



Opembe v Oyala & 3 others; Ashioya (Interested Party) (Environment & Land Case 23 of 2017) [2022] KEELC 14606 (KLR) (8 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14606 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 23 OF 2017
DO OHUNGO, J
NOVEMBER 8, 2022**

BETWEEN

RICHARD ANGULU OPEMBE PLAINTIFF

AND

JOSEPH SAYA OYALA 1ST DEFENDANT

MIDLAND CONSTRUCTION COMPANY LIMITED 2ND DEFENDANT

COUNTY GOVERNMENT OF KAKAMEGA 3RD DEFENDANT

SABEMA INTERNATIONAL LIMITED 4TH DEFENDANT

AND

PHANICE BETTY EVER ASHIOYA INTERESTED PARTY

JUDGMENT

1. Litigation in this matter started through plaint dated January 30, 2017. The plaint went through several amendments resting with further amended plaint dated August 6, 2019. The plaintiff averred in the further amended plaint that he is the administrator of the estate of Nellie Wanjala Opembe (deceased) who is the registered proprietor of the parcel of land known as Kisa/Wambulishe/2024 (the suit property) and that on January 10, 2017 the third defendant entered into a contract with the fourth defendant for the proposed construction of Weliboyi Junction - Khwisero Banana and Potato Project - Khwisero Girls - Andere Road to bituminous standard and that on or about January 17, 2017, the defendants jointly or severally started to extract murram from the suit property without the plaintiff's knowledge or consent. The plaintiff further averred that in furtherance of their trespass, the defendants and the interested party damaged the land and the ecosystem.
2. The plaintiff therefore prayed for judgement against the defendants and interested party jointly for:



- a. An order of a temporary injunction restraining the defendants, the interested party, their agents and servants from entering, extracting, quarrying, carting and/ or moving murram from the Land Reference Kisa/Wambulishe/2024.
 - b. An order of permanent injunction restraining the defendants, the interested party, their agents and servants from entering, extracting, quarrying, carting and/ or moving murram from the Land Reference Kisa/Wambulishe/2024.
 - c. Compensation for the damages and rehabilitation to Land Reference Kisa/Wambulishe/2024.
 - d. The value of murram excavated from Land Reference Kisa/Wambulishe/2024 and the cost of rehabilitation (to be ascertained by a Quantity Surveyor's Report) now quantified at Kenya Shillings Sixty Million Three Hundred and Ninety five Thousand Four Hundred and Eighty Seven. (Kshs. 60.395,487=),
 - e. The cost of the Quantity Surveyor invoiced at Kshs. 215.230/-
 - f. Cost of this suit together with interest thereon.
 - g. Any other relief that may be just in the circumstances of this suit.
3. The first defendant filed a defence on February 14, 2017 and denied ever signing an agreement with the second defendant for extraction of murram on the suit property. He prayed that the suit be dismissed with costs.
 4. The second defendant filed its defence on February 13, 2017 and denied ever being awarded any contract for gravelling and murraming the road and put the plaintiff to strict proof. It also prayed that the suit be dismissed with costs.
 5. The third defendant filed statement of amended defence on April 20, 2017 and denied having awarded any contract or tender to the second and fourth defendants and further pleaded in the alternative but without prejudice that it awarded a contract and or tender to the fourth defendant but never contracted on where and how materials for the contract were to be obtained. The third defendant further averred the suit against it does not disclose any cause of action, is a misjoinder and bad in law. It therefore prayed that the suit be dismissed.
 6. The fourth defendant filed its defence on May 3, 2017. It denied the averments in the plaint and further stated that it extracted murram from parcel of land known as Kisa/Wambulishe/2023 which is separate from the suit property herein. It therefore prayed that this suit be dismissed.
 7. The interested party filed her statement of defence on August 20, 2019 and stated that she is neither the registered proprietor of the suit property nor was she ever involved in any agreement or transaction with respect to the suit property. She averred that she was wrongly joined to the suit and therefore prayed that the suit against her be dismissed with costs.
 8. At the hearing, Richard Angulu testified as PW1. He stated that he was a resident of Ematunda village in Khwisero Sub-County and the ambassador of Kenya to Spain. That he holds letters of administration ad litem in respect of the estate of Nellie Wanjala Opembe (deceased) who was his mother and who was the registered proprietor of the parcel of land known as Kisa/Wambulishe/2024 (the suit property). That on January 10, 2017, the third defendant entered into a contract with the fourth defendant for the proposed construction of the road described in the plaint and that on January 17, 2017, the fourth defendant purchased murram from the first defendant who directed them to excavate it and cart it away from the suit property. That the fourth defendant hired excavators and



lorries from the second defendant who entered the suit property without verifying its ownership, cleared the topsoil and excavated murram without his consent and despite his protest. That they destroyed agricultural produce and trees, removed murram to a depth 20 metres and left the site without backfilling. That he obtained a valuation from a quantity surveyor who put the value of the murram extracted from the suit property and the cost of rehabilitating the land at KShs 60,395,587. He added that the quantity surveyor charged him KShs 215,230 and that the suit property remains registered in his deceased mother's name. He urged the court to grant him compensation.

9. PW1 further testified that his deceased mother acquired the suit property following a judgment in Butere Land Disputes Tribunal Claim Number 113 of 2000 which led to Kakamega High Court Misc. Application 54 of 2013 wherein the High Court cancelled the title, but the decision of the High Court was later reversed by the Court of Appeal after which PW1 filed this case. He added that there is a dispute between him and the first defendant over ownership of the suit property and that he neither knows the date of the extraction nor the registration numbers of the lorries that were involved since he was outside the country. That he does he have any photographs showing the vehicles on the land.
10. Geoffrey Onyiko Edasi, an Assistant Land Surveyor attached to the Kakamega District Surveyor's office, testified as PW2. He stated that the plaintiff requested his office to visit the suit property to ascertain if extraction was on the suit property. That he visited the suit property on January 27, 2017 and prepared report dated January 31, 2017 with a sketch which shows that excavation was within the suit property. That excavation was ongoing as he was on site. That the suit property is a subdivision of plot 1549.
11. Next on the stand was Brian Simiyu Barasa, a Quantity Surveyor who testified as PW3. He stated that the plaintiff instructed him to determine the extent of excavation on the suit property and what it would cost to make the land usable again. That he prepared reports dated October 3, 2017, October 19, 2018, and July 31, 2019 wherein he put the total cost at KShs 60,395,487. That the area excavated was around 140 metres by 67 metres and the average depth was 3 metres.
12. The plaintiff's case was then closed.
13. For the defence case, Joseph Saya Oyale testified as DW1. He stated that the deceased was never a bona fide proprietor of the suit property and that the deceased obtained it in an unlawful manner by using the local land dispute tribunal to secure an award in her favour which helped her subdivide the original title Kisa/Wambulisho/1549 in 2013 to create the suit property in her name and Kisa/Wambulisho/2023 against the registered proprietor Gabriel Eshikumo Aura (deceased). That the administration of the estate of the late Gabriel Eshikumo Aura was concluded in Succession Cause No. 1105 of 2012 and a certificate of confirmation of grant issued on April 28, 2016. That the estate including title Kisa/Wambulisho/1549 was distributed and Nellie Wanjala Opembe was not listed as one of the beneficiaries. DW1 further testified that the owner of the suit property who is the interested party herein is his wife. That the interested party had an agreement with the fourth defendant and that the fourth defendant decided the spot on the suit property where to excavate.
14. Divyesh Kotecha Ramesh testified next as DW2. He stated that he is a director of the second defendant and that the second defendant never had any transactions with either the plaintiff or the other defendants herein regarding construction, gravelling or murramming of the road in question. That the second defendant did not enter, trespass, extract or carry murram on the suit property. He added that the second defendant hires out its machines and vehicles.
15. Joseph Agingu Sweta testified as DW3. He stated that he works with County Government of Kakamega (the third defendant) as Chief Officer in charge of Roads and Energy. That the third defendant entered into a contract with the fourth defendant for the construction of the road and that



- the road was contracted to completion. That the third defendant did not give the fourth defendant any directions on where to obtain any materials and that the third defendant does not know where the fourth defendant got the murrum from.
16. Daniel Ombimo Malala testified as DW4 and stated that he works with the fourth defendant as Operations Manager. That the fourth defendant entered into an agreement with Phanice B. Ever Ashioya (the interested party) for extraction of murrum from land parcel No. Kisa/Wambulishe/2023 and that at no time did the fourth defendant trespass onto or excavate on the suit property. That the interested party showed him where to extract the murrum from and that he believed the interested party when she told him that the area of extraction was Kisa/Wambulishe/2023. That extraction went on for 8 (eight) months and that nobody stopped them during the period. That complaints emerged later after they had completed the contract. He added that the fourth defendant was awarded the contract by the third defendant and that the fourth defendant in turn hired transport machines from the second defendant. That if any claim arose, the fourth defendant would be responsible and not the second defendant.
 17. Defence case was then closed.
 18. During interested party's case, Phanice B. Ever Ashioya, the interested party, testified as IPW1. She stated that one Fibi Mutisa Aura approached her to purchase a portion of land known as Kisa/Wambulishe/1549 measuring 0.7 hectares and that she paid the agreed consideration and took over possession. That she was included as a beneficiary of the estate of Gabriel Eshikumo Aura in Succession Cause No. 1105 of 2012 and that the plaintiff has never occupied or resided on the suit property. That the plaintiff's deceased mother tried to unlawfully subdivide Kisa/Wambulishe/1549 and that the same was cancelled by the court and the parcel ordered to revert to the deceased Gabriel Eshikumo Aura. She added that Fibi Mutisa Aura is the widow of Gabriel Eshikumo Aura and that she (the interested party) entered into the contract for extraction of murrum with the fourth defendant. That as at the time of entering into the contract and as at the time of her testimony, she only had the certificate of confirmation of grant but no title in her name.
 19. Benard Ekonya Eshikamo testified as IPW2. He stated that he is the son of the late Gabriel Eshikumo Aura who died on December 22, 1992 and that his mother Fibi Musita Aura is the administrator of the late Gabriel Eshikumo Aura's estate. That land parcel Kisa/Wambulishe/1549 was part of the estate of the late Gabriel Eshikumo Aura left and that the plaintiff's late mother tried to fraudulently transfer a portion of the parcel to herself, but the court cancelled the subdivision and reverted the land to the late Gabriel Eshikumo Aura. That his mother Fibi Musita sold a portion of Kisa/Wambulishe/1549 measuring 0.7 hectares to the interested party and that the interested party is the owner of the portion. He added that he was aware that the interested party entered into the murrum harvesting agreement.
 20. The interested party's case was then closed. Parties thereafter filed and exchanged written submissions.
 21. The plaintiff filed his submissions on April 11, 2022 and argued that his mother obtained title to the suit property through a court process and that he has a good title to the suit property. That the first, third and fourth defendants and the interested party dealt with the suit property without his consent and that he is consequently entitled to reliefs sought. Reliance was placed on the case of [*Nakuru Industries Ltd v S.S Mehta & Sons*](#) [2016] eKLR. The plaintiff therefore urged the court to grant him judgment as prayed.
 22. The first defendant and the interested party jointly filed their submissions on June 6, 2022 and argued that the plaintiff is not entitled to a permanent injunction since he has failed to establish any proprietary right over the suit property. They relied on [*Kenya Power Lightning Company Ltd -vs- Sherriff Molana Habib*](#) [2018] eKLR. That the plaintiff only produced a title deed in his mother's name and a limited



grant naming him as a legal administrator and that from the court decisions produced in evidence, it is evident that there was a dispute on ownership between the plaintiff's mother and Fibi Aura and that High Court cancelled the plaintiff's mother's title on December 16, 2014. That the subsequent judgment of the Court of Appeal neither determined ownership of the suit property nor conferred its proprietorship upon the plaintiff's mother.

23. The first defendant and the interested party further submitted that the plaintiff never took any steps to enforce and implement the decision of the Court of Appeal and he is estopped from claiming ownership rights in respect of the suit property.
24. On the question of whether the plaintiff is entitled to compensation, the first defendant and the interested party argued that one can only be compensated upon proof of a right which has been infringed and that the plaintiff has not proven that he is the absolute registered owner of the suit property. In conclusion, they argued that the plaintiff has failed to prove his case to the required standard, and they therefore urged the court to dismiss it with costs.
25. The second defendant argued in its submissions that the plaintiff failed to discharge the burden of proof since he did not tender any evidence to prove his allegations against the second defendant. It therefore urged the court to dismiss the case against it with costs.
26. On its part, the third defendant argued that the plaintiff's suit against it is misplaced, and that no cause of action was established against it. It urged that the suit be dismissed.
27. The fourth defendant that the plaintiff failed to establish that it trespassed onto the suit property. It contended that it entered into an agreement for extraction of murrum from Kisa/Wambulishe/2023 which was at the time designated as Kisa/Wambulishe/1549 and that prior to entering into the contract, it conducted due diligence which established that the land belonged to the interested party. It argued, in conclusion, that the plaintiff wrongly sued it.
28. I have considered the parties' pleadings, evidence, and submissions. The issue that arises for consideration is whether the plaintiff is entitled to the reliefs sought.
29. The plaintiff's case is that he is the administrator of the estate of Nellie Wanjala Opembe (deceased) and that the deceased remains the registered proprietor of suit property. He produced in evidence a copy of a limited grant ad litem issued to him on January 26, 2017. In his own words, he does not yet have a full grant. He also produced a copy of a title deed in respect of the suit property which shows that Nellie Wanjala Opembe became the registered proprietor thereof on July 11, 2013 and that title deed was issued to her on July 16, 2013. The plaintiff did not produce a certificate of search as of January 17, 2017, which is the date he claims the defendants started extracting murrum from the suit property.
30. Proof of ownership of the suit property in this case is fundamental since the plaintiff is seeking to assert rights of a registered proprietor and to recover compensation for what he terms unauthorised extraction of murrum. According to him, the defendants could only extract validly from the suit property if they had authority from him.
31. There is no dispute that the suit property is a subdivision of Kisa/Wambulishe/1549. It is equally not in dispute that Nellie Wanjala Opembe became the registered proprietor of the suit property following award of the Butere Land Disputes Tribunal in Claim No. 113 of 2000 and which was adopted in Kakamega Chief Magistrate's Court Miscellaneous Award No. 7 of 2001 leading to subdivision of the parcel of land known as Kisa/Wambulishe/1549 and registration of the suit property in Nellie Wanjala Opembe's name. The litigation continued. The adoption of the tribunal's award and the subdivisions that resulted were nullified on December 16, 2014 in Kakamega High Court



Miscellaneous Application No. 54 of 2013. In turn, the decision of the High Court was set aside by the Court of Appeal on July 29, 2016 in Kisumu Civil Appeal No. 83 of 2015.

32. Amidst all the ragging dispute as to ownership of Kisa/Wambulishe/1549 and the resulting suit property, the interested party testified that she purchased the suit property and that she was included as a beneficiary of the estate of Gabriel Eshikumo Aura who was the registered proprietor of Kisa/Wambulishe/1549 in Kakamega High Court Succession Cause No. 1105 of 2012 wherein the grant was confirmed with her as a beneficiary of a portion of Kisa/Wambulishe/1549. I note that among the documents that the plaintiff included in his bundle is a certificate of confirmation of grant issued on April 28, 2016 in the said cause. The interested party is listed therein as being entitled to 0.7 hectares of Kisa/Wambulishe/1549.
33. The plaintiff has not demonstrated that the dispute on ownership of the suit property has been conclusively determined. He cannot, in those circumstances, claim ownership of the suit property. Even within the estate of Nellie Wanjala Opembe, the plaintiff holds only a limited grant ad litem. He cannot purport to enforce proprietorship rights which he does not have. The plaintiff is in the circumstances not entitled to the reliefs sought. The plaintiff, the first defendant and the interested party are well aware of the background of the dispute regarding the process of subdivision of Kisa/Wambulishe/1549 and Nellie Wanjala Opembe's claim to Kisa/Wambulishe/2024, the suit property. In view of the outcome of Kisumu Civil Appeal No. 83 of 2015, they would do well to resolve the underlying cause of the dispute: whether subdivision of Kisa/Wambulishe/1549 and creation of Kisa/Wambulishe/2024 was lawfully done. Skirting around the issue through proceedings such as this case will not help.
34. In the result, I dismiss the plaintiff's case. Considering the circumstances of the dispute, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 8TH DAY OF NOVEMBER, 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Mango holding brief for Mr Mukoya for the plaintiff

Mr Iddi holding brief for Ms Shijenje for the first defendant and interested party

Ms Masakhwe for the second defendant

No appearance for the third defendant

Mr Iddi for the fourth defendant

Court Assistant: E. Juma

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