



Asanyo (Bishop) & 2 others ((All suing as office bearers of Msanda Holy Ghost Church of East Africa) v Thoya & another (Environment & Land Case 193 of 2015) [2023] KEELC 18320 (KLR) (20 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18320 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 193 OF 2015**

NA MATHEKA, J

JUNE 20, 2023

BETWEEN

WALTER ASANYO (BISHOP) 1ST PLAINTIFF

GORDON ONGORO (PASTOR) 2ND PLAINTIFF

SAMSON OTULA (BISHOP) 3RD PLAINTIFF

(ALL SUING AS OFFICE BEARERS OF MSANDA HOLY GHOST CHURCH OF EAST AFRICA

AND

EMILY THOYA 1ST DEFENDANT

LAND REGISTRAR MOMBASA 2ND DEFENDANT

JUDGMENT

1. It is averred that the Plaintiffs are the Registered Proprietors of all that Parcel of Land known as Mombasa/Ziwa La Ng'ombe Scheme/317. The year 2002 the Land Adjudication Department through the Settlement Fund Trustees allocated to the Plaintiffs Plot No.367 measuring approximately 0.04 Hectares at Ziwa La Ng'ombe Squatter Settlement Scheme, Mombasa. Upon the allocation the Plaintiffs constructed a church building also used a nursery school, a pit latrine for use by the worshippers and school children and a house for the Pastor. That registration the Plaintiffs was were issued with title now and the parcel of land registered as Mombasa/Ziwa La Ng'ombe Scheme/ 317 with less acreage. The Defendants by way of deceit and fraud colluded and produced another title Mombasa/Ziwa La Ng'ombe Scheme/ 553 and attempting to subdivide the Plaintiffs' land in favour of the 1st Defendant. The Defendants action was illegal and fraudulent and to the detriment of the Plaintiff's right to its Land and quiet enjoyment thereof. It is the Plaintiffs contention that the 2nd Defendant had no right and lawful authority to subdivide the Plaintiff's land as allocated in 2002 to



the benefit of the 1st Defendant. The illegal subdivision has cut off the Plaintiffs pit latrine and the Pastor's house which were in existence even before titles were issued. The Plaintiffs claim against the Defendants is for a permanent injunction restraining the 1st Defendant from by herself, her servants and or authorized agents occupying, entering into, alienating, dealing in or in any other manner whatsoever interfering with and in the Plaintiff's parcel of land Mombasa/Ziwa La Ng'ombe Scheme/317 and for an order directing the 2nd Defendant to correct the register and rectify the title. The 1st Defendant has on several occasions entered into the Plaintiff's parcel of land claiming ownership and destroyed erected fences and has finally had a District Commission in the area issue a quit notice to the Plaintiffs. The Plaintiffs stands to suffer irreparably and even lose its property should the Defendants not be restrained and permanently stopped by this Court. Despite several meetings having been held, demand made, notice of intention to sue having been given, the Defendants have refused and or declined to stop interfering in the Plaintiff's parcel of land. The Plaintiffs prays for judgment jointly and severally against the Defendants for:-

- a. A permanent injunction restraining the 1st Defendant from by herself, her servants and or authorized agents, occupying, entering into, alienating dealing in or in any other manner whatsoever interfering with and in the Plaintiff's Parcel of Land known as Mombasa/Ziwa La Ng'ombe/ 317.
 - b. Rectification of Title Deed. *
 - c. Vacant possession of the suit property
 - d. Costs and interests if any.
2. The 1st Defendant states that the Plaintiff's claim against the Defendant is a non-starter, lacks any substance, is improperly before the courts, frivolous, vexatious and an utter abuse of the process of the court granted that the suit is wrongly brought before the court and is improperly before the court. The Plaintiffs claim is entirely based on a letter of offer which is not and has never been an absolute allocation. The said letter of offer like any offer contains specific conditions which must be met which the Plaintiff cannot and has not demonstrated. The said letter of offer refers to Plot No.367 and there is no connection and none has been demonstrated between this Plot 367 and Plot 317 contained in the Plaintiffs' title. Plot No.317 which is the subject of this suit clearly contains 0.0206 Hectare and has not contained any other area in measurement as is implied by the Plaintiff. Similarly, the 1st Defendant's Plot No.553 is by measurement 0.0163 Hectares from the onset and has never been by any other measurement. Evidently the subject parcel of land was obtained through the process of adjudication and settled subject to statutory procedure with regard to settlement of disputes. On the whole it is evident that it is the Plaintiff who is a trespasser in respect of the 1st Defendant's Parcel No. Mombasa/Ziwa La Ng'ombe/553 and has clearly been impervious to the process of resolution of the dispute through the relevant District Land Adjudication and Settlement Office.
3. The 2nd Defendant states that the Plaintiff does not possess title nor ownership of the parcel of land known as Mombasa/Ziwa La Ng'ombe Scheme /317. That the 2nd Defendant should not be condemned for carrying out his legal mandate as the Land Registrar as outlined in the [Land Act](#).
4. This court has considered the evidence and the submissions therein. In their Amended Plaint dated 7th October 2021 the Plaintiffs averred that they are the proprietors of Land Parcel No. Mombasa/Ziwa la Ngombe Scheme/317, while the 1st Defendant is the proprietor of Land Parcel No. Mombasa/Ziwa la Ngombe Scheme/553. The two plots, No. 317 and No. 553 are opposite each other and share a common boundary.



5. The Plaintiffs' Plot 317 is approximately 0.0206ha in size (PEX-3) while the 1st Defendant's is approximately 0.163ha in size (DEX-2). The evidence of PW1 was that they started the church in 1982 and put up the pit latrine then the church later in 2002. The 1st Defendant stated that during her cross-examination, that the Plaintiffs constructed a toilet and a small house on her Plot 553. The Plaintiff averred that, vide a letter dated 15th February 2002 (PEX-4), the Director of Land Adjudication and Settlement Mombasa allocated to the church Plot No. 367 of approximately 0.04ha at Ziwa la Ngombe Squatter Settlement Scheme. However, the Plaintiffs on 18th August 2013 the church was issued with a title deed to Land Parcel No. Mombasa/Ziwa la Ngombe Scheme/317 of approximately 0.0206ha. The Plaintiffs alleged that the Defendants colluded to reduce the initial Plot 367 from 0.04ha to 0.0206ha during registration in order to create Land Parcel No. Mombasa/Ziwa la Ngombe/553. The 1st Defendant maintained that the letter dated 15th February 2002 was a mere letter of offer and not an allotment letter that conferred the Plaintiffs with any rights to Plot No. 367 or Plot 553.
6. From a reading of the letter dated 15th February 2002, it was meant to inform the church that its application for a settlement plot was successful, they were offered Plot No. 367 of approximately 0.04ha. The Plaintiffs were required to report to the Provincial Land Adjudication and Settlement Officer Mombasa within 90 days in order to be shown the plot boundaries and to be issued with an allotment letter. The Plaintiffs were issued with a title deed for Plot 317 on 18th January 2013, which they have occupied with no dispute until 2015 when the 1st Defendant was issued with her title to Plot 553. It is only after the 1st Defendant was issued with a title deed that she released that the Plaintiffs had encroached on her land.
7. For the court to determine a dispute it issued an order on 26th October 2021 to the County Land Surveyor to identify the two parcels (Plot 317 and 553) and confirm whether they refer to the same parcel of land. On 4th November 2022, Gilbert Nderitu the County Surveyor prepared a report after conducting a site visit and made the following findings:

“We visited the site and found that Mombasa/Ziwa la Ngombe/ 317 and 553 they are not the same but found they are sharing a boundary. The boundary they are sharing the beacons are there and the boundary is secured by roofing iron sheet fence. Mombasa/Ziwa la Ngombe/317 is fully developed with a permanent structure which is a church. Mombasa/Ziwa la Ngombe/553 development is one room house and toilet.”
8. The survey report dated 12th June 2022 (PEX-7) makes reference to the RIM for Mombasa/Ziwa la Ngombe Scheme Sheet No. 1. It was reported that the Plaintiff was in Plot No. 317 which was initially 0.04ha and that Plot 553 was hived off Plot 317 hence the reduction in the final acreage of the property. During cross-examination, PW2 the surveyor who prepared the report confirmed that the survey number, which is Plot 317 was different from the allotted number which was Plot 367. He maintained that the numbering ought to be systematic and sustained his argument that Plot No. 553 was hived off Plot No 317 since the acreage of the two plots is 0.04ha, which was the initial acreage of Plot 367 allocated to the Plaintiffs in 1982. The [Land Registration Act](#) is very clear on issues of ownership of land and Section 24(a) of the [Land Registration Act](#) provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”



Section 26 (1) of the *Land Registration Act* states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”

9. From the findings of the County Surveyor, it is evident that the two plots were adjacent to each other and the beacons were identified. The boundary between the two plots was determined, it is clear that the Plaintiffs’ pit latrine and Pastor’s house are in Plot 553 and not Plot 317. From the evidence on record the Plaintiff vide a letter dated 15th February 2002 (PEX-4), by the Director of Land Adjudication and Settlement Mombasa allocated to the church Plot No. 367 of approximately 0.04ha at Ziwa la Ngombe Squatter Settlement Scheme. However, the Plaintiffs on 18th August 2013 the church was issued with a title deed to Land Parcel No. Mombasa/Ziwa la Ngombe Scheme/317 of approximately 0.0206ha. Miraculously, the plot number changed for 367 to 317 and the acreage was reduced. The Plaintiff’s title is dated 18th January 2013 while the Defendants is dated the 22nd January 2015. I find that the 1st Defendant’s parcel of land was fraudulently hived of the Plaintiffs allocated land without the Plaintiffs knowledge and after they took possession and constructed on the same. I find that the Defendant’s certificate of title was acquired illegally, unprocedurally or through a corrupt scheme. In my considered view that the Plaintiffs have proved their case on a balance of probabilities and I grant the following orders;

1. A permanent injunction restraining the 1st Defendant from by herself, her servants and or authorized agents, occupying, entering into, alienating dealing in or in any other manner whatsoever interfering with and in the Plaintiff’s Parcel of Land known as Mombasa/Ziwa La Ng’ombe/ 317.
2. The 1st Defendant’s title Mombasa/Ziwa La Ng’ombe/ 553 be cancelled and the Plaintiff’s title Mombasa/Ziwa La Ng’ombe/ 317 be rectified to reflect 0.04ha, which was the initial acreage of Plot 367 allocated to the Plaintiffs in 1982.
3. Costs to the Plaintiffs

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20TH JUNE 2023.

N.A. MATHEKA

JUDGE

