



**Kaposhi v Maweu & 4 others (Environment and Land Case Civil Suit 386 of 2017) [2024] KEELC 1276 (KLR) (11 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1276 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND CASE CIVIL SUIT 386 OF 2017  
MN GICHERU, J  
MARCH 11, 2024**

**BETWEEN**

**JONATHAN KAPOSHI ..... PLAINTIFF**

**AND**

**COLLETA MBATHA MAWEU ..... 1<sup>ST</sup> DEFENDANT**

**MUTHANI MUNYUA ..... 2<sup>ND</sup> DEFENDANT**

**ONESMUS KALI ..... 3<sup>RD</sup> DEFENDANT**

**SAMUEL MULWA ..... 4<sup>TH</sup> DEFENDANT**

**JOYCE KAVII ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff seeks the following reliefs against the five defendants.
  - a. An order for vacant possession do issue against the defendants jointly and severally within forty five (45) days after such and in default eviction order do issue.
  - b. A permanent injunction do issue against the defendants jointly and severally, their personal representatives and assignees restraining them from entering, using and otherwise interfering with the plaintiff's quiet possession of land parcel no. Kajiado/Kaputiei Central/2347 and or any other parcel belonging to the plaintiff.
  - c. The defendants do pay the costs of this suit.
  - d. Any other relief this court may deem fit to grant under the circumstances.
2. The plaintiff's case is as follows.



He is the registered owner of L.R. Kajiado/Kaputiei-Central/2347 which measures 31.54 hectares. He got the land from his father Kaposhi Njoroge Nakumana. The first, second and fourth defendants occupy 2 acres each of the suit land which they claim to have bought from the plaintiff's father. This is not true. The truth is that they intended to buy portions of the suit land but the sale transactions between them and the plaintiff's further did not go through.

3. As for the third and fifth defendants, they had no failed sale transactions with the plaintiff's father. They are just trespassers on the suit land. The portions of the suit land occupied by the 3<sup>rd</sup> and 5<sup>th</sup> defendants are not specified in the plaint and the plaintiff's witness statement both of which are dated 4/12/2014. It is for the above stated reasons that the plaintiff seeks the orders in the plaint.

4. In support of his case, the plaintiff filed the following evidence.

- i. Plaintiff's witness statement dated 4/12/2014.
- ii. Copy of title deed for the suit land dated 15/2/2012.
- iii. Copy of certificate of official search dated 13/3/2012.
- iv. Copies of agreements dated 30/4/2010 and 31/12/2009.

5. The first defendant, in a defence and counterclaim dated 16/1/2015 denies the plaintiff's claim in its totality and avers as follows.

Firstly, the original suit land was Kajiado/Kaputiei-Central /839 which belonged to one Kaposhi Njoroge Nakumana who is the plaintiff's father.

6. Secondly, on 30/4/2010, the said plaintiff's father and the first defendant entered into an agreement for sale of 2 acres which was to be excised for L.R No. 839. The purchase price was Kshs. 64,000/- for two acres which was paid in two installments of Kshs. 50,000/- on 30/4/2010 and Kshs. 14,000/- on 14/5/2010. The seller acknowledged receipt of full purchase price which was made in the presence of an advocate.

7. Thirdly, the 1<sup>st</sup> defendant took immediate possession of her two (2) acres which she has fully developed by building her residential home and cultivating thereon.

8. Fourthly, the National Government of Kenya started acquiring private land for the purpose of developing the Mombasa Nairobi Standard Gauge Railway and the 2 acres belonging to the 1<sup>st</sup> defendant were partially acquired to the extent of 0.32 hectares and the first defendant was due for compensation. This is the reason why the plaintiff filed this suit hoping to be paid the expected compensation.

9. Fifthly, the 1<sup>st</sup> defendant challenges the registration of the plaintiff as the owner of any land that includes her 2 acres on several grounds of fraud and illegality all particularized in paragraph 11 of the defence.

10. Sixthly, in the counterclaim the 1<sup>st</sup> defendant prays for the following orders.

- a. A declaration that the sale agreement dated 30/4/2010 between the 1<sup>st</sup> defendant and Kaposhi Njoroge Nakumana is legal and binding and the plaintiff ought to acknowledge the same as affecting his title to the suit land.
- b. An order compelling the plaintiff to transfer the 2 acres purchased by the defendant from his title with immediate effect and in default the Deputy Registrar of this court do execute the transfer documents.



- c. A declaration that the compensation for the acquisition of 0.32 hectares from the defendants' 2 acres ought to be made to the defendant to the exclusion of the plaintiff.
  - d. An order of permanent injunction restraining the plaintiff from evicting, selling, disposing, encumbering or in any other manner interfering with the defendant's quiet possession, use and enjoyment of the 2 acres purchased from the plaintiff's father, Kaposhi Njoroge Nakumana.
  - e. Costs of the suit and interest thereon.
  - f. Any other relief that this court may deem just to grant.
11. In support of her case, the first defendant filed the following evidence.
- i. Her witness statement dated 16/1/2015.
  - ii. Witness statement by Lydia Mumbua Mbithi dated 2/7/2019.
  - iii. Copy of sale agreement dated 30/4/2010.
  - iv. Copy of title deed for L.R. 839 dated 18/10/2001.
  - v. 8 Photographs showing houses, livestock, trees and crops growing in a field.
  - vi. Copy of award by National Land Commission in respect of acquisition of 0.32 hectares of the suit land.
12. The second defendant, in a written statement of defence dated 20/1/2015 denies the plaintiff's claim and avers as follows.
- Firstly, he purchased 2 acres of land No. 839 from Kaposhi Ole Nakumana alias Kaposhi Njoroge on 31/12/2009. There was a valid sale agreement which was witnessed by the plaintiff among other witnesses.
13. Secondly, upon purchasing his 2 acres, the second defendant took possession of the land which he developed by building a permanent homestead which he occupies together with his family.
14. Thirdly, it was up to the plaintiff's father to transfer 2 acres to the 2<sup>nd</sup> defendant as per the agreement. Instead he subdivided L.R. 839 into several parcels which include the suit land which carries the 2<sup>nd</sup> defendant's two acres. The 2<sup>nd</sup> defendant contends that the plaintiff holds the 2 acres in trust for the 2<sup>nd</sup> defendant and the plaintiff is estopped from denying the existence of this trust because the suit land was transferred to him when the 2<sup>nd</sup> defendant was already in occupation.
- In support of his case, the 2<sup>nd</sup> defendant filed a copy of sale agreement dated 31/12/2009.
15. The 3<sup>rd</sup> and 4<sup>th</sup> defendants through their counsel on record filed a written statement of defence and counter claim dated 21/1/2015 in which they state as follows.
- Firstly, they deny the plaintiff's claim against them and aver that both of them occupy part of the suit land. In the case of the 3<sup>rd</sup> defendant, he purchased the land that he occupied on 2/7/1994. The agreement was between him and the plaintiff's father Kaposhi Njoroge Ole Nakumana and his mother Ruth Mwendu Wambua. The 4<sup>th</sup> defendant purchased his land from the same parents of the plaintiff on 15/1/1991 and he too has been in occupation ever since.
- In total both of them occupy approximately 5 acres whose boundaries are well demarcated and by 2015, they have been in occupation for over 24 years.



16. Secondly, when the plaintiff realized that the 3<sup>rd</sup> and 4<sup>th</sup> defendants' land would be compulsorily acquired for the construction of the Standard Gauge Railway, and hence receive compensation for the acquisition, he attempted to swap L.R. No. 2347 with L.R. 2345 so that he would receive the compensation himself. Together with his father, they secretly undertook the subdivision of L.R. 839 in the year 2012 without any demarcation and fixing of beacons.
17. Thirdly, the plaintiff filed or is a party to four (4) other suits whose aim is to the abuse of court process and to deprive the defendants and other parties of their land.
18. Fourthly in the counterclaim the 3<sup>rd</sup> and fourth defendants seek the following orders.
  - a. A declaration that they lawfully occupy L.R. 2345 and 2347 and that the titles of the plaintiff or his father have been extinguished under Section 28 of the Land Registration Act, 2012.
  - b. A mandatory permanent injunction restraining the plaintiff and or Kaposhi Njoroge Nakumana by themselves, their agents or servants from selling, charging or in any other way alienating or interfering with the portions of the suit land occupied by the 3<sup>rd</sup> and 4<sup>th</sup> defendants.
  - c. A mandatory injunction compelling the plaintiff and or Kaposhi Njoroge Nakumana to transfer the title to the portion of 5 acres of L.R. Kajiado/Kaputiei-Central 2347 and or 2345 occupied by the 3<sup>rd</sup> and 4<sup>th</sup> defendants, in default the Deputy Registrar of the court do execute the transfer and all necessary documents in respect of such transfer.
  - d. Costs of the counterclaim.

This is as per the defence and counterclaim dated 21/1/2015.

19. In support of their case, the 3<sup>rd</sup> and 4<sup>th</sup> defendants filed the following evidence.
  - i. Witness statements by the 3<sup>rd</sup> and 4<sup>th</sup> defendants.
  - ii. Copy of agreement for sale between the 3<sup>rd</sup> defendant and Kaposhi Njoroge Nakumana dated 2/7/1994.
  - iii. Copy of pleadings in Kajiado SPMC Miscellaneous Application No. 8 of 2014.
  - iv. Copy of caution dated 2/2/2012 on title numbers 2345, 2346, 2347 and 2348.
20. On record, I have seen some evidence filed by E.K. Mutua and Company Advocates. It includes the following.
  - i. Photographs of a house, witness statements by Japhet Wambua and Naomi Kanyua.
  - ii. Sale agreement dated 7/11/87, 6/2/1988 and 17/9/1988.Finally, there is a witness statement dated 17/4/2012 and signed by one Zachary Njagi Gathaara Advocate. It is drawn and filed by Kinuthia Wandaka and Company Advocates.
21. At the trial, only the plaintiff, the 1<sup>st</sup> and 4<sup>th</sup> defendants testified. The fourth defendant testified on his behalf and that of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The three parties who testified adopted their witness statements and documents and they were then cross examined by the adverse counsel.
22. Counsel for the parties filed written submissions dated 26/5/2023, 12/7/2023 and 25/9/2023 respectively. The plaintiff's counsel identified the following issues for determination.
  - i. Whether the plaintiff is the registered proprietor of the suit land?



- ii. Whether the defendants have any rights/or interests in respect of the suit land protectable under any law.
  - iii. Who should pay the costs of this suit.
23. I have carefully considered all the evidence adduced in this case by all the parties including the witness statements, documents and testimony at the trial. I have also considered the written submissions by learned counsel for the parties including the case law cited therein. I find that the three issues as identified by the plaintiff's counsel will determine the dispute.

On the first issue, I find that it is not in dispute that the plaintiff is the registered owner of the suit land. The copy of title deed dated 15/2/2012 and the certificate of official search dated 13/3/2012 are prima facie evidence of that ownership as per Section 26(1) of the [Land Registration Act](#) (Act No. 3 of 2012) which provides as follows.

1. "The certificate of title issued by the Registrar upon registration, ...shall be taken by all courts as *prima facie* evidence that the person names as proprietor of the land is the absolute and indefeasible owner..."

All the defendants acknowledge that the plaintiff is the registered proprietor of the suit land. It is therefore my finding that the plaintiff's ownership of the suit land is proved and it is undisputed.

24. As for the second issue, I find that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants have rights and interest in respect of the suit land that are protectable under the law. Such interests are recognizable under Section 28 of the [Land Registration Act](#) which provides as follows at subsection (b).

"Unless the contrary is experienced in the register, all registered land shall be subject to the following overriding interests as may for the time being subsists and affect the same, without their being noted in the register –

- (b) trusts including customary trusts".

Section 30 (g) of the *Registered Land Act* (now repealed) provided as follows.

"Unless the contrary is expressed in the register, all registered land shall be subject to such of the overriding interests as may for the time being subsist and affect the same, without their being noted in the register –

- g. The rights of a person in possession or actual occupation of land which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed"

My understanding of the two provision of the two statutes is that a person in possession of land has a superior right to the registered person.

25. In this case, it is not in dispute that the four plaintiffs, that is to say, the first, second, third and fourth are in possession of two acres, two acres, 2 ½ acres and 2 ½ acres of the suit land respectively. This is admitted by the plaintiff in paragraphs 8, 9, 10 and 11 of the plaint and paragraph 3 of the plaintiff's witness statement both of which are dated 4/12/2014. It is the case of the four defendants that it is the plaintiff's father who put them in possession after he took their money in exchange for the land between the years 1991 and 2010. I believe this evidence which is corroborated by the copies of sale



agreements that the defendants produced in court as evidence. It is also not disputed by the plaintiff who avers as follows in paragraph 7 of the plaint.

“At all the material times the plaintiff has been the registered owner of all that parcel of land known as Kajiado/Kaputiei-Central/2347 and the defendants were interested purchasers from a third party (the plaintiff’s father) but failed and or refused to complete the transaction and encroached without any colour of right in the plaintiff’s aforementioned land”.

26. In the case of *Macharia Mwangi Maina and 87 other –versus- Davidson Mwangi Kagiri* (2014) eKLR, it was held that the action by receiving the full purchase price and putting the purchaser in possession created a constructive trust in favour of the purchaser and the court, in a case with similar facts to this one, granted an order of specific performance in favour of the purchaser.

Under Section 3 (4) of the *Law of Contract Act* where there is a resulting, implied or a constructive trust, there is no requirement that a contract for sale of land be in writing. It is therefore immaterial that any of the four defendants may not have had a written sale agreement with the plaintiff’s father. All that counts is that he paid the full purchase price and he was put in possession by the plaintiff’s father.

27. In the case of *Willy Kimutai Kitilit –versus- Michael Kibet* (2018) eKLR, it was held at paragraph 24 of the judgment dated 17/5/2018 as follows.

“There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel to the *Land Control Act*. By Article 10(2) (b) of the *Constitution* of Kenya, equity is one of the national values which binds the courts in interpreting any law (Article 10(1) (b)).

Further, by Article 159(2) (e), the courts in exercising judicial authority are required to protect and promote the purpose and principles of the *Constitution*... the *Land Control Board Act* should be constructed with the alterations, adaptations and exceptions necessary to bring it into conformity with the *Constitution*”.

The absence of the Land Control Board consent cannot therefore be a bar to the defendants being registered as the proprietors of the land that they bought from the plaintiff’s father and which they occupied after purchase. It was the duty of the plaintiff’s father to obtain the consent of the Land Control Board after receiving the full purchase price. He and his son should not benefit from their own deliberate faults.

28. It has been held by the Supreme Court of Kenya, in the case of *Isack M’Inanga Kiebia –versus- Isaanya Theuri M’Lintari and another* (2018) eKLR that trusts including customary trusts are overriding interests within the meaning of Section 28 (b) of the *Land Registration Act*. See paragraph 58.

(58) “...It is now clear that customary trusts, as well as all other trusts are overriding interests. These trusts, being overriding interests, are not required to be noted in the register...”

29. From the foregoing, it is quite obvious that whether one looks at this case from the perspective of constructive trust and proprietary estoppel (Article 10 (i) (b) as read with 10 (2) (b) of the *Constitution*) or that of overriding interests under Sections 30 (g) of the *Registered Land Act*, Cap 300 (now repealed) and 28 (b) of the *Land Registration Act* (Act No. 3 of 2012), there is only one conclusion, namely, that the defendants now own the parcels that they occupy after having been put in that possession by the plaintiff’s father. The defendants possession of their respective parcels is superior to the title held by the plaintiff.



30. In conclusion, I order as follows.

The first and second defendants to be registered as proprietors of the two acres that each of them occupies. The third and fourth defendants to be registered as owners of the 2 ½ acres that each of them occupies. I therefore dismiss the plaintiff's suit against the defendants with costs and I allow the defendants' counterclaims as drawn and also award them costs.

It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 11<sup>TH</sup> DAY OF MARCH 2024.**

**M.N. GICHERU**

**JUDGE**

