



**Luyeku v Mbuya & 5 others (Environment & Land Case 622 of 2014)  
[2023] KEELC 19813 (KLR) (18 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19813 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 622 OF 2014  
DO OHUNGO, J  
SEPTEMBER 18, 2023**

**BETWEEN**

**ANDREA LUYEKU ..... PLAINTIFF**

**AND**

**ROSA MBUYA ..... 1<sup>ST</sup> DEFENDANT**

**JOSPHAT TAIFA ..... 2<sup>ND</sup> DEFENDANT**

**FESTUS ANDABWA ..... 3<sup>RD</sup> DEFENDANT**

**KIZITO OMUYA ..... 4<sup>TH</sup> DEFENDANT**

**GODFREY LUYEKU ..... 5<sup>TH</sup> DEFENDANT**

**FRED LUYEKU ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff moved the court through plaint filed on November 17, 2014. He averred that he was the registered proprietor of the parcel of land known as Kisa/Mwikalikhha/659 (the suit property) and that the first defendant was his estranged wife while the second to sixth defendants were his children whom he allowed to reside on the suit property. He stated that the defendants had harassed him on several occasions and denied him peaceful occupation and use of the suit property besides subjecting it to waste and destruction.
2. The plaintiff therefore prayed for judgment against the defendants jointly and severally for:
  - a. A permanent order of injunction restraining the defendants, their servants, agents and or assignees from harassing the plaintiff in any way with a view of preventing the plaintiff from quiet enjoyment and use of all that parcel of land known as Kisa/Mwikalikhha/659 measuring



approximately 4 acres and which is registered in the names of the plaintiff as the absolute proprietor thereof.

- b. An order of immediate eviction of the defendants, their servants, agents and or assignees from all that parcel of land known as Kisa/Mwikalikhha/659.
  - c. Costs of this suit.
3. On December 9, 2014, the firm of J.J. Mukavale Advocates filed Notice of Appointment of Advocates, having been instructed by all the defendants. On the same date, parties appeared before the court represented by their advocates and recorded an oral consent to the effect that the plaintiff was at liberty to access the suit property and fell his trees as he pleased and that parties to comply with Order 11 as well as pre-trial procedures within thirty days.
  4. A perusal of the record reveals that although the matter was fixed by consent for hearing on several subsequent occasions, the defendants did not file any defence. The matter was even referred to mediation on November 25, 2019, again by consent of the parties. On August 31, 2021, the Mediation Deputy Registrar terminated the mediation on grounds on non-availability of the parties.
  5. The matter was later fixed for hearing on March 9, 2022, on which date counsel for the defendants sought and was granted an adjournment to enable him to file an application to cease acting. He neither filed the application nor attended the next hearing. The defendants did not also attend the hearing.
  6. The plaintiff testified on September 21, 2022 as the sole witness in respect of his case and reiterated that the first defendant is his wife with whom he separated in 1998 while the second to sixth defendants are children born to him and the first defendant. He added that the defendants were in occupation and use of the suit property as of the date of his testimony and that they usually chase him away whenever he goes there.
  7. The plaintiff further adopted his witness statement dated October 2, 2014 wherein he stated that he purchased the suit property in 1976 and became its registered proprietor on 31<sup>st</sup> March 1980. That when the second to sixth defendants got employed, they approached him, and he allowed them around the year 2000 to construct their houses on the suit property and to reside therein. That in the process, the second to sixth defendants invited the first defendant to the suit property. He added that he warned them that he was not agreeable to the first defendant staying on suit property since they were separated and had not been reconciled. That the second to sixth defendants invited elders who resolved that for the sake of the children, the first defendant was to be allowed to reside on the suit property notwithstanding the plaintiff's disapproval. That since the defendants have turned against him and prevented him from enjoying the suit property, he no longer wants them on the suit property.
  8. The plaintiff's case was closed at that point. Since the defendants did not attend the hearing despite the hearing date being fixed by consent, their case was closed upon an application by counsel for the plaintiffs. Directions were then given that parties file written submissions. The defendants did not file any. The plaintiff argued in his submissions that he is the registered proprietor of the suit property and that the defendants had violated his rights of ownership. He urged the court to intervene to allow him to enjoy his rights so that he is at liberty to give them a portion of he wishes.
  9. I have considered the pleadings, the evidence, and the submissions. The sole issue for determination is whether the reliefs sought should issue.
  10. From his testimony and the material on record, I am satisfied that the plaintiff is the registered proprietor of the suit property. There is on record a copy of a title deed and a certificate of search as



on April 24, 2014, both of which confirm that the plaintiff became registered proprietor on August 31, 1980.

11. In his capacity as a registered proprietor of land, the plaintiff is entitled to the rights, privileges, and benefits under Section 24 of the Land Registration Act. Further, Section 26 of the Act obligates the court to accept his certificate of title as conclusive evidence of proprietorship, unless of course the provisos under Section 26 (1) (a) or (b) are established. The defendants have not challenged the plaintiff's title in any way or denied the plaintiff's case that they have stopped him from enjoying his proprietorship rights. I am therefore persuaded that the plaintiff has made a case for the permanent injunction sought.
12. The plaintiff has stated that the first defendant who is his estranged wife and the second to sixth defendants who are his children are in occupation of the suit property. Being estranged does not deprive the first defendant of spousal rights. By virtue of their relationship to the plaintiff and considering that they are in occupation, the defendants may establish rights over the suit property including overriding interests under Section 28 (b) and (j) of the Land Registration Act and other laws. In those circumstances, I am not persuaded that I should order their eviction from the suit property.
13. It is a pity that the parties did not take advantage of the opportunity of mediation which the court had availed, to resolve their differences. That said, it is not too late. They are encouraged, as members of one family, to resolutely seek to resolve their differences regarding the suit property using mediation and even alternative justice systems.
14. In the result, I make the following orders:
  - a. A permanent injunction is hereby issued restraining the defendants, their servants, agents and or assignees from harassing the plaintiff in any way with a view of preventing the plaintiff from quiet enjoyment and use of all that parcel of land known as Kisa/Mwikalikhha/659.
  - b. In view of the family relationship between the parties, I make no order as to costs.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**D. O. OHUNGO**

**JUDGE**

**Delivered in open court in the presence of:**

Mr Kombwayo holding brief for Mr Amasakha for the plaintiff

Mr Mukavale for the defendants

Court Assistant: E. Juma

