



**Ayiro v Khayesi (Environment & Land Case 131 of 2019)  
[2023] KEELC 16577 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16577 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 131 OF 2019  
DO OHUNGO, J  
MARCH 28, 2023**

**BETWEEN**

**DANIEL ACHUMA AYIRO ..... PLAINTIFF**

**AND**

**FELIX M. KHAYESI ..... DEFENDANT**

**JUDGMENT**

1. By Originating Summons (OS) dated December 19, 2019, the plaintiff claimed to have acquired the parcel of land known as Kakamega/Shikulu/1828 (suit property) by adverse possession.
2. The OS was supported by an affidavit sworn by the plaintiff who deposed that the suit property was first registered in the name of Samuel Mujina Muyeka who was his step grandfather, and that he (the plaintiff) was peacefully residing in the suit property from 1991 until when he was charged with the offence of forcible detainer in Kakamega CM CR Case No 1983 of 2013 but was acquitted on February 21, 2019. He further deposed that the defendant in collusion with one Mary Imbenzi caused the suit property to be registered in their names.
3. The defendant opposed the OS through a replying affidavit which he swore on February 5, 2020. He deposed that he is the registered owner of the suit property which initially belonged to Samuel Mujina Muyeka (deceased) and that through Kakamega High Court [Succession Cause Number 959 of 2011](#), the suit property was transferred to Mary Imbenzi Nechesa as administrator and daughter of the deceased. That Mary Imbenzi sold the suit property to him on February 19, 2013. He further deposed that after the sale, the plaintiff destroyed the fence built by the defendant and the defendant reported to the police as a result of which the plaintiff was charged in the above criminal case. He also stated that the plaintiff does not reside on the suit property but occasionally enters therein illegally.
4. The defendant also included a counter claim at paragraph 11 of the replying affidavit wherein he sought judgment against the plaintiff for a permanent injunction restraining the plaintiff by himself, his heirs,



- agents, assigns or anyone acting on his behalf from entering, ploughing, cultivating, using and/or in any way transacting on the suit property.
5. Directions were given that hearing proceeds by way of oral evidence. When the matter came up for hearing on October 27, 2022, the plaintiff sought adjournment. Upon the application for adjournment being dismissed for reasons which are on record, the plaintiff applied to withdraw his suit against the defendant. The plaintiff's suit was thus marked withdrawn with costs to the defendant. Counsel for the defendant then sought to proceed with the counterclaim. Upon the court allowing hearing of the counterclaim to proceed, counsel for the plaintiff walked out of the court room.
  6. The defendant testified in support of the counterclaim and adopted his above replying affidavit as his evidence. He stated that as at the date of his testimony, the plaintiff was using the suit property forcefully.
  7. Next, Mary Imbenzi Nechesa testified in support of the defendant's counterclaim. She adopted her witness statement dated February 10, 2022 as her evidence in chief. She stated that she filed the above succession cause and that upon the suit property being registered in her name, she sold it to the defendant on February 19, 2013 and that she transferred it to the defendant upon payment of the full purchase price.
  8. At the conclusion of the testimonies, counsel for the defendant opted not to file any submissions. He urged the court to render judgment. I have carefully considered the parties' pleadings and evidence.
  9. The defendant is seeking a permanent injunction against the plaintiff. To succeed, he must demonstrate that his case is meritorious and that he will suffer damage if the order is not granted. See *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR and *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR.
  10. There is no dispute that the defendant is the registered proprietor of the suit property. The plaintiff asserted as much in his case and annexed a copy of a certificate of search dated October 9, 2019. On his part, the defendant produced a copy of a title deed in his name dated June 4, 2012 and a certified copy of the register of the suit property which shows that he became registered proprietor on May 31, 2012.
  11. The defendant's testimony that the plaintiff is in forceful use of the suit property is corroborated by the plaintiff's own affidavit in which he claims to be in possession and use.
  12. As a registered proprietor, the defendant is entitled to the rights, privileges and benefits accorded by section 24 of the *Land Registration Act*. His case has not been challenged at all by the plaintiff. He has made a case for the grant of the permanent injunction sought.
  13. In the result, I make the following orders:
    - a. A permanent injunction is hereby issued restraining the plaintiff by himself, his heirs, agents, assigns or anyone acting on his behalf from entering, ploughing, cultivating, using and/or in any way transacting on the the parcel of land known as Kakamega/Shikulu/1828.
    - b. The defendant shall have costs of the counterclaim.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 28<sup>TH</sup> DAY OF MARCH 2023.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:



No appearance for the plaintiff

No appearance for the defendant

Court Assistant: E. Juma

