



**Kalume v Wingira (Environment & Land Case 67 of 2013)
[2023] KEELC 18298 (KLR) (26 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18298 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 67 OF 2013**

**SM KIBUNJA, J
JUNE 26, 2023**

BETWEEN

ESTHER NZINGO KALUME PLAINTIFF

AND

CHILSON LWANGU WINGIRA DEFENDANT

JUDGMENT

1. Esther Nzingo Kalume, the plaintiff, has vide the amended plaint dated the May 20, 2015 filed through Ms Muriu, Mungai & Co Advocates, sued Chilson Lwangu Wingira, the defendant, seeking for;
 - a. Eviction of the defendant from the suit property;
 - b. Order for the defendant to remove any permanent or semi-permanent structure erected on L R No 6383 (original No 4593/2) section 111 Mainland North, the suit property, within 30 days from the date of judgement in default the plaintiff be at liberty to remove any such structure at the defendant's costs.
 - c. A permanent injunction restraining the defendant, servants, agents or heirs from entering onto, remaining on, and or otherwise interfering with the suit property in any manner whatsoever,
 - d. Costs of this suit and interests thereon from date of filing suit till payment in full.

The plaintiff has averred that she is the registered owner as a lessee from the Government of Kenya for a term of 99 years of LR No 6383 (original No 4595/2 section 111 Mainland North) measuring 0.3451 hectares or thereabouts with the improvements thereon, the suit property. That the suit property is a subdivision of 3843 (original No 3839/4) section 111 Mainland North, which she subdivided into subplots for sale and has obtained independent titles for each of them. That the defendant is a tenant



- on a portion of the suit property and has rejected the offer to purchase the said plot. That the defendant has also declined to vacate from the suit property to enable her sell it to another purchaser and hence this suit.
2. The plaintiff's claim is opposed by the defendant through his statement of defence, filed through Ms Godfrey Mutubia & Co Advocates, dated the May 24, 2013 denying among others that he has been a tenant on the suit property or part thereof. That he is the lawful owner of the portion or parcel of land where he has constructed his residence and lived for over thirty [30] years. That he has quietly and uninterruptedly occupied the suit property for over thirty [30] years having purchased it from the late Kalume Kitsaumbi, which sale was completed by the late Kavumbi Kalume Kitsaumbi. Alternatively, the defendant averred that he has acquired adverse title to the suit land against the plaintiff by reason of having continuously and uninterruptedly occupying it for over thirty [30] years. That the plaintiff's title to the suit property has been extinguished and he should be declared the lawful owner.
 3. The plaintiff testified as PW1 and told the court that she was born in 1961 and that she would not dispute if the defendant has averred that he had come on the suit land in 1978. That the defendant had come on the land with the permission of her late father and after her father passed on, he continued paying ground rent for the said land to her mother. She produced duplicate receipts of 1987, January and February 1988 she had issued to the defendant upon paying ground rent to her mother. She continued to testify that after her mother passed on in 2008, she became the administrator and only beneficiary of her estate. That she has subdivided the land she inherited for the 40 or 50 persons including the defendant and beacons were planted by a surveyor. She agreed knowing that her mother and the defendant had a case in court but did not know its outcome.
 4. The defendant testified as DW1 that he has lived on the suit land since 1978, when he bought a plot of 126 feet by 280 feet from parcel 308/2 for Kshs 18,000 from Kalume. That in 1992, Kalume's widow lodged a complaint over the plot with the chief but did not attend the hearing. Later on the widow, Rachel, filed Kilifi case No 335 of 2001 against him but it was dismissed for want of prosecution on March 12, 2010. He told the court that he had agreed with the mother to the plaintiff that he would pay her Kshs 180,000 so as to be issued with a title to his plot. That he paid that amount through the advocate to the plaintiff's mother who acknowledged receipt before Antony Mrima advocate. The defendant testified that he has his dwelling house on the said land and had extensively developed it. He called for the plaintiff's suit to be dismissed with costs.
 5. The learned counsel for the plaintiff and defendant filed submissions dated the February 6, 2023 and March 20, 2023 respectively, which the court has considered.
 6. The following are the issues for the determinations by the court;
 - a. Who between the plaintiff and defendant has the legal title to the suit property.
 - b. Whether defendant's occupation of the suit property was with the registered owner's permission, or as a purchaser and or adverse possessor.
 - c. Whether the plaintiff is entitled to any of the prayers sought.
 - d. Who pays the costs.
 7. The court has carefully considered the parties' pleadings, oral and documentary evidence tendered, submissions by the two learned counsel, superior courts decisions cited thereon, and come to the following determinations;



- a. That though the defendant appears to question the plaintiff's locus to file this suit claiming that she is not the owner of the said land through his counsel's submissions, there is no dispute that she is indeed the daughter and administrator of the estate of her late mother, Rachel Kavumbi Kalume. That from the copy of the certificate of postal search over the suit property done on the April 5, 2013 that is annexed to the defendant's list of documents dated the July 4, 2013 and December 19, 2018, the suit land is registered in the name of Esther Nzingo Kalume, the plaintiff, and the learned counsel's submission to the contrary is not derived from any evidence presented to this court. The court therefore finds that from the evidence tendered before it, the plaintiff is the registered proprietor of the suit land and has capacity to sue over it.
- b. That there is also no dispute that the defendant has been occupying a portion of the suit land from as far back as 1978. The plaintiff contends that the defendant's occupation was with permission of her late father whose terms she could not specify as she was young then, while the defendant position is that he had bought that portion for Kshs 18,000 under a written sale agreement. The defendant has availed a copy of the handwritten agreement dated January 11, 1978 for a portion of 126 feet by 280 feet out of plot 308/2. The court has noted that first, there is no documentary evidence presented to connect that parcel to the suit land subject matter of this suit. Secondly, there is no explanation whether the requisite statutory approvals were sought and obtained to enable the excision of the portion from the parent title, and transfer the portion of the land bought to the defendant. In the absence of consent having been obtained within the timelines prescribed, the sale agreement became void and what the defendant could have claimed for under the said agreement is reimbursement of the purchase price, if any is established to have been paid. Thirdly, no evidence to confirm the payment of the purchase price to the vendor was tendered. Had the whole payment of the purchase price have been made during the lifetime of the said Kalume, the defendant would not have continued to pay his widow, Rachel, ground rent for the same plot. It is instructive that when the defendant defaulted in ground rent payment, the widow, Rachel Kavumbi Kalume, sued him in Kilifi RMCC No 335 of 2001. The defendant has attached copies of the plaint, verifying affidavit and summons to enter appearance of that case in his supplementary list of documents dated the December 19, 2018. At paragraphs (3) to (5) and prayers (a) and (b) of the plaint dated December 3, 2001, the defendant had been sued for ground rent arrears totally Kshs 36,000 at Kshs 300 per month and vacant possession of plot No 3843/11/MN. Though the plot's description refers to section 11, the number 3843 is similar to that of the parent title where the suit property herein was subdivided from.
- c. The court has also noted copies of correspondences dated April 15, 2005, October 7, 2010, September 28, 2012 attached to the defendant's supplementary list of documents that appear to have been between advocates representing the interests of the parties herein to prove payment of Kshs 180,000 to Japhet Chizipha and offer for purchase of subdivision of plot 384/11/MN. That had the defendant really fully bought the suit land in 1978 as he claims from the late Kalume, then he would not have gone ahead to pay the Kshs 180,000 to the said Japhet. The defendant attached to his supplementary list of documents a copy a document headed "undertaking" dated the November 5, 2012 that the said Japhet Chizipha signed at the police station and in his evidence in court, he confirmed the plaintiff was not present. There is no documentary evidence availed to confirm that the said Japhet Chizipha was an advocate authorized by the Rachel or the plaintiff to act for them in the issue over payment of the Kshs 180,000. There is also no documentary evidence that the money was indeed received by the said Japhet, and the purpose of the payment. That even though the defendant stated that he had the receipts, he did not avail them to the court. That the foregoing clearing shows



that, up to the year 2012, the defendant had acknowledged his occupation of the suit land was with the permission of the registered owners either as a tenant and or purchaser. The defendant's claim based on adverse possession cannot therefore be sustained for the period he occupied or had possession of the suit land with permission of late Kalume, the late Rachel or the plaintiff. Such a defence can only succeed if the defendant satisfied the court that he obtained possession without permission, or license and that his occupation was open, notorious, exclusive and adverse as otherwise expressed "*nec vi, nec clam, nec precario*." See the decision in the case of *Njeri Kimani versus Edwin Onesmus Wanjau* [2022] eKLR. That as this suit was commenced through the plaint dated the March 18, 2013 and filed on the April 18, 2013, that was subsequently amended on the May 20, 2015, then the court finds the statutory period of twelve years had not lapsed for the defendant to raise the defence of adverse possession to the plaintiff's claim to the suit property. The defence of limitation is therefore not available to the defendant.

- d. That considering the availed documentary evidence, oral evidence by the plaintiff and the defendant who both testified before me, I find the testimony that the defendant was a rent paying tenant of the suit property from the time of the late Kalume and the late Rachel, more compelling and believable than the claim of a purchaser who had fully paid the purchase price. The defendant may have all along intended to one day buy the portion of the land he occupied, and the registered owners, including the plaintiff appeared ready to give him the first option, but that never materialized. What the defendant therefore has over the portion of the suit land that he has lived on for years is ownership of a house without owning the land it is situated on. That unique ownership is recognized in this region as confirmed in several superior court decisions including that of the Court of Appeal in *Abdukrazak Khalifa Salimu versus Harun Rashid Khaton & 2 Others* [2018] eKLR, in which the court held that;

“27.Having entered the suit land by consent, the appellant's continued presence or occupation of the suit property can only be by consent or permission of the registered proprietor. When the respondents informed the Mosque not to accept or receive rent from the appellant, such intimation constituted an implied cancellation of permission to remain on the suit property. Upon such permission being cancelled, the appellant became a trespasser.”

In the above case, the Court of Appeal dismissed the appeal, upheld the decision of this court with some variation, and gave the appellant three (3) months' notice from the date of the judgement to vacate from the suit property and remove his house without land. The court further directed that at the expiry of three (3) months, the respondents be at liberty to evict the appellant from the suit property. The court finds the above case to have great similarity to this instant case in that the plaintiff has indicated she now want to sell the suit land as opposed to have the defendant continue paying ground rent. That intimation is evidence enough that the permission or license the defendant had to occupy the land as a tenant from the time of the late Kalume had been rescinded or terminated by the plaintiff. His options were either take the plaintiff's offer to buy the plot or vacate to enable the plaintiff sell to another willing buyer.



- e. Though the plaintiff had claimed in her pleadings that she owned the developments on the suit land, she did not tender any proof to dislodge the defendant's claim that he is indeed the one who has carried out all the developments thereon. That even the counsel for the plaintiff has clearly confirmed that position through paragraphs 29 to 35 of their submissions.
- f. That having found the plaintiff has proved her claim against the defendant, then as under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event, the defendant will pay the plaintiff the costs of the suit.
 1. Flowing from the foregoing the court finds that the plaintiff has proved her claim against the defendant on a balance of probabilities. The court therefore enters judgement for the plaintiff against the defendant in the following terms;
 - a. That the defendant is hereby declared the owner of house without land that is situated on a portion of the suit property.
 - b. That in view of the plaintiff having terminated the permission or license on or about 2012 for the defendant to continue occupying the portion of the suit land where his house without land is situated, the defendant became a trespasser on that portion of the said land from that date.
 - c. The defendant is hereby granted thirty [30] days to engage the plaintiff and obtain a firm sale agreement over that portion of the suit land where his house without land is situated, and in default to remove the said house and vacate from that portion of the suit property within sixty [60] days from today. That should the defendant fail and or neglect to obtain a sale agreement or vacate within the foregoing timelines, the plaintiff be at liberty to demolish the said house and evict the defendant at his costs, in accordance with the law.
 - d. That in case the defendant does not buy the portion of the suit property where his house without land is situated, and instead gives vacant possession or is evicted, a permanent injunction be and is hereby issued restraining him or those claiming from him from remaining, entering or otherwise interfering with the plaintiff's use and possession of the suit property.
 - e. The defendant to pay the plaintiff's costs and interests at courts rate from the date of filing the suit till payment in full.

8 Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 26TH DAY OF JUNE 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of;

Plaintiff: Absent

Defendant : Absent

Counsel : Mr. Kongere for Plaintiff.

Mr Mutubia for Defendant

Wilson – Court Assistant.



S. M. Kibunja, J.

