



**Machani v Nyaundi (Environment & Land Case 182 of 2014)
[2023] KEELC 18745 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18745 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 182 OF 2014**

M SILA, J

JULY 12, 2023

BETWEEN

WYCLIFFE SAMSON MACHANI PLAINTIFF

AND

KENNETH YOBESH NYAUNDI DEFENDANT

JUDGMENT

(Plaintiff having purchased disputed land from a person said to have been the original allottee; land said to be within the Kisii Site & Service Scheme under the National Housing Corporation; plaintiff having a letter from the Corporation advising the Commissioner of Lands that he has paid off the loan due to the Corporation and title may issue to him; defendant taking possession of the land on the basis that he purchased the land from a third party who has title to the land; title of the third party not registered in the Lands office; no transfer effected to the defendant; court persuaded that plaintiff has demonstrated a better title than the defendant; judgment entered for the plaintiff)

1. This suit was commenced through a plaint which was filed on 9 May 2014. In his plaint, the plaintiff pleaded to be the owner of the Plot identified as Plot No 65, Phase I, Kisii Town Site and Service Scheme. He averred that he purchased this plot in the year 1994 from one Obachi Kearsi, who it is pleaded was allotted the said plot in the year 1977 and complied with the terms of allotment. The plaintiff pleads that in April 2014, the defendant entered the plot and deposited building materials and excavated a foundation in readiness for development. In the suit, the plaintiff seeks the following orders :-
 - (a) A declaration that Plot No 65 Phase I, Kisii Town Site and Service Scheme belongs to the plaintiff.
 - (b) A permanent injunction to restrain the defendant from the said plot.
 - (c) Costs of the suit.



- (d) Any other relief deemed fit to grant.
2. The defendant filed defence where he pleaded that he is not on the Plot No 65, as pleaded by the plaintiff, but is on the land parcel Kisii Municipality/Block I/682 and Kisii Municipalit/Block I/720.
 3. In his evidence, the plaintiff testified that he previously worked for ICDC as an extension officer and retired in the year 1995. He testified that his uncle, Obachi Keri, sold to him the plot in 1994. He testified that the plot was allotted to Obachi Keri who paid the requisite fees. He produced two receipts dated 30 August 1994 and a beacon certificate. He produced a transfer instrument dated 22 September 1994, from the Municipal Council of Kisii which transferred the interest of Obachi Keri to himself. He testified that he paid rates and produced some rates payment receipts. He testified that the plot was received from the National Housing Corporation and he paid off the loan owed to the said Corporation and what was pending was the lease instrument. He had a letter from the National Housing Corporation (NHC) dated 13 May 2014 which provides that he has paid off the loan and a lease to the parcel Kisii Municipality/Block I/720 should be issued to him. He stated that it is when the defendant started constructing that he realized that he also has another title to the same land. Cross-examined, he stated that the sale agreement with his uncle was oral. He had not constructed on the land but the defendant has constructed a structure to the lintel stage. He did not know the identity of the persons who sold the land to the defendant. He explained that the land as allocated is identified as Plot No 65 but title will be Kisii Municipality/Block I/720.
 4. PW-2 was Steve Mokaya, the then Land Registrar, Kisii. He testified that he has no record at all of the parcel Kisii Municipality/Block I/720. The Land Registry has no parcel file for it and no card. He opined that if the property was properly registered and a lease issued they would be having a white card for it. On the parcel Kisii Municipality/Block I/682 he testified that it was first registered on 11 August 2004 in name of Christopher Momanyi Keragori. On plots of the NHC, he testified that the procedure is for NHC to do a letter to the National Land Commission to confirm that they have allotted land to a particular individual and request them to do a lease. He queried the title of the owner alleged to have transferred the land parcel No 720 to the defendant. He noted that the title was issued on 1 January 1998 yet the ID card of the first allottee, Calvin Monari, indicates that he was born in 1983 meaning that he was 15 years at the time. He testified that there is no way the Government would allot land to 15 year old. He observed that the documents of the defendant show that the Certificate of Lease was issued on 11 August 2004 which is also the same date that the Certificate of Lease for Plot No 682 was issued.
 5. With the above evidence the plaintiff closed his case.
 6. The defendant testified that he is a teacher and Principal of one of the Secondary Schools in Kisii. He stated that on 14 October 2011, he entered into two sale agreements, one with Christopher Momanyi Keragori for the purchase of the plot No 628, and the other with Calvin Kenani Monari, for the purchase of the suit land i.e Kisii Municipality/Block 1/720. Each parcel cost him Kshs. 600,000/= and he paid in full. He was handed over the lease documents but he is yet to effect transfer to his name. The two plots abut each other. He started building in the year 2014. He intended to build three rental units of two bedrooms each, traversing the two plots. It is then that the plaintiff came to complain that he is constructing on his land.
 7. Cross-examined, he testified that he was not aware that the plots are in Kisii Site and Service Scheme. He testified that the person who sold to him the suit land, i.e Calvin Kenani, is alive. He only gave him the Certificate of Lease. He testified that it is because of financial constraints that he has not transferred the title to himself. He presented building plans in his name which were approved despite him not



having title. He testified that he personally did a search dated 11 October 2011 before purchasing the land on 14 October 2011. After the plaintiff complained, he went again to the Lands office, but this time he was unable to do a search, and the office told him that they cannot trace the documents. This caught him by surprise and he inquired from Calvin who told him that he will follow up. He later told him that he got busy and he was unable to get the information. He added that he went to the offices of NHC in Kisii and they told him that they have nothing for Calvin.

8. With the above evidence, the defendant closed his case.
9. I invited counsel to file submissions, which they did, and I have taken note of these before arriving at my decision.
10. In a nutshell, the case of the plaintiff is that the disputed plot is under the National Housing Corporation and is identified as Plot No 65 Phase I, Site and Service Scheme. He contends that it was allotted to one Obachi Keari and that he purchased the interest of Obachi in the year 1994. He avers that he has paid off the National Housing Corporation and what he is waiting for is issuance of title to him. The defendant on the other hand contends that he purchased the suit land, already titled as Kisii Municipality Block I/720, from one Calvin Monari, who was the first proprietor.
11. I need to exercise caution in my decision as Calvin Monari is not a party to this suit and I think the case needs to be decided on the basis of who between the plaintiff and defendant has demonstrated proprietary rights over the suit land.
12. I have assessed the documents presented by both plaintiff and defendant. I have seen the original receipts issued in the year 1994 and exhibited by the plaintiff, showing payment for transfer of the Plot No 65 to him, from Obachi Keari. I have also seen the exhibited beacon certificate dated 29 May 1990 issued o Obachi Keari for the Plot No 65. I have seen the consent to transfer dated 22 September 1994 permitting Obachi Keari to transfer his interest to the plaintiff. The plaintiff also exhibited land rates payment receipts for the years 2004, 2005, 2008, 2009, 2010, 2012, 2013, 2014 and 2015. Of great significance is the letter dated 13 May 2014, from National Housing Corporation, to the Commissioner of Lands, in reference to the Plot No 65, Site & Service Scheme. That letter informs the Commissoer of Lands that the plaintiff has cleared the loan owed to the Corporation and title may issue in his name. The letter advises that the Plot No 65 is to be titled under the registration Kisii Municipality/Block I/720.
13. It happens that the defendant is displaying a title to this Kisii Municipality/Block I/720, but which is not in his name. According to him, he purchased this land on 14 October 2011 from the person named in the title documents that he holds, one Calvin Monari Kenani . Calvin had a Certificate of Lease which he handed over to the defendant. The defendant also did a search which disclosed the name of Calvin as proprietor. It will be recalled that all that Calvin gave the defendant is the certificate of lease and nothing else. There is not displayed any consent to transfer from the Commissioner of Lands or the Municipal Council of Kisii. There is also not exhibited by the defendant any demand for rates or payment of rates, made prior to the year 2011. There is not displayed by the defendant a rates clearance certificate. Apart from the above, the alleged title of Calvin Monari is not recognized at the Kisii Lands Registry for there is no record at all of any lease having been registered in the name of Calvin or the defendant or indeed in name of any person. In other words, no lease instrument has ever been forwarded for registration. Importantly, the defendant has no title in his name. His excuse, that he has not done transfer due to lack of funds does not wash as he is developing, an exercise that requires finances.
14. In my opinion, the evidence is overwhelming that as between the plaintiff and defendant, it is the plaintiff who has demonstrated proprietary interest over the suit land. The defendant is holding on



to nothing more than a title in the name of another person which title is not recognized at the Lands Office. The plaintiff has shown that all he is awaiting is action on the letter dated 13 May 2014 which was addressed to the Commissioner of Lands, i.e, issuance of title documents in his name. I would assume that this would be issuance of a lease which will then be forwarded for registration. That process to proceed to the logical conclusion.

15. From the foregoing, I declare that the defendant has not displayed any valid interest in the land parcel Kisii Municipality/Block I/720. I hereby issue an order of permanent injunction, restraining the defendant from entering, being upon, constructing, dealing, or interfering with the plaintiff's quiet possession of the said land parcel Kisii Municipality/Block I/720. Possession of the suit land, upon delivery of this judgment, to henceforth be in the hands of the plaintiff. The plaintiff asked for an order of eviction. I don't know how he wishes this to be executed for there is a partly developed building on the land. It is upon the plaintiff to either keep the property as it is, or if he wishes to have it restored, then inform the defendant how he wants it restored, and the defendant to comply with such directions within 30 days. If he does not do so, the plaintiff is at liberty to proceed as he wishes and pass over the costs to the defendant.
16. I think I have dealt with all issues save for costs. The plaintiff will have the costs of this suit as against the defendant.
17. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 12 DAY OF JULY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

