



**Ayata v Orito & another (Environment & Land Case 823 of 2016)
[2022] KEELC 3334 (KLR) (19 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3334 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 823 OF 2016**

JM ONYANGO, J

JULY 19, 2022

BETWEEN

NYANAMBA AYATA PLAINTIFF

AND

BENARD KERAUMA ORITO 1ST DEFENDANT

JOYCE ONYIEGO 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated May 7, 2012, the plaintiff filed suit against the defendants seeking a declaration that he is entitled to exclusive and unimpeded right of possession of the entire parcel of land formerly known as L.R. NO. Kisii/west Kitutu/mwamonari/1123 (hereinafter referred to as the suit property). He also sought a declaration that the Defendants were wrongfully in occupation of a semi-permanent shop built on the suit property and thus deserved to be ordered to surrender vacant possession of both the land and the suit premises. Additionally, the plaintiff sought damages for trespass and/or mesne profits.
2. In support of his claim, the plaintiff averred that he together with his late brother, one Chanani Ayata were joint proprietors of the suit property with each of them entitled to half share. He stated that he was in occupation of the entire suit property whereupon he had constructed a semi-permanent shop and he had planted 2000 coffee trees on a portion of the suit property.
3. It was his case that sometime in 1996, based humanitarian grounds, he gave part of his shop and coffee plantation to one Andrew Bosire Oyata. The said Andrew Oyata was an orphan whom he had cared for all his life. He was to stay in the shop and use the coffee trees to get some income so that he could become economically empowered. He contended that the Andrew Bosire Oyata was to use the said shop and the coffee for a certain period and then surrender the same back to him.



4. He stated that on or about March 10, 1998, Andrew Bosire Oyata secretly, unlawfully and without his knowledge and approval, leased the shop together with the coffee plantation to the late Jackson Orito Mokora, the defendants' late father, for a period of 12 years at a cost of Kshs. 250,000.
5. The Plaintiff contended that when he learnt about the transaction he called Andrew Bosire Oyata and Chanani Ayata for a meeting to discuss the matter but Andrew Bosire Oyata did not show up for the meeting, which ended with a resolution of letting the late Jackson Orito Mokora continue leasing the suit land together with the semi-permanent shop. It was his averment that the late Jackson Orito Mokora died before the expiry of the 12-year lease and the defendants from then on took over the leased premises and the suit land.
6. It was his further averment that on or about 20th July, 2008, his late brother Chanani Ayata sold a portion of the suit property to one Henry Motengu Ondieki, thus the title to the suit property was closed upon subdivision. The resultant titles were West Kitutu/mwamonari/2480 registered in the name of the plaintiff and West Kitutu/mwamonari/2481 in the name of the Henry Motengu Ondieki. Further, the Plaintiff contended that when the lease period expired on March 10, 2010, he approached the Defendants and demanded that they vacate the premises and the land but they refused to do so.
7. It was his averment that after frequent squabbles between the defendants and his family on the issue, he approached an Advocate who wrote a demand letter asking the defendants to move out of the suit property. However, the defendants through their Advocate responded through a letter dated March 30, 2021 stating that their late father had through land sale agreement dated 1/2/1999 bought 3 ½ acres of the land from Andrew Bosire Oyata.
8. He argued that the said agreement was null and void as it wrongfully stated that the suit property belonged to Ayata Ombori by the time it was being sold which was not correct. He concluded that the Defendants were trespassers who needed to be evicted from the suit property and permanently barred from interfering with the user and occupation of the suit property by the Defendants.
9. Upon being served with the Plaint and Summons to enter appearance, the defendants filed a Statement Defence dated July 2, 2012 in which they denied the Plaintiff's claim. They instead claimed that their late father had through a sale agreement dated February 1, 1999 bought a portion of the suit property measuring approximately 3 ½ acres together with a building thereon at a purchase price of Kshs. 600,000 from one Andrew Bosire Oyata.
10. They claimed that before the said agreement was drafted by an advocate on February 1, 1999 the parties had drafted a sale agreement in Ekegusii language on March 10, 1998 before the Assistant Chief of Rioma Sub- location. In the said agreement Andrew Bosire Oyata had agreed to sell a portion of the suit property measuring approximately 50 feet by 129 feet to their late father. The defendants denied claims that Andrew Bosire Oyata was given a portion of the suit property on humanitarian grounds and that he later sold the said parcel to them.
11. They instead revealed that Andrew Bosire Oyata was a brother to the plaintiffs. They refuted the claim by the plaintiff that the land had only been leased to their father for a period of 12 years and maintained that the transaction between their father and Andrew Bosire Oyata was a sale.
12. The matter was fixed for hearing on November 19, 2020 and the plaintiff testified and closed his case. Unfortunately, the defendants failed to appear in court to testify in support of their case on three occasions. The court ultimately decided to close the defendants' case.



PLAINTIFF'S EVIDENCE

13. At the hearing of the plaintiff's case, the plaintiff called three witnesses to testify on his behalf.
14. Mr. James Nyanamba Ayata, the plaintiff herein testified as PW1. He adopted his witness statement dated 7th May, 2012 as his evidence in chief. He also produced the documents in the Plaintiff's List of Documents as the plaintiff's exhibits. He told the court that he knew the 1st defendant as a son of the late Jackson Orito Makora who had bought land from an uncle called Angwenyi. He testified that Andrew Bosire Oyata who had since died was his brother to whom he had given a house and a coffee plantation. He further testified that he later discovered that the late Andrew Bosire Oyata had leased the house together with the coffee plantation to the late Jackson Orito Makora for a period of 12 years. The said Jackson Makora died before the expiry of the 12-year lease. He urged the court to grant him the prayers outlined in his plaint.
15. Upon cross-examination, he stated that he could not recall when both Andrew Bosire Oyata and Jackson Orito Makora died. He told the court that he was given the suit property by his late father and that his late father could not have given land to Andrew Bosire Oyata who was his younger brother since he was still very young. He reiterated that he was the one who gave Andrew a piece of land. He admitted that he was aware that Andrew had sold a portion of the suit property to Jackson Orito Makora, who was the defendant's late father. He also admitted that the defendants have been in occupation of the contested portion of the suit property for a period more than 20 years.
16. Mr. Nelson Akama who introduced himself as a clan elder testified as PW2 and adopted his witness statement dated April 16, 2014 as his evidence. In his testimony Mr. Akama stated that he was approached by Jackson and Andrew on March 10, 1998 to draft a lease agreement on their behalf in relation to the suit property. He stated that Andrew was supposed to travel to Saudi Arabia for further studies and had therefore opted to lease a portion of the suit property that he had been staying on. PW2 further stated that the said portion of the land had been given to Andrew by the Plaintiff. He produced the lease agreement he had drafted on behalf of Jackson and Andrew. He further testified that the said lease was meant to expire in 2010. It was his testimony that by the time he drafted the lease, the land was vacant. He confirmed that Jackson died before the expiry of the 12-year lease period.
17. During cross examination by counsel for the defendants, he confirmed that he was the who drafted the lease agreement dated 10th March, 1998 which he had produced before the court and he did not make any alterations to it. He also confirmed that before drafting the agreement he confirmed that the portion being leased belonged to Andrew who was the plaintiff's brother. When taken to task as to whether he was aware of an agreement between Andrew and Jackson, he stated that he was not aware of any such agreement.
18. When re-examined by counsel the Plaintiff, he confirmed that he was not aware of the person who had altered the lease agreement dated March 10, 1998 and that the agreement he had drafted only indicated that Andrew had leased the property for 12 years in order to get money for further studies in Saudia Arabia.
19. Mr. Joseph Makora Ongera who is a brother to the late Jackson Makora testified as PW3. He adopted his witness statement dated January 20, 2014 as his evidence in this case. He testified that he was a witness to the lease agreement between Andrew and Jackson. It was his evidence that the lease agreement entered between Jackson and Andrew was to last for 12 years. He however could not confirm whether Jackson later bought the suit property from Andrew.



20. During cross examination, he confirmed that the defendants were staying on the suit property but they do not cultivate the land behind the shop because they were stopped by police officers. He also testified that they had been stopped from harvesting the coffee on the suit property. He further stated that he was not aware of any sale of the suit property to Jackson in 1999 and that all he was aware of was a lease of the same by Andrew so that he could further his studies in Saudi Arabia.
21. Counsel for the defendant was forced to close the defendants' case after several adjournments owing to the defendant's failure to attend court.
22. Thereafter, the court directed the plaintiff and the defendants to file written submissions and both parties filed their submissions which I have considered.

ISSUES FOR DETERMINATION

23. Having considered the pleadings filed by the parties, the testimonies of the plaintiff and his witness, the documentary evidence relied on by the parties as well as the submissions, the sole issue for determination is whether the plaintiff has proved his case on balance probabilities.

ANALYSIS AND DETERMINATION

24. It is common ground that the suit property was registered in the joint names of the plaintiff and his brother, the late Chanani Ayata. It is also not contested that Andrew Bosire Oyata had been given a portion of the suit property which comprised of a shop and a coffee plantation. It is also not in dispute that the defendants have been in occupation of the portion of the suit property which is said to have been given to Andrew. It is further not contested that there was a transaction between Andrew and Jackson whereby Andrew surrendered a portion of the suit property.
25. However, the dispute between the parties is with regard to the kind of transaction entered between the defendant's late father, Jackson Orito and the late Andrew Bosire. According to the plaintiff, the agreement entered between the two was a lease agreement that was supposed to last for 12 years. This position was supported by the testimony of Nelson Akama (PW 2) who produced a lease agreement he drafted for the parties dated March 10, 1998 and the testimony of Joseph Makora Ongera (PW 3) who indicated that he witnessed the signing of the 12-year lease agreement between Andrew and Jackson.
26. On the other hand, the defendants contend that the plaintiff bought the suit property vide a Sale Agreement dated February 1, 1999 drawn by Nyariki and Co. Advocates. They further claim that there is an agreement dated March 10, 1998 that had been executed before the Area Assistant Chief in Ekegusi Language which indicated that a portion of the suit property was sold to their father.
27. However, what is surprising is that the agreement that the Defendants claim to have been executed on March 10, 1998 in Ekegusi is similar to the one produced by PW2. During cross examination, PW2 confirmed that the same was a lease agreement. This is the only agreement that was produced as evidence before this court.
28. The defendants' counsel's submission that there existed a valid sale agreement between the late Andrew and the late Jackson in the presence of one John Nyambonga Mokoro and David Omwansa Ayata is therefore without any basis.
29. In view of the foregoing, there is no evidence before this court challenging the position stated in the lease agreement dated March 10, 1998 that the property was only leased to the defendant's late father for a period of 12 years which expired in 2010. The continued occupation of the suit property by the defendants beyond the year 2010 therefore amounts to trespass.



30. In the premises, I find and hold that the plaintiff has proved his case against the defendants on a balance of probabilities. I therefore enter judgment for the plaintiff and make the following orders:

a. A declaration is hereby issued that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit property.

b. A declaration is hereby issued that the defendants whether by themselves, their servants, agents or assigns or howsoever are in wrongful occupation possession and user of the suit property and are accordingly trespassers on the same.

c. An injunction is hereby issued restraining the defendants by themselves, their family members, agents, servants, assigns or otherwise howsoever from remaining or continuing in possession, occupation and user of the suit property.

d. An order is hereby issued directing the defendants to surrender vacant possession of the suit property to the plaintiff within 90 days failing which they shall be evicted without further recourse to the court.

e. The Defendants shall bear the costs of this suit.

DATED, SIGNED AND DELIVERED AT KISII THIS 19TH DAY OF JULY, 2022.

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J.M ONYANGO

JUDGE

