



**Maitha v Estate of Moses Mutua Kwinga & 2 others (Environment & Land
Case 11 of 2019) [2025] KEELC 4057 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4057 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 11 OF 2019**

EO OBAGA, J

MAY 22, 2025

BETWEEN

JOSHUA MUTISO MAITHA PLAINTIFF

AND

THE ESTATE OF MOSES MUTUA KWINGA 1ST DEFENDANT

PETER KIMATU MUTUA 2ND DEFENDANT

MUNYAO MUTUA 3RD DEFENDANT

JUDGMENT

Introduction

1. By an amended plaint dated 29th November, 2023, the Plaintiff sought for the following reliefs against the Defendants:
 - a. A declaration that the Plaintiff is the lawful owner of all the property known as Plot No. 2230 Mbanya Adjudication Section or such other acreages as shall be determined by the Makueni District Land Registrar and Surveyor whether the same go by that designation or otherwise together with all buildings and improvements erected and being thereon.
 - b. The Defendant either acting by himself, his agents, servants, employees or in any other manner whatsoever be restrained by a permanent injunction from trespassing, evicting, selling, mortgaging, letting and in any other manner whatsoever from interfering with Plaintiff's quiet possession, occupation, use and enjoyment of all the rights as the proprietor of all that parcel of land comprising of Plot No. 2230 Mbanya Adjudication Section.
 - c. A permanent injunction restraining order be issued against the Defendant whether acting by themselves, their agents, servants, employees or in any other manner whatsoever from



threatening, harassing or performing any such acts which cause adverse effects on the Plaintiffs health and wellbeing.

- d. The Officer Commanding Ndoos Area do ensure compliance of the court order for purposes of maintain law and order issued here.
- e. Cost of the suit.
- f. Interested on 5 above at court rates until payment in full.
- g. A declaration that the Defendants by themselves, their agents, their servants, employees, and assigns are trespassing on land Plot No. 2230 in the Mbanya Adjudication Section.
- h. A permanent injunction restraining the Defendants by themselves, their agents, servants, employees, assigns, or otherwise from interfering with and or doing any other act that is prejudicial to the Plaintiff's quiet enjoyment and occupation of the suit property (land Plot No. 2230 in the Mbanya Adjudication Section).
- i. An order of eviction against the 2nd and 3rd Defendants herein be and is hereby issued to the Defendants by themselves, their agents, servants, employees, assigns, or otherwise, and/or any other person or body of persons evicting them from the Plaintiff's suit premises known as land Plot No. 2230 in the Mbanya Adjudication Section.
- j. An order of general damages be and is hereby issued against the Defendants.
- k. Any other reliefs that this honourable court can deem fit and just to grant.

Background

2. The suit was originally filed at Machakos ELC as Case No. 90 of 2014 [Joshua Mutiso Maitha –vs- Moses Mutua Kwinga]. The suit was later transferred to Makueni ELC where it became No. 11 of 2019. The Plaintiff and the Defendant are step brothers. The Defendant in this suit died on 15th May, 2019.
3. Efforts to substitute the deceased Defendant nor cite his relatives to take out letters of administration in respect of his estate bore no fruit. On 20th November, 2023, the Plaintiff was granted leave to amend the plaint. This is the leave pursuant to which the Plaintiff amended the plaint in which he sued the estate of the deceased as the 1st Defendant including two other Defendants.
4. Prior to the demise of the Defendant, he had filed a defence and raised a counterclaim in which he sought the following reliefs:
 1. A declaration that the Defendant is the lawful owner of the entire plot number 1047 including plot number 2230 that was illegally excised from plot No. 1047 Mbanya Adjudication Section.
 2. That a permanent injunction be issued restraining the Plaintiff by himself, servants, agents, employees or any other persons acting on his behalf from trespassing, evicting, selling, letting and or in any other manner from interfering with the Defendant's quiet possession, occupation, use and peaceful enjoyment of all that parcel of land comprising of plot number 1047 and 2230 Mbanya Adjudication Section.
 3. Costs of the suit with interests.



Plaintiff's Case

5. On 11th March, 2025 the case came up for hearing. The Plaintiff stated that he was ready to proceed as he had served the Defendants. He adopted the witness statement which he had filed and relied on the documents he filed which were dated 19th September, 2014 and 29th November, 2023. He went on to state that he purchased the suit property but that he had been prevented from taking possession. He prayed that he be allowed to take possession.
6. Though the Plaintiff did not plead in his amended plead the relationship between the deceased and the 2nd and 3rd Defendants, in his submissions, he stated that the two are sons of the deceased. The Plaintiff identified the sole issue for determination as whether the Plaintiff had proved whether he is entitled to an order of eviction and permanent injunction. He relied on the case of Kenya Assemblies of God Trustees & Another –vs- Obuya & 5 others (Environment and Land Case E086 OF 2023 [2024] KEELC 4368 (KLR) [23 May, 2024] [Judgment] and Margaret Karwirwa Mwongera –vs- Francis Kofi (2019) eKLR which dealt with the procedure for eviction of a party in wrongful possession of a property.
7. On the issue of injunction, he relied on the case of Ennio Limited –vs- Kenya Revenue Authority & Another (Civil Suit E018 of 2021 [2024] KEHC 8935 (24 July, 2024) [Judgment] where it was held as follows:

“Unlike temporary injunction which are granted only to be in force for a specified time or until the issuance of further orders from court, permanent injunctions are rather different, in that they are perpetual and issued after a suit has been heard and finally determined. A permanent injunction fully determines the right of the parties before the court and is usually meant to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected”.
8. The Defendant filed two witness statements. The first one was filed on 23rd September, 2014. The second one was filed on 27th March, 2015. In the statement of 23rd September, 2014, the Plaintiff stated that he purchased plot No. 2230 in Ndo area within Mbanya Adjudication Section in 1992. He paid the purchase price in full. The said plot had been excised from plot 1047 owned by the deceased Defendant.
9. He stated that the Defendant never allowed him to take possession of plot 2230. He filed various complaints against the Defendant in Mbanya Land Adjudication Section Committee case No. 4 No. MBA/87/92 on 1st March, 1991, Arbitration Board Complaint number MBA/46/1996 on 15th April, 1996 and objection case Number MBA/DJB/8/1998 on 14th December, 1999. He further stated that no complaints were decided in his favour.
10. In the statement of 27th March, 2015, the Plaintiff stated that on 6th September, 1986, he purchased land from the Defendant at Ndo area. He took possession. After being in possession for about 3 months, the Defendant's nephew came and claimed that he was entitled to half of the land as the land was jointly owned by the Defendant and his nephew's father. The matter was taken before the District Officer who ordered that the land be shared equally between him and the Defendant's nephew. It is after this that the Defendant agreed to compensate him for the half land he lost to the Defendant's nephew by giving him land on his plot NO. 1047 at Kyuu area. This is because the Defendant did not refund him for the half portion he lost to Defendant's nephew at Ndo.



11. The Defendant was summoned by a surveyor who had come to plot 1047 to excise the portion he was to be given as compensation for the portion he lost but the Defendant did not attend. The surveyor went ahead to curve out plot 2230 out of 1047. In this statement he was claiming Kshs.100,000/= being loss for his damaged trees.

Analysis and Determination

12. I have considered the evidence which was adduced by the Plaintiff. The only issue for determination is whether the Plaintiff has a case maintainable against the Estate of the Defendant and the other two Defendants. As I pointed out in the background hereinabove, there was no substitution on the part of the Defendant. The particulars of trespass in the amended plaint are against the deceased. The deceased died on 15th May, 2019. The suit against the deceased abated one year after his demise. There is no suit which can be pursued against a dead person. In the eyes of the law, the suit against the deceased ceased to have any force of law after one year of his demise.
13. The 2nd and 3rd Defendants who are said to be his sons are not the legal administrators or representatives of his estate. There was nothing said against them either in the statement of 23rd September, 2014 or that of 27th March, 2015. There was no evidence given that they are the ones who have trespassed on to the suit property. This being the case, there is no order which can be given against them.
14. The Defendant's counterclaim in which he was contending that the Plaintiff had obtained title to plot 2230 illegally abated within one year of his demise.

Disposition

15. I therefore find that there is no suit which is maintainable as against the Defendants the same having abated and no legal representative of the estate of the deceased was brought in in his place. Equally the Defendant's claim abated and there was no application made to revive it or seek to take it over by his administrators. The two suits are therefore dismissed with no order as to costs.

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HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 22ND DAY OF MAY, 2025.

In The Presence Of:

Mr. Ngome for Mr. Otieno for Plaintiff.

Court assistant – Steve Musyoki

