased acquiring the property was clear. It was further contended that the suit property LR No 20750 was allotted to the deceased vide an allotment letter dated July 1, 1998 which was followed up by the issuance of a certificate of title. The allotment letter was from the department of Lands under Ref No 51776/XVI. It offered the deceased Land described as LR No 20750 for a term of 99 years beginning July 1, 1998 at a stand premium of Kshs 500,000/- and amount rent of Kshs 100,000/-. The suit property was surveyed pursuant to deed plan No 309639 on June 4, 2010. The deceased paid the stand premium together with the attendant fees of Kshs 601,950.00 on October 31, 2011. The grant number IR 142797 was then issued on November 7, 2012 and subsequently registered on January 24, 2013. The certificate of title showing that the deceased was granted a lease over the suit property for a term of 99 years with effect from July 1, 1998.
35. Reliance was placed on article 40 of the Constitution which guarantees the right of an individual to acquire and own property and the cases of Rutongot Farm Ltd v Kenya Forest Services & 3 others [2018] eKLR and Joseph NK Arap Ngok v Moiyo Ole Keiuwa & 4 others were cited to affirm this. Counsel also made reference to Section 23 (1) of the Registration of Titles Act and Section 26(1) of the Land Registration Act, 2012 emphasizing the doctrine of indefeasibility of title.
36. It was argued that Mahendra G. Patel gave evidence that as per the letter dated 14th September 2005 to the Director of Surveys that he perused the Registry Index Map and found that the suit property appears as LR No 20750 and not LR No 20699
37. It was also submitted that the crux of the 1st Defendant's claim to title over LR No 20750 was based on a survey plan wherein Robert Simiyu had testified that it is only a witness from Director of Surveys that can give evidence relating to survey and reference was made to Section 23 of the Survey Act which outlined the duties of a licensed surveyor. On this front, it was argued that the 1st Defendant had not proved to the required standard his claim to the title as he did not call or summon any witness from the Director of Survey in support of his claim. Reliance was made to the case of Vitalis Otiogo Odida v Martin Chengo [2020] eKLR wherein the court reiterated the role of the Director of Survey.
38. It was argued that the 1st Defendant had not produced before the court any evidence that the title relating to LR No 20750 was cancelled or rectified to reflect his name as he had requested in his letter dated September 14, 2005 to Director of Surveys and that to date the LR No 20750 is still registered in the deceased's name. It was also submitted that no search had been conducted by the 1st Defendant prior to purchasing of the property from Mbevo Investments Limited.
39. On the issue of reliefs sought and citing the case of M'Ikiara M'Mukanya & Another v Gilbert Kabere M'Mbijiwe [1994] eKLR, Counsel submitted that the elements of trespass had been proven, and Hasegama Company Limited through hired goons had entered the suit property and demolished the gate house erected on the property. The said actions in itself amounted to trespass on the deceased's property.
40. The cases of Alex Waigera Mwaura v Chania Power Company Limited & another [2020] eKLR and Ochako Obichu v Zachary Ogoti Nyamwenga [2018] eKLR were cited in respect to the prayer for permanent injunction, wherein it was submitted that the Plaintiff having demonstrated that the deceased is the registered owner of the suit property, holds an indefeasible title to the suit property and is entitled to enjoy all the rights and privileges as the proprietor of the suit property including quiet possession.



41. In respect to damages, Counsel submitted that once a trespass to land is established, it is actionable per se and indeed no proof for the court to award damages is necessary. Reference was made to the cases of *Kenya Power & Lighting Company Ltd v Fleetwood Enterprises Limited* [2017] eKLR and *Godfrey Julius Ndumba Mbogori & Another v Nairobi City County* [2018] eKLR.

Analysis and Determination

42. I have considered the cases put forward by the parties, the submissions filed, authorities cited together with the evidence adduced herein. Parties did not agree on a common set of issues falling for determination in the two consolidated suits. However, based on the pleadings, evidence and submissions presented to the court the following are the key issues falling for determination: -
- i. Whether the 1st Defendant in ELC Case No 131 of 2015 has proven his counterclaim to the required standard to warrant the grant of the reliefs sought therein.
 - ii. Whether the Plaintiff in ELC Case No 1201 of 2016 has a valid title to the suit property.
 - iii. What orders should be made in respect to the consolidated suits.
43. When the matter came for hearing on February 22, 2022, Counsel for Hasegeman the Plaintiff in ELC Case No 131 of 2015 informed the court that his witness was absent and that its suit property had been taken over by Kenya Airports Authority and that the Plaintiff no longer held title to its property, by reasons of which the court allowed Hasegeman to place in court its documents to that effect. Later when the parties appeared for hearing on 26th of May 2022 Hasegeman had not filed any documents to show that Kenya Airports Authority had taken over its property known as LR No 20750 neither did they appear in court and the court dismissed their suit prompting the matter to proceed for hearing of the 1st Defendant's counterclaim. The 2nd and 3rd Defendant never participated in the hearing of this matter.
44. In respect to the 1st Defendant's counterclaim, the 1st Defendant had sought for several orders and adduced evidence in support of the counter claim. It was the testimony of the 1st Defendant that the property was allotted to Mulu Mutisya and a title deed duly issued to Mbevo Investments Limited in 1995. He also produced his sale agreement with Mbevo Investments Limited, the transfer from Mbevo Investments to himself, proof of payment of land rates and rent for the years. However, during the testimony of Robert Simiyu, an Assistant Director, Land Administration from the Ministry of Lands, he conceded in cross examination that the two plot numbers were assigned the same survey site and that the Director of Survey had indicated that in order to solve the problem one survey plan had to be cancelled and he confirmed that a report had been done in respect to this but there was no cancellation of any survey plan.
45. It is trite law that a counterclaim is as a suit which ought to be proved to the required standard.
46. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the *Evidence Act*, which provides as follows:
- “(1) 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.



(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

47. Sections 109 and 112 of the same Act states;

“ 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

”

48. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in Mumbi M’Nabea v David M. Wachira [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M’airanyi & others v Blue Shield Insurance Company Limited -Civil Appeal No 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

49. The court will be guided by the foregoing, In the present case, the 1st Defendant was able to call an officer from the Ministry of Lands who in turn conceded that only a Director of Survey could have been better placed to address the problem herein, however the Director of Survey was never called as a witness herein and having considered and analyzed the evidence produced by the 1st Defendant herein, it is the finding of this court that the 1st Defendant’s counterclaim has not been proved to the required standard to warrant the grant of the prayers sought.

50. On the second issue for determination, I wish to make reference to the case of Munyu Maina v Hiram Gathiba Maina [2013]eKLR the Court of Appeal stated that:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”



51. In Nairobi High Court Civil Suit No 1024 of 2005 (OS), *Milankumar Shah & 2 others v The City Council of Nairobi & another*, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.

52. In the instant case, the Plaintiffs produced evidence showing that the deceased was lawfully allocated LR No 20750 and that they had no interest whatsoever to the 1st Defendant’s claim to property LR No 20699 and as such it is the finding of this court that the Plaintiffs in ELC Case No 1201 of 2015 has demonstrated their property interest to LR No 20750 and I am satisfied that they have established title to the suit property LR No 20750.

53. On the third issue, on what orders should be issued herein, having made a finding that the Plaintiffs have established their proprietary interest to LR No 20750, the Plaintiffs’ in suit ELC Case No 1201 of 2016 is entitled to some reliefs sought. The Plaintiffs also claimed injunctive reliefs and damages for trespass. However, they did not lead evidence to warrant the prayer for damages and I will decline to grant the same.

54. This court having made a finding that the 1st Defendant did not prove his counterclaim to the required standard, the orders sought in the counterclaim cannot be granted and as such the counter claim is dismissed.

55. On the issue of costs, the same is at the discretion of the court. As a general rule, costs follow the event unless the court for good reasons orders otherwise. However, looking at the circumstances in the present case, I will direct that each party to bear own costs of the suit.

Final orders

56. In conclusion, the suit in Nairobi ELC Case No 131 of 2015 and Nairobi ELC Case No 1201 of 2016 are disposed as follows:

- a) A declaration that Aziz Ahmed Karume (deceased) is the rightful owner of LR No 20750.
- b) The 1st Defendant’s counterclaim in ELC No 131 of 2015 dated March 13, 2015 is dismissed.
- c) All the other reliefs not expressly granted are deemed as declined.
- d) Each party to bear own costs.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2023.

E.K. WABWOTO

JUDGE

In the presence of:-

N/A for the Plaintiff in ELC No 131 of 2015.



Ms. Otieno h/b for Mr. Wandabwa for the 1st Defendant in ELC No 131 of 2015.

N/A for 2nd and 3rd Defendants in ELC No 131 of 2015

Ms. Maina for the Plaintiffs in 1201 of 2016.

N/A for the Defendants in ELC No 1201 of 2016.

Caroline Nafuna- Court Assistant.

E.K. WABWOTO

JUDGE

