



**Salmin & 6 others v Chengo & 2 others (Environment & Land Case
128 of 2022) [2025] KEELC 1487 (KLR) (26 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1487 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 128 OF 2022**

**SM KIBUNJA, J
MARCH 26, 2025**

BETWEEN

**AMAL AIDH SALMIN 1ST PLAINTIFF
TARIG AIDH SALMIN SALEH EL-KATHIRI 2ND PLAINTIFF
SALEH AIDH SALMIN 3RD PLAINTIFF
AIDH SALMIN SALEH EL-KITHIRI 4TH PLAINTIFF
TURKY AIDH SALMIN SWALEH 5TH PLAINTIFF
ABDALLA AIDH SALMIN SWALEH 6TH PLAINTIFF
HASSAN BADAR SALIM 7TH PLAINTIFF**

AND

**HAMISI CHENGO 1ST DEFENDANT
KARISA RIZIKI KARISA 2ND DEFENDANT
THE LANDS REGISTRAR, MOMBASA 3RD DEFENDANT**

JUDGMENT

1. The plaintiffs commenced this suit through the plaint dated 7th November 2022, in which they averred that they are the registered owners of land parcels Nos. MN/11/10952 to 10958, suit properties. That they had contracted the 1st defendant on casual basis to be a caretaker of the suit properties until 2020, and later realized that he had colluded with the 2nd defendant to sell, rent or dispose of the properties to some unknown third parties. That sometime in 2020 the 1st and 2nd defendants demolished the perimeter wall erected by the plaintiffs and injured the plaintiffs' representatives, and they reported the incident to Bamburi Police Station vide OB. Nos. 18/02/06/2021 and 25/28/07/2020. The plaintiffs



averred that due to the 1st and 2nd defendants/ deliberately trespassing and/or encroaching on the suit properties, they filed this suit and sought the following prayers:

- a. “An order of permanent injunction restraining the 1st and 2nd defendants, whether by themselves, their agents, employees, servants or otherwise howsoever from entering upon, remaining on or continuing in occupation of and/or otherwise dealing with or in any way whatsoever interfering with the plaintiffs’ access to, use of and quiet possession of the suit properties.
 - b. An order of mandatory injunction directing the 1st and 2nd defendants whether by themselves, their agents, employees, servants or otherwise howsoever to forthwith remove and demolish all the dwelling structures on the suit properties failing which the same be removed by the Plaintiffs’ at the costs of the 1st and 2nd defendants.
 - c. The officer commanding Bamburi Police Station do assist in effecting and supervising the enforcement of the orders herein.
 - d. Costs and interest.”
2. Through the affidavit of service of Daniel Mitsanze Thoya filed on 6th December 2022, it apparent the 3rd defendant was served with summons on the 2nd December 2022, and filed memorandum of appearance dated the 5th December 2022. That even though there is no specific affidavit of service on the 1st and 2nd defendants being served with summons, the affidavit of service sworn on 23rd March 2023, 20th January 2024 and 31st October 2024 by the same process server confirms that they had been served with the suit papers, mention and hearing notices. The record further confirms that on the 8th December 2022, the 2nd Defendant attended court and confirmed having been served with the suit papers and that the 1st defendant had been taken to hospital. He requested for and obtained thirty (30) days, to file and serve his replies. During the subsequent mention of 7th February 2023, one Ms. Kuria attended court representing the 1st and 2nd defendants, but as she had not filed notice of appointment, she was directed to do first. The court directed all parties to comply with Order 11 of the Civil Procedure Rules. In all the subsequent court appearances, only the learned counsel for the plaintiff and 3rd defendant appeared before the court. No statements of defence were filed by any of the defendants.
3. During the hearing, the plaintiffs called Turkey Aidh Salmin Swaleh, the 5th plaintiff, who testified as PW1. He testified on the relation he has with the other plaintiffs, and adopted the contents of his statement dated 7th November 2022, and list of documents of even date, as his evidence in chief. He told the court that the 1st defendant is a squatter while the 2nd defendant was a guard they had employed to take care of the suit properties. He produced copies of titles contained in the further list of documents dated 5th November 2024. He testified that they usually conducted frequent or weekly visits on the suit properties, up to sometime in 2020 or 2021 when they found trees had been cut and walls demolished. They also found their building blocks, gate and containers missing despite the 2nd defendant living opposite the suit properties. He testified that two months earlier he had seen some structures that had been erected on the suit properties. On cross-examination PW1 stated that the 1st and 2nd defendants had sold the suit properties and left in 2022, but did not know to whom the properties were sold. He further testified that he does not know the names of the strangers who reside on the suit properties or even their total number.
4. The learned counsel for the plaintiffs and 3rd defendant filed their submissions dated the 3rd January 2025 and 30th January 2025 respectively, which the court has considered.



5. The issues for determinations by the court are as follows:
- a. Who is the lawful registered and or beneficial owners of the suit properties.
 - b. Whether the plaintiff is entitled to the remedies requested.
 - c. Who bears the costs?
6. The court has carefully considered the pleadings, After perusing the pleadings, the evidence tendered and submissions by counsel for the plaintiff, the court has come to the following determination:
- a. Though the defendants did not file their statements of defence in opposition to the plaintiffs' claim, the plaintiffs still had the responsibility in law to prove their case on a balance of probabilities, to make the court decide the suit in their favour. I have noted the 3rd defendant has in their submissions indicated that they filed a statement of defence dated 7th March 2023, but none was traced on record. It follows therefore that as the 3rd defendant had filed no pleadings and or call witnesses in support thereof, then their submissions on factual matters/issues were without basis. Under the provisions of sections 106 to 109 of the *Evidence Act* chapter 80 of Laws of Kenya, one who alleges bears the burden to tender proof. In the case of *Nganga & 12 Others v Kahiu* [2024] KEELC 7067 (KLR) the court held that:

“It is trite that he who alleges must prove. The burden of proof in civil cases is on a balance of probabilities. It would be recalled that even in uncontested suits, the burden of proof on a claimant is not lessened in any way. See the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR.”
 - b. When it comes to proof of ownership of land, section 26 of the *Land Registration Act* chapter 300 of Laws of Kenya provides that:

“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—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”The above section was discussed by the Court of Appeal in the case of *Arthi Highway Developers Limited v West End Butchery Limited and Others*, Civil Appeal No 246 of 2013, where it expressly stated thus:

“section 23(1) of the then Registration of Titles Act (now reproduced substantially as sections 25 and 26 of the *Land Registration Act* set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder



under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

- c. The titles produced as exhibits by PW1 is sufficient proof of ownership of the suit properties as of the date noted thereon, as it is a fact their title have not been rebutted, challenged and or impugned by the any of the defendants. The court therefore finds that each of the listed suit properties subject matters of this suit belongs to the specific plaintiff named thereon. The suit properties or parts thereof, may from the testimony given by PW1, may have been sold off to third party(ies) who were not made party to the suit. The title documents produced by PW1 as exhibits carries the dates of 2011, 2012 and 2018, which was years before the filing of this suit. From the plaintiffs’ pleadings and testimony of PW1, the encroachments onto the suit properties occurred in the years 2020/2021. There is however, no evidence tendered, like current certificates of searches to show whether other than the physical encroachments onto the lands, the legal status of the suit properties had been affected since the title documents produced in court were issued.
- d. PW1 told the court that the 1st and 2nd defendants sold the suit properties to third parties who took possession, and left. That the plaintiffs do not know the names of and number of the said third parties who reside on the suit properties. That as admittedly, the 1st and 3rd defendants are not in occupation or possession of the suit properties or part thereof, and the said third parties who are in actual possession and occupation are unknown and have not been joined as defendants in this suit, an order of permanent and or mandatory injunction cannot be issued. The unknown third parties cannot be restrained by the court through an injunction without them being accorded an opportunity to be heard by being joined in an appropriate suit and having their day in court.
- e. In the case of Ndeti and Ndeti (Suing as the Administrators of the Estate of the Late Harrison Mulili Ndeti) & 4 Others v Ndeti (Administrator of the Estate of the Late Peter Nzuki Ndeti - Deceased) & Another [2025] KEELC 1129 (KLR), which had similar facts to the instant suit and where the court held as follows:

“Granting a prohibitory/injunctive order to apply to all those properties would have serious consequences considering the fact that the third parties who have subsequently acquired the said properties were never joined to these proceedings as parties and further considering the uncertainty as to the correct position and or status of the said properties. Such an order has the effect of condemning other parties without having granted them an opportunity to be heard and in view of the foregoing the said relief is equally declined.”

The fundamental rule of law is that no party should be condemned unheard, and the plaintiffs are through their prayers in the plaint requesting for exactly that. PW1 told the court that the 1st and 2nd defendants no longer have interest in the suit as they sold off the suit properties and left in 2022. That probably explains the reason why they had no zeal in defending the suit despite being served. The plaintiff needed to identify the persons to whom the suit properties has been sold to and or those in actual possession



of suit properties or portions thereof and join them as parties as it was against such person(s) that the injunction orders sought would be issued against. That way, those people would have been accorded opportunity to be heard in accordance with the law and constitution. The plaintiffs' suit is against parties who are not shown to hold title to the suit properties or in occupation/possession thereof and the suit is therefore for dismissal.

f. Under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya cost follow the events except where the court order otherwise for reasonable cause. As the defendants did not defend the suit, and the plaintiffs have been unsuccessful in their claim no orders as to costs will be issued.

7. From the foregoing conclusions, the court finds the plaintiffs have failed to prove their claim against the defendants to the standard required of balance of probabilities. The court therefore orders as follows:

a. That the plaintiffs' suit is dismissed in its entirety.

a. No orders as to costs.

Order accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 26TH MARCH 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiffs : Mr. Ganzala

Defendants : M/s Kiti For 3Rd Defendant

Shitemi –Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

