



**Momanyi v Siro (Environment & Land Case 464 of 2014)
[2023] KEELC 15874 (KLR) (1 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 15874 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 464 OF 2014**

M SILA, J

MARCH 1, 2023

BETWEEN

ESTHER KEMUMA MOMANYI PLAINTIFF

AND

NICHOLAS SIRO DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide a plaint filed on 3 December, 2014. She pleaded that she is the registered owner of the property known as West Kitutu/ Bogusero/2762 (hereinafter referred to as the suit property). She decried that the defendant had on diverse dates between the years 2012 and 2014, without her consent or permission, entered upon the suit property and excavated top soil therefrom which have rendered portions of the land unarable. In this suit, she seeks general damages, a permanent injunction restraining the defendant and or his agents, servants or any one acting in his instructions from entering the suit property, as well as costs of the suit and interest.
2. The defendant entered appearance and filed a statement of defence denying the plaintiff's claim. He also filed a counterclaim wherein he contended that the plaintiff acquired the suit property through fraud and thus her title should be cancelled. The particulars of fraud are that the plaintiff forged documents to transfer the suit property and that he colluded with one Charles Ohuru Kibeti, named as the 2nd defendant in the counterclaim, and transferred the land without his consent. In the counterclaim, he seeks a declaration that he has been in occupation for over 12 years thus has acquired the land by adverse possession and also a declaration that the plaintiff got herself fraudulently registered as proprietor of the suit land. He wants her title cancelled and he be registered as proprietor thereof.
3. The matter came up for hearing on 1st February 2023. The defendant was not present and counsel for the defendant sought an adjournment which I declined. The plaintiff testified as the sole witness. She narrated that she was the absolute registered owner of the suit property. She produced the title deed as an exhibit. She testified that the defendant came with a tractor and excavated soil from her land



between the years 2012 and 2014. She produced photographs to show the excavation. She stated that the land was transferred to her by her brother Charles Ouru Kibeti after the family gave her the land. She mentioned that the defendant does not live on the land but only comes to make structures which he then abandons. The plaintiff was not cross-examined, and as I have mentioned, the defendant was not present to testify. The hearing therefore closed with the uncontested evidence of the plaintiff.

4. Mr. Soire, learned counsel for the plaintiff, opted not to make submissions and fully relied on the evidence presented.
5. The evidence of the plaintiff is of course unchallenged. The plaintiff did produce the title deed of the suit property to demonstrate that she is the sole registered proprietor of the land. The defendant never availed any evidence to demonstrate that the plaintiff got the land through fraud or illegally and did not present any evidence to prove his claim of adverse possession. Section 26 of the [Land Registration Act](#) does provide that the holder of the Certificate of title is presumed to be the absolute and indefeasible owner. That Section is drawn as follows :-

26. Certificate of title to be held as conclusive evidence of proprietorship.

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

6. In this instant suit the Defendant raised a counterclaim alleging that the Plaintiff obtained the suit property through fraud. The defendant failed to appear in court and prove the claim of fraud. He also did not prove any adverse possession. That being the case, it is the plaintiff who is vested with rights over the suit land. This is provided for under Section 24 (a) of the [Land Registration Act](#), which provides as follows :-

a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

7. I have no reason not to issue an order of permanent injunction to the plaintiff barring the defendant from entering, excavating soil, being upon, or in any other way trespassing and/or disturbing the quiet possession of the plaintiff on the suit land. The plaintiff sought general damages. I will award her the sum of Kshs. 300,000/=. The same to attract interest at court rates from the date hereof. I also grant the plaintiff costs of the suit and of the counterclaim.
8. Judgment accordingly.

DATED AND DELIVERED THIS 1 DAY OF MARCH 2023



**JUSTICE MUNYAO SILA
JUDGE**

