



**Gunyama & 2 others v Musambayi & 3 others (Environment & Land Case 364 of 2014) [2024] KEELC 4762 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4762 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 364 OF 2014**

**DO OHUNGO, J**

**JUNE 19, 2024**

**BETWEEN**

**GUNYAMA ANDREW GUNYAMA ..... 1<sup>ST</sup> PLAINTIFF**

**LONITA LIHAVI ..... 2<sup>ND</sup> PLAINTIFF**

**MICHAEL MUSAMBAYI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**MICHAEL LULUMBI MUSAMBAYI ..... 1<sup>ST</sup> DEFENDANT**

**GUNYAMA A GUNYAMA ..... 2<sup>ND</sup> DEFENDANT**

**RESPA LISHINDU MACHINJI ..... 3<sup>RD</sup> DEFENDANT**

**JACKTONE NYIKULI ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. This judgment is in respect of two consolidated suits: ELCC No. 364 of 2014 and ELCC No. 112 of 2019. ELCC No. 364 of 2014 was filed in the High Court on 5<sup>th</sup> November 2008 as HCCC No 84 of 2008 by Gunyama Andrew Gunyama (hereinafter “Gunyama”) against Michael Lulumbi Musambayi (hereinafter “Michael”). The matter was later transferred to this court, whereupon it became ELCC No. 364 of 2014. Gunyama averred in plaint dated 5<sup>th</sup> November 2008 that he was the registered proprietor of the parcel of land known as Isukha/Shirere/2725 (the suit property) and that Michael trespassed into the suit property in October 2008 and started constructing thereon. He further averred that Michael did not vacate despite being requested to do so.
2. Consequently, Gunyama prayed for judgment against Michael firstly, for a declaration that Gunyama was the rightful owner of the suit property and “is entitled to exclusive, peaceful and unimpeded possession and use thereof and to issue an order that the defendant, his relatives, agents and or any other person claiming through him be evicted from the said parcel of land”; secondly, for “a permanent



injunction perpetually restraining the defendant either by himself or through his relatives, employees, servants and or agents or any other person claiming under him from alienating, laying claim to, trespassing onto, utilizing, developing, carrying out any works on, constructing and or in any other manner dealing with land parcel LR No. Isukha/Shirere/2725 and or interfering with the plaintiff's peaceful and exclusive ownership, possession and or use thereof"; thirdly, for costs and; lastly, for any other or further relief deemed fit and just.

3. Michael filed a statement of defence dated 6<sup>th</sup> May 2013 in which he averred that the suit property was ancestral land which belonged to his grandfather and that he was born and resided thereon up to the date of his said statement of defence. He denied Gunyama's allegations of trespass and added that transfer in favour of Gunyama was done fraudulently and in disregard of his interest. He therefore urged the court to dismiss Gunyama's case with costs.
4. On the other hand, Lonita Lihavi and Michael, as first and second plaintiffs respectively, filed Kakamega HCCC No. 8 of 2010 (OS) against Gunyama, Respa Lishindu Machinji and Jacktone Nyikuli as the first, second and third defendants respectively. The said suit was commenced through Originating Summons (OS) dated 31<sup>st</sup> December 2009 and was later transferred to this court, whereupon it became ELCC No. 112 of 2019.
5. Lonita Lihavi and Michael averred in the OS that they had acquired title to a 1 acre portion of parcels of land known as Isukha/Shirere/2725, 2904 and 2905 by adverse possession. They therefore sought determination of whether they had acquired title to the 1 acre portion by adverse possession, whether against Gunyama's, Respa's and Jacktone's title to the portion had been extinguished, whether Gunyama, Respa and Jacktone were holding title to the portion in trust for them, whether Gunyama's, Respa's and Jacktone's title to the portion should be cancelled and the portion be registered in their names and whether Gunyama, Respa and Jacktone should be ordered to execute transfer of the portion to them and in default the Deputy Registrar be empowered to do so on their behalf.
6. The OS was supported by affidavits sworn by Lonita and Michael. They deposed that prior to adjudication, land parcel numbers Isukha/Shirere/2725, 2904 and 2905 formed part of the estate of Lawrence Alusiola who was Lonita's father-in-law and the father of Athanas Musambayi who was Lonita's husband and Michael's father. That at adjudication, the parcels were registered in the names of Gunyama, one Andiriko Machinji and Jacktone.
7. The two cases were consolidated on 22<sup>nd</sup> March 2022, following an application by Gunyama. ELCC No. 364 of 2014 was chosen as the lead file. Earlier, Michael informed the court on 23<sup>rd</sup> November 2021 that Lonita in May 2018. She was not substituted. Consequently, her case stood abated in June 2018. Further, Michael withdrew his case against Respa Lishindu Machinji and Jacktone Nyikuli on 31<sup>st</sup> March 2023. As matters stand now, the case is only between Michael as plaintiff and Gunyama as defendant.
8. At the hearing, Gunyama testified that he purchased the suit property on 15<sup>th</sup> July 1988 from Antiriko Machinji Alusila, paid the purchase price and the land was transferred to him. He added that he conducted a search prior to the purchase and confirmed that Antiriko Machinji Alusila was the proprietor and that that there was no encumbrance on the title. He produced a copy of title deed in his name dated 12<sup>th</sup> January 1989 and a copy of certificate of official search as on 1<sup>st</sup> December 2011. He also showed the court the originals of the said documents.
9. Gunyama further testified that upon obtaining title, he fenced the suit property using fencing posts and iron sheets and constructed buildings on it in 1988 which he leased out to tenants. That Michael started constructing a semi-permanent house on the suit property in 2008 but he did not complete



the construction since Gunyama filed this case and obtained an order. That Michael's building was demolished, and Michael never returned to the suit property.

10. The plaintiff's case was then closed.
11. Michael then testified and adopted the affidavit which he swore in support of the OS and his witness statement which he filed on 6<sup>th</sup> May 2013 in ELCC No. 364 of 2014. He further stated that Lawrent Alusiola who was his grandfather owned parcel number Isukha/Shirere/30. That Antiriko Machinji who was Lawrent Alusiola's eldest son inherited the land fraudulently from Lawrent and disinherited Michael's father and Michael's uncles. That Antiriko Machinji then subdivided parcel number Isukha/Shirere/30 and started selling to strangers.
12. Michael went on to testify that as of the date of his testimony, he was not in possession of parcel number Isukha/Shirere/2725 (the suit property) but was residing on parcel number Isukha/Shirere/2905 which he inherited. He added that only a portion of a house which he was constructing encroached into parcel number Isukha/Shirere/2725 by 1 foot without his knowledge.
13. The defence case was then closed, after which parties filed and exchanged written submissions.
14. I have considered the pleadings, evidence and submissions. As noted earlier, Michael withdrew his case against Respa Lishindu Machinji and Jacktone Nyikuli on 31<sup>st</sup> March 2023. He had sued Respa Lishindu Machinji and Jacktone Nyikuli in respect of land parcel numbers Isukha/Shirere/2904 and 2905. Consequently, his claim concerning the two parcels is no longer available for determination by the court.
15. There is no dispute that Gunyama is the registered proprietor of parcel number Isukha/Shirere/2725. The copies of title deed and certificate of official search which he produced show that he became registered proprietor on 11<sup>th</sup> January 1989. Michael concedes that Gunyama is the registered proprietor, hence his adverse possession claim in respect of the parcel.
16. The issues that arise for determination are whether Michael has established adverse possession in respect of parcel number Isukha/Shirere/2725 and whether the parties are entitled to the reliefs that they respectively seek.
17. As the Court of Appeal stated in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, a party claiming adverse possession must assert hostile title in denial of the title of the registered proprietor. The process must start with a wrongful dispossession of the rightful owner and the proper way of assessing proof of adverse possession is whether the title holder has been dispossessed or has discontinued his possession for the statutory period of 12 years, as opposed to whether the claimant has proved that he or she has been in possession for 12 years. The party who claims adverse possession must demonstrate the date he came into possession, the nature of his possession, whether the fact of his possession was known to the registered proprietor and that the possession was open and undisturbed for the requisite 12 years.
18. Michael testified that he is not in possession of parcel number Isukha/Shirere/2725 but is instead residing on parcel number Isukha/Shirere/2905. He also testified that he only accidentally encroached on a 1 foot portion of parcel number Isukha/Shirere/2725 without intending to. Gunyama also confirmed in his testimony that Michael left the parcel and has never returned to it. In the absence of proof of wilful dispossession of the registered proprietor for 12 years coupled with an intention to acquire the property, there can be no adverse possession. I find that Michael has failed to establish adverse possession.



19. Being a registered proprietor of land, Gunyama is entitled to the rights, privileges, and benefits under Section 24 of the [Land Registration Act](#). Further, 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. His title has not been challenged in any way, save for the failed adverse possession claim.
20. There is evidence on record that Michael has previously encroached on Gunyama's parcel number Isukha/Shirere/2725 and has staked a failed adverse possession claim on it. There is thus valid reason to grant a permanent injunction as sought by Gunyama. Equally, in view of the non-contested ownership of parcel number Isukha/Shirere/2725 by Gunyama, a declaration will issue, but only valid as between the parties to this case. Further, since Gunyama has stated that Michael is no longer in occupation, there will be no need to issue any eviction order.
21. In the result, I make the following orders:
  - a. Michael Musambayi's case in ELCC No. 112 of 2019 is dismissed.
  - b. As between Gunyama Andrew Gunyama and Michael Musambayi, a declaration is hereby issued that Gunyama Andrew Gunyama is the rightful owner of land parcel number Isukha/Shirere/2725 and is entitled to exclusive, peaceful and unimpeded possession and use thereof.
  - c. A permanent injunction is hereby issued perpetually restraining Michael Musambayi by himself, his employees, servants and or agents or any other person claiming under him from alienating, laying claim to, trespassing onto, utilizing, developing, and or in any other manner dealing with land parcel number Isukha/Shirere/2725
  - d. Gunyama Andrew Gunyama shall have costs of the consolidated suits. Michael Musambayi shall bear the said costs.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF JUNE 2024.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Ms Nanjala for the plaintiff

No appearance for the defendant

Court Assistant: M Nguyayi

