



**Shing'ore v Achinga (Environment & Land Case 135 of 2015)
[2024] KEELC 6094 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6094 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 135 OF 2015
EO OBAGA, J
SEPTEMBER 25, 2024**

BETWEEN

ISAAC CYPRIANO SHING'ORE PLAINTIFF

AND

FRANCIS ACHINGA DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide Complaint dated 12th May, 2015 and filed on the same day. The Plaintiff's case is that he is the registered owner of the parcel of land known as Soy/Soy block 10 (Navillus)2000 (the suit property herein). He averred that the land was mostly fallow over the years, but that he has had possession of it. According to the Plaintiff, the Defendant trespassed onto the suit property without his consent or authority, and commenced ploughing and planted crops thereon. That the Defendant's actions are unlawful and a contravention of his rights as the registered proprietor of the land since the Defendant holds no title over the land. The Plaintiff averred that he has a right under law to keep away trespassers such as the Defendant from his land, and indicated that he had issued notice to sue, but the same was in vain. The prayers sought in the Complaint are:-
 - a. A permanent injunction restraining the Defendant, his agents or servants from trespassing onto the Plaintiff's parcel of land known as Soy/Soy block 10 (Navillus)2000 measuring approximately 0.05 Ha.
 - b. A declaration that land parcel number Soy/Soy block 10 (Navillus)2000 measuring 0.05 Ha belongs to the Plaintiff.
 - c. Mesne profits against the Defendant.
 - d. An order of eviction against the Defendant.
 - e. Costs of the suit.



- f. Any other relief this Honourable court deems fit to grant.
2. The Defendant entered appearance on 19th February, 2018 and filed his Defence on 29th April, 2019 denying each and every allegation contained in the Plaintiff. He averred that the legal owner of the suit property is Pius Netia Makokha who was allocated the suit land, then known as Soy/Soy block 10 (Navillus) 71 PLOT No. 208, on 25th January, 1999. That the owner put up structures on the land since 2000, including rental houses and a wall fence. That he was hired by the owner of the land as a casual contractor/care-taker since 2000, and has been cultivating the land with no claim thereto. That he had wrongly been sued as he is not the owner thereof, neither was he claiming ownership, adding that he had since left the land and is no longer a caretaker. The Defendant averred that the orders sought will be in vain, and that the suit is defective, untenable in law, a nullity in law and fact and that it is res judicata. He denied issuance of the notice to sue. He claimed that there is Eldoret HCCC No. 133 of 2006 pending in respect of the suit property. The Defendant prayed that the suit be dismissed with costs.
 3. In response, the Plaintiff filed a Reply to Defence, where he reiterated the contents of the Plaintiff. He averred that as the registered owner of the suit land, he is vested with absolute ownership thereof under Section 24(a) of the *Land Registration Act*, 2012. He averred that the Defendant had denied him access to the land and that a Demand letter was issued which the Defendant did not respond to. He stated that Pius Netia Makokha was never allocated the suit land and called into question Pius Netia's membership to the Ishyewe Self Help Group.
 4. The Plaintiff alleged that the suit property was hived off of Soy/Soy block 10 (Navillus)/71, which was purchased by the Ishyewe Self Help Group on 20th July, 1999 and thus was not available for allocation on 25th January, 1999. The Plaintiff added that the allegation that the Defendant is a caretaker was a lie meant to hoodwink this court. He further alleged there was no structure on the land before 2015, and that the rental houses and fence were put up by the Defendant in disobedience of court orders. The Plaintiff termed the Defence a sham with no legs to stand on and the documents filed alongside it a forgery. He prayed for judgment as sought in the Plaintiff.

Hearing and Evidence

5. During the hearing, the Plaintiff testified under oath as PW1 and adopted his witness statement dated 12th May, 2015 as his evidence-in-chief. He testified that he obtained title to the suit property on 5th June, 2009 which he produced as PEX1 together with a search and its receipt as PEX 2(a) and (b). He explained that he purchased the property from the Ishyewe Self Help Group and paid for it, and he produced the receipt given for purchase as PEX3. He also produced a ballot paper as PEX 4, a receipt for survey fees as PEX5, and the Plot allocation list as PEX6. He produced the list of members of the Ishyewe Self Help Group as PEX7. PEX 8 was an Agreement for Sale dated 20th July, 1999 for purchase of main block of 10 Acres.
6. PW1 testified that he wrote a letter (PEX 10) to the DCIO to investigate the Defendant's documents, and the investigation report (MFI 11) shows that the said documents were forgeries. That his registration as owner at the Lands Office has never been changed as evidenced by the Search dated 11th May, 2018 and the receipt thereto (PEX 12(a) and (b)). He also produced the demand letter issued as PEX 13, testifying that the Defendant is the one utilising the land.
7. PW1 was Cross-examined and testified that he obtained consent to transfer from the Group, but he had not produced it. He testified that the Defendant owns a plot opposite his. That the Defendant entered the suit land in 2015, at which point there were no structures, but the Defendant constructed a house thereafter. He testified that he did not know Pius and denied suing the wrong person. On re-



- examination, PW1 testified that he had sued the Defendant as the person who had forcefully taken possession of and is occupying the suit property, and that he was cultivating the land prior to the invasion. He said that he had never seen an adverse possession claim from the Defendant, or seen any documents from Pius Netia.
8. PW2, Cecilia Maitha Njuki, testified under oath and adopted her witness statement as her evidence-in-chief. She testified that she became the Secretary of Ishieywe Group in 1997 and produced her letter of appointment as PEX9. She testified that the suit property herein belongs to the Plaintiff and after it was allocated to him, he followed all the procedures and obtained title thereto. She said that the Defendant's wife, one Gladys Murefu, was their member. She testified that due to complaints of non-members forging documents, they engaged the DCIO, who investigated and revealed that some documents were indeed forged.
 9. PW2 was cross-examined upon which she testified that she does not know Pius Netia. PW2 testified that the Plaintiff purchased his land in 1998. She clarified that the Defendant's wife owned Plot 206, which is opposite the Plaintiff's land. Further, that the documents held by Pius were forgeries, and that the Defendant's documents were not taken to the DCIO. She testified that the Defendant had built on the Plaintiff's land but that she was not aware if the Defendant had laid any claim to the land. She testified that they had reported Pius to the DCIO. PW2 was also re-examined and she testified that Pius Netia was not a member of the group and she had never seen any claim from him. That the Plaintiff did not acquire his title fraudulently. She testified that the issue of forgery was still alive at the DCIO.
 10. On 9th February, 2023 the Plaintiff called Clement Ooko Odhiambo to testify as PW3. He was sworn and adopted his witness statement dated 7th October, 2022 as part of his evidence. He told the court that the documents produced by the Plaintiff were issued by Ishieywe Self Help Group. On cross-examination, PW3 testified that he is the chairman of the Group and knows all members. That Gladys was allocated Plot No. 206 which she is occupying with the Defendant, but the subject of this suit is Plot No. 208. PW3 testified that the receipts given by the Defendant bearing the name of Pius Makokha are fake. He acknowledged that Pius is not a Defendant in this suit. When re-examined, he testified that he did not know the Defendant. That the receipts in this case were brought by the Defendant.
 11. Silvanus Ndegwa, a DCI Officer at Eldoret, and formerly at Eldoret West where this matter was reported and was part of its investigation team, testified under oath as PW4. He gave a brief summary of the steps taken to investigate the signatures on the receipts presented by the Defendant. PW4 testified that he compared the specimen signatures he took from the chairman and secretary of Ishieywe Group and they differed from the signatures on the documents presented by the Defendant. He produced the investigation report as PEX11. The witness was cross-examined and he testified that he presented the documents to a document examiner. He confirmed that he had not received any forgery complaint against the Defendant. This witness was not re-examined, which marked the close of the Plaintiff's case.
 12. For the defence, the Defendant testified under oath as DW1. He testified that to his knowledge, Plot No. 208 belonged to his neighbour, Pius Makokha. He testified that he is staying on Plot no. 206 which belongs to his wife, and that he has no interest in Plot No. 208. He testified that he was employed by Pius Makokha. He admitted that he was not a member of Ishieywe Self Help Group. DW1 was cross-examined by Mr. Okara and testified that his wife is a member of the group and was allocated plot No. 206, and that he has no land at Ishieywe. DW1 testified that he has no interest on Plot No. 208 which later became Plot No. 2000. On re-examination, he reiterated that he is not a member of Ishieywe Group and only resides on Ishieywe land.
 13. DW2 was Pius Netia Makokha, he was sworn and adopted his witness statement dated 25th April, 2019 as his evidence-in-chief. DW2 testified that he bought property from Ishieywe Group in 1998. He



produced receipts dated 21st March, 1998 and 10th July, 1999 and DEX 1(a) and (b), a Share Certificate and receipt (DEX 2), a receipt dated 19th December, 1999 as DEX 3, an allotment letter as DEX 4 and a receipt for KShs. 10,000/- for processing the title as DEX5. He testified that he has not obtained title yet but he constructed a toilet which is not complete. He testified that his caretaker, who is also a village elder, was wrongly sued in court.

14. DW2 was cross-examined by Mr. Okara and testified that he became a member of Ishieywe Group in 1998 and was allocated 1/8th of an acre in March, 1999. He testified that his caretaker was not a member of the group, but that he did not know the name of his caretaker. That he did not know when the entire block was purchased. He testified that he has known of the case since 2015 but never applied to be joined, although he asked the court to issue orders in his favour as a witness. He denied any knowledge on the investigation that declared the receipts forgeries. DW2 admitted that he started developments on the land in 1999 before the allotment, but that they are not complete. On re-examination, DW2 explained that he did not complete the developments because he was transferred and that he sold the land to his brother. He explained that the signatures on the receipts are different because of a change of officials. He testified that he has been on the land for 25 years.
15. DW3 is Julius Ambeyi, who upon being sworn adopted his witness statement dated 25th April, 2019 as his evidence-in-chief. In summary, DW3 stated that he is a member of Ishieywe group and occupies Soy/Soy (Navillus) block 70 Sub-plot Provisional No. 119. That he started staying there in 2006 and met the Defendant who was a caretaker. He stated that he came to know Pius Netia when he started constructing rentals, but has always known that the land belonged to him. He stated that he does not know the Plaintiff and has never known him since he relocated there.
16. The witness was not cross-examined and the Defendant closed his case. The court then directed parties to file their written submissions.

Submissions:

Plaintiff's Submissions

17. In the Plaintiff's Submissions dated 11th June, 2024 Counsel started by giving a summary of the case herein. Counsel then submitted that under Section 26(1) of the [Land Registration Act](#), a Certificate of Title is prima facie proof that the named proprietor is the absolute and indefeasible owner. He submitted that the Plaintiff had proved that the land was allocated to him, and the court should thus find. He pointed out that the Defendant had admitted he was not the owner and Pius Netia had not proved that the land was allocated to him. Counsel argued that orders cannot issue in favour of a witness or a person not part to a suit. Counsel submitted that the Defendant called him a land grabber but led no evidence in support of his allegation. Counsel relied on Daudi Kiptugen vs Commissioner of Lands & 5 Others (2016) eKLR, Philemon L. Wambia vs Gaitano Lusitsa Mukofi & 2 Others (2019) eKLR. On costs, Counsel submitted that they follow the event per Section 27(1) of the [Civil Procedure Act](#). Counsel asked for the prayers as set out in the plaint and costs of the suit.

Defendant's Submissions

18. The Defendant's Submissions are dated 8th July, 2024. Counsel submitted that the Plaintiff did not show the process through which he acquired the tile, but only jumped to the issuance of the title. For this reason, Counsel submitted that the Plaintiff does not hold good title. Counsel relied on Mike Maina Kamau vs Attorney General (2017) eKLR and Daudi Kiptugen vs Commissioner of Lands (Supra). Counsel further submitted that the Defendant admitted that he had no interest in the suit property. He argued that Pius Netia is the one who had an interest in the suit property and was claiming



ownership thereto, thus the Defendant is not a proper party to this suit. Counsel relied on *Zephir Holdings Limited vs Mimosa Plantations Limited, Jeremiah Matagato & Ezekiel Misango Mutisya (2014) eKLR*, *Apex International Limited & Anglo-Leasing & Finance International Limited vs Kenya Anti-Corruption Commission (2012) eKLR*. Counsel prayed that the entire suit be dismissed with costs.

Analysis and Determination

19. I have considered the pleadings, the evidence tendered and submissions filed, and I am of the view that the only issues for determination are:
- i. Whether the Plaintiff is entitled to the reliefs sought in the plaint; and
 - ii. Who should bear the cost of the suit?

Whether the Plaintiff is entitled to the reliefs sought in the plaint

20. From the pleadings, the first prayer the Plaintiff is seeking is a permanent injunction restraining the Defendant from trespassing on his land. A permanent injunction fully determines the rights of the parties before the Court. It is meant to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. Under the provisions of Sections 1A, 3 & 3 A of the *Civil Procedure Act*, the court has powers to grant an order of permanent injunction, if it feels that the right of a party has been fringed, violated and/or threatened. I am persuaded by the holding of the Court in *Kenya Power & Lighting Co. Limited vs Sheriff Molana Habib [2018] eKLR*, where it was held that:

“...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected.”

21. In the instant suit, the fact that the Plaintiff is the registered owner of the suit property is not in contention. The other uncontested fact is that the Defendant has no claim over the suit property. The Plaintiff alleged that he is the registered owner of the suit land. He has given an account of how he purchased it from Ishieywe Self Hep Group. The Plaintiff has accused the Defendant of unlawful trespass and occupation of the suit property. The Defendant denied the Plaintiff's allegations and maintains that he lives on plot No. 206 belonging to his wife, which the court was informed in testimony, is opposite the suit property. The Defendant explained that he only cultivated the suit property as a caretaker, employed to do so by one Pius Netia Makokha.
22. In his Statement of Defence, testimony as well as his evidence, the Defendant unequivocally and repeatedly, stated that he has no claim over the suit property. This allegation is supported by the testimony of the said Pius Netia Makokha, who testified as DW2 and admitted to hiring him in such capacity, and he claimed an interest in the land as an alleged purchaser from the Ishieywe Group. The Defendant averred in his Defence filed back in 2018 that he had already stopped working as caretaker of the suit property. There is no evidence that the Defendant lied or that he is still in occupation of the suit property.
23. To this end, and in view of the circumstances of this case, I find that there is no legal or practical basis that has been established for the issuance of a permanent injunction. In addition, the matters



herein had been overtaken by events and rendered nugatory since the Defendant is no longer on the suit property and has repeatedly indicated his lack of proprietary interest or legal claim over the suit property. Further, a third party not party to this suit has claimed ownership over the property and cleared the Defendant's name of wrongdoing in his dealings with the suit property. In *Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) vs County Government of Nairobi* (2019) eKLR, Mativo, J. stated that:

- “23. A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact. ...Time and again, it has been expressed that a court should not act in vain.
25. No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity.
26. A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.”
24. Such is the case in the instant suit, and consequently, this court finds that the Plaintiff has failed to demonstrate why the court should issue orders against a person who has presented no interest or claim over the suit land. A person, who for all intents and purposes, this court has been informed already left the suit property. PW3, the former Chairman of the Ishieywe Self Help Group confirmed that the Defendant occupies Plot No. 206 with his wife.
25. The next prayer is for a declaration that the suit property herein belongs to the Plaintiff. The Defendant's response to this is that the suit property belongs to Pius Netia Makokha, his former employer. All the documents presented by the Defendant are in the name of Pius Netia. He admitted in his testimony that he is the one with an interest in the suit land and averred that he employed the Defendant and placed him on the land. The Plaintiff already holds title to the suit property, while the said Pius Netia does not. In any event, Pius Netia did not present his claim over the suit property in this case.
26. The Investigation report from the DCI did not place blame on the Defendant. It is worth noting at this point that the Court noted that Pius Netia, was being evasive in responding to questions posed by counsel during cross-examination. Yet even after it became clear who the proper Defendant ought



to have been in this suit, the Plaintiff still took no steps to regularise the position and join Pius Netia to this suit. It is trite that a court cannot issue an order against a party who is not before it. See the case of David Njoroge Kinuthia & 653 others vs Gnanjivan Screws and Fasteners Limited & 5 Others (2021) eKLR, where the court held that:-

“In the case *Kiai Mbaki & 2 others vs Gichuhi Macharia & another* (2005) eKLR the court stated as follows,

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

It follows that the court cannot issue orders against a person that is not a party to the suit. Further to the foregoing, the main purpose why a party may be joined to a suit is to claim some relief from such a party...”

27. Interestingly, Pius Netia asked the court to issue orders in his favour as a witness. Since orders cannot be made against a person who is not a party to the suit, in the same vein, orders cannot be issued in favour of a person not party to a suit, more so a witness. By testifying as a witness in this court, DW2 did not become a party thereto. In addition, a party’s case is found in their pleadings, which also indicate the kind of prayers he intends the court to make on his behalf. Pius Netia filed no pleadings or any other document in this suit. It is not clear therefore what orders exactly he was asking the court to make in his favour. In *Stella Nasimiyu Wangila & another vs Raphael Oduro Wanyama* (2016) eKLR, the court held that:

“The owner and driver of the said pick-up registration No KAY 651A are not parties in this case. The defendant had an option and opportunity to enjoin that party to the suit – See order 1 rules 15 of the Civil Procedure Rules. He did not do so. A court cannot adjudicate on issues touching a party or pass judgment against a party who is not a party in a suit. Failure to join the party that the defendant blames for the accident as a third party or a necessary party and or seek indemnity from that party has a legal consequence.”

28. Had Pius Netia been joined to these proceedings then it would have been necessary to issue the said declaration of ownership. However, since it is clear that the Defendant is not claiming ownership of the land, any such declaration against him would be superfluous. In the same vein, any claim for mesne profits is to be claimed from Pius Netia who has admitted to using the land and putting up structures thereon.
29. The Plaintiff also prayed for an order of eviction of the Defendant from the suit property. The Defendant admitted that he is no longer on the suit property. No evidence was led pointing to the fact that the fact that the Defendant is in any way still utilising or occupying the suit property. Due to the foregoing, this court finds that no case has been made out for issuance of the order of eviction against the Defendant.

Who should bear the cost of the suit?

30. The award of costs is normally guided by the principle that “costs follow the event”, as set out at Section 27(1) of the *Civil Procedure Act*. The material event referred to in the aforementioned provision is the result of the proceedings, and it is the successful party in this result who is awarded costs. Since the Defendant successfully defended himself from the Plaintiff’s suit, it goes without saying that he is the successful party in this suit.



31. The court has considered the fact that the Defendant vacated the suit property even before filing his Defence and informed the court through his said Defence. It follows that the Plaintiff could have at any time discontinued these proceedings against the Defendant at a very early stage once it became clear who was developing his property, but instead he chose to stubbornly still prosecute the suit. The Court also acknowledges that there have been various court attendances in this matter and has come to the conclusion that there is no reason to deny the Defendant the costs of the suit. The court in exercise of its discretion and in the interests of justice considering the specific circumstances of this case hereby awards the Defendants the said costs of the suit.
32. The court thus finds that the Plaintiff has failed to prove his case against the Defendant on a balance of probabilities. It follows therefore that the Plaintiff is not entitled to any of the reliefs sought. Accordingly, the Plaintiff's suit is dismissed with costs to the Defendant.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 25TH DAY OF SEPTEMBER, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Okara for Plaintiff.

Mr. Kipkemboi for Defendant.

Court Assistant –Laban

