



**Nechesa v Okumu & 2 others (Environment & Land Case
182 of 2013) [2022] KEELC 3427 (KLR) (7 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3427 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 182 OF 2013**

DO OHUNGO, J

JUNE 7, 2022

BETWEEN

YAKOBET WABUKO NECHESA PLAINTIFF

AND

GRACE AUMA OKUMU 1ST DEFENDANT

WYCLIFFE WELINDI CHIBOLE 2ND DEFENDANT

NAFTALI CHIBOLE 3RD DEFENDANT

JUDGMENT

1. Proceedings in this matter started on May 5, 2012 when Yakobet Wabuko Nechesa filed her plaint in the Chief Magistrate's Court, Kakamega. The matter was later transferred to this court. The plaint underwent several amendments resting with further amended plaint dated November 9, 2017. Yakobet passed away on January 27, 2019 and was substituted by Sherry Wamukoya Wabuko pursuant to an order made by the court on June 27, 2019. There was no further amendment of the plaint to reflect the substitution.
2. Yakobet averred in the aforesaid further amended plaint that she was the registered proprietor of the parcels of land known as Marama/Shianda/280 and Marama/Shianda/1815, hereinafter the suit properties, which she occupied and utilized. That sometime in July 2010, the first defendant and her late husband Joseph Chibole Osichiro and the second and third defendants forcefully entered the suit properties and started erecting houses thereon. That the late Joseph Chibole Osichiro passed away on February 10, 2012 and the defendants interred his remains on Marama/Shianda/1815 despite her protests.
3. Yakobet therefore prayed for judgment against the defendants jointly and severally for:



- (a) Exhumation order for the remains of Joseph Chibole Osichiro from land parcel No. Marama/Shianda/280.
 - (aa) Exhumation order for the remains of Joseph Chibole Osichiro from land parcel No. Marama/Shianda/1815.
 - (b) Costs of the suit
 - (bb) An order of eviction do issue to evict the defendants and all their siblings from land parcel No. Marama/Shianda/1815.
 - (c) Interest
 - (cc) An order of permanent injunction restraining the defendants their agents, servants from entering again into the plaintiff's land parcel No. Marama/Shianda/1815.
 - 9d) Costs of the suit.
4. The defendants filed statement of defence and counterclaim on July 16, 2018. They generally denied Yakobet's averments and went on to state that they had been in possession and use of the suit properties since birth. They averred that Yakobet obtained title to Marama/Shianda/1815 illegally, fraudulently and without regard to their interests. That Yakobet's title was extinguished owing to their quiet, continuous and uninterrupted possession and use of the property and that Yakobet's suit was statutorily time barred. The defendants therefore prayed that Yakobet's suit be dismissed with costs and that judgment be entered against Yakobet for a declaration that Yakobet's acquisition of Marama/Shianda/1815 was illegal and ought to be cancelled.
 5. On January 17, 2022, as the trial was about to commence, counsel for the plaintiff informed the court that the second defendant had passed away. He therefore withdrew the claim against the second defendant.
 6. Sherry Wamukoya Wabuko testified as the sole witness in respect of the plaintiff's case. She stated that Yakobet was her mother and that she is the administratrix of her estate pursuant to Limited Grant ad litem issued to her in Kakamega CM Ad Litem Cause No. 14 of 2019. That Yakobet was the registered proprietor of the parcels of land known as Marama/Shianda/280 and Marama/Shianda/1815 which she utilized for cultivation and upon which she constructed houses for herself, her children and her grandchildren. That sometime in July 2010, the defendants together with the first defendant's late husband Joseph Chibole Osichiro forcefully entered into Marama/Shianda/1815 and destroyed the boundary demarcating the two parcels of land. That by that time Yakobet had not obtained title deed for land parcel Marama/Shianda/1251 since it was under the process of succession by the owners and that thereafter Yakobet exchanged it with her land parcel Marama/Shianda/240.
 7. She further stated that Yakobet's land parcel Marama/Shianda/1251 was later on subdivided and Yakobet was registered as the owner of Marama/Shianda/1815. That when the defendants forcefully entered the said land, Yakobet filed Kakamega CMCC No. 358 of 2010 and obtained an order stopping them from entering Marama/Shianda/280 but the defendants forcefully entered and constructed houses on land parcel Marama/Shianda 1815. She added that while the case was pending, the first defendant's husband Joseph Chibole Osichiro died and defendants forcefully buried him at night on Marama/Shianda/1815. That by then, Yakobet had not yet obtained title for Marama/Shianda/1815. That Yakobet also owned another parcel Marama/Shianda/280 which borders Marama/Shianda/1815 and that the defendants destroyed the boundary that separated the two parcels. She produced copies of documents in Yakobet's list of documents dated April 5, 2012, further list of documents dated 9th



- November 2017 and further list of documents dated July 23, 2018 as exhibits. She further relied on a report filed in court on October 23, 2018 by the District Surveyor and the District Land Registrar pursuant to an order made by the court on July 25, 2018. She urged the court to grant her judgment.
8. Although evidence of service was availed, the defendants did not attend court on the date of trial. The testimony of Sherry Wamukoya Wabuko was therefore not tested by way of cross examination. The plaintiff's case was closed. Upon application by counsel for the plaintiff, the defence case was also closed. Parties were ordered to file and exchange submissions. Only the plaintiff filed submissions.
 9. Relying on section 26 of the *Land Registration Act*, 2012 and the report filed in court on October 23, 2018 by the District Surveyor and the District Land Registrar, counsel for the plaintiff argued that the plaintiff had proven ownership of Marama/Shianda/1815 and encroachment by the defendants on the said parcel. He contended that the plaintiff had established her case. He therefore urged the court to enter judgment in favour of the plaintiff and to dismiss the counterclaim with costs.
 10. I have considered the pleadings, evidence and submissions in this matter. The issues that arise for determination are whether exhumation should be ordered, whether eviction and permanent injunction should be ordered and who pays the costs of the suit.
 11. The plaintiff produced a copy of a title deed in respect of Marama/Shianda/1815 which shows that Yakobet was registered as proprietor of the said parcel on 11th May 2017 and that title was issued to her on May 30, 2017. Her ownership is confirmed in the report filed in court on October 23, 2018 by the District Surveyor and the District Land Registrar. It is further stated in the report that the first defendant herein has a homestead with a live fence on Marama/Shianda/1815 and that she has been tilling part of the said parcel. A sketch was annexed to the report which further confirms the location of the first defendant's homestead within Marama/Shianda/1815. The report does not however state that there is any grave on Marama/Shianda/1815.
 12. Yakobet's claim was that the late Joseph Chibole Osichiro was buried on Marama/Shianda/1815 in February 2012. It will be noted that as at that date, Yakobet was yet to become the registered proprietor of the said parcel. She became proprietor slightly over 5 years later. Besides the general allegations that the late Joseph Chibole Osichiro was buried on Marama/Shianda/1815, the plaintiff has offered nothing concrete to prove those allegations. The burial is said to have taken place at night. No eye witness account or even evidence from the local administration have been availed to support the allegations. While I am keenly aware that the defendants did not offer any evidence in rebuttal, I am not persuaded that I should order an exhumation without being persuaded about both the burial itself and the identity of the remains to be exhumed. I will in the circumstances not order exhumation.
 13. As a registered proprietor, Yakobet's estate is entitled to the privileges and benefits under section 24 of the *Land Registration Act*. Further, section 26 of the Act obligates the court to accept Yakobet's certificate of title as conclusive evidence of proprietorship. In those circumstances, I am persuaded that the plaintiff has made out a case for an order of eviction and permanent injunction. The defendant's counterclaim was not prosecuted and I therefore dismiss it.
 14. In view of the foregoing, I enter judgment in favour of the plaintiff and against the first and third defendants as follows:
 - a. The first and third defendants and all their siblings to vacate the parcel of land known as Marama/Shianda/1815 within 90 (ninety) days of service upon them of the orders made in this judgment. In default, the plaintiff shall be at liberty to evict them from the said parcel.
 - b. A permanent injunction is hereby granted restraining first and third defendants, their agents and servants from entering again into the plaintiff's land parcel No. Marama/Shianda/1815.



The injunction shall come into force immediately upon the eviction of the first and third defendants or immediately they grant vacant possession, whichever occurs earlier.

- c. Costs of the suit are awarded to the plaintiff and shall be borne by the first and third defendants.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 7TH DAY OF JUNE 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Okali holding brief for Mr Getanda for the plaintiff

No appearance for the 1st defendant

No appearance for the 2nd defendant

No appearance for the 3rd defendant

Court Assistant: E. Juma

