



**Mkalla v Kikopi & another (Environment & Land Case
83 of 2016) [2022] KEELC 3109 (KLR) (28 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3109 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 83 OF 2016**

**MAO ODENY, J
JUNE 28, 2022**

BETWEEN

NATHAN MKALLA PLAINTIFF

AND

KAVIHA KIKOPI 1ST DEFENDANT

STEMPO KAVIHA KIKOPI 2ND DEFENDANT

JUDGMENT

1. By a plaint dated April 12, 2016 the plaintiff herein sued the defendants jointly and severally seeking the following reliefs: -
 - a. A declaration that the plaintiff is the lawful owner of the unregistered land parcel measuring approximately 3 acres at Sabaki sub location, Malindi (the suit property) and that the defendants have no lawful claim on the same
 - b. A permanent injunction restraining the defendants from interfering with the enjoyment of the suit property.
 - c. Mesne profits.
 - d. Costs and interest.
2. It was the plaintiff's case that by a sale agreement dated December 5, 2009, he bought the suit property from one Mramba Taura, now deceased, and a relative of the defendants herein. That sometime in the year 2016, his neighbours Stempo and Phillip leased their portions of land for quarrying and that when the neighbours exhausted their quarries, Stempo approached the plaintiff to sell him a portion of the suit property, a request which the plaintiff declined. Thereafter on April 1, 2016, the 2nd defendant instructed a quarrying company to excavate marram from the suit property without his consent.



3. The defendants filed a joint statement of defence dated May 3, 2016 where they averred that the suit property was part of their unregistered family land measuring 20 acres and that the alleged sale agreement did not pass any title to the plaintiff since the said Mramba Taura had no title to pass. The defendants further averred that the Plaintiff at one point offered to give them Kshs. 10,000/- in exchange for the suit property but they declined the offer.

Plaintiff's Case

4. PW1 Nathan Mkalla adopted his written statement dated April 12, 2016 and testified that he bought the suit property from one Mramba Taura at a consideration of Kshs. 100,000/ and produced the agreement as pex No 1 & 2 which was the payment schedule. He told the court that he has built his home thereon and utilizes the suit property for farming.
5. On cross examination PW1 confirmed that the neighbours were not present when he bought the suit property and that it was only Mramba Taura who showed him the boundaries. PW1 further stated that the house he built thereon was temporary and that it has since collapsed.
6. PW1 told the court that the only reason he offered the 1st defendant Kshs. 10,000 was just in case the 1st defendant had not gotten anything from the sale. He also told the court that the defendants excavated 50 lorries of murram from the suit property.
7. PW2 Mwabao Mramba Taura equally adopted his written statement dated April 12, 2016 and testified that Mramba Taura, his late father, sold the suit property to the plaintiff whereby he built a house thereon but the 1st defendant disrupted the peaceful enjoyment by excavating murram on the suit property. He confirmed that the other family members have no claim over the suit property.
8. On cross examination, PW2 told the court that the suit property was given to his late father by the 1st defendant and his brother Hanga Kikopi (also Mramba's father) in the year 2009. PW2 disputed having any knowledge of a statement written by the said Hanga indicating that the suit property belonged to the 1st defendant.
9. PW2 stated in re-examination that the plaintiff lived on the suit property for 3 years and that the dispute only arose when the defendants started excavations.
10. Jumwa Mramba Taura- PW3 adopted his written statement dated April 12, 2016 and stated that Mramba Taura, her husband sold the suit property to the plaintiff.
11. On cross examination she confirmed that before her husband sold the suit property to the plaintiff, they went to the 1st defendant and his mother, one Matsezi to ask for a portion of the family land to sell in order to settle some problems they had. The 1st Defendant agreed to the sale however, he did not point out to them the specific area or portion to be sold.

Defendants' case

12. DW1 Kaviha Kikopi adopted his statement dated 1st May 2016 and stated that he was the owner of the suit land and that he had allowed his brother the vendors father to till the land and that it was on account of that permission that the vendor would also till the land. Further that the mere fact that the vendor would till the land is not in itself proof of ownership of the land.
13. On cross examination, DW1 testified that he had only one brother, Hanga Kikopi, who had a son, the late Mramba Taura and stated that the family land belonged to him and that he only allowed his brother Hanga to use part of the land for cultivation. Thereafter, Hanga's son started using the land on behalf of his father.



14. DW2 Stempo Kaviha Kikopi testified that the land was given to DW1 upon the demise of his grandmother and that Mramba Taura never told anyone about the sale. That Mramba was only to utilize the portion for cultivation.
15. On cross examination, DW2 told the court that they had nothing to show that the land belonged to his father DW1.
16. DW3 Hanga, Mramba Taura's mother equally adopted his statement dated 3rd May 2016 and testified that the land belonged to DW1's mother one Matsezi Mbaruku. She stated that and her husband Hanga Kikopi were given land by DW1 to use and was not aware that her son Mramba sold any part of the land.
17. DW4 Pola also testified and stated that the suit property belongs to the 1st Defendant.

Plaintiff's Submissions

18. Counsel for the Plaintiff submitted that by virtue of the doctrine of privity of contract, the Defendants lack locus standi to challenge the sale agreement since they were not parties therein and relied on the case of *Agricultural Finance Corporation Limited v Lengetia Limited and Jack Mwangi* [1985] eKLR where the court held that as a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it
19. Counsel submitted that the plaintiff has proved his case on a balance of probabilities and urged the court to grant the orders as prayed in the plaint.

Defendant's Submissions

20. Counsel for the defendant reiterated the evidence of the parties and submitted that the Plaintiff has failed to prove that the person who sold him the suit property had good title over the suit property to pass to him.
21. It was counsel's further submission that no witnesses to the sale agreement were called to testify on behalf of the plaintiff and that the vendor's own mother and sister testified against the plaintiff. counsel finally stated that the claim for mesne profits was not supported by any evidence to prove the actual loss and damage suffered.

Analysis and Determination

22. The Plaintiff filed this plaint contemporaneously with an application for injunction against the defendants whereby the court heard the application and vide a ruling dated February 3, 2017 the court allowed the application for injunction against the defendants on the ground that the plaintiff had produced evidence that he had purchased the suit land in 2009.
23. The issues for determination is whether the plaintiff entered into a valid sale agreement for the purchase of the suit land in 2009 and whether the plaintiff has proved that he is entitled to the orders of permanent injunction and mesne profits together with costs.
24. The plaintiff testified that he entered into a written sale agreement 5th December 2009 with the owner Mramba Taura hence he is the owner of the suit land. He called witnesses who corroborated his evidence and urged the court to grant the orders as prayed.



25. The Defendants gave evidence and stated the suit land belongs to them as the person who allegedly sold the suit land to the Plaintiff had no good title to pass. They told the court that the suit property was part of a larger parcel of land measuring 20 acres which belonged to his late mother Matsezi Mbaruku who is also a step mother to Hanga Kikopi who was the vendor's father. That the entire land was eventually given to the 1st Defendant upon the demise of his mother. The Defendant also stated the said Mramba Taura was only given a portion of the land for purposes of cultivating by virtue of being Hanga Kikopi's son.
26. The Defendants do not dispute the existence of a sale agreement between the Plaintiff and Mramba Taura, what is in dispute is that the said Mramba had just been allowed to till the land and not to own hence he did not have a good title to pass. This is case of unregistered land where it is the Plaintiff's word against the Defendants'
27. In the case of *Caroline Awinja Ochieng & another v Jane Anne Mbithe Gitau & 2 others* [2015] eKLR Onguto, J (as he then was), in determining the issue as to who between the Plaintiff and the defendants was the owner of an unregistered plot stated thus:

“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history. The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’”: per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.

The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant's beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.”

28. In the absence of a title deed the court has to rely on the oral evidence together with the available documentary evidence namely the sale agreement and payment schedule to ascertain who between the plaintiff and the defendant is the owner of the suit land. PW3 stated that when she got married to Mramba Taura, the vendor, she found his family cultivating on the land, a fact the defendants did not dispute. Indeed, the 1st defendant explained that he allowed his step brother, Hanga Kikopi to utilize the land and later Hanga's son, Mramba Taura.
29. The 1st defendant's claim that the entire land belonged to him alone was not substantiated and if the land was 20 acres as claimed why was the plaintiff given 3 acres in the sale agreement. It should be noted that the sale agreement was signed by 8 people who appended their signatures together with their national identity cards.



30. It is also on record from PW3's evidence that her together with her husband, Mramba Taura, notified the 1st defendant of their intention to sell a portion of the land for purposes of raising money to take care of their personal issues. That the plaintiff upon purchase built a temporary house which DW3 told the court that she saw a temporary house erected on the suit property but did not bother to find out who lived there.
31. On the issue whether the plaintiff is entitled to mesne profits, mesne profits are special damages which must be specifically pleaded and proved. The plaintiff did not specifically lead any evidence to prove mesne profits, therefore this limb of his claim fails.
32. In the case of *Karanja Mbugua & another v Marybin Holding Co. Ltd* [2014] eKLR the court stated as follows with regard to mesne profits: -
- “This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of order 21, rule 13 of Civil Procedure Act. “
33. I have considered the evidence, perused the sale agreement together with the payment schedule produced by the plaintiff and find that the plaintiff has proved his case on a balance of probabilities as far as ownership is concerned therefore he is entitled to a permanent injunction restraining the defendants from interfering with the suit land or further excavating murram from the suit land plus costs of the suit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF JUNE, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

