



**Mochama v Machogu (Environment & Land Case 72 of 2013)
[2023] KEELC 18971 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18971 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 72 OF 2013**

M SILA, J

JULY 25, 2023

BETWEEN

RACHEL MORAA MOCHAMA PLAINTIFF

AND

PAUL TIRIMBA MACHOGU DEFENDANT

JUDGMENT

(Suit filed by plaintiff seeking orders to have the defendant restrained from land described as Plot No. B/13 Gekomu market; plaintiff stating that she purchased the said plot with a building thereon and that the defendant has interfered with her possession; defendant's position being that the disputed building is on his parcel of land which is differently registered and is not on the plaintiff's land; evidence showing that there are two distinct plots, one owned by the plaintiff and one by the defendant; further that the disputed building is on the defendant's parcel of land not the plaintiff's; contention by the plaintiff that the defendant has built on her land clearly erroneous; plaintiff's suit dismissed with costs)

A. Introduction and Pleadings

1. This suit was commenced through a plaint which was filed on 20 February 2013. The plaintiff avers to be the owner of the Plot No. B/13 Gekomu, within Kisii Municipality. She pleaded that on the plot is a developed building comprising of shops and residential flats, which she leased out to one John Omari Bichanga (Omari) on 1 December 2010 for a period of 5 years and 3 months. Omari had in turn leased out the premises to tenants for occupation. It is pleaded that on 2 February 2013, the defendant invaded the premises and evicted the occupants purporting to be the owner of the premises. It is this action that prompted the plaintiff to file this suit seeking the following orders (slightly paraphrased for brevity):-



- a. A declaration that the plaintiff is the owner of the Plot No.B/13 Gekomu within Kisii Municipality.
 - b. A mandatory injunction directed against the defendant to vacate the Plot No. B/13 Gekomu, and give free access to the plaintiff.
 - c. A permanent injunction to stop the defendant from interfering in any manner with the Plot B/13 Gekomu.
 - d. General damages.
 - e. Costs of the suit.
 - f. Any other relief this court deems fit to grant.
2. Together with the plaint, the plaintiff filed an application seeking mandatory orders of injunction to have the defendant removed from the premises and to have the plaintiff maintain possession pending hearing of the suit. This application was allowed through a ruling dated 29 November 2013.
 3. I have seen two defences lodged by the defendant, one dated 14 March 2013 filed by the law firm of M/s Onyancha Bw'Omote & Co Advocates, and another dated 30 November 2016 filed by M/s Sagana Biriq & Company Advocates. This is certainly irregular but I will assume that the defendant will stand with the defence filed on 30 November 2016 given that he changed counsel before the hearing of the suit. In that defence, the defendant contends that what he owns is the land parcel Nyaribari Chache/B/B/Boburia/6353 (parcel No.6353) comprising of 0.05 Ha and which plot is the same property being referred to by the plaintiff as Plot No. B/13 Gekomu. He averred that he purchased the said parcel No. 6353 on 20 January 2012 from the previous proprietor, one Lenah Moraa Oira, and thus has a right to its quiet possession.

B. Evidence of The Parties

4. The plaintiff testified that she purchased the Plot No. B13 Gekomu, from one Nehemiah Okemwa Okenye, on 28 March 2006 for the consideration of Kshs. 3,200,000/=. She claimed to have paid the money and the plot was transferred to her. She was issued with a Plot Card. At the time of purchase, the plot had been developed with a three storey building which was however incomplete. She was given vacant possession and the approved plans. The said plans had been approved in the year 1997. She leased the incomplete building to Mr. Omari in the year 2011 for Kshs. 100,000/= per month and they entered into a tenancy agreement. In February 2013, she was called by Mr. Omari, who informed her that he has been evicted from the premises by the defendant, who claimed to own the property. She went to the premises and was handed over a letter dated 14 January 2013 written by M/s Kerosi Ondieki & Company Advocates asserting that the defendant is the owner of the premises which was described as comprising of the parcel Nyaribari Chache/B/B/Boburia/6353. She wondered how the defendant can contend to have building plans for the same plot yet it is already developed and she has been in occupation since the year 2006.
5. Cross-examined, she testified that Nehemiah held a market card for the Plot No. B13 which he handed over to her at the time of purchase. Market plots belong to the County Government of Kisii. The building plans prepared by Nehemiah were approved in 1997 by the Director of Physical Planning subject to issuance of a lease, though no lease was ever issued. She did not get an occupancy certificate. She leased out the whole premises to Mr. Omari who placed tenants therein. When she purchased the property she did not verify if Nehemiah had a pervious dispute over the same plot. She was questioned on some expert reports made by the Physical Planner and Land Registrar but I will get to these when



assessing their evidence, though her view was that the parcel No. 6353 is across the road from the Plot No. B13, thus separate and distinct.

6. PW-2 was Nehemiah Okemwe Okenye (Nehemiah). He testified that he is the one who sold the Plot No. B13 Gekomu to the plaintiff for Kshs. 3,200,000/=. He in turn had purchased this plot from one Davidson Ombaye (now deceased) in the year 1995. Upon purchase, he commenced construction in 1997. He testified that the building plan was approved by the Municipal Council of Kisii. He produced the building plan as an exhibit. He intended to build a four storey building but had only done two floors before selling the plot to the plaintiff. He undertook the construction between 1997-1998. He was aware of the suit Kisii CMCC No. 431 of 1997 where he had been sued by one James Oira. Judgment was delivered on 13 December 2005. He sold the plot about three months later to the plaintiff.
7. PW-3 was John Omari Bichanga. His evidence was that he leased the Plot No. B13 from the plaintiff for 5 years and 3 months. He renovated the building therein and placed tenants. On 2 February 2013, he was issued with notice by the defendant that he vacates the premises on the basis that it is on parcel No. 6353. He resumed possession in 2015 after the court issued the mandatory order of injunction.
8. PW-4 was Benard Nyabuga Motanya, who introduced himself as a surveyor and holding a Diploma from Kenya Polytechnic. He stated that he works with Geomatics Licenced Surveyor as an approved assistant and that he has worked for over 20 years. He testified that he was engaged by the plaintiff to undertake survey of the disputed premises. He got the map for Nyaribari Chache/B/B/ Boburia Sheet No. 13 and visited the site. In his opinion, the parcel No. 6353 is the last plot of the freehold titles and after that is the market plots (for Gekomu market). The market plots have market cards but no formal titles. His evidence was that Plot No. B13 Gekomu was within the market plots and is 28 metres away from parcel No. 6353. He testified that the records indicate two different plots but both parties are claiming one.
9. He was cross-examined on his competence and he claimed to be an approved survey assistant. He did not have a registration or licence, save for a letter from his alleged employer. He stood by his evidence that the two plots are different, with parcel No. 6353 being a freehold on the upper side (right hand side) of the Kisii University road and the Plot No. B13 being on the lower side (left hand side). According to him, the building in dispute was neither in plot No. B 13 or parcel No. 6353 and that the parcel No. 6353 only has kiosks on it, and no storey building. He stated that he did not check if the Plot B13 had any developments. He testified that he only measured the plot where the development is located which is on the Plot No. B13. When asked to draw on the Registry Index Map where the two plots are, he marked them on the same side i.e where the parcel No. 6353 is located. He differed with the opinion of the County Surveyor that the disputed plots are the same on the ground. He asserted his conclusion, that Plot B13 is on the upper side and that it is separated from the parcel No. 6353 by 28 metres. He had in his report stated that the plaintiff has acquired the land by 'adverse possession' which he calculated from 1995. He stated that he had been shown a market card dated 1995 in name of the plaintiff as allottee. He did not see documents that she purchased the land in 2006.
10. With the above evidence, the plaintiff closed her case.
11. The defendant testified and called a licenced surveyor as his witness. The defendant is an advocate who resides in Nairobi. He had documents relating to the case Kisii CMCC No. 431 of 1997, James Oira vs Nehemiah Okemwa, Daniel Okenya and Strabarg. The defendants therein were sued for encroaching onto a plot Nyaribari Chache/B/B/Boburia/2738 (parcel No. 2738) owned by James Oira. Judgment was delivered whereby an order of permanent injunction was issued against the defendants, and it was declared that they are trespassers in the parcel No. 2738. This land parcel No. 2738 was subsequently



subdivided, and one of the resultant subdivisions was the parcel No. 6353, which came to be owned by Lena Moraa Oira (Lena) a daughter of James Oira in the year 2010. He purchased this land parcel No. 6353 from Lena on 20 January 2012. He purchased the land with an incomplete building. He stated that he took occupation from January 2012 until October 2012 when he discovered encroachment into the building. He instructed his advocates to write a letter to the trespassers to vacate but they did not. This case was then filed and an injunction was issued against him.

12. Cross-examined, he reiterated that he purchased the land in the year 2012. It is Lena who showed him the land and on it there was an incomplete structure. Lena did not show him the building plan for the structure. He asked for the same but Lena told him that the structure was built illegally by a person who had encroached onto the land. He bought the property on 20 January 2012 for Kshs. 8,000,000/= which was consideration factoring in the cost of the land and the incomplete building. He took possession in February 2012. He sent a team of building professionals to conduct a site visit and give him a report on the incomplete structure, which according to him was vacant. He did not put tenants as the structure was inhabitable. He issued instructions to the professionals in mid-2012 but before they could complete their work, trespassers encroached into the property. It was in January 2013 that he found some people in possession. He instructed M/s Kerosi Ondieki & Company to write the letter dated 14 January 2013. The letter mentioned that the property had been leased by the plaintiff to Mr. Omari. The same law firm also wrote a letter to the tenants therein. He did not know when the structure that he found was put up and did not know who put it up. He did not talk to James Oira, who had filed the suit Kisii CMCC No. 431 of 1997, and has never met him. He could see that the subject matter in that case was parcel No. 2738. The land was subdivided in 1999 to create the land parcels No. 6353 and 6354. The case alleged encroachment of the parcel No. 2738 but he did not know whether the encroachment complained of was in the current parcel No. 6353 or 6354. He affirmed that the property he purchased is the same property that the plaintiff occupies. According to him, based on his due diligence, the property belonged to Lena and not the plaintiff. He did not take a surveyor to the ground at the time of purchase. He does not know where Lena is and does not know if she is still alive.
13. Re-examined, he testified that he has not been in communication with Lena since purchasing the property. He reiterated that at the time of purchase, the property was not occupied and he did not encounter John Omari then. He stated that he came to know of his occupation when the tem he had sent informed him that the property was not vacant. He has no dispute with the owner of parcel No. 6354. He thought that the plaintiff should take action against the person who sold to her the property.
14. DW-2 was Bartholomew Mwanyungu, a registered licenced surveyor. He produced his certificate of registration and his practicing licence. He has been a licenced surveyor since the year 2005. He testified that he was instructed to undertake survey of the disputed land. He used the Registry Index Map (RIM) and a hand held GPS. He testified that the parcel Nyaribari Chache/B/B/Boburia/6353 is titled and is in the RIM whereas the Plot No. B13 is in the market card. The card shows the name of Rachel Mochama and is dated 5 April 1995. His observation was that the two plots occupy two different ground positions and are on opposite sides of the tarmacked road leading to Kisii University. He attached a satellite image of the area to demonstrate the different location of the two plots. He testified that on parcel No. 6353 is the disputed building upon which there is a club known as Club Crystal Antarctica. On the Plot No. B13 Gekomu, which is across the road, is a developed house, occupying about half of the property. He observed that the building plan produced by the plaintiff did not have a location plan showing the surrounding area.
15. Cross-examined, he testified that the building plan for Plot No. B13 Gekomu, was implemented on parcel No. 6353. The plot No. B13 Gekomu does not have a storey building. Re-examined, he reiterated that the two plots occupy two different ground positions.



16. With the above evidence, the defendant closed his case.

C. Analysis and Disposition

17. I invited counsel to file submissions, and I have seen and read the submissions of both Mr. Soire for the plaintiff, and Ms. Hashi for the defendant. I have considered these before arriving at my decision.
18. There are some factual findings that I need to reach before going too far. The first, is that the plot No. B13 Gekomu, and the parcel No. Nyaribari Chache/B/B/Boburia/6353, both exist and occupy different ground positions. I am so persuaded by the expert evidence of Mr. Mwanyungu who demonstrated that the two plots occupy different locations, one on the left side and the other on the right side of the road heading to Kisii University. The second factual finding, is that both plots are developed. The development in dispute is on the parcel No. 6353 and not the Plot No. B13 Gekomu. Plot No. B13 Gekomu is developed with a house which none of the parties herein appear to claim. I am aware that in her submissions, Ms. Hashi submitted that the evidence of PW-4 is not credible as he is not an expert. I was also not persuaded as to the expertise of PW-4, and I am more inclined to believe the expert evidence of Mr. Mwanyungu. But whatever the case, there is consensus that the two plots occupy two different ground positions and are both identifiable on the ground.
19. With the above facts aside, I now turn to the pleadings of the plaintiff. The plaintiff wants to have a declaration that she is the owner of the plot No. B13 Gekomu market, an injunction to remove the defendant from the said Plot No. B13 and a permanent injunction to restrain him from this Plot No. B13. Well, the defendant is certainly not on the Plot No. B13 and has not claimed it at all. What the defendant is asserting rights over is the parcel No. Nyaribari Chache/B/B/ Boburia/6353, and as I have found above, this parcel of land is separate and distinct from the Plot No. B13 Gekomu market. There is no place for the plaintiff's pleadings, for the evidence adduced shows that the defendant has not in any way, trespassed into the Plot No. B13 Gekomu market. To the contrary, it is actually the plaintiff who has interfered with the parcel Nyaribari Chache/B/B/Boburia/6353. On the facts of the case, it is clearly the plaintiff who is mistaken. She filed suit believing that the development in dispute is on her Plot No. B13 Gekomu market; the evidence has demonstrated otherwise, for the development is not on the Plot No. B13 Gekomu, but is on the parcel Nyaribari Chache/B/B/Boburia/6353. As I have mentioned, the defendant has not encroached nor interfered with the Plot No. B13 Gekomu market. There is therefore no substance in the plaintiff's case in so far as she seeks orders to have the defendant restrained from the Plot No. B13 Gekomu market, as he has not in any way prevented the plaintiff from enjoying that land.
20. In his submissions, Mr. Soire, learned counsel, submitted that the court, being a court of equity, should proceed to give judgment in favour of the plaintiff and give her orders to claim the storey building in issue. I regret that the plaintiff cannot succeed in this. First, those are not her pleadings, and parties are bound by their pleadings. Nowhere has she lodged any suit seeking rights over the land parcel Nyaribari Chache/B/B/Boburia/6353. She cannot claim the storey building without claiming the land, and she has made no claim to be availed of the title to the land parcel Nyaribari Chache/B/B/Boburia/6353. There is in fact no case before me where the plaintiff is seeking to be granted title to the land parcel Nyaribari Chache/B/B/Boburia/6353. If there was such a case, then there would have been a different level of interrogation and analysis. There is certainly no suit before me seeking title to the land by way of adverse possession or through any other law. I repeat, what the plaintiff brought to court, was a case seeking to have the defendant restrained from the Plot No. B13 Gekomu, and the defendant has not encroached on this land.



21. Ms. Hashi, learned counsel, did submit that this court ought to hold that the plaintiff has demonstrated being a trespasser on the parcel Nyaribari Chache/B/B/Boburia/6353 and to find the defendant to be the lawful registered proprietor therefrom. I wouldn't wish to venture into that, for the simple reason that the defendant did not lodge any counterclaim. I will restrict myself to the pleadings that I have, and I will hold that the plaintiff has failed to demonstrate that the defendant has encroached or trespassed into her Plot No. 13B Gekomu market. What she is claiming as falling within Plot No. 13B Gekomu market is actually falling within the parcel Nyaribari Chache/B/B/Boburia/6353 which is owned by the defendant.
22. I really do not see the point of saying more. There is no substance in the plaintiff's case and it is hereby dismissed with costs to the defendant. Having lost the suit, the orders of injunction issued in favour of the plaintiff hereby lapse and are vacated.
23. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 25 DAY OF JULY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

