



**Mauda v Baraza & another (Environment & Land Case 71 of 2016)
[2022] KEELC 3732 (KLR) (4 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 3732 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 71 OF 2016**

**AA OMOLLO, J
AUGUST 4, 2022**

BETWEEN

SIMON OKWARA MAUDA PLAINTIFF

AND

JOHN KADULI BARAZA 1ST DEFENDANT

ENOCK MUSANI MURUYA 2ND DEFENDANT

JUDGMENT

1. Through an amended plaint dated July 4, 2019 and filed in court on the same date, the plaintiff sought for judgment against the defendants as follows:-
 - a. An order of permanent injunction restraining the defendants, their agents and/or servants from interfering with LR No South Teso/Amukura/1743 and a concurrent order of eviction from the suit land.
 - b. Costs of this suit.
 - c. Any other relief this honourable court deems fit to grant.
2. The plaintiff impleaded that he is the registered owner of land LR No S Teso/Amukura/1743 out of it, Wechuli Kochwabought from him around the year 2005 a portion measuring 6 acres at an agreed purchase price of Kshs 141,000/=. He stated that Kshs 100,000/= was paid leaving a balance of Kshs 41,000/=. He continued that later, the 1st Defendant bought from one Wamalwa Seng'enge who had bought from Wechuli Kochwa and settled on the land together with the 2nd defendant but the balance of Kshs 41,000/= remains unpaid. The plaintiff now wants the land back.
3. The defendants put in their amended defence and counterclaim dated December 18, 2019 and admitted that it is true that Wechuli Kochwa bought 6 acres from LR No S Teso/Amukura/1743 in 1995 at the agreed price of Kshs 141,000/= and not 2005 and no balance remained thereof. In their



counterclaim, they averred that Wechuli Kochwa who had bought 6 acres from the plaintiff herein had acquired the sold portion by way of adverse possession before even selling the two acres to Mr Kennedy Wamalwa on July 11, 2009 who then sold to the 1st defendant. They sought for judgment against the plaintiff as follows;

- a. A declaration and an order that the first defendant is the absolute owner of two acres and the 2nd defendant is the absolute owner of one acre from LR S Teso/amukura/1743 and the same be respectively registered in their names.
 - b. The plaintiff to sign and execute all necessary documents to facilitate the registration of the said portions of land in the names of the defendants' failure of which the executive officer of this honourable court be empowered to do so in his place.
 - c. The Busia County Land Registrar be advised to effect the registration of the said portions in the names of the defendants as per paragraph (a) above.
 - d. Costs of this defence and counterclaim and interest thereof.
 - e. Any other order that the court deems just to grant.
4. The plaintiff filed a reply to defence and defence to counterclaim on February 15, 2021. He contended that the defendants lack the locus standi to bring the counterclaim on behalf of Wechuli Kochwa and averred that the defendants have no cause of action against him and the counterclaim should be dismissed with costs.
 5. The matter began with the hearing of the plaintiff's case on November 22, 2021 with Simon Okwara Mandatestifying as PW1 and making reference to his witness statement dated September 5, 2016 which statement is dated is dated February 12, 2018. The witness stated that he got the land following succession and got registered as owner of LR No South Teso/Amukura/1743. That he never sold land to the defendants herein and there exists no valid land sale agreement between him and the defendants. He said that that the defendants entered his land without consent and put the same to their personal use. He denied that the 1st defendant does not have a house on the land and the 2nd defendant had a house on the land which was demolished by mob justice after the 2nd defendant and his wife had beaten his child to death. He produced the copy of title for the suit land and urged the court to grant the prayers sought.
 6. On cross-examination by the 1st defendant, the plaintiff stated that he did not know when he got on the land but he planted sugarcane in the year 2015. The witness admitted he had sold the land in 1995 approx six acres to Kochwa and the purchase price was Kshs 141,000/= That he paid Kshs 100,000 and he was not aware that Kochwa had sold him 2 acres of the land. He denied that the signature on the agreement dated December 18, 2019 was his and denied that he was aware Mr Kochwa sold land to Kennedy who later sold him the suit portion. He said that he reported the 1st defendant to the chief to move out of his land not to refund him the money.
 7. He stated that on May 12, 2016, he was not the one who summoned Wechuli Kochwa to witness the refund but it's the 1st defendant who reported him to the chief and later to the DO. He asserted that Wechuli Kochwa owes him but the 1st defendant also owed him for being on his land. He stated that Kochwa had not paid the balance but he did not sue him. He stated that the 1st defendant never came with Kennedy to hand over the land to him and it was not true that he was living at Wechuli's permission.
 8. On further cross-examination by the 2nd defendant, the plaintiff said he does not know when the 2nd defendant got onto the land as he was living with Wechuli Kochwa. He denied demarcating any portion



- of land to the 2nd defendant as he discovered he had bought from Kochwa after Kochwa left/moved out of the land. He said that the person using the land without his permission is the one to blame. The plaintiff closed his case and the matter proceeded for defence hearing.
9. Wechuli Nabulende opened the defence case as their first witness and adopted his witness statement filed in court on December 23, 2019. He testified that he does remember on 2/9/1995, he bought 6 acres of land from the plaintiff from his LR No South Teso/Amukura/1743 at the purchase price of Kshs 141,000/= of which he paid on the same day Kshs 100,000/= leaving a balance of Kshs 41,000/= That on the same day with the assistance of the surveyor of the plaintiff, the plaintiff demarcated the 6 acres' boundary for him. He entered that land on the same day and built his home and started cultivating it by planting maize, potatoes and sugar cane through Mumias Sugar Company Ltd. On October 20, 1995, he paid the plaintiff Kshs 24,000/= leaving a balance of Kshs 17,000/= and which balance was paid July 15, 1996 and an additional sum of Kshs 1,000/=. DW1 continued that later on January 7, 2003, he bought one more acre of land from the plaintiff at the agreed purchase price of Kshs 30,000/=. The plaintiff promised to give him a title to the 7 acres but failed to appear before the Land Control Board to facilitate the same.
 10. DW1 stated further that on July 11, 2009, he sold a portion of 2 acres from the land that he bought to Kennedy Wamalwa Seng'enge at Kshs 120,000/= and retained 4 acres. On January 4, 2011, he sold 1 acre thereof to his son Enock Msanii Muruya at Kshs 82,500/= which was fully paid. According to the witness, he now owned 3 acres of the 6 acres he bought from the plaintiff. He said that the 2nd defendant started building his home and both Kennedy Wamalwa and the 2nd defendant started to cultivate their respective portions by planting maize and sugarcane and thereafter on July 9, 2011, Kennedy Wamalwa Seng'enge sold his portion of 2 acres to the 1st defendant at Kshs 150,000/=. During their transaction, the 1st defendant insisted on seeing the plaintiff who was still the registered owner. Therefore, on July 9, 2011, they went to the plaintiff's home whereby they found the plaintiff who assured them that he has no problem and will process the titles of the portions for them.
 11. The 1st defendant paid the purchase price at the home of the plaintiff and they signed as witnesses on the agreement and thereafter he went to Uganda. DW1 testified that he left the 1st defendant cultivating his 2 acres that was sold to him by Kennedy Wamalwa and in May, he was summoned from Uganda by the 1st defendant to come to Kenya and when he came, the plaintiff, 1st defendant and himself went to the area chief who after hearing them advised the plaintiff to process the title for them but he refused and promised to return their money. The chief referred the matter to the DO, Amukura who also directed the plaintiff to process the title for them, which he agreed but later changed his mind and filed this suit. He prayed that the plaintiff's suit be dismissed with costs.
 12. On cross-examination, DW1 reiterated that he bought 6 acres from the plaintiff but they never attended before the DO for obtaining Land Control Board. He said that he stayed on the land for about 20 years then he asked the plaintiff to allow him to sell 2 acres and the plaintiff agreed and he even gave him a token. He knew the 1st defendant used to stay on the land but he moved out because of conflicts with the plaintiff and the 2nd defendant is his nephew and he lived on the land until last year when his house was demolished.
 13. Kennedy Wamalwa Seng'enge gave evidence as DW2 and stated that he is the one who sold land to the 1st defendant after he had bought from Wechuli (DW1) on July 11, 2009. On cross examination, he stated that Wechuli did not have a title so they went to the original owner and informed him. They never attended the Land Control Board. He said that the title is still in the name of the original owner.
 14. The 1st defendant John Khaduli Barasa gave evidence as DW3 and adopted his witness statement dated April 16, 2018 as his evidence in chief. He testified that he bought 2 acres of land from Kennedy



Wamalwa Seng'enge who had bought from Wechuli Kochwa who demarcated the boundary of those 2 acres for him from his portion that he bought from the plaintiff's LR No South Teso/Amukura/1743. When he bought the said land, the home of Wechuli Kochwa was on the suit land and he was staying thereon but later he immigrated to Uganda but the remains of his houses are still visible on the ground. He stated that after he bought the said land, Wechuli Kochwa sold one of his 2 acres that remained with him from his portion that he bought from the plaintiff, to one Martin Msanii who also built his home on that portion and he stays on it. Wechuli Kochwa still has one acre remaining which is looked after by Martin Msanii. He relied on the copies of the sale agreements contained in the list filed on April 16, 2018 and produced them as DEX 1-3.

15. DW3 was put to cross examination by counsel for the plaintiff, and he reiterated that he purchased 2 acres of land from DW2 who did not have a title. That he does not have a title to date. DW3 stated that they tried to have the owner take them to the land board but he refused and he was removed from the land in 2016 and now he does not use it. He said he had not given up his interest on the land because he depended on it.
16. Enock Muruya, the 2nd defendant adopted his witness statement dated December 23, 2019 as his evidence. His evidence was similar to that of DW1. He testified that on January 4, 2011 when he bought one acre from Wechuli Kochwa they brought a surveyor to separate the two acres from Kennedy Wamalwa's and the plaintiff was present and assisted them to measure the sold land in that respect. Thereafter Wechuli Kochwa went to Uganda but they used to call him back whenever there was a need to do so. He stated that the plaintiff later became slippery and avoided taking them to the area Land Control Board to process the title for 6 acres to Wechuli Kochwa which would enable Mr Wechuli to get title to transfer to the defendants' titles for their respective portions. Instead in early 2016, the plaintiff changed his mind and started to claim that he wants to pay back the money paid to any person in respect of the said 6 acres he sold to Wechuli Kochwa. According to DW4, he contends that they have acquired the portions of land in their possession from LR No South Teso/Amukura/1743 by way of adverse possession through Wechuli Kochwa who sold the same to them and prayed that the plaintiff's suit be dismissed with costs.
17. In cross-examination, DW4 said he never paid any money to the plaintiff since the transaction was between the plaintiff and his father (Wechuli). That he was removed from the land in the year 2020 on accusations that he was amongst those involved in the death of the plaintiff's son. He was unaware that Land Control Board consent had been obtained.
18. After the close of hearing, the parties agreed to exchange written submissions. The plaintiff filed his submissions on November 26, 2021 and submitted that no application was made to the land control board for transfer of the land that had initially been sold to Wechuli Kochwa and therefore no consent was obtained as provided for in section 8 of the *Land Control Board Act*. He said that the lack of compliance with said section rendered the transaction null and void and cannot give rise to orders of specific performance. On the counterclaim of adverse possession, the plaintiff has submitted that there have been disputes between the parties that have been reported to the DO and the chief and thus their claim is misplaced. He relied on the decision of *Samuel Mwangi v Jeremiah M'itobu* [2012] eKLR, which held as follows;

“The learned Judge of the High Court erred in his conclusion that only an “owner” of land had the right to sue in trespass. That is clearly not so. As Winfield and Jolowicz state in their book “Tort” (12th Edition at pg 361):

“Possession in fact confers no actual right of property, but a possessor may nevertheless maintain trespass against anyone who interferes who cannot himself



show that he has the right to recover possession immediately. A stranger cannot rely in his defence upon another person's right to possess (the "jus tertii") unless he can prove that he acted with that person's authority. Even wrongful possession, such as that acquired by a squatter, will, in principle, be protected except against the owner of the land or someone acting lawfully on his behalf."

19. The defendants put in their submissions on March 15, 2022 and submitted that the failure by the plaintiff as the seller and the owner of the land to obtain land control board consent does not defeat or prevent the buyer who had settled the purchase price and who is in possession of the purchased land to acquire the same by way of adverse possession. They submitted that they have proved their counterclaim whereby Wechuli Kochwa having occupied the 6 acres that he bought from the plaintiff for more than 12 years thus by virtue of the said section 7 of the [Limitation of Actions Act](#), the plaintiff cannot recover the suit land from any person driving his rights to the land through Wechuli Kochwa.
20. From the pleadings filed, evidence adduced during the hearing and rival submissions filed herein, I frame the following two issues for determination of this suit;
 - a. Whether the plaintiff's suit is merited on account of failure to comply with section 8 of the [Land Control Board Act](#);
 - b. Whether the defendants' counterclaim is merited;
 - c. Who should pay the costs of this suit?
21. It is not in dispute that the plaintiff is the registered owner of LR No South Teso/Amukura/1743 and that he sold 6 acres to one Wechuli Kochwa who testified herein as DW1. The dispute arises as to when the land was sold and whether the defendants sued should be evicted from the suit land or otherwise. The plaintiff in his submissions has said that he sold the land in 1991 while in his amended plaint, he has pleaded that he sold the land in 2005. DW1 in his evidence which was corroborated with DW4 evidence, testified that the plaintiff sold the land to him on September 2, 1995. The defendants produced the sale agreements dated September 2, 1995, October 20, 1995 and July 15, 1996 executed between the plaintiff and Wechuli to fortify their claim. The plaintiff does not deny signing the first agreement but he has claimed that DW1 did not clear his balance of Kshs 41,000/= The claim for any balance was denied by DW1 who explained how the balance was paid in 1995 and 1996 and which evidence is supported by the documents produced.
22. Consequently, the plaintiff's demanding back the land for non-payment of the balance fails. However, the plaintiff raised another issue that the lack of the consent from the Land Control Board rendered the agreement between him and DW1 null and void and orders of specific performance cannot hold. It is not disputed by the defendants that the Land Control Board consent was not obtained. The court therefore shall determine whether the transaction has been rendered null and void. From the evidence on record and not contradicted, after the agreement was executed, the sold portion is said to have been demarcated on the ground and DW1 took possession of the 6 acres immediately. The possession is confirmed by DW1 putting up a home and stayed on it for about 20 years before he sold the first 2 acres. What was the effect of the lack of Land Control Board consent vis-a-vis the stay by the seller for more than 12 years thereafter?
23. The plaintiff had a right to recover the portion of land he sold to Wechuli for non-compliance with section 6 of the [Land Control Act](#). However, such right had a time limitation and in this case, the right to sue started running six months of receipt of the purchase price which was on July 15, 1996.



Unfortunately, the plaintiff did not exercise the right within the 12-year period provided in law. Section 7 of the *Limitation of Actions Act* provide thus;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

24. The plaintiff said that the defendants are using his land without his consent. DW2, DW3 and DW4 have in their evidence said that the plaintiff was aware when they were sold their portions of land by DW1 and that they tried to get him to attend the Land Control Board but he refused. DW1 in cross examination said that he had stayed on the 6 acres for at least 20 years before he sold 2 acres. He first sold 2 acres to DW2 in 2009 which is a period of at least 13 years from when he took possession of the suit land. It would then seem that DW1 had gained proprietary interests in the suit land by operation of the law. It has not been shown that the plaintiff tried to assert his rights against DW1 by suing him to get the balance of the purchase price or to get him evicted. In default of that and at the expiry of the 12 years with DW1 in occupation and possession of the suit land, the plaintiff was merely holding title for the six-acre portion in trust for DW1 or subsequently persons deriving their rights from DW1 (Mr Wechuli Kochwa).
25. I am guided by the decision of the Court of Appeal in *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR, which held that:

“The *Land Control Act* does not, unlike section 3 (3) of the *Law of Contract Act* and section 38 (2) of the *Land Act* save the operation of the doctrines of constructive trust or proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purpose of the two statutes are apparently different, they both limit the freedom of contract by making the contract void and enforceable. Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the Land Control Act have unreasonably delayed in performing the contract. However, whether the court will apply the doctrines of constructive and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case ...

Thus, since the current Constitution has by virtue of article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.”

26. In the end, although, the plaintiff is the proprietor of LR No South Teso/Amukura/1743 and he has rights as envisioned by section 25 of the *Land Registration Act*, he is holding the 6 acres he sold to DW1 in trust for him. Therefore, DW1 had capacity in exercising his right to sell a portion of the six-acres to the defendants. I find that the plaintiff has failed to prove his case on a balance of probabilities.
27. On whether the defendants have proved their counterclaim of adverse possession, the defendants have submitted that they have proved that Wechuli Kochwa had occupied the 6 acres he bought from the plaintiff for more than 12 years and hence by virtue of section 7 of the *Limitation of Actions Act*, the plaintiff cannot recover the suit land from any person deriving his rights to the land through Wechuli



Kochwa. On the other hand, the plaintiff submitted that an adverse possession claim cannot hold water as there have been disputes on the land and the 1st defendant left the suit property 10 years ago and the 2nd defendant took possession in 2015 but was evicted by villagers in 2021. Further, that Wechuli Kochwa who sold them the land and testified as DW1 herein was not made a party to the counterclaim nor did the defendants demonstrate on what capacity they are claiming adverse possession on DW1's behalf.

28. The plaintiff referred to the occupation not being peaceful. However, he made no reference to any dispute which was reported to the local administration earlier than 2015. From his own admission, he stated that he saw the 1st defendant had planted can on the disputed portion in the year 2015. The 2nd defendant said he was chased away from the land in the year 2020 after the plaintiff accused him of being part of the mob that caused the death of the plaintiff's son. In any event, the plaintiff did not elaborate that he is the one currently in possession and what constitutes that possession. The action of chasing away the defendants after this suit was filed and after the expiry of 12 years from the time the plaintiff was dispossessed was unlawful and of no effect in extinguishing the rights of the defendants on the land.
29. In conclusion, I find that the counter-claim brought by the defendants are merited. I enter judgement in their favour in the following terms:
- a. A declaration and an order that the 1st defendant is the absolute owner of two acres, the 2nd defendant is the absolute owner of one acre and Wechuli Kochwa as owner of 3 acres all to be carved out of LR No South Teso/Amukura/1743 and the same be respectively registered in their names.
 - b. The plaintiff to sign and execute all necessary documents to facilitate the subdivision and registration of the said portions of land in the names of the defendants and Wechuli Kochwa within 45 days from the date of this judgement. In default, the Deputy Registrar of this honourable court be and is hereby empowered to do so in his place.
 - c. The Busia County Land Registrar be advised to effect the registration of the said portions in the names of the defendants and Wechuli Kochwa as per paragraph (a) above.
 - d. For completeness of this judgement and under the relief of any other order the court deems just to grant, the court does hereby is an order of permanent injunction restraining the plaintiff, his agents or representatives from interfering with the defendants' use and occupation of the six-acre portion that was sold and was in dispute.
 - e. Costs of the suit awarded to the defendants.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 4TH DAY OF AUG, 2022.

A OMOLLO

JUDGE

