



REPUBLIC OF KENYA



**Imbisi v Akhura & 2 others (Environment & Land Case 372 of 2013)
[2024] KEELC 252 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 252 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 372 OF 2013
DO OHUNGO, J
JANUARY 31, 2024**

BETWEEN

ADRIANO MUHANDICHI IMBISI PLAINTIFF

AND

PETER SHIKUNZI AKHURA 1ST DEFENDANT

LAND REGISTRAR, KAKAMEGA 2ND DEFENDANT

THE HON ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. Adriano Muhandichi Imbisi (Adriano) moved this court through plaint dated 2nd October 2013, which he filed on 19th December 2013. The said plaint was later replaced with amended plaint dated 20th January 2020 wherein Adriano averred that all transactions leading to creation of land parcel number Idakho/Shivakala/2146 (suit property) were corrupt, fraudulent, and un-procedural. He sought judgment against Peter Shikunzi Akhura (Akhura), Land Registrar Kakamega (second defendant) and the Hon. Attorney General (third defendant) for:
 - a. An order of cancellation of the registration of the 1st defendant herein as the proprietor of LR Idakho/Shivakala/2146 measuring 0.59 Ha and the same be registered in the names of the plaintiff. In the alternative, without prejudice to this prayer, in the unlikely event that the Honorable Court decides this case in favour of the 1st defendant, the 2nd defendant be ordered to compensate the plaintiff to the full for hiving off land Parcel No. Idakho/Shivakala/2146 without any justification.
 - b. Costs and interest.
 - c. Any other relief this Honorable Court may deem just and expedient.



2. Akhura filed amended defence dated 17th March 2020. The Hon. Attorney General entered appearance for both himself and the third defendant and even attended the hearing but did not file any defence.
3. Further, Akhura filed Kakamega CMELC No. 926 of 2018 against Adriano on 12th June 2018 through plaint dated 8th June 2018 wherein he averred that he was the registered proprietor of land parcel number Idakho/Shivakala/2146 and prayed for judgment against Adriano for Adriano's eviction from the said parcel, mesne profits from the year 2013, a permanent injunction restraining Adriano, his agents and servants from entering occupying or trespassing upon the said parcel, costs of the suit and interest. In response, Adriano filed defence dated 24th July 2018 in which he raised the issue of pendency of this suit and further averred that CMELC No. 926 of 2018 was time barred pursuant to [Limitation of Actions Act](#).
4. By Notice of Motion dated 17th September 2018 and filed in this case (ELCC No. 372 of 2013), Akhura sought transfer of Kakamega CMELC No. 926 of 2018 to this court for consolidation with this case for hearing and determination. The application was allowed by consent on 1st October 2018. This judgment is therefore in respect of both cases as consolidated on 1st October 2018. Despite its transfer to this court, Kakamega CMELC No. 926 of 2018 was not allocated a new case number in this court.
5. At the hearing, Adriano testified as the sole witness in respect of his case and adopted his witness statement dated 2nd October 2013. He stated that Paul Imbisi Kodia who was his father passed away in 1955 and left a parcel of land measuring 5 hectares and that during the adjudication period in 1969 he (Adriano) became the registered proprietor of the said parcel which became known as Idakho/Shivakala/819. That in 1971, one Gabriel Isenwa laid an unfounded claim on a portion of the said land which he alleged belonged to his father. He added that he had never seen anybody on the parcel either before or after his father's demise and that the said Gabriel Isenwa colluded with Akhura and fraudulently hived off a parcel known as Idakho/Shivakala/2047 measuring 1.2 hectares from Idakho/Shivakala/819 and registered it in his names.
6. Adriano added that he was aggrieved with the development and that he lodged Appeal No. 55 of 1973 with the Minister for Lands and Settlement pursuant to Section 29 of the [Land Adjudication Act](#). That Gabriel Isenwa died in 1973 and that since he had no surviving beneficiary, he (Adriano) filed succession proceedings in respect of his estate at the Kakamega Resident Magistrate's Court in 1974, obtained a grant and was registered as the sole proprietor of Idakho/Shivakala/2047 and was issued with a land certificate on 22nd June 1984. He further stated that in 1984, one Yohana Akhura Mboo claimed to have purchased a portion of Idakho/Shivakala/2047 from the late Gabriel Isenwa and colluded with the second defendant and fraudulently hived off Idakho/Shivakala/2146 and registered it in his names through an amendment on 27th June 1988. That a title deed was issued to Yohana Akhura Mboo on 28th June 1988 and that upon Yohana Akhura Mboo's death on 19th June 2000, he (Adriano) filed succession proceedings in respect of Yohana Akhura Mboo's estate and was registered as proprietor of Idakho/Shivakala/2146 but his registration was cancelled through an order dated 11th November 2010 and Akhura being the son of the late Yohana Akhura Mboo was then registered as the proprietor.
7. He further stated that he sued Akhura in this matter in Akhura's capacity as the legal representative of the late Yohana Akhura Mboo and that since the death of his father in 1955, he had occupied, used, and developed the suit land for over 58 years and that neither Akhura nor Akhura's father had ever occupied and or used the suit land. That all the transactions that he referred to were fraudulent since they were done without his consent or knowledge, by concealment of material facts and without following due legal processes. That he sued the late Yohana Akhura Mboo in Kakamega HCC No. 95 of 1989 seeking to recover Idakho/Shivakala/2146 but the suit abated after his death on 19th June 2000 and that there



was Ministerial Appeal Case No. 55 of 1973 but he did not challenge its outcome since he was not aware of it.

8. The plaintiff's (Adriano's) case was then closed.
9. Akhura testified as the sole defence witness. He adopted his witness statement dated 19th May 2014 which he filed in this case and his witness statement dated 8th June 2018 which he filed in Kakamega CMELC No. 926 of 2018. He stated that he is the registered proprietor of land parcel number Idakho/Shivakala/2146 and the administrator of the estate of Yohana Akhura alias John Akhura Mmboo (deceased) who was his father who passed away on 30th June 2010. That the deceased was the registered proprietor of the parcel and in occupation thereof during his lifetime. That Adriano filed Kakamega HCCC No. 95 of 1989 against the deceased in respect of Idakho/Shivakala/2146 and that the case abated hence Adriano is barred from filing a fresh suit and that Adriano's application seeking to substitute the deceased with him (Akhura) in the said suit was struck out on 25th April 2005.
10. He further stated that upon the demise of the deceased Adriano secretly and fraudulently instituted Kakamega HC Succession Cause No 369 of 2005 and proceeded to obtain Grant of Letters of Administration Intestate in respect of the deceased's estate but the grant was revoked through ruling delivered on 30th June 2010 and a fresh grant issued to him (Akhura) on 27th July 2007. He added that this suit is an abuse of the court process and that Adriano had built a small house on Idakho/Shivakala/2146 and is forcefully using the plot.
11. Akhura's defence case was then closed. Although given opportunities to present evidence in support of their cases, the second and third defendants did not offer any testimony. Their cases were therefore closed, after which parties were ordered to file and exchange written submissions. Both Adriano and Akhura filed submissions. The second and third defendants did not file any.
12. I have carefully considered the parties' pleadings, evidence, and submissions. The issue for determination is whether the parties are entitled to the reliefs sought.
13. There is no dispute that Akhura is the registered proprietor of land parcel number Idakho/Shivakala/2146 (suit property). From the material on record, the register in respect of the suit property was opened on 27th June 1988 with the first registered proprietor being John Akhura Mmboo. Subsequently, Adriano became registered proprietor on 10th August 2007. In his own testimony in this case, he stated that he obtained the proprietorship after filing succession proceedings in respect of Yohana Akhura Mboo's estate and that his registration was cancelled through a court order dated 11th November 2010. Adriano also testified that Akhura being the son of the late Yohana Akhura Mboo was then registered as the proprietor. A perusal of the register confirms that Akhura became registered proprietor on 25th November 2010 pursuant to an order issued in Kakamega HC Succession Cause No 369 of 2005.
14. As a registered proprietor of land, Akhura is entitled to the rights, privileges, and benefits under Section 24 of the [Land Registration Act](#). Additionally, Section 26 of the Act obligates the court to accept his certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. 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, un-procedurally or through a corrupt scheme.
15. Adriano has attacked Akhura's title on grounds of corruption, fraud, and want of procedure. Fraud and corruption are serious allegations of a criminal nature. Consequently, Adriano was bound to not only prove fraud but to additionally show that Akhura was party to such fraud. A party alleging fraud must plead it, particularise it, and strictly prove it to standard higher than the usual one in civil cases of



proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR.

16. A perusal of Adriano's amended plaint shows that no particulars of fraud or corruption were pleaded. Further, as noted above, Akhura became registered proprietor on 25th November 2010 pursuant to an order issued in Kakamega HC Succession Cause No 369 of 2005, in his capacity as administrator of the estate of his deceased father. Pursuant to a ruling delivered in the said cause on 11th June 2015, the grant to Akhura was confirmed and a certificate of confirmation of grant issued to him on 22nd July 2015 in which the suit property was exclusively or wholly distributed to him. Subsequently, he was registered as proprietor in his own right on 11th August 2017. Adriano has not shown that the ruling of 11th June 2015 and the certificate of confirmation of grant issued on 22nd July 2015 have ever been set aside or revoked. I have perused the ruling and I note that Adriano attacked Akhura's title to the suit property on allegations of fraud and that the attack failed. As long as the ruling of 11th June 2015 and the certificate of confirmation of grant issued on 22nd July 2015 remain in force, I do not see how Adriano's allegations that Akhura obtained title to the suit property through corruption, fraud, and want of procedure can hold. I find no merit in those allegations and in Adriano's case generally.
17. To the extent that Akhura remains the registered proprietor of the suit property, he is entitled to all the rights, privileges, and benefits of such proprietorship. Akhura testified that Adriano has built a small house on the suit property and is forcefully using the suit property. Those claims were corroborated by Adriano who testified that he has occupied, used, and developed the suit property. I am therefore satisfied that Akhura is entitled to the reliefs of eviction and permanent injunction claimed in Kakamega CMELC No. 926 of 2018.
18. Regarding the claim for mesne profits from the year 2013, I note that no evidence was offered to guide the court as to quantum. Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves. Mesne Profits must be pleaded and proved. See *Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees* [2020] eKLR. In the circumstances, the prayer for mesne profits fails.
19. In view of the foregoing discourse, I make the following orders:
 - a. Adriano Muhandichi Imbisi's case in ELCC No. 372 of 2013 is dismissed.
 - b. Adriano Muhandichi Imbisi to vacate land parcel number Idakho/Shivakala/2146 and within ninety (90) days from the date of delivery of this judgment. In default, Peter Shikunzi Akhura shall be at liberty to evict him.
 - c. A permanent Injunction is hereby issued restraining Adriano Muhandichi Imbisi, his agents and servants from entering, occupying, or trespassing upon land parcel number Idakho/Shivakala/2146 upon his vacating as ordered above or upon expiry of ninety (90) days from the date of delivery of this judgment.
 - d. Peter Shikunzi Akhura shall have costs of the consolidated cases. Adriano Muhandichi Imbisi shall bear the said costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF JANUARY 2024.

D. O. OHUNGO

JUDGE



Delivered in open court in the presence of:

The Plaintiff present

Mr Shiloya holding brief for Ms Kegehi for the 1st Defendant

No appearance for the 2nd and 3rd Defendants

Court Assistant: E. Juma

