

REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KAKAMEGA

ELC CASE NO.54 OF 2015

MARY NAMBUYE SIAGORA.....
.....PLAINTIFF

VERSUS

**CAROLYNE KHAVAKALI MUHATI (Sued
As the administrator of the estate of
ANDREW MUKHUTSI (Deceased).....1ST
DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL...2ND
DEFENDANT**

**COUNTY GOVERNMENT OF KAKAMEGA.....3RD
DEFENDANT**

JUDGMENT

Introduction

1. Julieta Khasandi Shiakora (hereinafter referred to as Juliet) sued Andrew Mukhutsi Muhati (hereinafter referred to as Andrew) vide a plaint dated 6th March 2015. Before the matter was determined, Julieta and Andrew died and were substituted by Mary Nambuye Siagora and Carlyne Khavakali Muhati respectively. Hence, vide an amended

plaint dated 27th March 2023, the plaintiff in this matter sought against the 1st defendant the following orders;

a) An order of evicting the defendant, his agents, servants, surrogates from the suit property known as Plot Number 2 Ivihiga Market

b) A permanent injunction restraining the defendant, his agents, servant, surrogates and assignees from in any way howsoever under any pretext or guise from interfering with, encroaching and or trespassing into the plaintiff's parcel of land known as plot Number 2 Ivihiga Market

c) Mesne profits

d) Costs of this suit.

2. The plaintiff averred that she was the proprietor of the parcel of land comprised in title known as Plot Number 2 Ivihiga Market together with all developments thereon, which property had initially been owned by her late husband Gabriel and upon his demise, she became owner and took possession of the same. She stated that at all material times, the defendant was her tenant on the suit property.

3. Further that the defendant defaulted in rent payment which led her to file a suit in the lower court for eviction, which was allowed but on appeal it was held that she ought to have filed her claim before the Business Premises Rent Tribunal. That on filing a reference before the Tribunal, the defendant in a surprise move claimed ownership of the suit property claiming to have purchased the same in 1993, which claim he has not substantiated. That the defendant had been unlawfully receiving rent in respect of the suit property.

4. The defendant filed application dated 12th March 2018 seeking for orders that the Attorney General and the County Government of Kakamega be joined to these proceedings. That application was allowed as prayed by consent of the parties on 29th May 2018. In that regard, the Attorney General described himself as the 1st interested party and filed his defence dated 18th December 2018, while the County Government of Kakamega defined itself as the 3rd defendant and also filed its defence dated 9th April 2018.

5. In a defence dated 12th May 2015, the defendant denied the plaintiff's claim and claimed to have bought the suit property in 1993, taken possession of the same and extensively developed it. He argued that the plaintiff had not been in possession of the suit property and that therefore she was not entitled to the same.
6. The Attorney General filed his statement of defence dated 18th December 2018 denying the plaintiffs claim. He maintained that he was a stranger to the plaintiff's allegations and the pleadings did not disclose any cause of action against him. He sought dismissal of the plaintiff's suit.
7. The County Government of Kakamega filed defence dated 9th April 2018. It denied the plaintiff's claim and sought dismissal of the same.
8. The matter proceeded by way of *viva voce* evidence. The plaintiff presented one witness, the 1st defendant presented three witnesses, the 2nd defendant did not present any witness while the 3rd defendant presented two witnesses.

Plaintiff's evidence

9. PW1 was Juliet Khasandi Shakara. She adopted her witness statement dated 6th March 2015 as her evidence in chief. Her testimony was that the suit property was initially owned by her late husband Mr. Gabriel Shakora who died in 1987, and that upon his demise, she was registered as owner thereof. That the defendant makes a claim of ownership. That in proceedings before the Business Premises Rent Tribunal, the Town Clerk Kakamega testified that the suit property belonged to her.

10. She testified that the defendant continues interfering with the suit property, even receiving rental income therefrom. She produced documents attached on the list dated 6th March 2015. She produced change of ownership certificate, rates payment receipts, certified proceedings before the Business Premises Rent Tribunal, pleadings, Judgment and ruling, permit, reference and order of the Business Premises Rent Tribunal.

11. On cross examination, she stated that Andrew entered the suit property in 1993 as a tenant and that the agreed rent was Kshs. 1, 200/= per a month. That the agreement was oral. That the premises consisted of two rooms one being a

bar and another one a shop. That he also had pool table in one of the shops. That he sublet the premises to third parties. That he began constructing on the suit property and she moved to court to stop him. She stated that her husband never sold the suit property to one Joseph Gitau and that the latter never sold the plot to Andrew.

12. That they had earlier had a case before the Business Premises Rent Tribunal in 2012. That Andrew never paid any rates for the suit property. That they had a dispute with Andrew before the County Council offices. That she had fully paid rates up to 2022. That before Andrew came to the suit premises, there had been another tenant called Jackson. That Joseph had been her tenant for about a year before acquiring his own premises. That when Andrew Mukhatsi entered the suit property, her husband was already dead. That they had disputes within months of Andrew's entry on the suit property because he was not paying rent. That she had no dispute with the county Government of Kakamega. That marked the close of the plaintiff's case.

Defendant's case

13. DW1 was Carolyne Khavakali Mulati. She stated that she was born in 1972 and was Andrew's daughter. She adopted her witness statement dated 12th March 2018 as her evidence in chief and produced documents attached to her list of documents of even date. She produced sale agreement between Joseph Gitau Kamau and Andrew, agreement for construction between Andrew and one Jacob Shilaho dated 2nd August 1993, permit for change of ownership between Joseph Gitau Kamau and Andrew, receipt dated 1st March 1995, and a bill for search fees dated 31st August 2012.

14. Her testimony was that the suit property had been sold by Gabriel to Joseph Gitau Kamau and that the latter sold it to Andrew at Kshs 90, 000/= on 17th May 1993. That when Andrew purchased the premises, it had a bar and hotel and that he further developed the same where he still operates bar and hotel business and that he also has tenants on the premises. That one of his tenants operated a school. That he has been in occupation of the suit property and paid rates for the same. That together with Joseph Gitau they

appeared before Kakamega County Council where the later executed a transfer.

15. She also stated that she continued paying rates. That for all this time the plaintiff remained away until 2012 when she lodged a claim against Andrew at the Business Premises Rent Tribunal seeking eviction. That Andrew had never been Julietta's tenant. That Andrew learned that as he was paying rates at the County Government of Kakamega, the plaintiff was also paying the same and that the 3rd defendant received rates from both of them and failed to effect a transfer in favour of the defendant.

16. On cross examination, she stated that she did not witness her father purchasing the suit property and that she has never seen any agreement between Joseph Gitau and Gabriel. Further that she had no evidence to show that Joseph Gitau was owner of the suit property at the time of the sale agreement with Andrew.

17. She maintained that at the time her father was purchasing the suit property, Gabriel was already dead having died in the 1980s. That she does not know the date

Joseph Gitau transferred the suit property to Andrew and that being an administrator of the deceased, she paid rates until 2014 when she stopped upon Julietta filing this suit.

18. PW2 was Nicholas Kisundi who stated that Andrew had been his landlord since 2009. On cross examination, he stated that he paid rent to Andrew's widow. That he had no evidence of rent payment as there is no written lease or receipts. That he does not know Julietta.

19. DW3 was Jacob Shilaho. He stated that he was a stone mason and vide agreement dated 2nd August 1993, he entered into an agreement with Andrew to construct a house on Andrew's plot. On cross examination, he stated that at the time he agreed to construct on the suit property, the same already had other buildings. That he constructed an extension which were a bedroom and a store. That marked the close of the 1st defendant's case.

20. The Attorney General did not present any witness but closed its case.

The County Government of Kakamega's case

21. DW4 was James Otsialo Misango, a surveyor working at the County Government of Kakamega. He adopted his witness statement dated 19th February 2020 as his evidence in chief and produced documents attached on a list dated 17th June 2020. He produced letters dated 24th February 2020 and 3rd December 2019 from the 3rd defendant's senior legal officer, his letter dated 19th February 2020; the market plot rent register, a letter dated 27th August 2002 from the Clerk to Kakamega County Council, permit for change of ownership, receipts from the 3rd defendant issued to Julieta and demand notice to Julieta for 2020. His testimony was that Julietta was the owner of the suit property which was transferred from her husband. That the 3rd defendant summoned Andrew who failed to respond to summons.

22. On cross examination, he stated that the original allottee was Gabriel. He denied being aware of D exhibit 12 and stated that he was not aware that Andrew bought the suit property. He maintained that the records held by the 3rd defendant and D exhibit 15 constitute proof of ownership. That the suit property has had many cases and that he has

never visited the suit property. That when the shop on the suit property collapsed Andrew rebuilt it. That he had not seen Andrew's ownership documents.

23. DW5 was Stephen Oluoch Nyagol, the Court Administrator Kakamega Law courts. He produced court file in relation to Kakamega Misc Application 33 of 2010. He referred to the application dated 8th July 2010 and the ruling in respect thereof. He also produced the ruling dated 22nd October 2010. He stated that in that matter, the applicant Julietta had sued Andrew seeking eviction, which application was allowed. That marked the close of the 3rd defendant's case.

24. Parties filed submissions in support of their respective cases. On record are submissions filed by the plaintiff dated 28th July 2025; and submissions by the 1st defendant dated 26th September 2025.

Plaintiff's submissions

25. Counsel for the plaintiff submitted that the evidence of DW4, one James Misango, a surveyor at the County Government of Kakamega, demonstrated records showing that the original allottee was Gabriel, who was succeeded by his wife Julieta Khasandi Shakora. Counsel further submitted that the evidence of the court administrator vide the court file in respect of Kakamega CM MISC 33 OF 2010, demonstrated that an eviction order was issued against Andrew.

26. Counsel relied on the decision in the case of **Joseph Arap Ng'ok v Justice Moijo Ole Keiwua [1997] e KLR** and section 26 of the Land Registration Act for the proposition that the, plaintiff was entitled to the suit property as Gabriel had been allocated the same. Reference was made to the case of **Mike Maina Kamau v Attorney General [2017] e KLR**.

27. Counsel argued that there was no allegation that the allocation of the suit property to Gabriel was fraudulent and hence in the absence of fraud, the allotment cannot be defeated. Counsel also contended that as the defendant

was a trespasser, the plaintiff is entitled to the orders sought.

Defendant's submissions

28. Counsel for the defendant submitted that the defendant demonstrated by way of documents that he purchased the suit property from one Joseph Gitau and that transfer forms were executed by both Joseph Gitau and Andrew Muhati and approved by Kakamega County Council. They further submitted that the defendant has since been paying rates. Counsel argued further that the defendant availed his tenants to testify in court.

29. It was the defendant's counsel's submission that the plaintiff did not avail evidence to show that she filed succession in respect to her husband's estate before having the property transferred to her. Counsel argued that therefore the transfer of the suit property from her husband to her without a certificate of confirmation was irregular, unlawful and fraudulent. Counsel maintained

that the County Government of Kakamega was receiving rates from both the plaintiff and the defendant. It was further submitted that provisions of the Land Registration Act cited by the plaintiff were inapplicable in the circumstances of this case. Counsel maintained that it was not disputed that the defendant had been in possession of the suit property and extensively developed it since 1993 while the plaintiff watched and took no action until 2015 and that therefore the suit was time barred.

Analysis and determination

30. The court has carefully considered the pleadings, evidence and submissions. It is clear to me that the parties herein have had a long-standing dispute concerning the suit property which has been before different fora. In 2002, the dispute was before the defunct Kakamega County Council where both parties herein were summoned and asked to avail documents of ownership.

31. In 2004, the suit property was transferred from Gabriel Shakora to Julietta Khasandi Shakora. Later, the plaintiff filed Kakamega Miscellaneous application No. 33 of 2010,

where the court ordered eviction of the defendant herein from the suit property. Thereafter, the defendant filed Kakamega HCC Appeal No. 144 "A" of 2010 wherein he argued that the matter concerned tenancy and ought to have been filed before the Business Premises Rent Tribunal. The High court allowed the appeal and held that the defendant herein being a tenant, the proper procedure for his eviction was not followed. That the Miscellaneous application for eviction was premature because the matter had not been heard before the Business Premises Rent Tribunal and that the procedure to terminate the tenancy between the parties was not followed.

32. Taking cue from the High court decision, the plaintiff filed a case before the Business Premises Rent Tribunal being Tribunal Case No. 172 of 2012, complaining that the defendant had refused to pay rent. In the Tribunal, the defendant argued that the suit property belonged to him having purchased the same in 1993 and on that basis, the Tribunal held that the issues raised were in respect of occupation and title to land which it had no jurisdiction to determine as those were matters for the Environment and

Land Court. That decision having been made, the plaintiff decided to file the instant suit.

33. That being the case, the defendant's use and or occupation of the suit property has been anchored on two positions where he oscillated between claims of being the lawful owner of the suit property and being a tenant thereon. Having considered the pleadings before me, the only issue that arise for determination is who between the plaintiff and the 1st defendant is the lawful owner of the suit property.

34. While section 107 of the Evidence Act places the burden of proof in a suit on the plaintiff, section 109 thereof places the burden of proof of a fact on he or she who alleges existence of such fact. The suit property is rateable property on Vihiga market in Kakamega county. The 1st defendant does not contest the fact that the original allottee of the suit property was Gabriel, the late husband of Julietta Khasandi Shakora the original plaintiff herein.

35. The plaintiff maintained that Gabriel never sold the suit property to Joseph Gitau. The defendant's claim and

position is that the late Gabriel Shakora sold the suit property to Joseph Gitau who in turn sold it to him. The evidence on record including the evidence from the County Government of Kakamega show that as early as 2002, there was a dispute in respect of the suit property, and when the 1st defendant was asked to present his ownership documents, none were forthcoming.

36. Therefore, the plaintiff having demonstrated that her late husband Gabriel lawfully owned the suit property, and that the same transmitted to her on his death, it is clear that she is the rateable owner thereof. With that evidence, the evidential burden therefore, shifted to the defendant to show that he not only purchased the suit property from Joseph Gitau, but that at the time of purchase, the latter lawfully owned the same, and had the requisite capacity to sell the same and or that Joseph Gitau lawfully acquired the suit property from the late Gabriel.

37. I have considered the defendant's evidence, and I note that no agreement between Joseph Gitau and Gabriel was produced by the 1st defendant. On that basis and on the basis of the doctrine of *nemo dat quod non habet*, meaning

that a person cannot give to another that which they do not own, I am satisfied that Joseph Gitau had no capacity to sell the suit property to Andrew.

38. Article 40 of the constitution protects the right to acquire and own property only where it is demonstrated that the acquisition thereof was lawful. As Joseph sold what did not belong to him, I am persuaded that the alleged acquisition by the defendant was unlawful and hence incapable of legal protection. The defendant's allegation of payment of rates was not proved and therefore his claim of purchase remains unclear.

39. The plaintiff having shown that the suit property lawfully belongs to her, is entitled to quiet enjoyment of the same without interference from 3rd parties including the defendant. Thus, the plaintiff is entitled to quiet possession of the suit property and permanent injunction to restrain the defendant from interfering with the same as sought in the amended plaint.

40. Regarding mesne profits, in the case of **Attorney General v Halal Meat Products Limited [2016] e KLR**, the Court of Appeal held as follows;

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of wrongful period of occupation of his/her property by another. See McGregor on Damages, 18th Ed. Para 34-42.”

41. Mesne profits are damages recoverable by a land owner from a trespasser for profits/rent the trespasser has or might have obtained during his unlawful occupation of another’s land. To succeed in a claim for mesne profits, it behoves the party claiming mesne profits to place evidence before court to demonstrate that there is trespass, specify the period of trespass and the income the trespasser has or might have received from their occupation of the land.

42. A claim for mesne profits is a claim for special damages which must not only be pleaded but also proved. In the case of **Karanja Mbugua & Another v Marybin Holding Company Limited [2014] e KLR**, the court stated as follows;

“This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded, but also proved, as shown by the provisions of Order 21 Rule 13 of the Civil Procedure Rules.”

43. Similarly, in the case of **Peter Mwangi Mbuthia & Another v Samow Edin Osman [2014] e KLR**, the Court of Appeal stated as follows;

“We agree with counsel for the appellants that it was incumbent upon the Respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

44. In the instant suit, the plaintiff did not plead the period which she was deprived profits from the suit property and the specific amount and no evidence was presented in that regard, and therefore her claim for mesne profits fails.

45. It is the defendant who obtained orders to join the Attorney General and the County Government of Kakamega to this suit, although no claim or indemnity was made against them. I therefore find and hold that the County

Government of Kakamega who had been asked by the defendant to clarify who between the plaintiff and defendant owned the suit property, indeed demonstrated that their records show that the owner thereof is the plaintiff. In the premises, I find and hold that the plaintiff has proved her case on the required standard against the defendant. Therefore, I enter judgment for the plaintiff against the defendant herein, namely CAROLYNE KHAVAKALI MUHATI as follows;

- a) The defendant, her agents and servants, shall vacate Plot Number 2 Ivihiga Market (the suit property) in 90 days of this judgment, and in default eviction orders to issue.**
- b) A permanent injunction is hereby issued restraining the defendant, her agents, servant, and assignees from interfering with, encroaching and or trespassing into the plaintiff's parcel of land known as plot Number 2 Ivihiga Market.**
- c) The costs of this suit are hereby awarded to the plaintiff and shall be borne by the defendant.**

46. It is so ordered

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
IN OPEN COURT/VIRTUALLY THROUGH
MICROSOFT TEAMS VIDEO CONFERENCING
PLATFORM THIS 11TH DAY OF FEBRUARY 2026**

**A. NYUKURI
JUDGE**

In the presence of;

Mr. Mondia for the plaintiff

Mr. Mukavale for the defendant

No appearance for the Attorney General

No appearance the County Government of Kakamega

Court Assistant: Delphine