



**Nyanumba v Alivisa; Mbaruku (Third party) (Environment & Land Case 166 of 2014) [2023] KEELC 20379 (KLR) (3 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20379 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 166 OF 2014**

**DO OHUNGO, J**

**OCTOBER 3, 2023**

**BETWEEN**

**PHILIP MACHUKI NYANUMBA ..... PLAINTIFF**

**AND**

**ELIZABETH ALIVISA ..... DEFENDANT**

**AND**

**HASSAN MUSAMBAYI MBARUKU ..... THIRD PARTY**

**JUDGMENT**

1. By plaint filed on 4<sup>th</sup> June 2014, the plaintiff averred that he was the registered proprietor of the parcel of land known as Isukha/Shirere/5949 measuring 0.06 Hectares (the suit property) and that sometime on 17<sup>th</sup> May 2014 the defendant alongside her agents had trespassed onto the suit property and caused damage to the fencing poles continued to threaten the plaintiff not to set foot on the suit property. The plaintiff further averred that the defendant and her workers continued to be violent anytime the plaintiff wanted to develop the suit property and that the defendant also incited her agents and members of the public to loot the plaintiff's construction materials on the suit property. The plaintiff therefore sought judgment against the defendant for a permanent injunction restraining her, her agents and or servants from trespassing into and causing any damage to the plaintiff's property or interfering in any manner with any development activities being conducted on the suit property. He further prayed for costs and any other relief this court may deem fit to grant.
2. The defendant issued a third party notice dated 21<sup>st</sup> July 2014 against Hassan Musambayi Mbaruku (the third party) and filed an amended defence and counter claim dated 21<sup>st</sup> July 2014. Although she referred to herself in both the third party notice and the amended defence and counter claim as "Elisheba Imali Alividza," the plaint was never amended to reflect any change in her name. She denied the allegations in the plaint and further averred that she purchased the suit property sometime in 2001



while it was still part of title number Isukha/Shirere/3244. That she took vacant possession of the land and developed it.

3. In her counter claim, the defendant reiterated that vide a sale agreement dated 20<sup>th</sup> July 2001, she lawfully purchased land measuring 0.25 acres curved out of land parcel number Isukha/Shirere/3244 from the third party which title was later closed upon subdivision into parcel numbers 5557 and 5558. She further averred that she had been in occupation of the said 0.25 acres since 2001 and had immensely developed it by constructing a semi- permanent house, a permanent latrine and bathroom and planted several indigenous and exotic trees thereon. She also averred that the plaintiff failed to exercise due diligence and was not therefore a bona fide purchaser. She therefore prayed for judgment against the plaintiff and the third party for a declaration that the plaintiff's title in land parcel number Isukha/Shirere/5949 was not bona fide; cancellation of the subdivisions of land parcel number Isukha/Shirere/5557 so that the title reverts back to the third party's name; a declaration that the defendant is entitled to 0.25 acres from land parcel number Isukha/Shirere/5557; an order directing the third party to transfer a portion of 0.25 acres from land No. Isukha/Shirere/5557 into the defendant's name and in the alternative, an order of compensation at the current market value of the 0.25 acres together with the value of all the developments thereon. She also sought for dismissal of the plaintiff's suit with costs.
4. The third party filed his defence on 29<sup>th</sup> October 2014 and denied allegations in the third party notice. He averred that the sale agreement between him and the defendant was "abandoned for breach of contract" in the year 2004 and that the defendant was therefore not allowed to conduct any development in the suit property. That before purchasing the suit property, the plaintiff inspected it in the presence of the defendant who never raised any objection. He therefore prayed that this court dismisses the counter claim with costs and allows the plaintiff's suit.
5. In response to third party's defence, the defendant filed a reply to third party's defence on 26<sup>th</sup> November 2014 and denied ever seeing the plaintiff surveying the land. She further averred that she entered upon the suit property with full permission of the third party and reiterated that the plaintiff had acquired a bad title having failed to conduct due diligence.
6. The plaintiff filed a reply to the amended defence and defence to the counter claim on 2<sup>nd</sup> December 2014 and averred that he conducted due diligence, and that he obtained a good title which cannot be cancelled. He therefore prayed that his suit be allowed and that the counter claim be dismissed with costs.
7. On 8<sup>th</sup> December 2021, counsel for the plaintiff informed the court that the third party passed away in September 2018. There was no substitution.
8. At the hearing, Sophia Njeri Shaban testified as PW1 and adopted her witness statement dated 11<sup>th</sup> March 2020 as her evidence. She stated that she is one of the widows of the third party and that sometime in 2014, the plaintiff approached the third party with the intention of buying the suit property and that the third party informed PW1 and her co-widow one Miriam Isamba that they had agreed to sell the suit property at a purchase price of KShs 1,450,000 and the said co-widow accompanied the parties to the advocates office in Kakamega to witness the sale agreement. That the plaintiff thereafter took possession of the suit property and started fencing it, but the defendant was causing problems to the plaintiff. That the defendant had encroached onto the plaintiff's portion, forcefully cultivated it, and even dug a pit latrine on it. She added that the plaintiff is the registered owner of the suit property and is therefore entitled to peaceably occupy and use it.
9. Philip Machuki Nyanumba testified as PW2 and adopted his witness statement filed on 4<sup>th</sup> June 2014 as his evidence. He stated that he is the registered proprietor of the suit property which he purchased from the third party and that upon purchase, the third party and surveyors fixed the boundaries upon



which he started utilizing the land. That sometime on 17<sup>th</sup> May 2014 when he went to the suit property with the intention of fencing it, the defendant called people to attack them, and that the defendant had continuously prevented him from using the suit property. He added that the defendant had looted and even incited members of the public to loot his fencing poles.

10. The plaintiff's case was then closed.
11. Despite evidence of service of hearing notice being availed, the defendant never attended the hearing. The defence case was then closed and directions for filing and exchanging written submissions given. She however attended court twice at the submissions stage, sought and obtained time, but did not file any submissions.
12. The plaintiff filed his submissions on 14<sup>th</sup> November 2022 and argued that his case is unchallenged since the defendant did not offer any evidence. The plaintiff therefore urged that his case be allowed as prayed since he legally purchased the suit property, fully paid the agreed purchase price, and proceeded to process his title deed which he currently holds as the absolute registered proprietor. He argued that a certificate of title is conclusive evidence of proprietorship and that since the defendant never pleaded fraudulent acquisition, he remains the absolute registered proprietor of the suit property and his suit should be allowed as prayed.
13. I have considered the pleadings, the evidence, and the submissions. The plaintiff's case and evidence is not challenged in any way by the defendant or even the third party. The defendant does not dispute that the plaintiff is the registered proprietor of the suit property. In fact, she acknowledged the plaintiff's title in her defence and counterclaim and went ahead to seek its cancellation.
14. From the material placed before the court, I note that the plaintiff produced a copy of a title deed in respect of the suit property which shows that he became the registered proprietor on 5<sup>th</sup> May 2014 pursuant to entry number 2 in the proprietorship section of the register and that a title deed was issued to him on 6<sup>th</sup> May 2014.
15. A registered proprietor of land is entitled to the rights, privileges, and benefits under Section 24 of the [Land Registration Act](#). Further, Section 26 of the Act obligated the court to accept the proprietor's certificate of title as conclusive evidence of proprietorship, unless of course the provisos under Section 26 (1) (a) or (b) were established. In other words, the grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. The defendant has not made any case to warrant impeaching the plaintiff's title. On the contrary, the defendant has not offered evidence to challenge the plaintiff's case or even to support her counterclaim.
16. It follows therefore that the plaintiff has established his case. On the other hand, the defendant's counterclaim, and the defendant's claim against the third party are for dismissal.
17. In the result, I make the following orders:
  - a. The defendant's counterclaim, and the defendant's claim against the third party are dismissed.
  - b. A permanent injunction is hereby issued restraining the defendant, her agents and/or servants from trespassing into and causing any damage to the plaintiff's property in the parcel of land known as Isukha/Shirere/5949 or interfering in any manner with any development activities being carried out on the parcel of land known as Isukha/Shirere/5949.
  - c. The plaintiff shall have costs of the suit. The defendant shall bear the said costs.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 3<sup>RD</sup> DAY OF OCTOBER 2023.**



**D. O. OHUNGO**

**JUDGE**

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

Mr Okali holding brief for Mr Getanda for the Plaintiff

Defendant present in person

No appearance for the Third Party

Court Assistant: E. Juma

