



Unity 45 Housing Co-operative Society Limited v Kamuyu & 3 others (As Chairman, Secretary, Treasurer & Patron of Maili Saba Mwingenye Youth Self Help Group); Awuor (Suing on Behalf of Dorice Auma Owuor) & 2 others (Interested Parties) (Environment & Land Case 994 of 2014) [2024] KEELC 622 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEELC 622 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 994 OF 2014**

**LN MBUGUA, J
FEBRUARY 8, 2024**

BETWEEN

UNITY 45 HOUSING CO-OPERATIVE SOCIETY LIMITED PLAINTIFF

AND

KORI KAMUYU 1ST DEFENDANT

PETER NGULU KIMULI 2ND DEFENDANT

SAMMY KAMANDE 3RD DEFENDANT

PETER MWAGA 4TH DEFENDANT

**AS CHAIRMAN, SECRETARY, TREASURER & PATRON OF MAILI SABA
MWENGENYE YOUTH SELF HELP GROUP**

AND

**GEOFRY JUMA AWUOR (SUING ON BEHALF OF DORICE AUMA
OWUOR) INTERESTED PARTY**

TIMOTHY MWEMA KIBANGA INTERESTED PARTY

JOSHUA NZAU MUTHUSI INTERESTED PARTY

JUDGMENT

1. The Plaintiff commenced this suit vide a plaint dated 28.7.2014, contending that it is the registered owner of parcel LR No. 11531/9 through purchase from Upsana Kent & Nidhi Kent (the administrators of the Estate of Ranbir s/o Keharchard Kent). It avers that it had in quiet and peaceful enjoyment of the suit parcel until year 2010 when the defendants invaded the said land



after getting a judgment issued on 18.11.2010 in their favour in another suit. The plaintiff contends that the said judgment was obtained fraudulently, as the current defendants had filed a suit claiming adverse possession against the administrators of the estate of Upsan Kent & Nidhi Kent, yet the said administrators had no vested interest in the suit property as they had already transferred the same to the Plaintiff.

2. The Plaintiff further avers that in a ruling dated 25.7.2013, the court set aside the judgment of 18.11.2010, but the Defendants have set up illegal structures on the suit property. The plaintiff therefore seeks the following orders;
 - a. An order of eviction of the Defendants from the suit property more specifically described as LR No. 11531/9.
 - b. An order compelling the Defendants to give vacant possession of the suit property to the Plaintiffs.
 - c. A permanent Injunction against the Defendants whether by themselves, their servants, members or agents and/or otherwise howsoever from wrongfully trespassing, entering, remaining, alienating, interfering with the possession, ownership, dealings or continuing in occupation of the suit property.
 - d. Mesne profits from the month of July 2009 to date.
 - e. Costs of the suit.
3. The Defendants and the 2nd Interested Party filed a joint statement of defence dated 9.11.2017 where they deny the Plaintiffs' claim. They contend that the 160 members of Maili Saba Mwengenyie Youth Self Help Group have occupied, lived, inhabited, erected structures and carried on different business on the suit property for a period of over 20 years since 1995, thus they have an overriding interest of actual possession and occupation.
4. They further aver that ownership, entitlement and interest of individual parties over the suit parcel have been a subject of several disputes between the plaintiff and individual members of Maili Saba Mwengenyie self-help group and successive officials since the year 2002 when the Plaintiff purported to acquire title over the suit land.
5. The 2nd Interested party added that on 12.3.2012, he purchased plot No. 205 within parcel LR No. 11531/9 measuring 33 by 66 feet from one George Nzuki who was an original member of the Defendant and was issued with a certificate and has built a residential house and settled on the suit property.
6. The 1st Interested Party opposed the suit vide her statement of defence dated 29.11.2017, where she contends that she acquired Plot No. 4 and 275 excised from the suit property for ksh.480,000/= each in April 2013 and has constructed a 4 storey building on Plot No. 4 and a 1 storey building on Plot No. 275.
7. The 3rd Interested Party opposed the suit vide a statement of defence dated 22.11.2017. He avers that he acquired Plot No. 128 within the suit parcel from Mr. Jeremiah Nyaga, who was a member of the Defendant at ksh.600,000/= after conducting due diligence.

Case for the Plaintiff

8. The Plaintiff's sole witness, PW1 was Peter Mburu Kamau. He adopted his witness statement dated 22.5.2014 as his evidence. He produced 28 documents contained in their list dated 31.5.2018 as their



exhibits. His testimony is that as of 29.7.2002, the Plaintiff was the registered owner of the suit parcel No. LR 11531/9, having purchased the same from Upsana Kent & Nidhi Kent (the administrators of the Estate of Ranbir S/O Keharchard Kent). That the land was vacant, and was measuring 40 acres subdivided into 125 plots approved by the City Council of Nairobi and director of survey. However, there were frequent harassment by grabbers who have all along sought to illegally acquire and sell the said land to unsuspecting members of the public which led to prosecution of various criminal cases in the years preceding 2008.

9. That in the year 2009, the defendants filed a suit (Nairobi HC Civil Case No. 353 of 2009) against the administrators of the estate of the late Ranbir S/O of Keharchand claiming the suit parcel by way of adverse possession. That by a judgement dated 18.11.2010, the court purportedly approved the Defendant's entry into the suit property.
10. However, the Plaintiff herein moved the court in the said matter by an application dated 25.6.2012 wherein in its ruling dated 25.7.2013, the court set aside its judgment dated 18.11.2010.
11. That thereafter, in an application dated 15.8.2013, the administrators of the estate of Ranbir S/O Keharchard Kent namely Upsan Kent & Nidhi Kent applied for their names to be struck out since they had no interest in the suit parcel and they were subsequently discharged from the suit by an order issued on 14.7.2014.
12. In cross-examination, PW1 stated that he has been the Plaintiff's secretary since 1999 and was still its secretary at the time of purchase of the suit parcel on 29.7.2002. That they had inspected the suit land and found a few trees and bushes and that there were no structures.
13. They commenced the purchase vide a sale agreement dated 7.7.1999 and there was a caveat on the title which was a wayleave. He further stated that the parcel was transferred to the Plaintiff on 29.7.2002 and between that year and 2009, there were many cases involving the suit parcel. He pointed out HCCC No. 1256 of 2002, in which Plaintiffs in the said matter were carrying out quarrying activities on the suit parcel and the Plaintiffs herein sought to restrain them.
14. He also pointed out that they reported invasions of the suit parcel to the police and the ruling at page 11 of the defendants bundle indicates that those who were arrested were charged and acquitted.
15. PW1 is not able to know who amongst defendant's members occupies which portion of the suit land as it is very dangerous to access that land.
16. PW1 stated that the 1st Interested Party (Doris Auma) is claiming Plot 4 & 275 on the basis that she was issued with ownership certificates by Maili Saba Self Help Group and has developed a multi floored building.
17. In re-examination, PW1 stated that the discrepancies in entries in the transfer to the suit parcel and the title came from administrators of the estate when they were transferring the land to them.
18. He further stated that Civil Suit No. 1256 of 2002 was filed by John Oyawo Neko and 3 others against the Plaintiffs herein and that the Defendants and the Interested parties herein were not parties to that case.
19. He stated that the charge sheet at Page 57 of the Plaintiff's bundle indicates that John Ndungu and Peter Kimuli were charged in a Criminal court in 2008 over malicious damage to the suit property and by then, the Plaintiff was in possession of the suit parcel.
20. He stated that there is a certificate of registration of Maili Saba Mwingenye Self Help Group from the Ministry of Gender at page 266 of the Plaintiff's bundle indicating that the self-help group was



registered on 23.6.2010 yet the group now claims to have owned the property for over 25 years. He added that the list of members does not indicate which portions the alleged members own on the suit parcel.

Defence case

21. The Defendant's sole Witness, DW1 was David Kori Kamuyu, the Secretary of Maili Saba Mwengenye Self Help Group. He adopted the witness statement of Samwel Munyui Mwangi, the chairman of the Group dated 9.11.2017 as his evidence. He produced 5 documents in their bundle dated 9.11.2017 as D. Exhibit 1-5. He told the court that they started the self Help group and registered it on 29.6.2010 and that they have been on the suit parcel from mid 1990's.
22. He avers that the suit property is inhabited by over 200 families with residential and commercial buildings including muti-dwelling units belonging to different members of the self-help group, some of whom have sold their portions to 3rd parties.
23. In Cross-examination, DW1 stated that he was part of the officials of the self-help group who sued Upsan Kent and Nidhi Kent in 2010 as they were already in the suit parcel but without titles, that they sued him since he owned the land from the beginning. That by the time they went to court in 2010, they had been on the suit parcel since 1995 and after the said case, they did not process titles. That they acquired the suit parcel by adverse possession.
24. He stated that the suit parcel was formerly a quarry, then the original members of the self-help group took the land when the Indian (original owner) left.
25. In re -examination, DW1 stated that for case No. 2499 of 2008 (Criminal Case), he was accused No. 5 and they were acquitted. That they were also acquitted in Criminal Case No. 3457/2012 for altering false documents as officials of the self-help group.
26. The 1st and 3rd Interested Parties did not tender any evidence.

Submissions

27. The Plaintiff's submissions are dated 18.9.2023, where it avers that it has established that Defendants are trespassers. That since the Plaintiff's evidence of registration was not challenged at the hearing, it is entitled to the suit parcel and protection as provided under Section 24, 25 (1) and 26 of the [Land Registration Act](#). The case of John Monyancha Ngoge v Marcela Kerubo Kebabe [2019] eKLR was relied upon.
28. It was also submitted that the Defendants' attempts to plead adverse possession was annulled in ELC Case No. 353 of 2009 and that the unincorporated association (Self Help Group) was only registered in 2010, and thus, it cannot purport to challenge a title issued in year 2002. The case of Khalif Mohammed Hure v Mohammed Abdi Karim [2021] eKLR was cited.
29. The Plaintiff further submits that it has established grounds for grant of permanent injunction and to this end, the case of Daniel Moroko v Anthony Ng'erechi & another [2017] eKLR was cited.
30. The Defendants and the 2nd Interested Party filed submissions dated 29.9.2023. They cited the case of Kipsiwo Community Self Help Group v Attorney General & 6 others [2013] eKLR and the case of Rose Florence Wanjiru v Standard Chartered Bank of Kenya Ltd & 2 others [2014] eKLR to submit that a Self Help Group is not an entity capable of suing and being sued and that the only remedy available to the Plaintiff was to sue Maili Saba Mwengenye Youth Self Help Group in a representative



suit through the names of its officials and/or members under Order 1 Rule 8 (1) of the Civil Procedure Rules which the Plaintiff failed to comply with.

31. It was further submitted that the Plaintiff has no locus to commence this suit since its title was not properly acquired. To this end, the cases of Samuel Odhiambo Oludhe & 2 others v Jubilee Jumbo Hardware LTD & another [2018] eKLR as well as Elijah Muthoka Daniel v Justus Mutua Musyimi [2018] eKLR were relied upon.
32. It was argued that despite the Plaintiff entering into a sale agreement to purchase the suit property on 7.7.1999 and securing a transfer dated 1.7.2002, it took them 12 years until 28.7.2014 to file this suit to seek eviction and obtain vacant possession of the suit property ostensibly to defeat the provisions of Section 7 of the Limitation of Actions Act.
33. It is further submitted that at the time of transfer of the suit parcel on 29.7.2002, the Defendants were in occupation of portions of the suit property as evidenced by the suits attached to the Plaintiff's bundle. Thus by virtue of Section 30 (g) of the Registered Land Act, Section 28 of the Land Registration Act and the provisions of the Constitution, the Defendants and the 2nd Interested Party have overriding interest over the suit property by being in actual possession and occupation thereof. To that end, the case of Grace Mwakiria Mugambi v Philip Kimani [2018] e KLR was cited.
34. The 1st and 3rd Interested Parties filed submissions dated 7.8.2023 which mirrors those of the Defendants and the 2nd Interested Party, adding that Plaintiff has not met the threshold for grant of injunctions as stated in the case of Giella v Cassman Brown (1973] EA 358.

Determination

35. The issues falling for determination are; Whether the defendants have capacity to be sued, and whether the orders sought by the plaintiff can be granted.
36. The Defendants and the Interested Parties have argued that the Plaintiff lacks capacity to sue the Defendants as it is just an association which is incapable of being sued.
37. In Kipsiwo Community Self Help Group v Attorney General and 6 Others [2013] eKLR, cited by the defendants and the 2nd interested party, the court was of the view that associations cannot sue in their own name but they can sue and be sued through their registered trustees/members on behalf of all the members. I find that the issue at hand was raised nine years ago by the defendant through a Preliminary Objection dated 15.9.2014. And in a ruling dated 19.12.2014, the Preliminary Objection was dismissed. Further, it is noted that the persons named as the defendants do not dispute that they are the officials of the entity known as Mailisaba Mwingenye Youth Self Help Group. Indeed DW1 testified as an official of the aforementioned entity. To this end, I am inclined to believe that the defendants have properly been sued.
38. Is the plaintiff entitled to orders of eviction, permanent injunction mesne profits and costs?.
39. At this juncture, it is pertinent to note that the defendants and the Interested Parties have no counterclaim.
40. The Plaintiff has tendered evidence that defendants invaded the suit property following the Ex-Parte vesting orders issued on 18.11.2010 by Justice Msagha Mbogoli in HCCC No. 353 of 2009 instituted by them (current defendants) against Upsan Kent and Nidhi Kent, administrators of the estate of the late Ranbir S/O Keharchard. The plaintiff applied to set aside the orders of 18.11.2010 on the basis that it is the registered owner of the suit parcel and by the time the said orders were set aside on July



2014, the Defendants had already trespassed on the suit parcel and erected structures thereon on the strength of the impugned judgment.

41. The Defendants claim that they have been on the suit parcel since 1995 but they have no title. The Plaintiff has a title to the suit parcel. In *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR, the Court of Appeal stated that;

“..We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

42. I find that plaintiff has availed cogent evidence to show that it is the properly registered owner of the suit property.

43. The Defendants claim that Maili Saba Mwengenyu Youth Self Help Group entered the suit parcel in 1995 and have been in quiet possession. The self-help group was however registered in 2010. The defendants have not indicated the nature of their interest in the land, as there is no counterclaim. It is noted that the defendants were silent on the fate of their suit HCCC No. 353 of 2009, where they were claiming the suit property by way of adverse possession.

44. What I discern particularly from the litigation history is that the occupation of the suit land by the defendants and the Interested Parties was through sheer brute force, what can be termed as a brazen invasion with not the slightest semblance of innocence. To this end, the plaintiff has availed documents which give a sneak preview of both civil and criminal litigation in respect of the suit properties.

45. The 1st case touching on the suit parcel, HCCC No. 1256 of 2002 was filed by John Oyawo and 3 others against the current Plaintiff herein. They were seeking title by adverse possession on the suit property, but the suit was struck out on 27.11.2002. (page 53 of the Plaintiff’s bundle).

46. The same parties were to file another case HCCC 1782 OF 2002, still against the current Plaintiff which was struck out on 10.7.2003 (see page 56 in plaintiff’s bundle).

47. It is pertinent to note that at an early stage of the litigation, the issue of invasion was centered on excavation and not erection of structures. This is evident from the order issued in case no. HCCC 1256 OF 2002 on 18.7.2003 (page 55 of plaintiff’s bundle) where it is stated as follows;

“That the Plaintiffs/Respondents herein be and are hereby restrained from excavating, quarrying or doing anything on ALL THAT piece or parcel of land known as Land Reference Number 11531/9, Njiru, Nairobi that interferes or is likely to interfere with its quiet enjoyment by the Defendant or with its preservation.”

48. In the ensuing criminal cases Makadara Criminal cases nos. 1379 of 2008 and 2499 of 2008, the current plaintiff has given an account of how the invasion was occurring.

49. The hallmark of the brutality of the defendants was actually manifested in the filing of the case ELC Civil Case No. 353 of 2009 by the current defendants seeking adverse possession. That case was filed by JOHN MUCHEMI NDUNGU, PETER NGULU KIMULI and KORI KAMUYU (current DW1) as Chairman, vice chairman and secretary of Mwengenyu self help group.



50. During his re-examination, DW1 (Kori Kamuyu) admitted that he was accused no. 5 in the criminal case no. 2499 of 2008. The current PW1 gave his testimony in that case on 29.3.2010 detailing how they owned the suit land. DW1 and a majority of his colleagues in the criminal matter actually disappeared while on cash bail which was eventually forfeited leading to the withdrawal of their case. However, DW1 and his cohorts were very much present in the civil case ELC Civil Case No. 353 of 2009 where they had sued the administrators of the estate of Ranbir S/O Keharchand Kent. The criminal case was filed in year 2008, which implies that the accused persons (including DW1 herein) knew the complainant by then (the current plaintiff). It follows that the civil suit (HCC No. 353/2009) by the defendants against the wrong party was a red herring, meant to circumvent the law. They indeed succeeded by getting a judgment through *ex parte* proceedings in the civil case, but this judgment was eventually set aside.
51. It is noted that while the court in the civil case ELC Civil Case No. 353 of 2009 was setting aside its judgment on 25.7.2013, the court issued orders that the Judgment of that court dated 18th November 2010 and all orders flowing thereunder were set aside. The application dated 25.6.2012 was allowed in terms of prayer Nos 3 and 6 to the effect that;
- “That pending the hearing and determination of the suit, a temporary injunction be and is hereby granted restraining the Plaintiffs by themselves, servants agents or otherwise from entering, trespassing, harassing, intimidating threatening, provoking, inciting or otherwise howsoever interfering with the intended party’s quiet enjoyment, possession and occupation of parcel No. L.R. No. 11531/9 (the suit property).”
52. Thus again the current defendants were duly warned not to interfere with the suit property.
53. A perusal of the photographs of the suit land availed by the plaintiffs depict a vast land, generally undeveloped but with some buildings scattered here and there most of them unfinished. A clear manifestation that the structures were coming up “on the go”, as the dispute was thriving.
54. It appears that the invasion continued with unbridled ambition and was even apparently captured in the print media in the Daily Nation of 25.9.2014 (see page 229 of plaintiff’s bundle) in the following words;
- “ Armed land grabbers turn life into living hell for city land owners”
55. This resonates with PW1’s testimony that it is even dangerous for the plaintiff to access the property which again buttresses the finding of this court that the defendants are in occupation of the suit land through sheer brute force.
56. In the case of *Amos Kibata Githeko v Loise Gachiku Kinuthia* [2021] eKLR, I cited the Court of Appeal Case of; *Richard K. Bunei & 8 others t/a Geo-Estate Development Services v Lorien Ranching Company Limited & 799 others* (being sued on behalf of themselves and on behalf of alleged 795 Members) [2017] eKLR, where the court decried the
- “ the startling decree of misuse of the judicial process in the pursuit of an insatiable greed and varice that stops at nothing to achieve its ends, including subverting the legal process”.
57. This is exactly what has happened in the current dispute. The defendants have gone to every length to circumvent justice through insatiable greed, reaping where they did not sow, and attempting to sanctify their actions through judicial processes. Such actions should not be allowed in a civilized society.



58. In the case of Obade & 299 others & 10 others v Kirima & 60 others (Environment and Land Case Civil Suit 1257 of 2014 & 252 of 2011 & Environment & Land Case 509 & 850 of 2014 & 1496 & 1318 of 2013 (Consolidated)) [2023] KEELC 20868 (KLR) (23 October 2023) (Judgment), the court (specifically in the case ELC 1496 OF 2013) found that the defendants had no legal basis for entering and carrying out constructions on the suit property and hence found them to be trespassers. Taking cue from the aforementioned findings, I find that the defendants and the interested parties herein have no legal basis of being on the suit property. Thus, they are trespassers.
59. The provisions of Article 40 (1) of *the Constitution* provides for the protection of the right to property either individually or in association with others. To this end, the plaintiff deserve to be protected by this court from the sustained illegal trespass by the defendants and the interested parties. The plaintiff has however not quantified their claim of mesne profits hence the claim is disallowed.
60. In the final analysis, I find that the plaintiff has proved its case on a balance of probabilities and I enter judgment for the plaintiff against the defendants and the interested parties in the following terms.
1. An order of eviction of the Defendants and the Interested Parties from the suit property LR No. 11531/9 is hereby issued. To this end, any person in occupation of the suit land is given 30 days to vacate the said land.
 2. A permanent Injunction is hereby issued against the Defendants and the interested parties whether by themselves, their servants, members or agents and/or otherwise howsoever from trespassing, entering, remaining, alienating, interfering with the possession, ownership, dealings or continuing in occupation of the suit property.
 3. The defendants and the interested parties are jointly and severally condemned to pay costs of the suit to the plaintiff from the time the suit was filed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF FEBRUARY, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mbichire for Plaintiff

Ongocho holding brief for Kapere for Defendant and 2nd Interested Party

Kibukosya holding brief for Esuchi for 1st & 3rd Interested Parties

Court Assistant: Cheronno

