



**Siro v Kibagendi (Environment and Land Appeal 24A of 2022)
[2023] KEELC 17539 (KLR) (24 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17539 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL 24A OF 2022**

M SILA, J

MAY 24, 2023

BETWEEN

CHARLES SIRO APPELLANT

AND

JAMES KIBAGENDI RESPONDENT

*(Being an appeal against the judgment of Hon. S.N. Abuya Chief Magistrate,
in the suit Kisii CMCC/ELC No. 24A of 2021 delivered on 6 October 2022)*

JUDGMENT

1. Through a plaint filed on June 16, 2017, the respondent, as plaintiff, sued Francis Siro and Charles Siro (appellant) seeking the following orders :-
 - a. A declaration that the plaintiff is the legally registered owner with his wife Roseline Nyaboke Kibagendi, of the land parcel West Kitutu/Mwagichana/3391.
 - b. An order of permanent injunction to restrain the defendants from entering, encroaching, doing further construction of the mud-walled house or doing anything on the suit land and have their structure demolished by forceful eviction.
 - c. Cost of the suit.
 - d. Any other relief deemed fit.
2. In his plaint, the respondent pleaded that the 1st defendant (Francis Siro, now deceased) who was father to the 2nd defendant/appellant (Charles Siro) had sold to him and his wife the land parcel West Kitutu/Mwagichana/3391 (the suit land) vide a sale agreement dated September 7, 2010. He averred that in the month of April 2017, the defendants encroached into the land and started constructing a mud-walled house hence the prayers in the plaint.



3. The 1st defendant filed defence in person where he inter alia denied selling the suit land to the respondent. He averred that he owns the land parcel West Kitutu/Mwagichana/3061 and denied knowledge of the existence of the suit land i.e West Kitutu/Mwagichana/3391. He also denied trespassing into the suit land. He pleaded that the mud-walled house in issue belonged to him. The appellant, as 2nd defendant, also filed defence in person. He pleaded that he could not verify or admit that the respondent had any transaction with his father. He pleaded that he has done nothing sinister as he was sired and brought up on the suit land.
4. The 1st defendant died in August 2019 and it follows that the suit against him abated as there was no substitution.
5. Hearing commenced on July 5, 2022 when the respondent testified. He relied on a witness statement wherein he averred that he purchased from the 1st defendant a portion measuring 50 X 100 feet out of the land parcel West Kitutu/Mwakibagendi/3061. He stated that the seller invited a surveyor who filed mutation forms and the vendor transferred the land into his name. He was thus surprised when in the year 2017 the defendants entered the land and constructed a mud-walled structure. He produced a sale agreement dated September 7, 2010 showing that the land was sold for Kshs 210,000/=. He also produced a document dated September 27, 2010 being an acknowledgment of the purchase price, an official search of the parcel West Kitutu/Mwakibagendi/3061, showing the registration of the 1st defendant as proprietor, a mutation form for the land parcel West Kitutu/Mwakibagendi/3061, a title deed for the suit land and a search showing that he and his wife became registered as proprietors on May 26, 2011. The respondent called one Yuvenalis Bosire as his witness. His evidence was that he witnessed the sale agreement between the respondent and the 1st defendant and he also witnessed the 1st defendant receive the money.
6. In his evidence, the appellant testified that he does not know how the land was sold and that he built on the land because his father gave it to him. He stated that he reported to the police when he realized that the land had been sold and that the advice he was given was that he could continue living on the land if the respondent had not put anything on it. He denied building on the respondent's land and insisted that he built on his father's land. He stated that the family does not know the purchaser of the land. He was cross-examined and he stated that he complained to the Chief that his father had sold the land without his consent. He acknowledged that the land belonged to his father and that the buyer bought the land and planted beacons. He did not call any witness.
7. In her judgment, the trial Magistrate found that the respondent had proved that he is the registered owner of the suit land jointly with his wife. She also found that the respondent had proved that the appellant was a trespasser on their land. She found that he was entitled to the orders sought and entered judgment in his favour. She ordered the appellant to vacate the suit land within 90 days or be evicted.
8. Aggrieved, still acting in person, the 2nd defendant in the suit preferred this appeal. I opt not to set out the grounds of appeal as drawn because they are clearly jumbled up and drafted in the most inelegant manner. Doing the best I can, I can fish out complaints that it was wrong for the trial court to order his eviction from ancestral land; that he was not served; that the 1st defendant was deceased; that identity was not established; that no succession has been done. He seeks that the judgment be set aside and for leeway to file a suit against the respondent.
9. The appeal was argued orally and the appellant stated that the judgment was not proper as he was not served. He also stated that he found no case registered as case No 24A in court. He raised issue that the case proceeded without survey or police report yet it was a claim of trespass. Mr Kimaiyo, learned counsel for the respondent, did not find fault in the judgment. On the issue that there needed to be



a survey report, he submitted that the appellant confirmed that he complained that the land was sold without his consent.

10. I have considered the appeal.
11. The appellant in his submissions before this court complained that he was never served. That is frivolous because he did file an appearance in person and also filed defence. He also fully participated in the hearing of the suit, cross-examined the witnesses of the respondent, and also presented his own evidence. I also see no issue about succession. The land was sold while the 1st defendant, who was registered owner, was still alive. He in fact died in 2019 after title had issued to the respondent. If the appellant wished to contest the sale of the land and claim it for the benefit of the estate of his late father, nothing stopped him from filing a succession cause and defending the suit against his father's estate, or even filing a suit on behalf of the estate of his late father. I really do not see any issue regarding succession. There was insinuation that the trial court erred in proceeding despite the death of the 1st defendant. There was no error. After lapse of one year, the suit against the 1st defendant abated by operation of law but the suit against the appellant continued.
12. Probably the more serious contention is that the suit proceeded without a survey report. It is true that no survey report was presented to demonstrate that the appellant actually occupies the land of the respondent. However, the appellant himself did not in his evidence seriously deny occupying the land and did not assert that his occupation is for a separate and distinct parcel of land. His defence was that this was ancestral land and that his father ought not to have sold it without his consent or the family's consent. The claim that this was ancestral land was never proved. What was shown was evidence that the vendor wholly and absolutely owned the land parcel West Kitutu/Mwakibagendi/3091 from where the suit land was carved out of. The evidence shows that there was indeed a sale agreement and that the vendor received and acknowledged the full purchase price. If there was any complaint regarding the sale, it was the vendor, or his estate, to complain, and not the appellant, for he lacks locus standi to sue on behalf of the estate of his late father.
13. The respondent did prove that he is the registered proprietor of the suit land together with his spouse. The appellant did not demonstrate any legally sustainable claim to the suit land. The respondent displayed title and this must be protected as outlined in Section 26 of the [Land Registration Act](#), Act No 3 of 2012, which provides that :
 26.
 - (1) 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, 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.
 - (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.



14. The appellant did not bring any evidence that the title of the respondent was obtained by way of fraud or misrepresentation, and there was no evidence that the title was obtained illegally, unprocedurally, or through a corrupt scheme. I have already mentioned that there was no evidence that the land was ancestral land nor did the appellant prove any claim of trust. I see nothing wrong in the title of the respondent.
15. I am in those circumstances unable to disturb the judgment of the trial court. The trial court was correct in finding that the respondent had proved that he is the rightful proprietor of the suit land; the court was also correct in finding that the appellant was a trespasser; and the court was correct in issuing an order for the appellant to vacate the suit land or he be evicted. It was also correct for the trial court to issue the order of permanent injunction.
16. The long and short of it is that I find no substance in this appeal and it is hereby dismissed with costs. The respondent is at liberty to proceed with execution of the judgment of the trial court save that I do give the appellant a grace period of 30 days to give vacant possession.
17. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 24 DAY OF MAY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

