



Dzihonza & 4 others v Mwakuwewe & another (Environment & Land Case 40 of 2021) [2023] KEELC 16472 (KLR) (27 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16472 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 40 OF 2021**

**AE DENA, J
MARCH 27, 2023**

BETWEEN

**ALI SALIM DZIHONZA 1ST PLAINTIFF
IDDI SWALEHE MWACHIPONDA 2ND PLAINTIFF
SULEIMAN HASSAN MWAMURYA 3RD PLAINTIFF
MARIAM HAMADI MJAVI 4TH PLAINTIFF
MOHAMED SWALEHE MWAKUTUNZ 5TH PLAINTIFF**

AND

**SUDI AMADI MWAKUWEWE 1ST DEFENDANT
MWAPILISI HAMADI MWAKUWEWE 2ND DEFENDANT**

JUDGMENT

Pleadings

1. By a plaint dated November 15, 2019 the Plaintiffs filed this suit against the Defendants seeking the following orders; -
 - a. Permanent injunction restraining the defendants whether by himself or his servants or agents or otherwise howsoever from remaining on or continuing in occupation of the suit property.
 - b. General damages to trespass
 - c. Costs of this suit together with interest thereon at such rate and for such period of time as this honourable may deem fit to grant.
 - d. Any such other or further relief as this Honourable court may deem fit to grant.



2. In their plaint the Plaintiffs averred that the piece of land known as Kwale/kundutsi B/1381 (“the suit property) situate at Tsimba within Kwale County is registered in their names. That they have at all material times, lawfully and rightfully been in possession of the suit property. That the Defendants have wrongfully entered and continue to trespass on the suit property and had started installing permanent structures. It is averred that the said trespass has resulted into confrontations and efforts to resolve the same through the local administration officers have been futile. The Plaintiffs deny ever selling or promised to sell any portion of the suit property.
3. The Plaintiffs aver that as a result of the trespass above they have suffered loss and damage which were particularised as follows; -
 - a. The defendant’s erection without the Plaintiff’s consent of a house on the suit property is an eye sore and have therefore defaced the suit property.
 - b. The Plaintiffs have been deprived of the use and quiet enjoyment of the suit property.
 - c. The Defendants misuse of the suit property resources including flora and fauna has led to environment degradation of the suit property.
4. The Defendants in their defence dated 30/9/20 filed on 5/11/20 averred that the Plaintiffs filed Kwale Civil Suit No 267 of 2007 seeking similar orders against the Defendants herein which was dismissed on account of their indolence and reserved their right to raise a preliminary objection. That the Plaintiffs had approached the court with unclean hands.
5. The matter was heard on 24/03/22, 23/05/22 and 13/10/22. The Plaintiffs called 3 witnesses and the Defendants called one witness in support of their cases.

Plaintiffs Case

6. PW1 was Ali Salim Dhihonza the 1st Plaintiff. He adopted his witness statement dated November 15, 2019 as part of his evidence in chief and produced the documents in the Plaintiffs list of documents dated November 15, 2019 and 30/11/21. He told the court that he inherited his mother’s share who was a beneficiary of the suit properties
7. PW1 testified that initially the suit property was given to the 3rd plaintiff Suleiman Hassan Mwamuria and currently the title to the same was registered in 5 names his included. He denied that the Defendants bought the land from his father and stated that he had not come across any agreement in this regard. He told the court that the Defendants were neighbours invited to the suit property to undertake subsistence farming. The Plaintiff’s concerns were that the Defendants were in occupation and were cutting down the Plaintiff’s cash crops such as mangoes and coconut trees. That efforts to remove them from the suit property had been futile.
8. Upon cross examination PW1 told the court he was 73 years old and had lived mostly in Mombasa. He admitted the Defendants had both lived in the suit property since 1970 a period of around 52 years. He confirmed he had never constructed any house on the suit property and had not been to the same for over 20 years and could not tell what was on the suit property.
9. PW2 was Iddi Swaleh Mwachiponda one of the registered proprietors of the suit property. He told the court that Suleiman Hassan Mwamuria the 3rd plaintiff initially held the land in trust for them. PW2 stated he later inherited his paternal grandmothers portion which she inherited from his brother Hassan Abdalla Mwamuria who was also the 3rd Plaintiffs father. He denied they ever sold the land to the Defendants.



10. PW2 also admitted during cross examination that the 1st Defendant lived on the land since 1970. That PW2 had no structure neither had he planted any trees on the suit property. That none of his children lived in the suit property. That he was not present during adjudication but his uncle was the one who was listed. That he had never been to the suit property until the year 2021 and the cash crops he saw on the ground were planted by the Defendants.
11. PW3 was Suleiman Hassan Mwamuria. He adopted his witness statement dated November 15, 2019. He testified that the Defendants father sought for land for farming from Hassan Abdalla Mwamuria and that they were to stay thereon but vacate peacefully when required. However, the Defendants refused to leave when required. He testified his father Hassan Abdalla Mwamuria told him the land was family land and that he should not leave out the others thus the names in the title.
12. Upon cross examination he stated he was born in Ukunda Shamu in 1968 though his ID read 1970. That he was about 10 years old in the year 1975. Further that he never saw any documents in relation to his father's ownership though he was aware ownership is by title.
13. With the above the Plaintiffs case was closed.

The Defendants Case

14. The Defendants had lined up two witnesses but since the two had signed a joint witness statement it was agreed between counsels that only one would give evidence.
15. DW1 was Mwapilisi Amadi Mwakuwewe the 2nd Defendant born in 1959. He adopted his witness statement dated 8/11/21 as his evidence in chief and produced the documents listed in the Defendants list of documents dated 8/3/21. He testified that he came into the suit property on 4/8/1976 and had lived therein for over 45 years. That no one had disturbed them except the present litigation. That they bought the land from Suleiman Hassan Mwamuria Mwamsumi at Kshs 172,800 which was fully paid in instalments. That the said vendor came to the land in 1976 and insisted he was selling the land since he resided in Shamu Msambweni. His testimony was that he has never seen any land officers on the property neither was he consulted on the same by the land adjudication officers. That he had planted trees thereon which were over 40 years old. He lived and brought up his family on the suit property. That the Plaintiffs had nothing on the land except the title they held.
16. DW1 testified that the vendor showed him documents for processing title but not a title. That the graves belonged to their family and not the Plaintiffs. That there were no beacons on the land. The Plaintiffs stayed away from the land because they had no interest having sold the land
17. On cross examination DW1 confirmed he was the one who entered into the agreement with the 3rd defendant in 1976. On being shown the green card produced by the Plaintiffs he conceded the first entry was for Hassan Abdalla Mwamuria and that Suleiman's Hassan Mwamuria Mwamsumi entry was made later in April 2007. That he never reported to any authority about his doubts on the title held by the Plaintiffs.
18. With the above the Defence case was closed.
19. Thereafter parties were directed to file submissions. Only Counsel for the Plaintiff complied and which I have considered in this judgement. After confirmation with the registry that the defendants counsel had not filed any submissions this court proceeded to write this judgement.



Analysis And Determination

20. The Plaintiffs claim against the Defendants in my view is basically for trespass and vacant possession. The Plaintiffs allege that the Defendants wrongfully entered the suit property under the guise that they bought the land from the 3rd Plaintiff with his father's approval at a consideration of Kshs 172,800. They seek a permanent injunction against the Defendants continued occupation of the suit property and damages for trespass. The main issues for determination therefore are; -

1. Whether there was trespass by the Defendants and if an Order of Permanent Injunction should issue.
2. Whether the Plaintiffs are the legitimate owners of the suit property
3. Who bears the costs of this suit?

21. It is therefore important to understand what constitutes trespass in law. Section 3(1) of the [Trespass Act](#) Chapter 294 of the Laws of Kenya provides that; -

Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.

The [Act](#) defines Private land as interalia land which is owned or occupied by any person by virtue of a freehold title, a certificate of ownership or lease.

[Halsbury's law of England](#) 3rd Edition, Volume 38 at page 739 paragraph 1205 defines trespass as follows:

A person trespasses upon land if he wrongfully sets foot on, Or rides or drives over, it, or takes possession of it, or expels the person in possession or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it, or it seems if he erects or suffers to continue on his own land anything which invades the air space of another, or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own land to another's land."

22. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership also see [Clerk & Lindsell on Tort](#) (21st Edn) page 1345). Therefore, there must be entry into another's land, such entry must be without permission of the owner of the land and or without reasonable excuse. Section 107(1) of the [Evidence Act](#) Chapter 80 of the Laws of Kenya provides that; -

"Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

23. From the above therefore it behoved the Plaintiffs to prove that they are the owners or occupiers of the property and that the Defendants were trespassers. Let me observe at this point that Mr. Chebukaka learned counsel for the Plaintiffs focused more on ownership of the property in his submissions.

Whether the defendant trespassed unto the suit properties without authority of the plaintiffs

24. The Plaintiff's case was that the suit property at adjudication in the year 1976 belonged to Hassan Abdalla Mwamuria which was confirmed by a letter dated 11/11/21 from the Land Adjudication



& Settlement Office Kwale. A green card certified on 20/1/2020 showing the said Hassan Abdalla Mwamuria was registered the first owner on 3/7/75 was also produced. The Plaintiffs produced as part of their evidence a title deed issued on 25/02/19 in their names by dint of being beneficiaries by inheritance. The Plaintiffs produced a Chiefs letter dated August 26, 2019 where they were termed 'dependants/beneficiaries of Hassan Abdalla Mwamuria'. I will not belabour the point because there is no contention from the defendants that the plaintiffs were not from Mwamuria's lineage.

25. It is trite the title should be treated as prima facie evidence of ownership Section 26(1) of the Land Registration Act states; -

Certificate of title to be held as conclusive evidence of proprietorship

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except on grounds of fraud.

26. From the above provisions the title must be issued upon registration, or purchase or transmission. PW1 upon cross examination made reference to the existence of their grandfathers' title but it was not produced in court yet the Green card produced does not show that a title was issued to Hassan Abdalla Mwamuria. Upon being asked in cross examination as to why they did not obtain title since 1970 he belatedly stated it was because their uncle had the papers which to me was an afterthought. He conceded he didn't know when adjudication was undertaken. According to the parcel register the 3rd Plaintiff was registered as absolute proprietor in April 2007. Even assuming Hassan Abdalla Mwamuria was issued with a title the green card produced does not show the movement of the title from him to the 3rd Plaintiff. PW3 stated in cross examination that his father Hassan Abdalla Mwamuria died in 1991 but there is no transition/transmission shown in the parcel history to PW3. It is not supported by anything. Section 119 of the Registered Land Act (now repealed and which was the law applicable at the time of registration) provides as follows; -

119.

- (1) If a sole proprietor or a proprietor in common dies, his personal representative, on application to the Registrar in the prescribed form and on production to him of the grant, shall be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after his name of the words "as executor of the will of deceased" or "as administrator of the estate of deceased", as the case may be.
- (2) Upon production of a grant, the Registrar may, without requiring the personal representative to be registered, register by transmission -
- (a) any transfer by the personal representative;
- (b) any surrender of a lease or discharge of a charge by the personal representative.



- (3) In this section, “grant” means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee.

27. There is no evidence that the application for transmission was made and if it was then the entry in respect of Suleiman Hassan Mwamuria would have the addition

“as administrator of the estate of deceased”

as required under the law. In addition, there is also no record as to how the names of the 1st, 2nd, 4th and 5th Plaintiffs were entered into the parcel register in the year 2019. Ordinarily there would be succession proceedings before the Kadhi’s court the parties clearly being of the Muslim faith but no evidence was produced in this regard. Mr. Chebukaka learned counsel for the Plaintiffs did not find it necessary to address this issue which he had notice of through the preliminary objection pleaded in the Defence herein.

28. Based on the foregoing gaps this court cannot firmly state that the title herein can suffice for purposes of the claim for trespass raised by the Plaintiffs.

29. The other element of trespass is the lack of permission of the owner or occupier of the suit premises. The Plaintiffs as the alleged registered proprietors term the entry of the Defendants into the suit property unlawful or trespass. The Plaintiffs evidence supersedes this by confirming the Defendants were permitted to enter into the suit property. PW1 told this court that the Defendants were allowed entry into the suit properties to cultivate subsistence crops. This was corroborated by PW3 who added that the permission was granted by his father Hassan Abdalla Mwamuria with the expectation that the Defendants would return to where they belonged when the land was required. The Defendants cannot therefore be trespassers having been allegedly given permission.

30. The Plaintiffs contend that they indeed wanted the Defendants out but the Defendants have since then refused to give vacant possession despite efforts to resolve the same. Infact this is corroborated by the filing of the Kwale Civil suit No 267 of 2007 which PW2 confirmed on cross examination were commenced by their parents, Suleiman Hassan Mwamuria Mzigomani and Hemedi Mwakuwewa. DW1 testified that he came into the suit property in 4/8/1976. PW2 admitted during cross examination that the 1st Defendant lived on the land since 1970. That the cash crops he saw on the suit property in 2021 were planted by the Defendants. PW1 and PW2 upon cross examination conceded that both Defendants herein were known to them and had lived in the suit property for 52 years. Both PW1 and PW2 admitted they have not been in occupation, they had no structure neither had they planted any trees on the suit property. PW3 during cross examination confirmed he was born in Ukunda Shamu in 1968. What should the court infer from this other than they acquiesced to the Defendant’s presence in the suit property. To me they are estopped from now claiming that the Defendants are trespassers. Moreover, it is too late by limitation to claim ownership.

31. Based on the foregoing discussion and analysis this court makes a finding that the Defendants are not trespassers on the suit property. This then takes me to the issue of ownership of the property.

32. The Plaintiffs claim they are the registered owners of the suit properties. On the other hand, the Defendants claim ownership by purchase of the suit property from Suleiman Hassan Mwamuria, the 3rd plaintiff. Learned Counsel for the Plaintiffs relied on the provisions of section 24(a) of the [Land Registration Act, 2012](#) on absolute ownership of the proprietor and section 26 (1) on indefeasibility of title except by fraud or misrepresentation and which counsel pointed were neither pleaded nor proved.



33. The Defendants filed a Statement of Defense on 5/11/20 dated 30/9/2020 together with a preliminary objection through the law firm of M/s Oduor Opallo & Company Advocates. My perusal of the defence did not reveal any plea of fraud and particulars thereof except for some preliminary objections mainly on previous litigation relating to the suit property seeking the same reliefs and failure to take out letters of administration on behalf of the owner of the suit property. I therefore must agree with learned counsel for the plaintiffs. There is no challenge of the Plaintiff's title by reason of fraud or otherwise as envisaged under section 26 (1) (a) and (b) of the Land Registration Act. It is trite that parties are bound by their pleadings. However, this does not negate my earlier observations on the register.
34. The court must interrogate and express itself on Defendants claim of purchase of the property. DW1 testified they were on the suit property by dint of purchase from the 3rd Plaintiff, Suleiman Hassan Mwamuria Mwamsumi and which they paid in full albeit in instalments. That the said vendor came to the land in 1976 and insisted he was selling the land since he resided in Shamu Msambweni. They produced a copy of what they term an agreement.
35. Section 3 (3) of the Law of Contract Act cap 23 provides that -
- No suit shall be brought upon a contract for the disposition of an interest in land unless-
 - i. the contract upon which the suit is founded-
 - ii. is in writing;
 - iii. is signed by all the parties thereto; and
 - iv. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.
36. Applying the above criteria to the agreement produced it is apparent that the agreement relied upon by the Defendants does not measure up to the standards of the agreement contemplated under the law. While it was in writing it was not signed by the parties thereto and attested by a witness present during its execution. To me it looked like a narration of a story by a third party who may have been aware of what transpired and there is no acknowledgement of the consideration by the vendor. I have also noted Mr. Chebukaka's analysis of the oral testimonies where he observed that the 3rd Plaintiff was a minor of 6 years in 1976 and could not have entered into the agreement. Indeed, DW1 in his evidence in chief stated he was born in 1959, that they bought the land from the 3rd Plaintiff who came to the suit property in 1976 and insisted he wanted to sell. The 3rd Plaintiff placed his date of birth as 1968 during cross examination. He was therefore only about 8 years old (or 10 if we were to go by his identity card which states 1970) when he allegedly sold the property. He therefore did not have the requisite capacity in law to enter into the alleged agreement.
37. The Defendants case is that they have been in occupation of the suit property since 1976 and this has been admitted by the Plaintiffs as observed earlier in this judgement by the court. The Plaintiffs have never been in possession of this suit property. Having considered the totality of the evidence I'm inclined to make a finding the Defendants are properly on the suit property having been in possession as admitted by the Plaintiffs and are not trespassers.
38. Based on this court's observations of the glaring irregularities in the registration of the Plaintiffs as proprietors this court cannot give its seal of approval over the said registration. This court therefore declines to make a finding that the Plaintiffs are the legitimate owners of the suit property.



39. Are the Plaintiffs therefore entitled to the orders sought. The Plaintiff craves an order that a permanent injunction restraining the Defendants whether by himself or his servants or agents or otherwise howsoever from remaining on or continuing in occupation of the suit property. The requirements for grant of a permanent injunction is for the party moving the court to demonstrate a prima facie case first. Based on the evidence and the various findings above, the Plaintiffs have not established a prima facie case to warrant all the orders sought.

Conclusion

40. The upshot of the foregoing is that this court makes a finding that the Plaintiffs have not proved their claim to the required standard to sustain a judgement in their favor. The Plaintiffs suit against the Defendants is hereby dismissed with costs to the Defendant.

41. Orders accordingly

DELIVERED AND DATED AT KWALE THIS 27TH DAY OF MARCH, 2023

A.E. DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Chebukaka for the Plaintiffs

No appearance for the Defendants

Mr. Mwakina- Court Assistant.

