



**Mwema v Maina & another (Environment & Land Case  
178 of 2016) [2024] KEELC 3815 (KLR) (14 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3815 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 178 OF 2016**

**M SILA, J**

**MAY 14, 2024**

**BETWEEN**

**NATHAN ONKUNDI MWEMA ..... PLAINTIFF**

**AND**

**JEREMIAH OINO MAINA ..... 1<sup>ST</sup> DEFENDANT**

**ROBERT YUSUF SIMBA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Through a plaint filed on 28 June 2016, the plaintiff commenced suit against the two defendants, whereat he pleaded that in 1979 he and the 1<sup>st</sup> defendant jointly purchased the land parcel Daraja Mbili Plot No. 145 measuring 0.26 Ha, located at Kisii. He claims that they each paid Kshs. 20,000/= to buy the land and that it was agreed that title would be registered in the name of the 1<sup>st</sup> defendant and he would later transfer to the plaintiff his half share. It is pleaded that in 1982, the plaintiff developed a permanent house on his share of the land. He contended that the 1<sup>st</sup> defendant proceeded to illegally subdivide the land giving rise to two titles being Central Kitutu/Daraja Mbili/2687 and 2688 registered in name of the 1<sup>st</sup> defendant and one Gilbert Momanyi Maturwe respectively. The plaintiff further avers that the 1<sup>st</sup> defendant subdivided the land parcel No. 2687 to give rise to the parcels No. 4635 for himself and No. 4636 in name of his children Stephen Nyakundi Onchanga and Gladys Moraa. He then transferred a portion measuring 0.04 Ha, titled as Central Kitutu/Daraja Mbili/2988 to the plaintiff. It is contended that the 1<sup>st</sup> defendant allocated to the 2<sup>nd</sup> defendant another portion lying squarely on the plaintiff's land. In the suit he asked for a declaration that he owns half of the land and asked that any subsequent titles not according to the half share be cancelled.
2. When the matter came up for hearing on 19 October 2023, I pointed out to Mr. Begi, learned counsel for the plaintiff, that there was no proof of service of summons upon the 2<sup>nd</sup> defendant. I also pointed out to counsel that the suit as pleaded is bound to affect all purchasers of the original parcel of land,



and their titles, but they were not parties. Mr. Begi sought time to seek instructions and I directed the matter to be mentioned on 6 December 2023. On that day, Mr. Begi stated that he had written to the Land Registrar, seeking particulars of the subdivisions and he was waiting for the same. He asked for 30 more days, which I gave, and I directed the case to be mentioned on 28 February 2024. On that day, Mr. Begi stated that he had prepared an application to amend but his client was indisposed and asked for 30 more days to file his application which time I gave. I directed the matter to be mentioned on 13 May 2024. Mr. Begi made no appearance on the day and I directed that I would make orders today.

3. As far as I can see the case of the plaintiff is a non-starter against the 2<sup>nd</sup> defendant. There is no proof of service of summons against him and the suit against him has thus abated for failure to serve summons as provided for under Order 5 Rule 2 (7) which gives court power to dismiss suit on expiry of 24 months from the date of issue of the original summons. The original summons herein were issued in the year 2016 which is 8 years ago. On the basis of Order 5 Rule 2 (7) the suit against the 2<sup>nd</sup> defendant is struck out.
4. There is also nothing to proceed for trial as against the 1<sup>st</sup> defendant only. The case of the plaintiff is that several titles have been issued for the half share that he is entitled to which are in the names of different people. The case cannot proceed without those people having the titles being made parties. Time was given for the plaintiff to amend but he has failed to do so. There would be no substance to proceed for trial without these persons being parties. It is therefore pointless to set down the matter for hearing. For this reason I proceed to strike out the entire case. Costs will be to the 1<sup>st</sup> defendant.
5. It is so ordered.

**DATED AND DELIVERED THIS 14 DAY OF MAY 2024**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT AT KISII**

Delivered in presence of :

Mr. Ochoki for the 1<sup>st</sup> defendant

N/A on part of M/s Aboki Begi & Company for the plaintiff

N/A on part of 2<sup>nd</sup> defendant

Court Assistant – David Ochieng’

