



**Nyareru v Meroka & another (Appeal E013 of 2021)  
[2023] KEELC 818 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 818 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
APPEAL E013 OF 2021  
M SILA, J  
FEBRUARY 15, 2023**

**BETWEEN**

**LUCAS SASATI NYARERU ..... APPELLANT**

**AND**

**ONSINYO MOCHUMBE MEROKA ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, KISII COUNTY ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the ruling of Hon. Nathan Shiundu Lutta, Chief Magistrate, Kisii, dated 28 July 2021, made in the suit Kisii CMCC/ELC No. 58 of 2021)*

**JUDGMENT**

1. The primary suit was commenced through a plaint filed on 2 October 2015 by the 1<sup>st</sup> respondent. In his plaint, he averred that he is the rightful proprietor of the land parcel Kisii Municipality/Block I/788, having purchased it in the year 1994, from the original allottee, one Samwel Ayienda. He pleaded that the transaction was approved by the Commissioner of Lands and he was issued with a Certificate of Lease in the year 2003. He thereafter took possession until March 2015 when the appellant emerged, ejected his worker, and took possession, on the basis that he is the one with title to the land. It was the contention of the 1<sup>st</sup> respondent that the title of the appellant was fraudulently acquired. In the plaint, he sought a declaration that the registration of the appellant, as proprietor of the suit land, was illegal, an order cancelling the title of the appellant, and costs of the suit.
2. The appellant appointed counsel and filed defence. He pleaded that the suit land was first allocated to one Moywayu Nyabaro through an allotment letter dated 14 January 1986; that in the year 2000, the said Moywayu Nyabaro transferred the suit land to him as a gift; that he became registered as proprietor on 16 February 2000 and was issued with a Certificate of Lease. He asserted that he was the one in possession and had even constructed rental houses therein. He thus contended to be the one who is the rightful proprietor of the suit land.



3. On 13 April 2021, the suit was transferred to the Chief Magistrate's Court Kisii for disposal given the value of the subject matter.
4. On 29 April 2021, the plaintiff (1<sup>st</sup> respondent herein) filed an application dated 28 April 2021, seeking the following orders which I copy as drawn :-
  1. That the application be certified urgent, heard ex-parte and service be dispensed with in the first instance.
  2. That the Court do issue an order directing that a forensic test be done on the signatures of Moywayu Nyabaro as they appear on the Letter of Allotment, Transfer of Lease dated 9<sup>th</sup> February 2000 and on the last page of the transfer to confirm whether they were done by one person and/or forged and a copy of the late's National Identification Card.
  3. That an injunction restraining the 1<sup>st</sup> defendant either by himself, his agents, servants from selling, alienating, trespassing, transferring, leasing, erecting iron sheet shanties, letting illegal tenants, or in any other manner howsoever interfering with the applicant's Kisii Municipality/Block I/788 located at Nyanchwa within Kisii County pending hearing and determination of the application.
  4. Demolition of illegal and irregularly erected iron sheet shanties and eviction of all the illegal occupants/tenants pending hearing and determination of the main suit.
  5. That this Honourable Court do issue an order restraining the 1<sup>st</sup> defendant either by himself, his agents, servants from selling, alienating, leasing, trespassing, transferring, erecting illegal and unapproved iron sheet shanties or receiving rent from the illegal tenants from Kisii Municipality/Block I/788 located at Nyanchwa pending hearing and determination of the main suit.
  6. That the plaintiff be allowed to erect a gate at the entrance and lock the suit premises i.e Kisii Municipality/Block I/788 pending hearing and determination of the suit.
  7. That the plaintiff be allowed to further amend his Amended Plaintiff before hearing and determination of the application.
  8. That OCS from Kisii Central Police Station do issue security during the eviction.
  9. That costs of this application be provided for.
5. In his supporting affidavit, the applicant went at lengths to state how he acquired the suit land and how he must be the only genuine proprietor of it. He indeed annexed his documents of title. He asserted that the documents of title being relied upon by the 1<sup>st</sup> defendant/appellant were forgeries. He contended that the signatures of the vendor, the late Moywayu Nyabaro, are forged, as they appear in the Lease dated 6 May 2022 and the transfer of lease dated 9 February 2000. He mentioned that he will apply to have the signatures compared with what was in his identity card.
6. The appellant filed a replying affidavit to oppose the motion. He averred that the applicant, having filed a land claim, cannot apply to the same court to investigate a criminal element of the same case, as this would deny the court its role as an independent arbiter. He reiterated that the suit land was allotted to his late father who thereafter transferred the same to him. He averred that he has been in actual occupation and use since the year 2000 and that he developed the plot in the year 2015 where he now has tenants. In the same year, 2015, he sold the plot to one Samwel Gekonge Mirieri and he annexed a sale agreement dated 23 February 2015. He contested the prayers in the application seeking



- declaratory orders and eviction which he averred would be determining the suit at an interlocutory stage. On amendment of the plaint, he was of opinion that this ought to be in a separate application to which a draft of the amended plaint needs to be annexed.
7. The application was heard and ruling delivered on 28 July 2021. The trial Magistrate made the following final orders :-
- a. An order directing that a forensic test be done on the signatures of Moywayu Nyabaro as they appear in the Letter of Allotment, Transfer of Lease dated 9<sup>th</sup> February 2000 and on the last page of the transfer to confirm whether they were done by one person and/or forged and a copy of the late's National Identification Card.
  - b. An injunction restraining the 1<sup>st</sup> defendant either by himself, his agents, servants from selling, alienating, trespassing, transferring, leasing, erecting iron sheets shanties, letting illegal tenants, or in any other manner howsoever interfering with the applicant's Kisii Municipality/Block I/788 located at Nyanchwa within Kisii County pending hearing and determining of the application (sic).
  - c. An order restraining the 1<sup>st</sup> defendant either by himself, his agents, servants from selling alienating, leasing, trespassing, transferring, erecting illegal and unapproved iron sheet shanties or receiving rent from the illegal erecting illegal tenants from Kisii Municipal/ Block/I/788 located at Nyanchwa pending hearing and determination of the main suit.
  - d. The plaintiff be allowed to further amend his Amended Plaint before hearing and determination of this matter.
8. Aggrieved by the above orders, the 1<sup>st</sup> defendant preferred this appeal listing 9 grounds. They basically attack the order for forensic investigation and the order of injunction. It is contended that the trial Magistrate erred in making the order for a forensic test as it allowed itself to be used to fish for evidence. On the injunction, it is stated that the trial Magistrate erred, for this was tantamount to evicting the appellant and determining the dispute at an interlocutory stage. The appellant asks that the ruling of 28 July 2021 be set aside and the application dated 28 April 2021 be dismissed with costs.
9. Both counsel filed written submissions to argue the appeal. I have taken these into consideration before arriving at my decision. I do note that in his submissions, Mr. Sausi, learned counsel for the 1<sup>st</sup> respondent, went at great lengths to point me to a ruling of Onyango J, regarding orders of stay pending the hearing of this appeal. There was indeed an order of stay pending appeal subject to deposit of the sum of Kshs. 75,000/=. I need not address myself to this, for the issue of stay is spent. What I have before me is the substantive appeal of which I will straight away delve into.
10. It is apparent that the application dated 28 April 2021, sought three key prayers being :-
- i. A forensic audit to be done on some documents presented by the appellant.
  - ii. An injunction restraining the appellant from the suit land and for the appellant to be removed therefrom pending hearing of the suit.
  - iii. An order for amendment of plaint.
11. In addressing himself to the prayer for injunction, the trial Magistrate pronounced himself as follows :-
- “In the instant case, the issues that can be granted as at the interlocutory stage in form of conservatory orders are those that will maintain the status quo of the property pending hearing and determination of the suit. The prayers on demolition of structures will be



prejudicial to the party considering the case has not been determined and in the interest of justice, the property should be maintained as it is, with no party having access or control to it until the case is determined. This court proceeds to grant orders 1, 2, 4 and 6 as stipulated in the application while the other orders are denied as they will be dealt with in the hearing and determination of the suit, being the substance of the case.”

12. The court then proceeded to make the final orders as I have outlined them above.
13. Starting with the prayer for injunction, I am persuaded that the trial Magistrate made the wrong decision given the circumstances of the case. This was a suit where both parties held title to the land and the titles had been held by them for a long time. The issue of who has a better title could not be determined at the interlocutory stage. It was common ground that it was the appellant who was in possession of the suit premises and he had made some developments. He had tenants therein and he was the one collecting rent. Indeed, the whole application of the 1<sup>st</sup> respondent was premised on this fact. If the intention of the trial Magistrate was to have the status quo maintained, then this was the status quo, that the appellant had developed the property and had tenants therein. However, the trial Magistrate proceeded to make orders which were tantamount to evicting the appellant without first having determined the case and I am persuaded that the wrong order was made.
14. On the second limb of the application, that concerning a forensic audit, I am also persuaded that the trial Magistrate erred in making that order. A court should always remember that the dispute before it is brought by the parties and generally it is upon the parties to present evidence to prove their case. It would be in very special circumstances for a court to intervene and make orders related to an investigation, for that, ordinarily, would be the domain of the parties. In our case, what the applicant wanted was an order for an expert’s opinion on whether the signatures in documents of the appellant were forgeries or genuine. I don’t know why the applicant did not simply proceed to engage an expert who would then give him an opinion. If it is the contention of the 1<sup>st</sup> respondent that the documents of the appellant are forgeries, nothing stops him from engaging an expert and independently conducting a forensic exercise. If engaged, and if the 1<sup>st</sup> respondent so wishes, such expert will adduce evidence in relation to his findings, and produce the report as an exhibit. I wouldn’t think that in the circumstances of the case, this is a domain where the court ought to have ordered a forensic investigation. In any event, in his ruling, the trial Magistrate did not even state who was to conduct this forensic investigation. I am persuaded that this order was erroneously given.
15. The last limb of the application was to amend the plaint, which the court allowed. I have not seen any grounds of appeal attacking this part of the ruling and I have not seen anything in the submissions of Mr. Momanyi, learned counsel for the appellant, addressing himself on the issue of amendment. However, I have gone through the application and it was never mentioned what it was that the 1<sup>st</sup> respondent intended to amend. Amendment was only mentioned in prayer 6 of the application but the supporting affidavit failed to have even one paragraph to state what it was that was being sought to be amended. Neither was any draft amended plaint annexed. I would have thought that in absence of any indication as to what is being amended, then the prayer to amend ought to have been dismissed. However, I observe that pursuant to the ruling of the court, an amended plaint was filed on 9 August 2021. I can see that it has added some prayers relating to the developments made by the appellant. Given that an amended plaint has already been filed, I will not make any order that would set aside the order to amend. The parties can proceed with the case on the basis of the amended plaint.
16. Thus, save for the prayer allowing the 1<sup>st</sup> respondent to amend his plaint, I am persuaded to set aside all other prayers that were granted by the trial Magistrate in the ruling of 28 July 2021. I have mentioned that if the 1<sup>st</sup> respondent wishes to have a forensic report, nothing stops him from engaging an expert to



supply him with one, but in the circumstances of this case, it is not the business of the court to commit itself to an investigation. Let parties present their evidence and the court will assess the same before arriving at its judgment. In so far as orders of injunction are concerned, I order that the status quo, that was existing before the application dated 28 April 2021 was filed, do subsist until the case is finalized. The status quo is that the appellant is in possession of the suit property and has already developed rental units where he has tenants. I will only order the appellant not to make any additional structures nor adversely deal with the land by charging or selling it. There is also issued an order of inhibition stopping the registration of any instrument or dealings in the register of the suit property until the case is heard or determined. Although it had been mentioned by the appellant that he has entered into a sale agreement, there was no evidence of change of proprietorship, and the position therefore, is that it is the appellant who still holds a parallel title to the suit land, and as I have mentioned, there should be no registration of any disposition until the case is finalized. The order not to enter into any dealings also applies to the 1<sup>st</sup> respondent/plaintiff until the suit is concluded.

17. It will be seen that I have largely allowed this appeal and I therefore award costs of it to the appellant.
18. The appeal has succeeded and if any monies were deposited as security for stay, the same be released to the appellant.
19. Judgment accordingly.

**DATED AND DELIVERED THIS 15 DAY OF FEBRUARY 2023**

**JUSTICE MUNYAO SILA**

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

