



**Kimanthi & another v Kalua (Environment & Land Case
24 of 2021) [2024] KEELC 3418 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3418 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE 24 OF 2021**

LG KIMANI, J

APRIL 24, 2024

BETWEEN

JOYCE MUTETHYA KIMANTHI 1ST PLAINTIFF

IRENE KATUMBU KIMANTHI 2ND PLAINTIFF

AND

ISAAC KALUA DEFENDANT

JUDGMENT

1. This suit was instituted by way of the plaint dated 2nd August 2016. The Plaintiffs aver that the 1st Defendant is the beneficial owner over Land Parcel Kyangwithya/Tungutu/1153 where they had jointly constructed a commercial building.
2. The Plaintiffs claim that the defendant his agent/servants and/or employees illegally, unlawfully, fraudulently and inequitably demolished the building valued at Kshs.342,500 thereby occasioning them loss of revenue and investment and damage.
3. The particulars of fraud were given and include colluding with third parties to record consent orders to override the court's jurisdiction, overlooking the caution on the land, procuring processing of irregular land control board consent, inducting unlawful arrangements, demolishing the plaintiffs' building without lawful authority and misleading the police, auctioneers and the court bailiff.
4. The Plaintiff's pray for: -
 - a. Kshs.342,500.00 compensation for the value of the demolished building on Kyangwithya/Tungutu/1153.
 - b. General damages for loss, consequential loss, damage, loss of revenue and investment.
 - c. Costs of and incidental to the suit and interest at court rates.



Defendant's statement of defence

8. The defendant filed a defence dated 6th November 2017 where he acknowledged being the beneficial owner of the suit parcel of land Kyangwithya/Tungutu/1153, having purchased the same for valuable consideration on 14.2.2001 from the previous registered owner Timothy Kimanthi Kiiva. He denied the allegations of illegality, unlawfulness, fraud and inequity made in the plaint. He stated that the demolition of the illegal structure claimed to be a commercial building was carried out by M/S Transfield Auctioneers in execution of a lawful decree issued by the Resident Magistrates' Court at Kitui in Civil Suit Number 58 of 2015 between himself as the plaintiff and Timothy Kimanthi Kiiva.
9. The defendant therefore states that the plaintiffs have no recognized interests in the land and denies any loss or damage claimed to have been suffered. He averred that there were other previous proceedings relating to the suit land which were determined in the Chief Magistrates Court at Kitui being CMCC NO. 298 of 2005 Joyce Mutethya Kimanthi vs Timothy Kimanthi Kiiva and 2 others where the judgment was delivered on 2.6.2016. There was also CMCC 58 of 2015 Isaac Kalua Vs Timothy Kimanthi Kiiva where judgement was entered by consent of the parties on 12.3.2015 and decree issued on 20.3.2015 and in both suits the suit land Kyangwithya/Tungutu/1153 was decreed to the defendant. The defendant claimed that this suit is res judicata and therefore denied that this court has jurisdiction over the matter.

Evidence at the Trial

The Plaintiff's case

10. The hearing began on 17.1.2023 when PW 1 Joyce Mutethya Kimanthi the plaintiff herein testified and stated that she had given the 2nd Plaintiff authority to give evidence on her behalf. On cross-examination she stated that the 2nd Plaintiff built the shop for her on her land, the suit property which is registered in the name of Timothy Kiiva, her husband. She testified that when she realized her husband was selling the land to Isaac Kalua the defendant herein, she put a caution on the title. She does not know that there was a previous suit between her husband and the defendant. She stated that construction had not been completed and that she could not tell the value of the property that was destroyed.
11. PW 2 Irene Katumbu Kimanthi, the 2nd Plaintiff gave evidence that she is the daughter of the 1st Plaintiff and had been given authority to testify on her behalf. She relied on her witness statement dated 2.8.2016 and produced the bundle of documents filed in court. She reiterated the contents of the plaint confirming that the 1st Defendant is the beneficial owner of the suit land parcel Kyangwithya/Tungutu/1153 and that their commercial building valued at Ksh.342,500 was demolished by the 1st defendant through fraudulent means, causing loss, damage, loss of revenue, interfering with their equitable interests of rights of quiet possession, occupation and enjoyment thereof.
12. She testified that they were not served with eviction orders. On cross-examination, PW 2 stated that the suit land was registered in the name of Timothy Kiiva (Deceased), her father who died last year. She stated that there were police officers present at the time of demolition but that she did not see the defendant. She confirmed that she did not produce any receipts for construction but had produced a valuation report dated 8.7.2016. She also stated that the building was complete but was not occupied. She denied seeing a demolition order.

Defence Hearing

13. The Defence hearing proceeded on 26.9. 2023 when DW 1 Isaac Kalua Green testified. He relied on his witness statement dated 29.1.2018 and produced his bundle of documents. In his witness statement,



he stated that the land parcel number Kyangwithya/Tungutu/1153 was registered in the name of Timothy Kiiva since the year 1977.

14. Through an agreement of sale between him and the said Timothy Kiiva, he purchased the suit parcel of land for a total sum of Kshs.150,000.00 which he paid in instalments as agreed but the said Timothy Kiiva did not transfer title to his name. This led to the defendant suing him vide the Kitui Chief Magistrates' Court Civil Case 58 of 2015. Judgment was delivered in his favour and the final decree was issued on 20.3.2015. At the time he filed his case, a small structure was being erected on the parcel of land and Transfield Auctioneers carried out the demolition of the structure with the Officer Commanding Station, Kitui Police Station providing security to the auctioneers. According to him, the decree still stands since there was no appeal lodged against it.
15. Upon cross-examination, he acknowledged that there was a caution registered by the 1st Plaintiff but he was unaware of it. He confirmed that and the sale agreement did not indicate that he would be given vacant possession. He stated that the construction began without his knowledge when he had already bought the land. He also acknowledged that the transfer of title was yet to be done and that the seller's wife did not sign the agreement for sale even though he knew of the requirement for spousal consent. He however stated that he did not know about the auctioneers going onto the suit land as he is not the one who instructed them to go to the site.
16. Upon re-examination, DW 1 stated that the eviction orders came through the court process. He further noted that Timothy Kiiva had committed in Clause 1 of the Agreement of sale that he had consulted with his wife, who was not a party to the agreement of sale and therefore was not sued in the previous case. He had sought the removal of the structures from the suit land as a prayer to the Chief Magistrates' Court.

The Plaintiffs' Written Submissions

17. Counsel for the Plaintiffs submitted that their claim is anchored in the decision in Samuel Kamere vs Land Registrar(2015)eKLR on the definition of a bonafide purchaser for value. They submit that the orders issued in Kitui Chief Magistrate Court Civil suit no.58 of 2015 were eviction orders and the defendant relied on the orders to carry out demolition which was contrary to the orders sought in the application dated 2.4.2015 and the court's decree. Counsel submitted that the consent judgment had been geared to defeat the 1st Plaintiff's interests protected by the caution. even though the defendant was evasive and elusive in his testimony by denying that the demolition was not done by him. On the defendant's denial of knowledge of the structure thereon the suit land, they highlighted that in the supporting affidavit defendant's application for vacant possession, he had stated in paragraphs 6,7,8 and 9 that it was the defendant's daughter who was constructing thereon.
18. The Plaintiffs relied on Section 27 of the *Land Registration Act* CAP 300 on registration of ownership vesting in the registered proprietor of the land, submitting that the 1st Plaintiff's husband was a trustee. Counsel for the Plaintiffs relied on several authorities, namely: MWK VS PKM Interested Party Equity Bank(Kenya) Limited(2019)eKLR where other authorities were cited with approval such as Mugo Muiiru Investments Limited v. EWB & 2 others(2017)eKLR all on matrimonial property as well as the case of and Mawji v. US International University & another(1976)KLR 185 on the doctrine of lis pendens.
19. Counsel further relied on Samuel Kamere vs Lands Registrar Kajiado(2015)eKLR where the court held that a purchaser who failed to search land cannot blame anyone for challenging their purchase if a caution had been lodged on the land. MWK v SKK & 5 others(2018)eKLR where it was held that a bona fide purchaser for value must have carried out the necessary due diligence.



20. Counsel for the Appellants also quoted Article 45(3) of *the Constitution* of Kenya on the equality of parties to a marriage. Counsel further relied on section 28(a) of the *Land Registration Act* 2012 and Sections 93(2) and 93(3)(b) as well on rights to matrimonial property and the necessity of spousal consent. They relied on the authority of *Kadzo Mkutano v Mukutano Mwamboje Kadosho & 2 others*(2016)eKLR where it was held that spousal rights over matrimonial property are an overriding interest as they urged the court to allow the plaintiff's claim.

Defendant's Written Submissions

21. Counsel for the defendant filed submissions dated 1.1.2023 and further submissions dated 21.11.2023 where he submitted that the plaintiff's claim is based on the execution process that had been issued in the Chief Magistrates' Court in CMCC no.58 of 2015 and claimed that this arose from a valid and enforceable decree.
22. Counsel submitted that the demolition was lawful and could not be challenged through a separate suit under Section 34 (1) of the *Civil Procedure Act* which provides that the issues raised in this suit ought to have been raised in case number 58 of 2015. Counsel submitted that the plaintiffs herein were bound by the order of that court since they are the wife and daughter respectively of the defendant in the said suit. Counsel also relied on Order 22 Rule (1) of the Civil Procedure Rules. Counsel relied on the case of *Misc. Civil Appeal No. 18 of 2020 Kennedy Ooko Jacob Vs John Abudhi Ochanda*
23. The defendant's position is that the magistrates' court decree dated 12.3.2015 settled the issue of ownership. Any equitable rights or interests that the plaintiffs may have held were extinguished by the judgment and subsequent decree of the lower court. They therefore submit that the issue of ownership for determination.
24. Their submission is that the auctioneer was acting as an independent officer of the court acting on the authority of the court in satisfaction of a decree. If an individual is not satisfied with a decision of the court, he challenges that decision by way of an appeal, review or judicial review and does not sue in a different suit on matters arising from execution by the auctioneer of a valid court decree through valid warrants.
25. The defendant concluded that the plaintiffs sued the wrong party and the suit should be dismissed with costs to him.

Analysis and determination

26. The plaintiffs claim compensation in the sum of Kshs. 342,500.00 being the value of the commercial building said to have been wrongfully demolished on Land Parcel Kyangwithya/Tungutu/1153 as well as general damages. The defendant on the other hand contends that judgment was issued in his favour in Kitui Chief Magistrates' Civil Suit number 58 of 2015 between Isaac Kalua vs Timothy Kimanthi Kiiva and the demolition of the said building was in execution of that decree.
27. The Court has considered the the pleadings, evidence adduced during the trial and the submissions by Counsel for the parties and authorities cited and has considered that the following issues arise for determination:
1. Whether the suit is properly before this court
 2. Whether the Plaintiffs are entitled to the Ksh. 342,500 as compensation for the demolition of their building and general damages.
 3. Who shall bear the costs of the suit?



1. Whether the suit is properly before this court
28. Counsel for the defendant raised the above issue for determination submitting that the plaintiff's claim is based on the execution process issued in the Chief Magistrates' Court case No. 58 of 2015 between the defendant herein and Timothy Kimanthi Kiiva. He claimed that the execution was carried out lawfully by a registered auctioneer and overseen by the OCS Kitui Police Station and they are not joined as parties to this suit.
29. Counsel for the defendant submitted that since the cause of action herein arose from a valid and enforceable decree this claim ought to have been filed in the original suit under Section 34 of the *Civil Procedure Act*. The said section states that;
- Questions to be determined by the court executing decree
1. All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
 2. The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.
 3. Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.
- Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.
30. Counsel for the Defendant submitted that in the present case, the Plaintiffs are the wife and daughter of Timothy Kimanthi Kiiva, the defendant in case No. 58 of 2015 and were bound by the terms of the decree. It was submitted that the decree at paragraph 3 thereof issued a mandatory injunction directed at the Defendant, his wives, daughters, sons, agents, servants, assignees and whoever else to remove any work, construction structure, and themselves from the land parcel number Kyangwithya/Tungutu/1153.
31. Counsel for the plaintiffs challenged the proposition by Counsel for the defendant faulting the orders issued in Kitui Chief Magistrate Court Civil suit No.58 of 2015 were eviction orders and the defendant wrongly relied on them to carry out demolition. He stated that this was contrary to the orders sought in the application dated 2.4.2015 and the court decree. Counsel further submitted that the consent judgment entered in the cited case was geared to defeat the 1st Plaintiff's interests protected by the caution lodged against the title to the suit land. He also stated that the defendant herein was evasive and elusive in his testimony by denying that the demolition was carried out by him.
10. Under the above-said Section 34 of the *Civil Procedure Act*, for a question to qualify for determination by the court executing the decree, the question must be one between the parties to the suit in which the decree was passed or their representatives. On the face of the pleadings in case No. 58 of 2015, it is clear that the Plaintiffs were not parties to the suit. The question to be determined is whether the plaintiffs were the representatives of the Defendant Timothy Kimanthi Kiiva.
11. According to the Black's Law Dictionary A representative is "someone who stands for or acts on behalf of another."
12. Counsel for the Defendant did not directly address this question of whether or not the Plaintiffs herein were the representatives of the Defendant Timothy Kiiva. He relied on the fact that the decree issued



was directed at the said defendant, his wives, daughters and sons among others. Counsel stated that the Plaintiffs were bound by the decree of the court and ought to have challenged the process of execution in the suit where the execution was issued.

13. The Court has considered the pleadings herein and the evidence adduced in court and has concluded that the defendant herein has not shown that the Plaintiffs herein were representatives of Timothy Kiiva and were thus bound to challenge the execution of the decree in case No. 58 of 2015 within the suit where the decree was issued. The reasons for the court's conclusion are derived from the above-cited definition of the term "representative" under Section 34 of the *Civil Procedure Act*. In the court's view, it was not shown that the Plaintiffs were persons standing in for or acting on behalf of Timothy Kiiva. Indeed this is negated by the evidence of the Plaintiffs herein that they were not aware that Timothy Kiiva was selling the suit land and they did not sign the agreement for sale. They testified that when they became aware of the sale of the land the 1st plaintiff filed a caution on 9th May 2005 against the title claiming a right as a licensee. It is not clear that the plaintiffs herein were the wife, sons and daughters mentioned in the sale agreement and in case No. 58 of 2015.
 14. The court has also seen the Amended Plaint in Senior Resident Magistrates Court at Kitui case number 298 of 2005 between Joyce Muteithya Verses Timothy Kimantheni Kiiva & Others produced in evidence by the plaintiffs herein. In the said suit, the 1st Plaintiff herein was also the Plaintiff in that suit and she was claiming that Timothy Kiiva (the seller) held the suit land in trust for herself and she sought to have the said Timothy transfer undivided shares in the land to her.
15. Further, the plaint in Kitui Civil Case No. 58 of 2015 paragraph 8 shows that the suit was instituted when the 2nd Plaintiff Irene Katumbu Kimantheni, a daughter of Timothy Kimantheni deposited building stones and other materials on the land. The Court finds it strange that the Defendant herein did not find it necessary to join the said Irene Katumbu Kimantheni as a defendant in the suit seeing that she was the one constructing on the land. The defendant informed the court that the judgement in case number 58 of 2015 was entered by the consent of the parties. It would therefore have made sense if Timothy Kiiva had acted peaceably and without being compelled to demolish the building. Alternatively, Irene Katumbu would have demolished the building without being compelled to do so if she had been acting as the representative of Timothy Kiiva.
16. It is the court's view that the evidence presented does not show that the building subject matter of this litigation was being constructed on the suit land by the 2nd plaintiff herein as a representative of Timothy Kiiva and that the questions of execution of the decree were to be heard and decided by the court that issued the decree and could not be properly challenged by way of a separate suit as the one before this court.
 2. Whether the Plaintiffs are entitled to the Ksh. 342,500 as compensation for the demolition of their building and general damages.
 8. The Plaintiffs confirm in the plaint in paragraph 3 that the Defendant was and still is the beneficial owner of the suit land Kyangwithya/Tungutu/1153 on which they had jointly constructed a commercial building. They claim that the defendant his agent/servants and/or employees illegally, unlawfully, fraudulently and inequitably demolished the building valued at Kshs.342,500 thereby occasioning them loss of revenue and investment and damage.
 9. In the defence filed, the defendant acknowledged being the beneficial owner of the suit parcel of land Kyangwithya/Tungutu/1153, having purchased the same for valuable consideration on 14.2.2001



from the previous registered owner Timothy Kimanthi Kiiva. He further contended that when the seller failed to transfer the land to him he filed CMCC NO. 58 of 2015 Isaac Kalua Vs Timothy Kimanthi Kiivawhere judgement was entered in his favour against the defendant by consent. A decree was issued by the court and stated as follows;

1. A mandatory injunction be and is hereby issued against the defendant directing the defendant to transfer to the plaintiff title to land parcel number Kyangwithya /Tungutu/1153
 2. A mandatory injunction be and is hereby issued restraining the defendant himself, his wives daughters, sons, agents, servants, legal representatives, assignees, or by whosoever else acting on his behalf or claiming through him from entering remaining, constructing, grazing, cultivating and/or carrying out any work of whatever nature, on any portion or part of land parcel number Kyangwithya /Tungutu/1153
 3. A mandatory injunction be and is hereby issued directing the defendant himself, his wives daughters, sons, agents, servants, legal representatives, assignees, or by whosoever else to remove any work, construction, structure and themselves from land parcel number Kyangwithya/Tungutu/1153
 4. Costs of the suit be and are hereby awarded to the plaintiff
8. The defendant claims that under the above decree, he applied and was issued with "warrants to give vacant possession of land dated 5th June 2015 which were executed by M/S Transfield Auctioneers and the building on the suit land was demolished.
9. The court has considered the pleadings herein and the evidence adduced before the court and the question that one must seek to answer is "whether the plaintiffs had a legal right to construct the commercial building on the suit land." The plaintiffs produced an official search dated 3.8.2015 showing that Timothy Kiiva was registered as the proprietor of the suit land Kyangwithis/ Tunguti/1153 on 5.5.1977 and a land certificate issued on 27. 2. 1979. On 9th May 2005, the 1st plaintiff lodged a caution against the said title claiming licensee interest. On 13.7. 2016 a court order in Nairobi ELC Appeal No. 610 of 2016 was registered.
10. The 1st plaintiff's right to lodge the caution claiming a right as a licence is provided for under Section 71 (1) (b) of the [Land Registration Act](#) CAP 300 Laws of Kenya. Section 2 of the [Land Act](#) CAP 280 Laws of Kenya defines a "licence" as follows;
- "means a permission given by the Commission in respect of public land or proprietor in respect of private or community land or a lease which allows the licensee to do some act in relation to the land or the land comprised in the lease which would otherwise be a trespass, but does not include an easement or a profit;"
8. It is noted that the caution was lodged against the title holder Timothy Kiiva, the registered proprietor but the plaintiffs did not sue the said title holder claiming licensee rights. In the court's view, the evidence adduced in court did not show that the defendant herein or the said Timothy Kiiva permitted the plaintiffs allowing them to be on the suit land or to construct on the same.
9. Further, the plaintiffs produced in evidence an Amended plaint dated 23.8.2007 in Chief Magistrates Court at Kitui being CMCC NO. 298 of 2005 Joyce Mutethya Kimanthi vs Timothy Kimanthi Kiiva and 2 Others where the 1st plaintiff claimed that Timothy Kimanthi Kiiva held the title to the suit land among other parcels of land in trust for her. She sought a mandatory injunction to have the said Timothy transfer the title to her. The plaintiff did not provide the judgement of the court with regard



to the suit land. The plaintiffs produced in court a ruling from the Court of Appeal in Civil Application No. E321 of 2021 between the same parties in CMCC NO. 298 of 2005. From the said ruling the court has been able to conclude that the judgement of the trial court in CMCC No 298 of 2005 did not favour the 1st plaintiff herein and neither did the appeal filed in Machakos ELC No. 10 of 2017. It appears also that the appeal to the Court of Appeal has not been determined. It will be noted that the order of injunction issued by the Court of Appeal was issued on 3rd December 2021 while the demolition of the structure claimed in this suit is said to have been carried out in August 2015.

10. In the Court's assessment of the evidence adduced, the question of whether or not the suit land was held by Timothy Kiiva in trust for the 1st Plaintiff herein is the subject pending determination before the Court of Appeal.
11. The plaintiff's Counsel further submitted that the 1st plaintiff had rights to the suit land by being Timothy Kiiva's spouse. However, the 1st plaintiff has not shown that she made a successful claim over the suit land under the Matrimonial Causes Act. It is trite in law that the simple fact of being a spouse does not give the spouse rights over their property. The Supreme Court of Kenya in the Petition 11 of 2020 Joseph Ombongi Ogentoto Vs Martha Ogentoto stated as follows:

“Nowhere in the Constitution do we find any suggestion that a marriage between parties automatically results in common ownership or co-ownership of property (hence vesting of property rights) and Article 45(3) was not designed for the purpose of enabling the court to pass property rights from one spouse to another by fact of marriage only”

8. The rights of a registered owner of property are clearly set out under sections 24, 25 and 26 of the Land Registration Act, 2012. Section 24(a) provides:

“24. Subject to this Act

- (a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

48. Sections 25 and 26 provide that such a registered owner's rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. The Defendant had challenged the title in the previous court case by virtue of being a buyer who obtained a court decree and was enforcing this decree.

49. In the Court's view the plaintiffs have not shown on a balance of probabilities that they had a right to be on the suit land and that the same was infringed upon by the defendant. Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

50. The above provision provides for the legal burden of proof. Section 109 of the same Act provides for the evidentiary burden of proof and states as follows: “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.”

51. In this case, the burden on the plaintiff was to show on the balance of probabilities they were rightfully on the suit land they were exercising their legal rights as they constructed on the said land and that the defendant was wrong in demolishing the building. The burden of proof was on the plaintiffs since they



were the ones who invoked the aid of the law and asserted positively their rights which they wished the court to believe.

52. In the court's view, the plaintiffs tended to shift the burden of proof to the defendant without first establishing the legal rights they wished to enforce by court action. Counsel for the plaintiffs submitted extensively on the discrepancies between the contents of the warrants issued on 5.6.2015 in CMCC No. 58 of 2015 and the application that was presented before the court on 2.4.2015 stating that the application sought eviction of the Defendant in that suit and any other person yet the Defendant in this suit relied on the eviction orders to demolish which was contrary to the orders sought and granted by the lower court. Counsel also took issue with the orders granted in the decree in the above-mentioned suit and stated that the warrants issued were also contrary to the orders issued in the decree.
53. The court finds that there was a valid decree and order of the court that was being executed and the same has not been appealed against nor set aside and according to the evidence adduced it is still in force. It is trite in law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable. This was emphasized in the case of Florence Nyaboke Machani vs Mogera Amosi Ombui & 2 others(2014)eKLR.
54. Section 30 of the *Civil Procedure Act* states that a decree may be executed either by the court which passed it or by the court to which it is sent for execution. Section 38 (a) of the *Civil Procedure Act* provides for the Powers of the court to enforce execution and states that;
- Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree---
- a. by delivery of any property specifically decreed

TABLE

50. Further under Order 22 Rule 29 of the Civil Procedure Rules provides for the execution of a decree for immovable property and states;
1. Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.
50. From the foregoing, the court finds that the plaintiffs have not proved their claim as pleaded in the plaint.

3)Who shall bear the costs of the suit?

50. On the issue of costs, the court has agonized over the question of who ought to bear the costs of the suit. The court is cognizant of the provisions of Section 27 of the *Civil Procedure Act* which provide as follows;

subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:



provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

50. In the present case the court is inclined to order each party to bear its own costs of the suit for the reason that before the filing of suit No. 58 of 2015 and execution of the decree therein, the defendant herein who was the plaintiff in that suit was aware that the 2nd plaintiff in this suit Irene Katumbu was the one constructing on the suit land. This is evidenced by the averments made in paragraph 8 of the plaint and also paragraphs 6 to 9 of the affidavit of the defendant herein Isaac Kalua sworn on 2.4.2015 in support of the application for execution of the decree. The court further notes that the caution lodged by the 1st plaintiff against the title to the suit land was in existence since 7.5.2005 long before filing of the suit No. 58 of 2015. In the court's view, the failure by the defendant herein to join Irene Katumbu and Joyce Mutethya in case No. 58 of 2015 was mischievous and was not in good faith. It led to the plaintiffs expending money on the construction of a building that was being challenged in court without their knowledge. In my view, it would be unjust to further condemn them to pay the costs of the suit when they were unaware of the challenge to construction on the suit land.
51. The upshot of the above is that the plaintiff's suit is hereby dismissed. Each party shall bear their own costs of the suit.

Dated, signed and Delivered at Kitui this 24th day of April 2024

L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT, KITUI

Judgement read in open court and virtually in the presence of:

C/A Musyoki

Odawa for the Plaintiffs

No appearance for the Defendant

Page 5 of 5

ELC 24 OF 2021

