



**Mashele v Wanzetse & another (Environment & Land Case
53 of 2016) [2022] KEELC 3177 (KLR) (8 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3177 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 53 OF 2016
AA OMOLLO, J
JUNE 8, 2022
(FORMELY BUSIA CMCC CASE NO. 499 OF 2014)**

BETWEEN

MANNASEH EMISEMBE MASHELE PLAINTIFF

AND

DAVID WANZETSE 1ST DEFENDANT

KALORI WANZETSE 2ND DEFENDANT

JUDGMENT

1. Vide a Complaint dated December 5, 2014, the Plaintiff impleaded the Defendants in this suit and prayed for judgement against them for:
 - a) An order of injunction against the Defendants, their agents, servants and or any person under them from interfering with L.R No. Bukhayo/Nasewa/1491;
 - b) Damages for denial of use and or mesne profits since 2012 to the date of settlement of this matter;
 - c) Interests on (2) above;
 - d) Costs of this suit;
 - e) Any other relief this Honourable Court deems fit to grant.
2. The Plaintiff avers that he is the registered owner of land parcel no. Bukhayo/Nasewa/1491 measuring 0.78Ha and that the Defendants without any justification have entered into his land and are putting it to their own use in breach of the Plaintiff's absolute rights and registration and in contravention of sections 27, 28 and 29 of Registered *Land Act*. That the Defendants have denied the Plaintiff exclusive use of the land hence denying the Plaintiff's profits that would have ordinarily enjoyed the suit property.



3. The Defendants filed their joint Statement of Defence and Counterclaim on the February 27, 2015 denying the contents of the Plaint. The 1st Defendant in particular stated that the suit land belonged to his grandfather and he has no direct right to the said land and thus the suit is a misjoinder. The Defendants reiterated that where they live and or put up is squarely ancestral land and they have never dispossessed anyone of the land. That they have been on the suit land since 1947 when the 2nd Defendant was born and in 1970 when the 2nd established his home thereon. That the Plaintiff obtained his documents fraudulently seeking to dispossess the Defendants of their beneficial ownership and inheritance. They listed the particulars of fraud on the part of the Plaintiff as:
 - a. Failing to involve the defendants in their transactions and or dealings being the rightful beneficial owners of the said suit land;
 - b. Acquiring the Defendants' and/or home without his knowledge and consent;
 - c. Failing to timely warn, caution and or bring to the attention of the Defendants of the facts as at the time of the Plaintiff's suit and acquisition;
 - d. Secretly dealing in the Defendant's beneficial proprietary rights;
 - e. Forging the 2nd Defendant's father's signature as he had no capacity to subdivide the land due to illness, being dumb and insane.
4. In their counterclaim, the Defendants aver that the 2nd Defendant has a beneficial claim and interest in Land Parcel No. Bukhayo/Nasewa/616 which is the mother number of Bukhayo/Nasewa/1491 by virtue of belonging to his father who nominated him to stay on a portion he has since settled on and adversely possessed from the late 1970s. That the Plaintiff completely and without following due process trespassed into land parcel no. Bukhayo/Nasewa/616 being the mother title of Bukhayo/Nasewa/1491, alienated the same and has violently been holding the parcel and dealing with it as if it was his. The Defendants in their counterclaim prayed for judgement against the Plaintiff for orders that:
 - a. A declaration that the Plaintiff's acquisition hold and continued use of the land parcel is unlawful, null and void;
 - b. A declaration that the Plaintiff's process of acquisition of land parcel No. Bukhayo/Nasewa/1491 is illegal and amounts to trespass;
 - c. An order for the cancellation of the title deeds in respect of subsequent numbers including Bukhayo/Nasewa/1491 arising from the purported 1996 subdivision of land parcel Bukhayo/Nasewa/616;
 - d. An order for the removal and or striking out of the 1st Defendant's name from these proceedings;
 - e. Costs any other relief the Court shall deem fit just and expedient.
5. The Plaintiff filed a reply to Defence and Defence to Counterclaim on the March 17, 2015 and denied the contents of the counterclaim and stated that he has never trespassed on L.R No. Bukhayo/Nasewa/616 and has always been on L.R No. Bukhayo/Nasewa/1491 which he seeks orders of injunction. That the counterclaim as drawn, filed and served is defective for lacking a verifying affidavit and it is undated.
6. The hearing commenced on the 18th of November, 2011. The Plaintiff Manasseh Emisember Mashele testified as PW1. He stated that towards the end of 2013, he bought land parcel Bukhayo/



- Nasewa/1491 from Syfrosa Nyongesa Obwero for K.Shs. 400,000/=. That the same was reduced into a sale agreement(PEx 1) and he paid an initial deposit of K.Shs. 200,000 and the balance was cleared in February, 2014. That she executed the transfer documents and he received the title deed(PEx 2) in his name as indicated in the search (PEx 3). PW1 continued in evidence that he was not using the land because at one point he sent a tractor but David chased the driver away. That the 2nd Defendant is the one who is claiming the land and they have not shown any documents to support their claim. That he obtained the title through lawful process hence his claim for permanent injunction and damages.
7. Upon being shown mutation documents, application for transfers and two searches for the suit title intended to be produced by the Defendants, PW1 stated that he was not aware of the history of the mutation form signed in 1996, neither did he meet the Mr Oduori who signed the mutation form. He stated that he is also a stranger to the application for consent to subdivide the title number 616, neither did he know about the transfer to Kalori in 2014. That from the search, parcel number 616 was registered in the name of Oduori in 1968 and the title was closed on subdivision on 8/11/1996 upon creation of six new titles. That it was not possible that parcel number 616 was transferred to the 2nd Defendant, Kalori Wanzetse Oduori by transmission and that the title could not have been subdivide again in 2007 as per the application for consent to subdivide produced. He concluded by urging this Court to dismiss the Defendants' Counterclaim.
 8. During cross-examination, PW1 reiterated that Syfrosa Okweru was the one who sold him the land and that before buying the land he conducted a search which confirmed the land was in Syfrosa's name although he had not produced the certificate of search and the transfer form from Syfrosa to him. That parcel number 1491 was previously registered in the name of Stephen who was Syfrosa's husband. That he bought the land with all the trees and the fence. That his representatives were refused access to the suit land in January 2014 and later in July the same year. That although the Defendants were claiming the land as family land he did not investigate the history of the land.
 9. On re-examination, PW1 stated that it would have been impossible to transfer the land to him if it had been in the name of Stephen Okweru. That both Stephen and Syfrosa have not complained even though he was only dealing Syfrosa who was the registered owner. That he had no reason to deal with the family or clan.
 10. Phoebe Ikhumba Etakabale testified as PW2. He stated that the Plaintiff bought the suit land from Syfrosa Nyongesa Okweru and she was one of the witnesses of the sale agreement. That after the purchase price was paid the title was issued to the Plaintiff. She stated that they are currently not using the land because the Defendants barre them from doing so. That the Defendants started building on the land, buried someone thereon and even cut trees. She urged the Court to issue orders for them to use the land and to permanently refrain the Defendants from using the land.
 11. During cross-examination, PW2 admitted that the house built on the land did not belong to the Plaintiff and it was the Defendants who were farming the land. She confirmed that they neither planted the trees not put up the fence on the land. That the local administrator was not present during the preparation of the agreement for sale. PW2 stated although they did not bring a copy of the search to court, that they conducted one and it indicated that Syfrosa was the owner. That Stephen Okweru was Syfrosa's husband but he was dead so they never met. That she did not know the name of the person who was buried on the suit land and they could not obtain a court order to stop the burial or exhume body because they learnt about the burial after it had happened.
 12. On re-examination, PW2 reiterated that their interest was to get the land and their agreement was witnessed by four (4) people. She stated that she had no idea that the law required the presence of a local administrator when preparing the agreement.



13. George Mukabi Oluoch testified as PW3. He adopted his witness statement dated March 5, 2019 as his evidence in chief. He stated that he conducted the search for the suit property on behalf of the Plaintiff and the search indicated that Syfrosa Okwero was the owner of the land. That after they agreed on K.Shs. 400,000 for two acres. That the Plaintiff paid the money and got the title. That on the June 28, 2014, the Plaintiff sent him to plough the land and they were chased away and when he tried again on the 12th of July, 2014, they were still chased away. He stated that the Defendants had no rights over the land and they have illegally taken possession of the same and are cultivating it.
14. During cross-examination, PW3 stated that the Plaintiff sent money to his account and he in turn paid the same to Syfrosa who was doing succession at the time. That at the time of the sale, the land was not in Syfrosa's name and that he did not go to the land's office to confirm whether it was family land. That while the Defendant was chasing them he stated that the land had not been sold.
15. Upon re-examination, PW3 stated that the transfer to the Plaintiff was done after Syfrosa did succession and there was no complaint from Syfrosa or her children. He stated that the 1st Defendant was not Syfrosa's child. This marked the close of the Plaintiff's case.
16. Defence hearing commenced on the September 23, 2020. The 1st Defendant, David Wanzetse testified as DW1. He adopted his stated filed on the November 6, 2018 as his evidence in chief. He confirmed that he did not know the Plaintiff and that the suit land belonged Bukhayo/Nasewa/616 is where they live and it belonged to his grandfather called Yohana Oduori Wanzetse, the 2nd Defendant's father. That no transfer or subdivision was done on the August 25, 2002. He that after succession they went to the land's office to transfer the land and it was then that they discovered a mutation on the land. That the Land Registrar referred them to the Land Control Board and the Board did not find any records of the consent for the subdivision. That upon receiving the report, the Land Registrar cancelled the subdivision and registered the land in the 2nd Defendant's name.
17. DW1 continued in evidence that they did not know who subdivided the land and their grandfather died on the August 25, 2002. That they had no idea how the Plaintiff got the land and neither have they ever seen him visit the land. That the entire land is registered in the 2nd Defendant's name. DW1 produced the documents on the Defendants' list of documents as Dex1-6 and urged this Court to dismiss the Plaintiff's suit.
18. During cross-examination by the Plaintiff's advocate, DW1 stated that he had annexed a copy of the title in the 2nd Defendant's name. That they were in the process of getting title when they received pleadings for the present case. After being shown a copy of the Plaintiff's title, DW1 state that he did not know how the Plaintiff got his land in 2014 and that he had not produced any documentation nullifying the said title. He stated further that the Plaintiff is not using the said land. That he has neither planted crops or constructed thereon. DW1 confirmed that both the application for transfer by transmission and that of consent bore the name or Panyako Oduori and that none of the documents produced bore the Plaintiff's name. That Dex 1 bears the name of Oduori Wanzetse before the Plaintiff bought the land and that there was no document signed by the Plaintiff which he ought not to have signed.
19. On re-examination, DW1 reiterated that the Plaintiff got title in 2014 without succession because according to the search issued in 2007, the land was in the name of Stephen Okwero.
20. The Land Registrar Nicholas Obiero testified as DW2. He explained that Bukhayo/nasewa/1419 was a subdivision from parcel Number Bukhayo/nasewa/616 and the said subdivision was carried out on the November 8, 1996 creating land parcels 1490,1491,1492. 1493, 1494 and 1493. While noting the history of the land, DW2 stated that on the November 8, 1996 L.R No. 1491 was transferred to Stanlus



- Oduor, on September 28, 2001 to Mary Akuku Delewa, in 2005 to Stephen, on December 23, 2013 Syfrosa transferred it to Okwero and later on the February 12, 2014 Okwero transferred it to Manasseh Emishele.
21. DW2 continued in evidence that on the August 16, 2016, they received an order cancelling the subdivision of land parcel number 616 and pursuant to that order all the titles being 1490 to 1495 were cancelled. That the 2nd Defendant as an administrator then registered himself on 16th August, 2018. That a confirmation of grant issued on the September 28, 2021 gave the parcel to the 2nd Defendant, Joyce Akumu and Benedict Panyako. That they later received an order dated July 18, 2021 cancelling the order issued on the August 16, 2018. That they registered the order but did not sign it because title number 616 was in circulation, That the order dated July 18, 2021 is specific to parcel no. 1491. Therefore, according to the records at lands the said parcel number 1491 does not exist.
 22. On cross-examination, DW2 confirmed that parcel number 1491 was created from parcel number 616 and the Plaintiff was the 6th owner. That the transfer to Syfrosa is not indicated on transmission. DW2 stated further that they received the order to restore the Plaintiff's title on the 2nd of July, 2021 and the said order was complicated as it was only restoring one number while the others remained cancelled. That although the search indicates that the parcel was restored to the Plaintiff, the same is erroneous as the records at Lands indicate otherwise.
 23. During re-examination, DW2 stated that Succession Cause 542 of 2017 was formerly High Court Succession Cause 59 of 2014 and it was where the order dated August 16, 2021 was issued. That upon receiving the order of July, 2021, they made a note in the register that the said order had been overtaken by events. This marked the close of the Defendants' case.
 24. Parties were required to file submissions within 14 days. The Plaintiff filed his submissions on the November 23, 2021. He reiterated the facts adduced during trial and submitted that the Defendants have never given him peace as regards the free use of the land. That the Defendants have without justification entered the land and are putting the same to use without his consent and to his exclusion and in breach of his absolute rights of ownership. While relying on the case of *R.G Patel v Lalji Makanji* [1957] EA 314 the Plaintiff submitted that the Defendants' allegations that he acquired the land fraudulently have not been proved as they did not produce any documentation to substantiate the said allegations. He urged this Court to allow his claim and award K.Shs. 500,000/- as mesne profits for denial of the use of his land for the last 13 years. They relied on Busia ELC Case No. 166 of 2016, Sheri Naauriya vs. Stephen Ekirapa.
 25. The Defendants filed their submissions on the December 15, 2021. They submitted that the subdivision by the person called Panyako Oduor Ajenje on the April 12, 2007 yet he was not the registered proprietor of the suit parcel. That after the subdivision the suit land non of the registered owners lived in the subdivided parcels and neither did they apply for the eviction of the beneficiaries of the late Oduori Wanzetse from the land. That the Land Registrar advised the parties to seek a court order to cancel the subdivision as there was fraud in the same and the sub-division was subsequently cancelled and the suit land was subdivided among the beneficiaries. While quoting Article 40 of *the Constitution*, the Defendants submitted that their title deserves protection under the law. They relied on the case of *Daudi Kiptugen vs. Commissioner of Land & 4 others* (2015) eKLR.
 26. The Defendant submitted further that this Court is empowered by section 80(1) of the *Land Registration Act* to order the rectification of the register by directing any registration be cancelled or amended if satisfied that the same was obtained through fraud or mistake. That even though the Court should take the production of a title document as prima facie evidence that the person named in the title as the proprietor of the land, section 26 of the *Land Registration Act* provided that the same



can be impeached if procured irregularly, misrepresentation or by mistake. That the Chief Magistrate Succession Cause No. 542 of 2017 gave an order for the cancellation of all the subdivisions of parcel number 616 after being satisfied that the same was done initially. While relying on the case of *Falcon Global Logistics Co. Ltd vs. Management Committee of Eldama Ravine Boarding Primary School* (2018) eKLR, the Defendants submitted that the Plaintiff did not deserve the prayers sought for as the title for parcel number 1491 does not exist. They urged the Court to dismiss the Plaintiff's suit with costs.

27. Having considered the parties' pleadings, submissions and the applicable law, the issues which in my opinion arise for determination are as follows:
- a) Whether the Plaintiff acquired the suit parcel fraudulently;
 - b) Whether the Defendants have encroached onto the Plaintiff's parcel of land;
 - c) Whether the Plaintiff's title is extinguished by virtue of adverse possession.
 - d) Who pays for the costs of this suit?

Determination

28. From the evidence presented by the plaintiff and his witnesses, the plaintiff has proved that he purchased L.R Bukhayo/Nasewa/1491 on 30th December 2013 and proceeded to acquire a title in his name on March 10, 2014. The plaintiff stated that he attempted to take possession of the land in January and July 2014 but received hostility from the defendants. As a result of the hostility, he filed this suit seeking an order of permanent injunction. The defendants are contesting the plaintiff's title in two respects – first that it was irregularly obtained and secondly that their rights of adverse possession supersedes the rights of the plaintiff.
29. In determining this matter, I will consider who between the two parties have demonstrated they are entitled to ownership and occupation of the suit parcel Bukhayo/Nasewa/1491. The plaintiff placed reliance on the copy of sale agreement and title deed bearing his name as proof that he is entitled to the land. The said title has been challenged in accordance with the provisions of section 26 of the *Land Registration Act*. The suit parcel was curved from L.R Bukhayo/Nasewa/616. L.R. 616 was opened on 2/10/1968 in the name of Oduori Wanzetse who the 1st defendant refers to as a grandfather. The title is recorded to have been closed on sub-division by the said Oduori on 8/11/1996 when created titles 1490-1495 (Dex 5). The said Oduori died on August 25,2002 as per the death certificate produced as Dex 2.
30. On this background, it was important to follow whose names the new sub-divisions were transferred to or registered particularly the suit title. There is a search certificate dated 6/2/2007 (Dex 6) showing Stephen Okewero Otewu was registered as owner of suit title L.R 1491 on April 13,2005. From the evidence adduced by both parties, it is agreed that Stephen was the husband to Symprose who later sold the land to the plaintiff. As at the time of sale, it is stated that the said Stephen was deceased. There was no evidence whether the said Symprose had the land in her name at the time of sale as no certificate of official search was produced. Neither was there any evidence to show that she had taken letters of administration of the estate of Stephen Okwero – deceased. The plaintiff admitted not producing a transfer form signed by the seller Symprose.
31. The court is alive to the rule of evidence that he who alleges a fact must establish its existence. In this case, the burden rested on the defendants to prove the fraud. They raised the two points I have discussed above i.e. no transfer form signed and no evidence that the transfer was by transmission since the registered owner was deceased by the time the land was sold in the year 2014. It was therefore



incumbent upon the plaintiff to defend his title. Besides the sale agreement and the title deed, the plaintiff ought to have provided evidence of his visit to the suit land.

32. The 2nd defendant stated that he has been on the land since 1970. The plaintiff's agreement states that he purchased the land, houses and trees on it. The agreement does not specify whose houses and trees and how many they were. The plaintiff does not produce a search as part of the due diligence neither did he show proof that consent of the Land Consent Board was obtained. The defendants also produced court orders issued in High Court Succession Cause No. 542 of 2017. One of the orders is issued on April 26, 2018 directing the Registrar to re-visit the original number Nasewa/616 and divide into equal shares amongst the beneficiaries. This order appears to have been set aside on July 18, 2021 yet another order contained in the certificate grant of grant dated September 7, 2021 shared out L.R 717 between three (3) people; Kalori Wanzetse 2.5 acres; Benedict Panyako Oduori 2.5 acres and Joyce Akumu Oduon 1.5 acres.
33. This court does not have jurisdiction over matters of probate and administration. However on the face of the 3 sets of orders produced especially the last one dated September 7, 2021, unless the record is set straight, it seems the plaintiff's interest which was derived from parcel No. L.R 616 may have been taken away. The original number 616 measured 2.6Ha which translates to 6½ acres and which has been shared out fully between the three (3) beneficiaries as per the order dated September 7, 2021.
34. The last point I delve into is whether the defendants have proved their counter-claim regarding the issue of adverse possession. The 2nd defendant stated that he was born, brought up on the land and subsequently built his home there with the permission of his father. At the time he built his home, the land was registered in his grandfather's name and his father acquired the rights through ancestry which rights it seems were subsequently transferred to the defendants by virtue of their kinship. Therefore, the defendants needed to demonstrate when the hostility of their occupation started to run to make the right of adverse possession to accrue.
35. From the evidence on record, the closest ownership changed was in the year 2005 when the suit property got registered in the name of one Stephen Okweru – deceased. Between the year 2005 and 2014 when this suit was filed, a period of twelve years had not elapsed. Suffice it to say that the defendants claim by way of adverse possession has not been proved.
36. The Defendants also pleaded at paragraph 10 – 12 of the counter-claim that the plaintiff did not acquire his title procedurally and used unlawful means. They sought a declaration to be made to this effect and asked the court to cancel the said title. As explained in previous paragraphs 31-33 of this judgment, the court already made a finding that the plaintiff did not demonstrate that he followed due process in acquiring his title. This court makes reference to the persuasive authority in the Case of *Daudi Kiptugen v Commissioner of Lands* [2015] eKLR;

“It is not enough that one issue a Lease or a Certificate of Lease and asserts that he has a good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by individual was improperly acquired, then the holder thereof must demonstrate through evidence that the lease or certificate of lease that he holds was properly acquired. The acquisition of title cannot be constricted only in the end results; the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, the all one would need to do is to manufacture a lease or certificate of title at (some) backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein ...”



37. It is therefore my determination that this limb of the counter-claim is proved thus the counter-claim is allowed in terms of prayers 1-3 that;

1. A declaration be and is hereby issued declaring that the plaintiff's acquisitions and continued use of Land Parcel Bukhayo/Nasewa/1491 is unlawful, null and void.
2. A declaration be and is hereby issued declaring that the plaintiff's process of acquisition of Land Parcel No. Bukhayo/Nasewa/1491 is illegal and their use if any amounts to trespass.
3. An order is hereby issued for cancellation of title deed Bukhayo/Nasewa/1491 which arose from the purported sub-division of Land Parcel No. Bukhayo/Nasewa/616.
4. Each party to bear their respective costs of the suit.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 8TH DAY OF JUNE, 2022.

A. OMOLLO

JUDGE

