



**Nyamai (Suing as the representative of the Estate of Josiah Nyamai Musyemi
- Deceased) v Mutiso & 3 others (Environment & Land Case 413 of 2017)
[2023] KEELC 798 (KLR) (15 February 2023) (Judgment) (with dissent)**

Neutral citation: [2023] KEELC 798 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 413 OF 2017
CA OCHIENG, J
FEBRUARY 15, 2023**

BETWEEN

**BETH JOSIAH NYAMAI (SUING AS THE REPRESENTATIVE OF THE ESTATE
OF JOSIAH NYAMAI MUSYEMI - DECEASED) PLAINTIFF**

AND

KALEKYE MUTISO 1ST DEFENDANT

MUSAU MUTISO 2ND DEFENDANT

MUSYIMI MUTISO 3RD DEFENDANT

ISAAC MUTHAMA KIMILU 4TH DEFENDANT

JUDGMENT

1. By a plaint dated the September 19, 2017, the plaintiff herein filed this suit against the four (4) defendants seeking the following orders:
 - a) That a permanent injunction restraining the defendants and/or their agents, relatives/heirs and or whosoever from entering, cutting trees, claiming ownership, disposing of and/or dealing and or doing any activity whatsoever on the land parcel plot number 1 part of LR 355/25 west of Machakos municipality situated at Katheka-Kai.
 - b) Costs of the suit.
 - c) Any other further order that this court may deem fit and just to grant.
2. The defendants filed their statement of defence dated the October 30, 2017 where they denied all the averments in the plaint except the descriptive and jurisdiction of the court. They stated that the suit



property was registered in the name of the late Agnes Kavuli Nyamai who had during her lifetime shared the land into two equal parts between the plaintiff and her family and the other portion to the 1st defendant and her family. They explained that no dispute existed during the lifetime of the late Agnes Kavuli Nyamai and prayed that the suit be dismissed.

3. The suit then proceeded by way of viva voce evidence with the plaintiff and her witnesses testifying.

Evidence by the Plaintiff

4. PW1 Beth Josiah Nyamai, testified that she is the sole legal wife of one Josiah Nyamai Musyemi (deceased), who was jointly registered as member number 60 of Katheka-Kai Co-operative Society together with her late mother-in-law, Agnes Kavuli Nyamai. She stated that since her husband survived her mother-in-law, the suit land being Plot No 1 part of LR 355/23 Katheka-Kai, automatically devolved to him. Further, that since she took out letters of administration intestate for both the estate of her late husband and her mother-in-law, the suit land belonged to her. It was her testimony that the defendants never raised any objection to her being granted letters of administration intestate as they were well aware of the fact that they did not have any beneficial or legal interest in the suit land. She averred that she had enjoyed quiet possession over the suit land, cultivated it and erected a permanent house thereon. She explained that sometime in 2014, the 1st, 2nd and 3rd defendants without her permission entered the suit land, cut trees and put up structures thereon. Further, that the three (3) defendants sold one (1) acre of the suit land to the 4th defendant. It was her contention that the defendants were intermeddlers to the estate of her deceased husband and that they should be restrained from interfering with it.
5. PW2 Aaron Munguti Josiah confirmed he was the son of the plaintiff and the late Josiah Nyamai Musyemi. He explained that the 1st defendant was his aunt while the 2nd and 3rd defendants were his cousins as they were sons to the 1st defendant. It was his testimony that his mother had taken out letters of administration intestate in respect to the estate of his late father and his grandmother. He stated that they had been in possession of the suit land until 2014 when the defendants started interfering with it and even sold an acre to the 4th defendant.
6. PW3 Thomas Maweu Nyamai, testified that he was a brother to the late Josiah Nyamai. He confirmed that his late brother Josiah Nyamai had been allocated the suit land by their mother while the husband to the 1st defendant, Dickson, was allocated property in Makueni which he had later sold. He averred that all the brothers had been allocated land and settled in their respective parcels. He argued that the 1st - 3rd defendants had no right to sell a portion of the suit land since it belonged to the late Josiah Nyamai.

Evidence by the defendants

7. Despite entering appearance and defending an interim application, the defendants did not attend court for the hearing. The record by affidavits of service indicates that they were frequently and properly served with court notices. They also failed to file submissions in support of their case.

Submissions by the Plaintiff

8. The plaintiff submitted that the suit land was the subject of the succession proceedings being Machakos High Court Succession Cause No 798 of 2013 and Machakos High Court Succession Cause 838 of 2013 for the estate of her late husband and mother in law respectively and that grants of letters of administration intestate to both estates were issued to her, without any objection. She referred to the provisions of section 49 of the *Land Act* and argued that since the suit land had been jointly registered, in the name of her husband and mother-in-law, she was entitled to be registered as its sole proprietor



upon the demise of her husband. She argued that she had demonstrated a *prima facie* case against the defendants who had not challenged the confirmed grants issued to her, in respect to the two estates. She reiterated that since she had been in occupation of the suit land even before the demise of her husband, she would suffer irreparable harm if the orders sought were not granted and the defendant stopped from trespassing on the said suit land.

9. To buttress her averments, she relied on the following decisions: *Kenya Power & Lighting Co Ltd v Sheriff Molana Habib* (2018) eKLR and *Nguruman Limited v Jan Bonde Nielsen & 2 others*, CA No 77 of 2012 (2014) eKLR.

Analysis and Determination

10. Upon consideration of the plaint, defence, witnesses testimonies, exhibits and the plaintiff's submissions, the following are the issues for determination: Who is the current proprietor of the suit land. Whether the defendants have trespassed on the suit land and should be permanently restrained from interfering with it. Who shall bear the costs of the suit?

As to who is the proprietor of the suit land.

11. The plaintiff claims to be the owner of the suit land which initially had belonged to her late husband and mother-in-law. pw1 in her testimony confirmed that her husband Josiah Nyamai Musyemi (deceased), was jointly registered as member number 60 of Katheka-Kai Co-operative Society together with her late mother-in-law, Agnes Kavuli Nyamai. She stated that since her husband survived her mother-in-law, the suit land automatically devolved to him. It was her testimony that she took out letters of administration intestate vide Machakos High Court Succession Causes No 798 of 2013 and 838 of 2013 and obtained letters of administration intestate for both the estate of her late husband and her mother-in-law. I note she produced two certificates for confirmation of grant dated the February 23, 2015 and March 20, 2015 respectively. I further note that in the Machakos High Court Succession Cause No 798 of 2013, in respect to the Estate of Josiah Nyamai Musyemi, the plaintiff was granted the suit land to hold in trust for the beneficiaries of the deceased estate. PW3 Thomas Maweu Nyamai, who was a brother to the plaintiff's late husband confirmed that his late brother had been allocated the suit land by their mother while the husband to the 1st defendant, Dickson, was allocated property in Makueni which he had later sold. He explained that all the brothers had been allocated land and settled in their respective parcels. I note the defendants despite filing their defence failed to attend court to tender evidence in support of their assertions and challenge the evidence of the plaintiff and her witnesses. In the case of Janet Kaphiphe Ouma & another v Marie Stopes International (Kenya) Kisumu HCCC No 68 of 2007, Ali-Aroni, J favourable cited with approval the decision in *Edward Muriga through Stanley Muriga v Nathaniel D Schulter* Civil Appeal No 23 of 1997, where it was held that even if a party filed a defence but failed to adduce evidence to support the assertions made therein, the evidence of the plaintiff hence remained uncontroverted.
12. In the circumstances while associating myself with the cited decision, I find since the defendants failed to tender evidence to confirm their assertions and challenge the plaintiff's evidence as well as testimonies of her witnesses hence remain uncontroverted. Based on the facts before me, I declare that the plaintiff is indeed the legal owner of the suit land.
13. As to whether the defendants have trespassed on the suit land and should be permanently restrained from interfering with it.
14. The plaintiff seeks permanent injunctive orders against the defendants who she claims have trespassed on the suit land and put up structures thereon. Both PW2 and PW3 confirmed that the defendants had encroached on the suit land. I note the court in the aforementioned succession proceedings



allocated the plaintiff the suit land to hold in trust for the beneficiaries of Josiah Nyamai Musyemi. The defendants did not tender any evidence to confirm if they had lodged objection proceedings in respect to the aforementioned succession proceedings. Looking at the documents presented by the plaintiff especially the certificate for confirmation of grant and the letter dated the July 11, 2013 from Katheka-Kai Farmers' Cooperative Society in which the secretary confirmed that the suit land was registered in the name of Josiah Nyamai and his mother Kabui, I do not find them baseless. Based on the principles established in the case of *Giella v Cassman Brown* [1973] EA 358 as well as definition of a prima facie case as stated in the case of *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR, I find that the plaintiff has indeed established a prima facie case to warrant the orders of permanent injunction. Further, together with her beneficiaries, she will suffer irreparable harm as the 1st defendant has even proceeded to sell off a portion of the suit land to a third party and attempted to construct structures thereon as evident in the photographs which were produced as an exhibit.

15. It is my considered view that if the defendants indeed had an issue with the suit land being inherited by the plaintiff, they should have lodged objection proceedings in the aforementioned succession causes. However, in the current circumstances, I find that they are actually trespassers on the suit land and should hence be restrained therefrom.
16. On who should bear the costs. Since the plaintiff is the inconvenienced party, I award her costs and direct that the same be shared between the 1st, 2nd and 3rd defendants.
17. It is against the foregoing that I find that the plaintiff has proved her case on a balance of probability and will proceed to enter Judgment in her favour. I will proceed to make the following final orders:
 - a) That a permanent injunction be and is hereby issued restraining the defendants and/or their agents, relatives/heirs and or whosoever from entering, cutting trees, claiming ownership, disposing of and/or dealing and or doing any activity whatsoever on the land parcel plot number 1 part of LR 355/25 West of Machakos municipality situated at Katheka-Kai.
 - b) That costs of the suit shall be borne by the 1st, 2nd and 3rd defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 15TH DAY OF FEBRUARY, 2023

CHRISTINE OCHIENG

JUDGE

