

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 15 of 2021

ALFRED WANAMBISI BUTASI.....1ST

PLAINTIFF

ESTHER K. BUTASI.....2ND

PLAINTIFF

VERSUS

LUCY NJUGUNA1ST

DEFENDANT

JUSTUS KETON2ND

DEFENDANT

JUDGEMENT

1. This suit was filed at the lower court through a Plaint dated 10th April 2008 and later transferred to this court. The Plaintiffs in the **Amended Plaint** dated 7th November 2022, claim that they are the registered owners of properties LR No. Kajiado/Kisaju/1974 and Kajiado/Kisaju/1975. It is their case that sometime

between the year 1999 and 2000, they approached the late Keton Ole Koponi Parsena (the 2nd Defendant's father) to sell them land. The land was surveyed, mutations done and they were then issued with title deeds for parcels Kajiado/Kisaju/1974 and Kajiado/Kisaju/1975.

2. On 14th November 2008, the lower court ordered a resurvey of the parcels and when this was done, it was recommended that the parcels do revert to their original positions as per the 1997 survey. This recommendation would render the 1st plaintiff and the 1st defendant landless.

3. It is their case that sometimes in March 2020, the 1st defendant unlawfully evicted the 1st plaintiff from Kajiado/Kisaju/1975, demolished his house and occasioning him to seek alternative shelter. They therefore sought the following reliefs;

a. An order that the Plaintiffs are the proprietors of parcels Kajiado/Kisaju/1974 and Kajiado/Kisaju/1975.

b. Damages for unlawful eviction.

- c. A refund of the rent paid to date calculated at Kshs. 3,500 per month.**
- d. Costs of the suit.**
- e. Interest at court rates until payment in full.**
- f. Any other relief that the Hon. Court deems fit and just to grant.**

4. The 1st Defendant in her Statement of defence and counterclaim dated 20th November 2008 contested this claim and sought that the suit be dismissed on grounds that the Plaintiffs misled the Land Registrar into issuing them with title deeds and registering the mutation which was contrary to the actual position on the ground. In her counterclaim she sought the following reliefs;

- a. Eviction and vacant possession of land parcel No. Kajiado/Kisaju/3544.**
- b. Mesne profits found to be due dating from 30th November 2003 or alternatively from 30th February 2004 until payment in full.**
- c. Costs.**
- d. Any other relief that the Hon. Court will deem fit to grant.**

5. The 2nd Defendant neither entered appearance nor filed a defence.
6. By a notice of motion dated 28th June 2023, the 2nd Plaintiff (Esther K. Butasi) sought that she be struck out as the 2nd Plaintiff in this suit on the grounds that she had no claim against the 1st Defendant herein.

Evidence of the Plaintiff

7. **PW1, Alfred Wanambisi Butasi**, adopted his witness statement as his evidence in chief and produced his bundle of documents as P. Exhibits 1 to 18 respectively. He testified that his structures were demolished without notice and when he reported the matter to the police, he got no assistance.
8. **On cross examination** he stated that he purchased his parcel of land from one Keton Ole Koponi Parseina in the year 2000. He purchased one acre and his wife had earlier purchased Kajiado/Kisaju/ 1620 from the said Keton Ole Koponi Parseina. He however claims that after the purchase, they were informed that parcel 1620 was two acres only for them to later discover that it was 0.043

hectares. A resurvey was done and new beacons fixed. It was his testimony that he purchased a portion of Kajiado/Kisaju/1618 and when the resurvey was done, one acre was excised from parcel 1618. It is his case that, parcel 1619 belonging to the 1st defendant, remained the same. He did not know the 1st defendant at this point and only got to know her in the year 2004. He further stated that part of parcel 1618 was purchased by one Sichangi. He bought four (4) acres though he took possession of five (5) acres with the extra acre from Kajiado/Kisaju/1619.

9. He further stated that Kajiado/Kisaju/ 1620 was later subdivided to parcels 1974 and 1975 respectively. The same were registered in the name of the 2nd Plaintiff. She transferred Kajiado/Kisaju/ 1975 to his name.

10. **On re-examination**, he stated that his wife was not prosecuting the case since she was supporting the 1st defendant's case. It was his testimony that he never moved to parcel 1618 because he wanted a parcel adjacent to parcel 1620. He stated that at the time of purchase they knew parcel 1620 was two (2) acres only for them to discover that it was one acre. They sought

advice from the land surveyor who advised them to ask the owner to carry out a resurvey. They later sought consent from the land control Board for subdivision of Kajiado/Kisaju/1620 into two parcels; 1974 and 1975 respectively.

Evidence of the Defendants

11. **DW1 Lucy Njuguna** adopted her witness statement as her evidence in chief. She produced her bundle of documents as D. Exhibit 1 to 19 respectively. She stated that Shelter Women of Kenya group approached the owner with the intention of buying land from him. As per the documents shown to them, a subdivision had been undertaken in the year 1997 resulting into parcels; Kajiado/Kisaju/ 1618 measuring 5 acres, Kajiado/Kisaju/ 1619 measuring 5 acres, and Kajiado/Kisaju/ 1620 measuring 1 acre. The women group initially wanted to purchase ten (10) acres but due to limited funds, they purchased five (5) acres which is Kajiado/Kisaju/ 1619. It was her testimony that she had contributed about three quarter of the purchase price but the group was unable to raise the money to refund her. So they transferred the

land to her. This was done in 2000 and she took possession. In 2004 she tried to fence the land only to discover that the beacons had been removed. They reported the matter to the Land Registrar who asked parties to adhere to the mutation undertaken in 1997. She then later got a Court order which allowed her to evict the 1st plaintiff from his parcel. She states that she was not aware that there was an order issued to resurvey the plots and if there was any she did not consent to it.

12. **On cross examination** she stated that she had a valid transfer from Shelter Women Group of Kenya to herself. It was her testimony that in 2002, the land on the ground measured five (5) acres but in 2004 she discovered that beacons had been tampered with. The 1st Plaintiff prevented her from fencing. She stated that when Shelter Women Group of Kenya purchased the land, it was registered in the name of Keton Ole Koponi Parsena. The said Keton had passed on by the time it was transferred to her.

13. **On re-examination** she stated that there was a consent from the Land Control Board to transfer the land

from Shelter Women Group of Kenya to herself and the officials were present. She also stated, she was not aware that the 1st Plaintiff had taken possession of a portion of the land in the year 2002 because the land was still vacant.

14. **DW2 Esther Kemuma** adopted her witness statement as her evidence in chief. She stated that the 1st plaintiff was her estranged husband. She stated that she was not aware of any amendment to Kajiado/Kisaju/ 1620. She did not transfer any portion of it to him.
15. **On cross examination** she stated that she did not participate in resurvey of the property, she was not issued with two title deeds and that she did not attend a land control board meeting to subdivide her parcel Kajiado/Kisaju/ 1620. She reiterated that she was still in possession of title deed for Kajiado/Kisaju/ 1620.
16. **On re-examination** she stated that a re-survey of the land was carried out through a Court order and it was recommended that the land reverts to its original state. She also stated that when she undertook a search she

discovered that Kajiado/Kisaju/1974 had been registered in her name.

17. At the close of the oral testimonies, parties filed their final written submissions.

Submissions of the Plaintiff

18. Counsel for the Plaintiffs submitted that the 1st Plaintiff was the legal and registered owner of Kajiado/Kisaju/1975 and had a title as proof. His title was therefore protected by dint of Section 24, 25 and 26 of the Land Registration Act and as held in **Margaret Njeri Wachira vs Eliud Waweru Njenga [2018] eKLR**. The 1st Defendant thus trespassed on the said land and unlawfully evicted the Plaintiff without notice contrary to Section 152E of the Land Act and Regulation 65 of the Land Registration (General) Regulations. Reference was made to the following cases on trespass and eviction: **Rhoda S. kiilu vs Jiangxi Water and Hydropower Construction Kenya Ltd; Ringera vs Muhindi [2022] KEELC 2481 (KLR)** and **Hasmukh Raichand Shah & another v Piave Quarry Limited [2022] eKLR**.

19. Therefore, the Plaintiff claimed that the eviction was unlawful and he was entitled to the orders sought.

Submissions of the 1st Defendant

20. On which land belongs to the 1st plaintiff, it was submitted that it was his testimony that his wife had purchased parcel 1620 and he also intended to purchase a portion of parcel 1618. However parcel 1619 stood between the two parcels and he wanted to have a parcel adjacent to parcel 1620. So a resurvey was done and he purported to have been given a portion of parcel 1619. The 1st defendant protested this and when court ordered for a resurvey, it was recommended that everyone goes back to their original positions. It is therefore not clear which portion the 1st plaintiff owns because the boundary dispute was determined by the Land registrar as mandated under **Section 18 of the Land Registration Act** and held in **George Kamau Macharia v Dexka Limited [2019] eKLR.**

21. Counsel also pointed out that the surveyor's report showed that the boundaries had been moved and the 1st plaintiff encroached onto the 1st defendant's parcel and was entitled to damages for trespass and mesne profits at Kshs. 3,500 per month.

22. As such, the court should grant the 1st defendant's prayers in the counterclaim together with costs of the suit and interest.

Analysis and Determination

23. I have considered the suit before this court, evidence, submissions, statutes and legal authorities and find that the issues for determination are:

- i. Whether the 1st Plaintiff has proved that he is the rightful owner of parcel LR No. Kajiado/Kisaju/1975;***
- ii. Whether the 1st plaintiff is entitled to the prayers sought;***
- iii. Whether the 1st defendant has proved her case and is entitled to the prayers sought in the counter claim***

iv. Who should bear costs of the suit?

24. It is not in contention that parties in this suit purchased some parcels of land from the late Keton Ole Kopeni Parsena. It is also not in dispute that the 1st Plaintiff purchased 0.43 hectares of parcel Kajiado/Kisaju/1618 on 2nd August 2000 as per the sale agreement produced as exhibit in this case. It reads that the purchaser is willing to purchase 0.43 hectares of the aforesaid plot. Clause 3 provides that; “the said plot which is 2.02Ha shall be subdivided into two plots of 0.43Ha and 1.59Ha and the purchaser shall get 0.43ha bordering plot number Kajiado/Kisaju/1620 (Approximately 0.43 Ha). He claimed that by this time, his wife (the 2nd Plaintiff) had already purchased Kajiado/Kisaju/1620. The sale agreement dated 5th November 1999 between the 2nd Plaintiff and Keton Ole Kopeni Parsena was also produced as an exhibit in this case. It stated that she purchased Kajiado/Kisaju/1620 which measured approximately one acre.”

25. It is the Plaintiffs’ case that following these two agreements and noting that the actual ground acreage shown was different, the said Keton Ole Kopeni Parsena

agreed to carry out a re-survey of the plots. The re-survey was done in the year 2000 and the Plaintiffs plots were then joined into one parcel Kajiado/Kisaju/1620 measuring 0.86 hectares which was then subdivided into Kajiado/Kisaju/1974 (registered in the 2nd Plaintiff's name) and 1975 (registered in the 1st Plaintiff's name) measuring 0.43 hectares each.

26. There is a letter dated 30th August 2000 from the District Surveyor addressed to the District Land Registrar confirming the re-survey of parcels; Kajiado/Kisaju/1617, 1618, 1619 and 1620. They were surprised when the 1st Defendant wanted to fence the property in 2004.

27. From the court record, there is a mutation form dated 14th January 1997. The mutation form shows that there was once property Kajiado/Kisaju/1564 measuring approximately 12.8 hectares registered to Keton Ole Koponi Parsena which was subdivided into four parcels: 1617 measuring 8.57 hectares; 1618 measuring 2.02 hectares; 1619 measuring 2.02 hectares and 1620 measuring 0.43 hectares.

28. It is clear that the Plaintiff (Alfred) bought 0.43 ha out of Kajiado/ Kisaju/ 1618 vide the sale agreement dated 2nd August 2000. While the suit was pending at the lower court, there was a consent dated 23rd April 2014 which allowed a resurveying of the land parcels. The plaintiffs and the 1st Defendant (Lucy Njuguna) were to bear the survey fees equally. The 1st Defendant cannot therefore feign ignorance of this resurvey.

29. The 1st Defendant stated that Kajiado/Kisaju/1619 was transferred to her by Shelter Women of Kenya Group. She produced the transfer dated 2002, as an exhibit in this case.

No sale agreement between the said Shelter Women Group of Kenya and Keton Ole Koponi Parsena has been produced in this court. The 1st Defendant just stated that they bought five acres from the Late Keton. No other evidence has been adduced to support this claim. As things stands, it is not clear how much land the Women Group bought from the late Keton. No transfer from the said seller Keton Ole Ole Koponi Parsena to the said Women Group was produced as exhibit. It is not clear if

there existed a title deed in the name of Shelter Women Group of Kenya.

30. Given this scenario it cannot be said that the plaintiff has encroached onto Kajiado/Kisaju/1619 when it is not clear if indeed the same measures five (5) acres.

Where did the plaintiff's portion go? He bought a portion of Kajiado/Kisaju/1618.

31. In my view, the acreage of Kajiado/Kisaju/ 1619 was not defined from the beginning as there are no documents to confirm. It should also be noted that the 1st Defendant has sub-divided Kajiado/Kisaju 1619 into Kajiado/Kisaju/ 3544 and 3545 respectively. The question still remains, what is the respective acreage?

32. I find that the trial court was wrong in adopting the Survey Report dated 23rd June 2024, seeking that the first survey be reverted to. This was done without taking into consideration the titles Kajiado/Kisaju/ 1974 and 1975 respectively in the names of the initial plaintiffs.

33. I find the evidence of DW2, Esther Kemuma, to be of no probative value. She claims to own Kajiado/Kisaju/1620 which does not exist as the same was closed on sub-

division to give rise to Kajiado/Kisaju/ 1974 and 1975. I believe she just stated this to defeat the plaintiff's claim with whom they are now separated.

34. As things stand, Titles No. Kajiado/Kisaju/ 1974 and 1975 have not been cancelled. It is the evidence of DW1 that she found the plaintiff on the land. He was in occupation until the eviction in the year 2020.

35. I find the 1st Defendant failed to demonstrate that the Plaintiff has encroached on her parcel. The counter-claim fails and the same is dismissed.

36. It is the Plaintiff's case that he was unlawfully evicted from his land and his house demolished. He was not given any notice; assuming that he had even encroached on the 1st Defendant's parcel. I find that he has suffered loss and he is entitled to damages.

I award Kshs.500,000/= which I think is reasonable.

In the case of **Hasmukh Raichand Shah & another Vs. Piave Quarry Limited (2022) eKLR** the court stated that **Section 152E of the Land Laws (Amendment) Act No.28** clearly provides that the notice to vacate must

be issued not less than three months before the intended date of eviction.

37. The Plaintiff claims a refund of Kshs.3500/= being rent. This is a special damage which ought to be proved. I find that it was not proved and I decline to award any.

38. Accordingly Judgement is entered in favour of the Plaintiff as against the 1st Defendant on as follows;

a) That a declaration is hereby issued that the plaintiff is the owner of Kajiado/Kisaju/1975.

b) General damages of Kshs.500,000/=

c) That costs be in the suit and interest.

Dated, Signed and Delivered virtually at Kajiado this 23rd October 2025.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

N/A for the Plaintiff.

Ms. Munanie for Ms. Namiinda for the 1st Defendant.

N/A for the 2nd Defendant.

Court Assistant – Peter.