



**Helbling v Masha & another (Environment & Land Case 157 of 2016)
[2022] KEELC 13668 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13668 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 157 OF 2016
JO OLOLA, J
OCTOBER 19, 2022**

BETWEEN

MARGARET KABIBI HELBLING PLAINTIFF

AND

KAREMBO ANTHONY MASHA 1ST DEFENDANT

LENNOX NZAI CHOGO 2ND DEFENDANT

JUDGMENT

Background

1. By a Plaint dated and filed herein on June 16, 2016 Margaret Kabibi Helbling (the Plaintiff) prays for Judgment against the Defendant for an order of eviction and a permanent injunction restraining her from cultivating, putting up structures and/or in any other way interfering with the Plaintiff's enjoyment of the parcel of land known as Kilifi/Mtondia/1116.
2. Those prayers arise from the Plaintiff's contention that she purchased the suit property from one Lennox Nzai Chogo who is the son and lawful administrator of the estate of the late Karisa Chogo Nzai on July 9, 2008. The Plaintiff accuses the Defendant of invading the said property some time in December, 2010 and thereafter proceeding to erect structures thereon without the Plaintiff's consent.
3. But in her Statement of Defence and Counterclaim dated July 4, 2016 as filed herein on July 5, 2016, and amended on March 17, 2017, Karemba Anthony Masha (the Defendant) denies that the Plaintiff is the lawful owner of the suit property. On the contrary the Defendant avers that she and her family have been in lawful uninterrupted possession and occupation of three (3) acres contained in Plot No Kilifi/Mtondia/201 out of which the suit property was carved from the same having been bought from the late Karisa Chogo Nzai by the Defendant's husband Anthony Masha Maitha on January 25, 2001.



4. The Defendant avers that since the purchase of the property by her husband who is also now deceased, she has extensively developed the same by putting up some residential houses for herself and family and planting various trees thereon.
5. The Defendant further avers that the Plaintiff had through one Tsuma Kenga Mwadzemba sued her in Malindi ELC Case No 201 of 2013 wherein her Plaintiff was struck out on May 6, 2016. It is the Defendant's case that her Counterclaim in the said suit remains pending for hearing and determination.
6. By way of her Counterclaim the Defendant introduces Lennox Nzai Chogo as the 2nd Defendant and asserts that her husband who passed away in the year 2004 had purchased 3 acres of the suit property from Karisa Chogo Nzai on January 25, 2001. It is further her case that out of the agreed purchase price of Kshs 127,500/- her husband had by the time of his death paid a sum of Kshs 57,715/- leaving a balance of Kshs 69,786/- which the sons of Karisa Chogo Nzai led by the 2nd Defendant have since refused to accept.
7. The Defendant accordingly urges the Court to dismiss the Plaintiff's suit with costs and to instead make the following orders:
 - (a) A declaration that the sale of the three (3) acres which form part of the suit property by the 2nd Defendant to the Plaintiff is void ab initio and therefore an illegality in law;
 - (b) A declaration that the 1st Defendant and other beneficiaries of the deceased are entitled to three (3) acres of the parcel of land known as Kilifi/Mtondia/1116 which they have been in possession and/or occupation since 2001;
 - (c) Rectification of the register to have the Defendant registered as the owner of three (3) acres of the parcel of land known as Kilifi/Mtondia/116;
 - (d) A permanent injunction restraining the Plaintiff by herself and/or through her authorised agents, servants and/or employees, (from) interfering with the Defendant's quiet possession of the three (3) acres of Plot Number Kilifi/Mtondia/1116 in any manner whatsoever;
 - (e) Costs of the Counterclaim; and
 - (f) Any other relief this Honourable Court may deem fit to grant.

The plaintiff's case

8. In support of her case the Plaintiff testified as the sole witness at the trial. Testifying as PW1, the Plaintiff told the Court she was told that there was a parcel of land being sold by the family of Karisa Nzai Chogo. PW1 did a search at the Kilifi Lands Office and confirmed that the title was indeed registered in the name of the 2nd Defendant's father. The parcel of land was then known as Kilifi/Mtondai/201 measuring 12 acres.
9. PW1 testified that she agreed to purchase 6 acres from the said parcel of land at the consideration of Kshs 300,000/- and that they executed a Sale Agreement to that effect on July 9, 2008. PW1 told the Court she paid the purchase price immediately in cash upon execution of the Agreement and that even through the registered owner Karisa Nzai was dead, the family had procured Letters of Administration to the estate.
10. PW1 further testified that upon execution of the Agreement, a Surveyor went to the land and placed beacons on the portion she had purchased. Upon transfer the portion came to be known as Kilifi/



Mtondia/1116. In 2010, PW1 was out of the Country when she was informed that her neighbor had trespassed onto the land and built a Makuti house and a temporary toilet thereon.

11. On cross-examination, PW1 told the Court that the 1st Defendant has some land near her own. She told the Court she never saw the 1st Defendant on the portion of land she had bought and that there was no homestead on the land she had bought.

The defence case

12. The 1st Defendant called two witnesses who testified in support of her case. Testifying as DW1, the 1st Defendant told the Court she had lived on the disputed parcel of land for 15 years. DW1 told the Court she had been on the land since 2001 when she cleared the grounds and started planting crops thereon. She however started living on the land in the years 2005.
13. DW1 told the Court her husband bought the land and partially paid for the same before his death in 2004. She told the Court the 2nd Defendant knew of the purchase of the land from his father and that he had no right to sell to the Plaintiff the portion that had already been sold to DW1's husband.
14. On cross-examination, DW1 conceded that she was not present when the Sale Agreement between her husband and the 2nd Defendant's father was executed. She further conceded the 2nd Defendant's name did not feature as a witness, in the Agreement and told the Court it is her husband who had shown her the Agreement before he died.
15. DW1 told the Court no surveyor had gone to the land at the time of the Agreement and that the boundaries had been shown by hand to her husband by the seller. DW1 further told the Court the land was sold to her husband at a consideration of Kshs 127,000/- although he had not paid the full purchase price by the time he passed away in the year 2004.
16. The 1st Defendant called Karisa Mweni Masha, a clansman as the sole witness in her case. Testifying as DW2, the 1st Defendant's witness told the Court the late Anthony Masha (the 1st Defendant's husband) had on January 25, 2001 purchased 3 acres of land from his father. DW2 told the Court the 1st Defendant's husband initially paid Kshs 30,000/- to his father and that he was a witness to the Sale Agreement. The 1st Defendant's father later paid a further sum of Kshs 27,500/-.
17. On cross-examination, DW2 told the Court the 3 acre parcel of land was sold to the 1st Defendant's husband for Kshs 127,000/-. DW2 told the Court he witnessed the payment of Kshs 30,000/- to his father and that they later paid Kshs 27,500/- for processing of a title deed. DW2 conceded they never placed beacons on the land and that his father had shown the boundary by walking across the land and that they planted trees on the portion measuring 70 x 70 feet.
18. The 2nd Defendant Lennox Nzai Chogo similarly testified as the sole witness in his case. Testifying as DW3, the 2nd Defendant told the Court he knew the Plaintiff and that he had sold to her a parcel of land measuring six (6) acres.
19. DW3 told the Court that after the sale, a Surveyor went to the land and placed beacons thereon. Plot No 201 thereafter ceased to exist as the same was sub-divided into portion Nos. 1116 and 1117 Kilif/Mtondia. DW3 told the Court the Plaintiff's portion is now Plot No 1116 after he transferred the land to herself. The other portion No 1117 is registered in DW3's name.
20. DW3 further told the Court he had sold some 2.5 acres of the said Plot No 1117 to one Fredrick Kahiho and that upon sub-division, Fredrick's parcel came to be known as Plot No 1912 while that of DW3 is now Plot No 1913.



21. DW3 denied that his father had sold any land to the 1st Defendant. He told the Court his father never mentioned to him about the sale and that the 1st Defendant does not reside on the said parcel of land. He told the Court the 1st Defendant does not have any house on Plot No 1116 and that she entered the portion now known as Plot No 1913 belonging to DW3 in 2010 and built a house thereon.
22. On cross-examination, DW3 conceded that by the time he sold the land to the Plaintiff in 2008, he had not been issued with Letters of Administration for the father's estate. DW3 told the Court that it was not true that when he sold the land to the Plaintiff, the 1st Defendant was already there on the land. He denied that his father sold any land to the 1st Defendant's husband.
23. DW3 however conceded that they had agreed to refund the 1st Defendant the sum of Kshs 57,000/- which her late husband is said to have paid to DW3's father. He told the Court they had agreed to refund the money because they did not want to commit an injustice.

Analysis and determination

24. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses and the evidence adduced at the trial herein. While the Court had directed the parties to file closing submissions within 21 days upon the closure of the trial, I was unable to find any submissions filed by any of the parties.
25. The Plaintiff herein prays for an order of eviction of the 1st Defendant from the suit property. The Plaintiff also prays for an order of permanent injunction restraining the Defendant from cultivating, putting up structures and/or in any other way interfering with the Plaintiff's peaceful enjoyment and use of the suit property said to be measuring approximately 6 acres.
26. Those prayers arise from the Plaintiff's contention that she is the registered proprietor of all that parcel of land known as Kilifi/Mtondia/1116 having purchased the same on July 9, 2008 from the 2nd Defendant who is the lawful administrator of the estate of one Karisa Chogo Nzai. The Plaintiff accused the 1st Defendant of invading the said property some time in December, 2010 and proceeding to erect temporary structures thereon.
27. But in her Statement of Defence and Counterclaim dated July 4, 2016 as amended on March 17, 2017, the 1st Defendant avers that she has been in occupation and possession of three acres of a parcel of land described as Kilifi/Mtondia/201 since the time her husband Anthony Masha purchased the same from the late Karisa Chogo Nzai in 2001. The 1st Defendant asserts that she moved into the said parcel of land shortly after her husband's death in the year 2004 and that she has since extensively developed the same by putting up residential houses and planting some trees thereon.
28. In her Counterclaim in which she has joined the 2nd Defendant as the Administrator of the Estate of the late Karisa Chogo Nzai, the 1st Defendant seeks a declaration that the sale of the 3 acres which form part of the suit property by the 2nd Defendant to the Plaintiff is void ab initio and is therefore an illegality in law. The 1st Defendant further prays for a declaration that she is entitled to the three acres of the parcel of land now known as Kilifi/Mtondia/1116 as well as a rectification of the register to reflect her ownership thereof. In addition the 1st Defendant prays for a permanent injunction to restrain the Plaintiff from interfering with her quiet possession of the three acres of the suit land.
29. On his part, the 2nd Defendant denies that the 1st Defendant has had possession of the 3 acres of the said parcel of land and/or that the 1st Defendant's husband purchased the 3 acres from his father. The 2nd Defendant supports the Plaintiff's position that the 1st Defendant only invaded the suit property sometime in the year 2010 after he had in the year 2008 sold the land to the Plaintiff.



30. In support of her cases, the Plaintiff produced a copy of a Sale Agreement dated July 9, 2008 executed between herself and the 2nd Defendant Lennox Nzai Chogo. A perusal of that Agreement reveals that the 2nd Defendant sold a portion of land measuring 6 acres which land was to be hived off from the Parcel of land then known as Kilifi/Mtondia/201 measuring some 15 acres.
31. From the material placed before me, it was apparent that the said parcel of land was previously at the point of land adjudication in the area known as Plot No 586/D and was registered in the name of the 2nd Defendant's father one Karisa Chogo Nzai. Following the Agreement executed between the Plaintiff and the 2nd Defendant, the said parcel of land was sub-divided into two with the first portion being Title No Kilifi/Mtondia/1116 measuring 2.43 Ha. being registered in the Plaintiff's name on 16th July, 2009 while the remaining portion being Title No Kilifi/Mtondia/1117 was registered in the 2nd Defendant's name.
32. It was however not clear to me on what authority the 2nd Defendant had sold the land to the Plaintiff. In her testimony before the Court, the Plaintiff told the Court that at the time of the executing the Sale Agreement they did a search and confirmed that the property was still registered in the name of the 2nd Defendant's father. It was not in dispute that as at the time the Agreement was executed, the 2nd Defendant's father had long passed away in the year 2003.
33. While the Plaintiff asserts that the 2nd Defendant was the lawful administrator of the estate of the late Karisa Chogo Nzai when he sold the land to her, the said Letters of Administration issued to the 2nd Defendant were not produced before this Court. While holding that he was the administrator of the estate, the 2nd Defendant conceded during cross-examination herein that he had not been issued with any Letters of Administration as at the time he sold the 6 acres of land to the Plaintiff.
34. As it were, Section 45 of the [Law of Succession Act](#) provides as follows:
- “(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”
 - (2) Any person who contravenes the provisions of this Section shall –
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”
35. Arising from the foregoing it was apparent that the Plaintiff obtained the title she is seeking to enforce herein through a process that amounted to intermeddling and that was punishable in law. It follows therefore that the prayers sought by the Plaintiff herein cannot be granted as to do so would amount to this Court sanctioning a criminal process.
36. On her part, the 1st Defendant urges the Court to declare that she is entitled to 3 acres of the parcel of land now known as Kilifi/Mtondia/1116 and that the land registered be rectified to reflect her ownership thereof. In support of her case, the 1st Defendant has produced a hand-written Sale



Agreement executed between her husband the late Anthony Masha Maitha and the 2nd Defendant's father dated January 25, 2001.

37. A perusal of the Agreement written in Kiswahili reveals that the 3 acre portion of land was being sold at Kshs 127,500/- and that the 1st Defendant's husband was to pay the balance in small unspecified instalments from the months of June, 2001. That Agreement gave the 1st Defendant's husband permission to start developing the land immediately and it was the 1st Defendant's testimony herein that they immediately took over the land and started cultivating the same before moving therein in the year 2004 and constructing a residential house thereon.
38. In further support of her case, the 1st Defendant produced a copy of an acknowledgment note dated January 29, 2004 indicating that a sum of Kshs 27,715/- was paid to the 2nd Defendant's brother one Ploti Nzai for processing a title deed. While the Plaintiff dismissed the note for failing to indicate which of land was being paid for, I was left with no doubt that the sum was paid in respect of the same parcel of land. In his written Statement dated and filed herein on June 18, 2018, the 2nd Defendant concedes that his family had reluctantly agreed before the Area Chief to refund the total sum of Kshs 57,715/- to the 1st Defendant even though the family was not involved in the sale. Asked during cross-examination why they would refund the money if it was not paid, the 2nd Defendant told the Court that they did not want to commit an injustice. That in my view was a tacit acknowledgment that their family had received the down payment from the 1st Defendant's husband.
39. It was further the 1st Defendant's evidence that the 2nd Defendant's family had refused to accept the balance of the purchase price being the sum of Kshs 69,786/- even though she was ready and willing to pay the same. That fact is indeed supported by a letter dated August 11, 2009 in which the Tezo Location Chief gives abrief of the dispute to the Bahari District Officer.
40. Arising from the foregoing I was satisfied that the 1st Defendant had proved her Counterclaim on a balance of probabilities. Accordingly I hereby enter Judgment for the 1st Defendant and make orders as follows:
 - (a) The Plaintiff's suit is hereby dismissed;*
 - (b) A declaration is hereby made that the sale by the 2nd Defendant of the three (3) acres which have been in use and occupation of the 1st Defendant since the year 2001 is void ab initio and unlawful;
 - (c) Subject to the payment by the 1st Defendant of the sum of Kshs 69,786/- to the 2nd Defendant's family, a declaration is hereby made that the 1st Defendant is entitled to the three (3) acres out of the land parcel known as Kilifi/Mtondia/1116 which portion of land she has been in possession and occupation thereof since 2001.
 - (d) Subject to the payment of the balance of the purchase price, the Register to be rectified to have the 1st Defendant registered as the owner of the three (3) acres of the parcel of land known as Kilifi/Mtondia/1116;
 - (e) A permanent injunction is hereby issued restraining both the Plaintiff and the 2nd Defendant by themselves and/or through their authorized agents from interfering in any manner whatsoever with the 1st Defendant's quiet possession of the three (3) acres of land currently comprised in Plot No Kilifi/Mtondia/1116; and
 - (f) The 1st Defendant shall have the costs of both the suit and the Counterclaim.



JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 19TH DAY OF OCTOBER, 2022.

In the presence of:

Ms Garama holding brief for Nyachiro for the Plaintiff

Mr. Lewas for the Defendant

Court assistant – Kendi

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J. O. OLOLA

JUDGE

