



Katula & another ((Suing as Legal Representatives and Administrators of the Estate of Stephen Katula Muyendi)) v Musambayi (Being Sued on his own behalf and on behalf of 41 others) (Environment & Land Case 209 of 2017) [2022] KEELC 14549 (KLR) (31 October 2022) (Judgment)

Neutral citation: [2022] KEELC 14549 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 209 OF 2017**

**CA OCHIENG, J
OCTOBER 31, 2022**

BETWEEN

PIDDAN MUSAU KATULA 1ST PLAINTIFF

CHRISTINE MUTILE MWANGI 2ND PLAINTIFF

**(SUING AS LEGAL REPRESENTATIVES AND ADMINISTRATORS OF THE
ESTATE OF STEPHEN KATULA MUYENDI)**

AND

**SILAS KHAEMBA MUSAMBAYI (BEING SUED ON HIS OWN BEHALF AND
ON BEHALF OF 41 OTHERS) DEFENDANT**

JUDGMENT

1. Through a Plaint dated the 9th May, 2016, the Plaintiffs pray for Judgment against the Defendants for:
 - a. An eviction order directed to the Defendants ordering them to vacate the Plaintiff's parcel of land known as Mavoko Town Block 3/2111.
 - b. A permanent injunction restraining the Defendant from trespassing, encroaching, ingressing into, selling, developing, disposing, or in any manner interfering with the Plaintiff's quiet possession and ownership of Mavoko Town Block 3/2111.
 - c. General damages.
 - d. Mesne profit.
 - e. Costs of this suit together with interest on (c) and (d) above.
 - f. Any other relief that this Honourable Court may deem just and fair to grant.



2. The Defendants filed their Statements of Defence where they denied the averments in the Plaint except the descriptive as well as the jurisdiction of the court. They contend that they are bona fide purchasers for value, having purchased their respective portions of land from Mbukoni Holdings Limited. They state that they have resided on land parcel number Mavoko Town Block 3/2111 hereinafter referred to as the 'suit land', since 2005 and substantially developed as well as built residential houses thereon. They deny being trespassers on the suit land. They explain that the 1st Defendant bought the suit land on 26th April, 2006 and 18th November, 2009 respectively from the then Administrators of the Estate of Stephen Katula Muyendi one Reuben Katula. Further, at the time of purchase, the Plaintiffs were not administrators of the deceased Estate. They reiterate that they in possession of the suit land by virtue of purchase and are not strangers as alleged.
3. The matter proceeded for hearing where the Plaintiff called one witness while the Defendants had two witnesses.

Evidence of the Plaintiffs

4. The Plaintiffs have sued in their Capacity as Administrators of the Estate of Stephen Katula Muyendi (deceased). They confirmed that they became Administrators of the deceased Estate vide Machakos High Court Succession Cause No. 718 of 2013. The Plaintiffs claim that, the Defendants without any colour of right trespassed on the suit land in 2015 and have constructed residential houses thereon. They hence seek to evict the Defendants from the said suit land. The Plaintiffs contend that they never sold the land to the Defendants nor did they enter into any Sale Agreement with Mbukoni Holdings Ltd, that was the vendor. To support their case, they produced the Certificate of Title as well as the Certificate for Confirmation of Grant in respect to the Estate of Stephen Katula.

Evidence of the Defendants

5. The Defendants' witnesses insist they bought their respective plots from Mbukoni Holdings in 2006 and have developed them. Further, that they purchased the plots after seeing the Sale Agreement Mbukoni Holdings Ltd had with the initial administrator of Estate of the late Stephen Katula Muyendi being Reuben Katula who is since deceased. They confirmed that they do not have titles to their respective portions of land. They claim to have substantially developed and built residential houses on the suit land. They explain that the portion of the land purchased from the suit land is only 20 acres but the entire acreage is 40 acres. A representative of the 42nd Defendant, Mbukoni Holdings Ltd, confirmed that the company bought the suit land from Reuben Katula the then Administrator of Estate of Stephen Katula Muyendi and relied on the Letters of Administration Intestate in the Nairobi High Court Succession Cause No. 799 of 1983. They produced the following documents as exhibits: Sale Agreement dated 26th April, 2006 between the Administrator, Reuben Katula and Mbukoni Holdings Ltd; a further Agreement dated 18th November, 2009; Ruling dated 14th November, 2000 on administration of Estate of Stephen Katula Succession No. 799 of 1983; Summons for revocation dated 17th January, 2020 in Succession 718 of 2013; Copy of Judgment in Criminal Case No. 259 of 2016 and Ruling in Criminal Appeal No. 120 of 2017; Letter dated 2nd February, 2009 and copy of title and certificates of ownership.

Submissions

Plaintiffs' Submissions

6. The Plaintiffs in their submissions aver that Reuben Katula could not act alone as the administrator of the Estate of the late Stephen Katula Muyendi and had no title capable of being transferred or



sold. Further, that he had a co-administrator by the name Joseph Muyendi Katula. They insist he had no title that he could pass over to anyone before the distribution of the Estate. They contend that they hold a title to the suit land which they acquired legally and the same has not been challenged. Further, that the Defendants do not have a title to the land and did not file a counter claim. They insist that whatever transaction Mbukoni Holdings Ltd entered into or was involved in, with Reuben Katula, was contrary to the Judgment of Justice Githinji and as such void from the onset. Further, that Reuben Katula could only sell his portion after Confirmation of Grant but what he tried to sell was not his share but immovable asset belonging to the Estate. They claim the Grant issued to Reuben Katula and Joseph Muyendi Katula was dismissed and they had to file a fresh Succession Cause. Further that the sale transactions between Reuben Katula and Mbukoni Holdings Ltd and between Mbukoni Holdings Ltd and the Defendants herein were null and void and as such cannot give any right to the Defendants. They insist the Defendants are not purchasers for value without notice. They reaffirm that the Defendants are trespassers and they are hence entitled to damages for trespass amounting to Kshs. 50,000,000. To support their arguments, they relied on Sections 24(a), 26(1) and (2) of the *Land Registration Act*; Section 45 and 82(b) (ii) of the *Law of Succession* as well as the following decisions: *Estate of the late Epharus Nyambura Nduati (Deceased)* (2021) eKLR; *Morris Mwiti Mburungu v Denis Kimathi M'mburungu* (2016) eKLR; *Samuel Wainaina Kioko and another v Registered Trustees, Capuchin Franciscan Fathers Kenya & 4 others* (2020) eKLR; *Weston Gitonga & 10 others v Peter Rugu Gikanga & Another* (2017) eKLR; *Park Towers Ltd v John Mithamo Njika & 7 others* (2014) eKLR; *Avid Developers Ltd v Blue Horizon Properties Limited & 2 others* (2021) eKLR.

Defendants' Submissions

7. The Defendants pointed out that there were two parallel succession proceedings in respect to the Estate of Stephen Muyendi Katula, the owner of the suit land to wit: Nairobi Succession Cause No.799 of 1983 and Machakos High Court Succession Cause No. 718 of 2013. They explained that vide a Grant issued on 14th November, 2000, in the first succession, Reuben Katula and Joseph Muyendi Katula were named as the Administrators. They stated that the deceased was a polygamous man with two wives. Further Reuben Katula was from the 1st House whereas Joseph Muyendi was from the 2nd House/or the Plaintiff's house. They argued that, in the Summons for Confirmation of Grant dated the 4th May, 2002, thirteen properties were listed thereon while in the Machakos High Court Succession Cause No. 718 of 2013 where the Plaintiffs herein were appointed as Administrators of the Estate of Stephen Katula, yet they came from the 2nd House, it only indicated two properties being Iveti/Mun'gala/155 and Mavoko Block 3/2111. They averred that the Plaintiffs failed to disclose to court that there was an earlier parallel succession cause being Nairobi HCCC No. 799 of 1983. They contended that several properties were hidden and sold off. Further, that the Grant was obtained fraudulently and through concealment of material facts and the said Grant is currently under challenge vide Summons for Revocation dated the 17th January, 2020 and filed in Court on 30th January, 2020. They reiterated that there is no evidence before this Court that the initial Grant was either nullified or revoked. Further, that the Grants are inconsistent and if both of them were to be executed, there would be a clash of proportions. They disputed that the Plaintiffs are entitled to general damages and mesne profits as they never produced any valuation reports to prove income received on the suit land prior to the alleged trespass. They argued that they entered the suit land in 2006 with consent of Mbukoni Holdings Ltd who had consent of the seller. Further, that Reuben Katula was awaiting Confirmation of Grant to confirm his share in the deceased Estate. They reiterated that there is in existence a Sale Agreement dated the 24th April, 2006 with complete consideration for purchase of twenty Acres of land and there is no dispute in respect to payment of the purchase price.



8. Further, upon payment of the said consideration, land was sold to the Defendants who equally fully paid the purchase price and were issued with acknowledgement letters. Consequently, they were shown their respective plots, took possession in 2006 and have invested heavily thereon. They insisted that the Plaintiffs were fully aware of the sale, occupation of suit land and investment thereon since 2006 and only came to Court ten (10) years later in 2016 after the death of their brother and former Administrator to complain. They reaffirmed that the Plaintiffs have not challenged the Sale and that the whole of the suit land measures forty acres. Further, that the Plaintiffs as the current Administrators are obligated to honour the interest of the Defendants as bona fide purchasers for value and transfer titles to them with respect of the share of Reuben Katula (deceased beneficiary) who had sold his share. To buttress their averments, they relied on the following decisions: *In the Estate of Zakaria Lugonzo Amalemba* (deceased) eKLR; *Selina Tipango v Emily Wambui, Ishmael & 7 others* (2016) eKLR; *Ndamba v M. Murungi & Anor* (2004) eKLR; *In the Estate of Kanyekei Kimatu, (deceased)* (2020) eKLR; *Philip Atata Aluchio v Chris Pius Ngayo* (2014) eKLR; *Attorney General v Halal Meat Products Limited* (2016) eKLR; *Peter Mwangi Mbuttha & Anor v Samon Edwin Osman* (2014) eKLR; *Morris Mwiti Mburugu v Denis Kimanthi M. Mbingo* (2016) eKLR; *Stephen Waweru Nganga -v Kimani Nganga*, Njeri HC P & A No. 1 of 2011 and *Wellington Nzioka Kioko v Attorney General* [2018] eKLR.

Analysis and Determination

9. Upon consideration of the pleadings filed herein including testimonies of the witnesses and exhibits, the following are the issues for determination: Whether the Defendants are bona fide purchasers for value without notice. Whether the Plaintiffs are entitled to the orders sought in the Plaint. Who should bear the costs of this suit.
10. As to whether the Defendants are bona fide purchasers for value without notice.
11. The Defendants claim they are bona fide purchasers for value without of their respective portions of land. DW1 and DW2 tendered evidence to the effect that the first administrator of the Estate of Stephen Katula being Reuben Katula sold suit land to Mbukoni Holdings Ltd who in turn sold it to the Defendants. Further, that at the time of the sale, Reuben Katula and Joseph Katula had been granted Letters of Administration Intestate in respect to the deceased Estate. The Defendants further testified that they had taken possession of their respective portions of the suit land in 2006 and developed them. Further, that from 2006, the Plaintiffs never took any action to evict them from the said suit land. They insisted that since the Administrators had died, they were waiting for the family to process their respective titles in their names. The Plaintiffs on the other hand opposed the Sale insisting that the Defendants were trespassers. PW1 in his testimony contended that since the two first administrators to the deceased Estate had died before the Grant had been confirmed, the said Grant was revoked after which they applied for a fresh Grant which enabled them to be registered as proprietors of the suit land which they now seek to evict the Defendants from. In the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* (2015) eKLR the Court of Appeal dealt exhaustively with the issue of bona fide purchaser for value without notice and held that a party cannot invoke indefeasibility of title where the process of acquisition of the title was irregular. Further in the Uganda Court of Appeal decision of *Katende v Haridar & Company Ltd*, the Court defined what amounts to a bona fide purchaser for value by stating thus:

“... a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:



- a. He holds a certificate of Title
- b. He purchased the Property in good faith;
- c. He has no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.

A bona fide purchase of a legal Estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

12. Further in the case of *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others* (2017) eKLR the Court of Appeal held that a party cannot claim to be a bona fide purchaser for value where the vendor did not have a valid title.
13. From the evidence tendered in court, the deceased administrators entered into a Sale Agreement before the confirmation of Grant and distribution of the Estate of the owner of the suit land. Further, the purchaser Mbukoni Holdings Limited never acquired title to the portion of land it had purchased but proceeded to subdivide and sell to the rest of the Defendants who took occupation and developed them. In associating myself with the principles established in the aforementioned decisions, even though I sympathize with the plight of the Defendants, as they hold ownership documents issued by Mbukoni Holdings Limited, they cannot be deemed to be bona fide purchasers for value without notice since the respective vendors never had any title to pass to them.
14. As to whether the Plaintiffs are entitled to the orders as sought in the Plaintiff.
15. The Plaintiffs sought for eviction orders, permanent injunction, damages and mesne profits as itemized above. It was the Plaintiffs contention that the Defendants had trespassed on the suit land, constructed thereon and declined to move out despite their issuing them with a notice. PW1 in his testimony confirmed that the first administrators of the deceased Estate sold the suit land before the Grant was confirmed. He explained that the said first Grant had been revoked and they applied for a fresh one wherein the Grant was confirmed and they are now the registered proprietors of the said land. DW1 and DW2 stated that they legally purchased the suit land from the first administrators in 2006 who allowed them to take possession and develop it. From the documents tendered in court, I note the Plaintiffs never furnished court with the first cancelled Grant as claimed. Further, that the succession cause in respect to the Estate of Stephen Katule indeed had two Grants. In respect to the prayer for damages for trespass, I will make reference to the definition of trespass as contained in *Clerk & Lindsell on Torts, 18th Edition*, page 923, paragraph, 18-01 where it states thus: as any intrusion by a person on the land in the possession of another without any justifiable cause.

While Section 3 of the *Trespass Act* provides that: -

- “(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.



(2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”

16. In the case of *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] eKLR, the Court of Appeal favourably cited the case of *M’Mukanya v M’Mbijiwe* (1984) KLR 761, wherein the ingredients of the tort of trespass were described as follows: -

“Trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See *Thomson v Ward*, (1953) 2QB 153.”

17. In the said case, the Court of Appeal further cited an excerpt from *Winfield & Jolowicz on Tort, Sweet & Maxwell*, 19th Edition at page 428 which stated as follows:-

“Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land.” [Emphasis supplied]

18. From the evidence before this court, it emerged that the initial administrators of the Estate of Stephen Katule granted the Defendants access to the suit land including permission to develop it. Insofar as the Plaintiffs contend that they did so before the Grant was confirmed, it is my considered view that these are the issues they ought to have resolved in the succession cause since the said administrators were also beneficiaries. I opine that the burden of proof was upon them to prove intrusion by the Defendants, without justification which they failed to do.

19. As for mesne profits, I wish to make reference to the legal provisions governing the same. Section 2 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya defines mesne profits as follows: -

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”

20. In the case of *Peter Mwangi Mbutia & another v Samow Edin Osman* [2014] eKLR, the Court of Appeal while dealing with the issue of mesne profits held as follows:

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

21. Based on the evidence placed before me while associating myself with the legal provisions and decisions cited above, I find that the Plaintiffs failed to discharge their burden of proof as stipulated under section 107 of the *Evidence Act*, in respect to their entitlement to general damages including mesne profits as



they never produced any valuation reports to prove income received on the suit land prior to the alleged trespass. I will decline to grant the said prayers.

Who should bear the costs of this suit.

22. Since the Defendants purchased land from the initial legal administrators of the deceased Estate who allowed them to take possession and develop it; noting that from 2006, the Plaintiffs knew they were on the suit land but never took action and are now relying on legal technicalities to evict them, I will direct each party to bear their own costs.
23. It is against the foregoing that I enter Judgment in favour of the Plaintiffs in the following extent only:
 - i. The Defendants be and are hereby directed to grant the Plaintiffs' vacant possession of land parcel number Mavoko Town Block 3/2111 within one hundred and twenty (120) days, from the date hereof or negotiate fresh terms of the Sale with the said Plaintiffs, failure of which an eviction order do issue.
 - ii. After one hundred and twenty (120) days from the date hereof, a permanent injunction be and is hereby issued restraining the Defendants from trespassing, encroaching, ingressing into, selling, developing, disposing, or in any manner interfering with the Plaintiff's quiet possession and ownership of Mavoko Town Block 3/2111.
 - iii. Each party to bear their own costs

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 31ST DAY OF OCTOBER, 2022

CHRISTINE OCHIENG

JUDGE

