



**Isatsiro v Mary & 2 others (Environment & Land Case E003 of 2022)
[2023] KEELC 19913 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19913 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT & LAND CASE E003 OF 2022**

**E ASATI, J
SEPTEMBER 21, 2023**

BETWEEN

DAVID AMAYI ISATSIRO PLAINTIFF

AND

JANET AKETCH MARY 1ST DEFENDANT

ANDREW IMBEGO 2ND DEFENDANT

EPHRAIM LIVAMBULA 3RD DEFENDANT

JUDGMENT

1. Vide the plaint dated August 26, 2022, the plaintiff sued the defendants herein seeking for the following orders against them; -
 - a. An order of eviction, demolishing of any structure or an order giving vacant possession to be rendered by the Respondents by themselves, or agents and to allow the plaintiff peaceful occupation and possession thereof.
 - b. Costs and interest of the suit
 - c. Any other further relief that this honourable court may deem fit to grant.
2. The plaintiff's case is that he is at all material times the registered owner of a parcel of land known as Kakamega/Shiru/669 measuring 1.2 Ha (the suit land) That the defendants illegally and fraudulently invaded the suit land and started committing acts of waste and wanton damage by putting up some structures. He therefore sought the court's intervention in terms of the prayers sought in the plaint.
3. In response to the claim, the defendants entered appearance and filed joint statement of Defence and counterclaim dated January 30, 2023. The defendant denied the plaintiff's claim and by way of the counterclaim claimed that they innocently bought the suit land from one Peter Muse Isatsiro, the



plaintiff's father, and that they have been in exclusive possession thereof openly and as of right for a period of 12 years and have done extensive developments thereon. They prayed for: -

- a. An order compelling David Amayi Isatsiro to transfer to the defendants their respective portions of the suit land as occupied and marked on the ground and the acreage to be determined by County Surveyor. Failure by the plaintiff to transfer to the defendants their respective portions, the Deputy Registrar of this court be authorized to sign the necessary forms and applications on behalf of the plaintiff.
- b. A permanent injunction against the plaintiff restraining him, his agents from interfering with the defendants' peaceful occupation and use of the respective portions they are occupying.
- c. Costs of the counter claim be paid by the plaintiff.

The Evidence

4. The plaintiff testified, produced documents and called 2 witnesses. The plaintiff relied on the contents of his Supporting Affidavit sworn on August 26, 2022 as his evidence in chief. He produced certificate of official search and Notice to vacate dated 30/5/2022 as exhibits in the case.
5. On Cross examination he stated that he is the owner of the suit land which originally belonged to his father. That there are people who are on the land without permission. That he does not know whether his father sold the land. That it was in the year 2021 that he realized that the defendants were on the land. That his father told him that those people were tenants. And in re-examination he stated that his house is on the suit land.
6. PW2, Peter Isatsiro, relied on his witness statement dated 26th January 2023. He had stated in the statement that he is the father of David Amayi Isatsiro, the plaintiff. That he voluntarily transferred the suit land to the plaintiff as his (plaintiff's) share of his (PW2's) land. That he had entered into an agreement with the 2nd and 3rd defendants and one Tadayo Makobwero to make use of the suit land by cultivating and farming and in appreciation they gave him a token. That later he came to learn from the plaintiff that they were claiming ownership of the land. That the 2nd and 3rd defendants who are relatives of the area Assistant Chief have been working through the office of the Assistant chief to grab the land. That he has never sold the suit land to the defendants.
7. On Cross Examination PW2 stated that he is the father of the plaintiff, that the suit land originally belonged to him and that he gave the land to the plaintiff in the year 1980. That he leased the land to the defendants who were his neighbours in the year 1960. That the tenancy was to run for 8 years. That the tenancy agreement was not in writing. He further stated that he did not sell land to the 2nd defendant but that the 2nd defendant asked him (PW2) for a piece of the land to cultivate for which he gave him kshs 10,000/= as rent. That rent per year was ksh 3000/=. On re-examination he stated that the defendants had been on the land for a long time, they have been utilizing the land and that they have houses on the land.
8. PW3, Matayo Marenya relied on his witness statement dated January 26, 2023 as his evidence in chief. He stated in the witness statement that he is the "Mzee wa Mtaa" since the 1980's, that he does not remember PW2 selling the suit land as claimed by the defendants. That he signed some documents in the office of the Assistant Chief in the absence of PW2. On cross examination he stated that he is a village elder. That there was a time he was called to the office of the Assistant chief about people who had bought the land namely Shadrack Amalemba, Tadayo Omenya and Andrew Ombega. That he did not sign the agreement because he did not see the owner there. That he has never signed any land Sale Agreement where PW2 is selling land.



9. The defence evidence was comprised of the testimonies of the three defendants, a witness they called who testified as DW4 and the exhibits they produced. DW1 was the 1st defendant she relied on her witness statement dated April 13, 2023. She had stated in the statement that her brother Tadayo Omenya bought a portion of the suit land from Petero Isiavali on 7/11/2988, took possession and has been in occupation to date. That the seller applied for and obtained consent to sub-divide and to transfer the sold portion of land in favour of the purchaser in the year 1990, but thereafter the seller declined to register the consent at the lands office. That in the year 2020 the seller transferred the whole of the suit land to the plaintiff fraudulently without the knowledge of her brother, the buyer. That the buyer and the 1st defendant have been in occupation of the sold portion of land since the year 1988. That they have had adverse possession of the suit land.
10. On Cross- examination DW1 stated that she stays on the suit land because it belongs to her brother who gave her permission to stay thereon. That her brother moved away from the land and left her to stay thereon and take care of the land, That the land was bought at kshs 22,400/=
11. DW1 produced green card for the suit land, green card for L.R No. Kakamega/Shiru/668, land Sale Agreement, application for consent of the Land Control Board, Letter of consent, and Agreement as exhibits in the case.
12. DW2 was the 2nd defendant. He adopted the contents of his witness statement dated April 13, 2023 as his evidence in chief. He stated in the witness statement that he bought a portion of land measuring one (1) acre out of the suit land from Peter Isatsiro on February 27, 1988 at kshs. 10,605/= That he took possession in the year 1988 to date. He prayed that the suit be dismissed. On cross examination, he stated that he started staying on the land in the year 1988. He stated that there was no Parcel No. of the land he bought indicated on the land sale agreement. That although the purchase price was kshs 10,600/= he later paid more money for the crops and trees which were on the land. That they obtained consent of the Land Control Board but the seller refused to transfer the sold land to him. That he was still utilizing the land to date.
13. DW3 was the 3rd defendant. He too relied on the contents of his witness statement dated April 13, 2023 as his evidence in chief. He had stated in the witness statement that his father one Shadrack Amalemba Mademba bought a portion of land which he (DW3) was occupying from a person known as Cheki Soita Kuwabusia who had in turn purchased the same from Petero Isatsiro. That his (DW3's) father gave the portion of land to him (DW3) in the year 1995. That DW3 constructed his residential home thereon where he resides. That in the year 2014, Petero Isatsiro came up with a dispute over the parcel of land and the same was resolved. That Petero transferred the entire land to the plaintiff without his (DW3's) knowledge. On cross- examination he stated that the agreement between Cheki Soita and Petero Isatsiro was in respect of land parcel No. 668 while the suit land is No. 669. That the dispute which was resolved by the Assistant Chief was in respect of land No. 668. On re- examination he stated that the subject land is No. Shiru/669 and that he stays on that land since the 1990s together with his children.
14. DW4 was Tadayo Omenya Obiero. He adopted the contents of his witness statement dated April 13, 2023 as his evidence in chief. The contents of his statement were that in the year 1988, he bought a piece of land measuring 1 acre from land parcel known as Kakamega/Shiru/669 at Kshs. 22,400/= from Peter Isasilo Isiavali. They entered into Agreement dated November 7, 1988. That he paid the purchase price in two installments namely Kshs. 21,100/= on November 7, 1988 and kshs. 1,300 on 2nd December 1988.



That the 1st defendant is his sister who has been staying with him on the suit land since he purchased it from Peter Isasilo Isiavali. That the portion of the suit land measuring 1 acre belongs to him as he purchased it for value. That he is an innocent purchaser for value.

15. On Cross examination, DW4 stated that after paying the purchase price in full, they obtained consent of the Land Control Board. That thereafter the seller delayed the transfer. That the Seller's wife and son were witnesses in the agreement. That in the year 2006 he moved from the land but left it to his sister, the 1st defendant to occupy. That he started staying on the land in the year 1989. That his child died and was buried on the land.

Submissions

16. At the close of the evidence parties filed submissions on the case. The plaintiff through the firm of P.K Makau & Co advocates filed written submissions dated June 21, 2023. The defendants through the firm of A.B.L Musiega & Company Advocates filed written submissions dated July 12, 2023.

Issues for determination

17. I have read the pleadings, the evidence adduced by the parties and their respective witnesses and the written submissions made by Counsel for the parties. Through his submissions, the plaintiff framed the issues for determination to be; -

- a. Whether the plaintiff is the bon fide owner of all that parcel of land known as Kakamega/Shiru/699.
- b. Whether this court has jurisdiction to order the plaintiff to surrender the suit land by way of adverse possession to the 1st respondent
- c. The cost of the suit be borne by therespondents.

The defendants on the other hand framed the issues for determination as; a. Whether the defendants are illegally and/or fraudulently occupying respective portions of L.P Kakamega/Shiru/669

- b. Whether the defendant should be evicted from L.P Kakamega/Shiru/669
- c. Costs of the suit.

From all these I find the issues for this court's determination to be; -

- a. Whether or not the defendants bought portions of the suit land from the original registered owner thereof.
- b. Whether or not transfer of the entire of the suit land in favour of the plaintiff was illegal and fraudulent.
- c. Whether or not the defendants have obtained title to the respective portions of the suit land by adverse possession.
- d. Whether or not the plaintiff is entitled to the relief sought in the plaint.
- e. Whether or not the defendants are entitled to the relief sought in the counter-claim.
- f. Who pays the costs of the suit land counter-claim.



Analysis and determination

18. This court is enjoined by the provisions of Order 21 Rule 4 *Civil Procedure Rules*, 2010 to ensure that its judgements in defended suits contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. Rule 5 requires the court, in suits in which issues have been framed to state its findings or decision with the reasons therefor upon each separate issue.
19. On whether or not the defendant bought portions of the suit land from the original registered owner, the 1st defendant's case is that it was her brother by the name Tadayo Omenya who bought a portion of the suit land from PW2 on 7/11/1988. She produced a land sale agreement dated 7/11/1988 as exhibit D.6. The agreement titled Land Agreement form written in Kiswahili language indicates that the seller was Peter Isasilo Isiavale ID NO. 5579114 and the buyer Tadayo Omenya Obiero ID No. 09971163. The size of the land was shown as hekali 1 of L.R No. 669 and the purchase price as Kshs 22,400. The Agreement further indicated that kshs. 21,100/= had been paid leaving a balance of kshs. 1,300/=
20. Tadayo Omenga testified as DW4 that in the year 1988, he bought a piece of land measuring 1 acre of a larger parcel of land known as Kakamega/Shiru/669 at kshs 22,400/= from Peter Isasilo Isiavale vide an Agreement dated 7/11/2988. That he paid the purchase price in two installments Kshs 21,100 on 7/11/1988 and 1,300/= on 2/12/1988.
21. The 2nd defendant's case is that he bought a piece of land measuring 1 acre out of the suit land from Peter Isatsiro on February 27, 1988 at a purchase price of kshs. 10,600/=. An Agreement dated 27th February 1988 was produced as exhibit D3. The Agreement written in Kiswahili language shows that the Seller was Peter Isaziro and the buyer Mr Andrew Imbego Ambei- the size of the land is shown as half acre and the purchase price ksh 10,600/= That there was additional kshs 400/= for the crops. The parcel number was indicated as 669/Tiriki/Shiru. Another Agreement dated November 17, 1990 showing that the 2nd defendant paid a further kshs 900 leaving a balance of Kshs 2100/= for the crops. The 2nd defendant testified that although the purchase price was kshs 10,600/- he later paid more money for the crops.
22. The 3rd defendant's case is that his father Shadrack Amalemba who bought the portion of land from a person known as Checki Soita Kuwalusia who had bought if from Peter Isatsiro. That his father Shadrack Amalemba gave the land to him (3rd defendant) in year 1995. The Agreement produced as exhibit D4 dated February 13, 1985 showed that the agreement was over land parcel No. 668. The seller was Peter Isaziro Isiavale. The buyer was Checki Soita the size of the sold portion was 76ft by 24 ft. That the purchase price was 2150/= That the buyer had paid the entire of the purchase price.
23. In response, the plaintiff stated that his father had told him that the people occupying the land were tenants and that he did not know whether his father had sold land to them (defendants). The plaintiff's father who testified as PW2 stated that the agreement that he had with the 2nd and 3rd defendants and one Tadayo Omenya was for them to use the land to cultivate and farm and in appreciation they gave him a token. That he leased the land to the defendants who were his neighbors in the year 1960 and that the period of the tenancy was 8 years. That the 2nd defendant gave him kshs. 10,000/= as rent and that rent for one year was kshs 3000/- PW2 did not however produce any tenancy agreement to support his claim.
24. On this issue, It was submitted on behalf of the defendants that there is evidence that the defendants bought the respective portions of the land. That they are legally thereon.
25. It was submitted on behalf of the plaintiff that the defendants encroached onto the suit property and erected structures thereon thereby necessitating the suit.



26. On the basis of the evidence and more particularly the land sale agreements produced, I find that the defendants bought portions of land in the manner described in the land sale Agreements.
27. The next issue is whether or not transfer of the suit land in favour of the plaintiff was illegal or fraudulent. PW2 who was the original owner of the suit land testified that he voluntarily transferred the suit land to the plaintiff to whom he had given the land in the year 1980.
28. The defendants' case was that after they bought the land from PW2, PW2 applied and obtained consent of the Land Control Board to transfer the land to the defendants but later failed to transfer and instead transferred the land to the plaintiff. They contended that transfer of the land to the plaintiff was illegal and fraudulent as they had bought portions of the land, were in occupation and consent of the land control Board had been obtained for their transactions. Exhibit D7 was an application to the Land control Board and exhibit D8 a letter of consent dated 14/2/1990 for the subdivision of land parcel number Shiru/669. It originates from the Hamisi Land Control Board P.O Box 101 Hamisi. No specific response was made by the plaintiff and his witnesses in respect of the Land Control Board consent. PW2 did not deny obtaining the Consents as claimed by the defendants. Secondly, the defendants claimed to have stayed on the suit land since the time they purchased which was in the year 1988 and 1990. Both the plaintiff and PW2 admitted that the defendants had been on the suit land for a long time.

I find that in the face of the land sale agreements which had been subjected to the land control board and consent obtained for subdivision and in view of the defendants' occupation of the land, transfer of the entire of the suit land in favour of the plaintiff on 15. 6. 2020 was fraudulent and illegal. Section 28 of the [Land Registration Act](#) section 28 of the [Land Registration Act](#) provides;

‘Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted in the register-

- a.
 - b.
 - c.
 - d.
 - e.
 - f.
 - g.
 - h. Rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”
29. The land as at the time of transfer to the plaintiff was subject to an overriding interest in the form of rights acquired by the defendants by virtue of limitation of actions or adverse possession.
 30. The next issue is whether the plaintiff is entitled to the relief sought. The substantive relief sought in the plaint is for the eviction of the defendants from the suit land and handing over of vacant possession of the suit land to the plaintiff. The basis for seeking the relief is that the plaintiff is the registered owner of the suit land and hence entitled to occupation and quiet enjoyment thereof. Counsel for the plaintiff relied on the provisions of section 25(1) of the [Registered Land Act](#) cap 300(Repealed) and s. 26 (1)



thereof to support the submission that the plaintiff as the registered owner of the suit land was entitled to exclusive rights thereof.

31. On the other hand, it was submitted on behalf of the defendants that the defendants should not be evicted from the respective portions of the suit land which they are occupying because they are bona fide purchasers for value. That the plaintiff is misleading the court as he knows that his father sold portions of the land and that the defendants are rightfully occupying what they bought. That evicting the defendants will render them homeless as they have settled and established homes on their respective portions for over 20 years now.
32. It is not in dispute that although the plaintiff is the current title holder to the suit land, the defendants have occupation of portions of the same. It was the defendant's case that they took occupation of their respective portions in the year 1988 and 1990 after purchase. Both the plaintiff and PW2 admitted that the defendants had been on the land for a long time and that they have houses thereon. PW2 further testified that the tenancy agreement was to run from the year 1960. Under s. 7 of the *Limitation of Actions Act* no action to recover land may be brought after 12 years from the time the cause of action arose. The cause of action arose in the year 1988 and 1990 when the defendants entered the land. By the year 2020 when the land was transferred in favour of the plaintiff, more than 12 years had elapsed from the time the defendants entered the suit land. The original owner's title had been extinguished by effluxion of time in so far as the portions occupied by the defendants were concerned. He did not have a good title to pass to the plaintiff. I find that the plaintiff is not entitled to the order sought.
33. On whether or not the defendants have acquired title to their respective portions that they occupy by adverse possession, adverse possession is a doctrine of law the ingredients whereof are that the claimant has had peaceful, open and uninterrupted occupation of the suit land for a period in excess of 12 years as of right.
34. In the case of *Francis Gicharu v Peter Njoroge Mairu* [2005] e KLR it was held that in order for a claim of Adverse Possession to succeed:
“ the plaintiff has to prove that he used the land which he claims as of right, nec vi, nec clam, nec precario meaning no force, no secrecy, no persuasion. The plaintiff must show that the defendant had knowledge, means of knowing actual or constructive of the possession or occupation. Such possession must be continuous it must not be broken for any temporary purpose or any endeavor to interrupt if by way of recurrent consideration.”
35. It was the defendants' case that soon after purchase each one of them took possession of the portions bought. That they have developed the portions extensively, have built their homes and reside thereon. Although the plaintiff alleged that it was in the year 2020 that he discovered that the defendants had entered the suit land and erected structures he admitted that the defendants had been on the land for a long time and that they have houses thereon. Though PW2 alleged that the agreement he had with the defendants were tenancy agreements there is no evidence as to what action he took at the expiry of the alleged 8-year tenancy. He did not take any step to assert his title. He also testified that he entered into the tenancy in the year 1960. I find that the defendants have acquired title to the respective portions of the suit land by adverse possession.
36. On whether or not the defendants are entitled to the relief sought in the counterclaim, the substantive claim in the counterclaim is for transfer of the suit land and permanent injunction. The sizes of the portions of land claimed is not indicated in the counterclaim. However, from the evidence in the form of the land sale agreements produced as exhibits, the sizes are 1 acre for the 1st defendant, ½ acre for the 2nd defendant and 75 feet by 24 feet for the 3rd defendant. Although the land sale agreement for the 3rd defendant shows that he bought part of land parcel known as No. 668, evidence on record is that he



occupied and developed a portion of parcel No. 669. I find that each of the defendants is entitled to the portions above stated by reason of having had exclusive occupation for a period in excess of 12 years.

37. Although costs of a suit ought to follow the event, in view of the fact that the parties are ultimately neighbours, I consider it just that each party bear own costs.
38. In conclusion I find that the plaintiff has not proved his case on a balance of probabilities. On the other hand, the defendants have proved the counterclaim to the required degree. I make the following orders:
- a. The plaintiff's suit is hereby dismissed with no order as to costs.
 - b. Judgement is entered in favour of the defendants on the counter claim for: -
 - i. A declaration that each of the defendants have acquired title by adverse possession to their respective portions of the suit land namely 1 acre for the 1st defendant, ½ acre for the 2nd defendant and 76 ft by 24 ft for the 3rd defendant out of L.R. No. Kakamega/Shiru/669.
 - ii. An order for transfer by the plaintiff of one (1) acre, half (1/2) acre and 76ft by 24 ft of L. R. No.Kakamega/Shiru/669 in favour of the 1st, 2nd and 3rd defendants respectively, and in default the Deputy Registrar of the court to sign the requisite documents so as to effect the transfer.
 - iii. Each party to bear own costs of the counterclaim.

Orders accordingly.

Judgement dated and signed at Vihiga and delivered this 21st day of September, 2023 virtually through Microsoft Teams Online Application.

E. ASATI,

JUDGE.

In the presence of:

Maureen-----Court Assistant.

Makau Advocate for the plaintiff.

No appearance for the defendants.

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