



Bubeya & 3 others (As trustees of Arab Central Association of Kenya, Mombasa also known as Arab Welfare Association Mombasa) v Mohammed & 2 others (Environment & Land Case 272 of 2013) [2023] KEELC 16390 (KLR) (23 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16390 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 272 OF 2013
NA MATHEKA, J
MARCH 23, 2023**

BETWEEN

**FEISAL SAID BUBEYA 1ST PLAINTIFF
ABDULALIM SALEH BALALA 2ND PLAINTIFF
ABDULALIM SALEH BALALA 3RD PLAINTIFF
AWADH AHMED JEIZAN 4TH PLAINTIFF
AS TRUSTEES OF ARAB CENTRAL ASSOCIATION OF KENYA, MOMBASA
ALSO KNOWN AS ARAB WELFARE ASSOCIATION MOMBASA**

AND

**HAMISI MOHAMMED 1ST DEFENDANT
AMIR MOHAMMED 2ND DEFENDANT
KAZUNGU KIMANDO 3RD DEFENDANT**

JUDGMENT

1 The claim is that at all material times, the Plaintiff was and remains the registered owner of all that parcel of land subject of Plot No. Mn/III/83-Mtwapa held by a Certificate of Title registered as Number CR.4391 measuring approximately 6.26 acres situated at Mtwapa Township within Kilifi County of the Republic of Kenya. The Plaintiff state that they acquired the suit land as purchasers for valuable consideration without notice from the then registered owners. The Plaintiff states that on several visits to the suit land with a view to commence fencing the suit land the Defendants approached and threatened the Plaintiff with dire consequences including physical violence and destruction of the fence in the intended construction takes place. The Plaintiff states that the Defendants are residents to the plots neighboring to that of the suit land and reasonably apprehends that are likely to execute their



threats of violence and destruction of any structures that is intended to be put up on the suit land unless restraining orders are made issued by the Honourable Court directed at the Defendants stopping them from in any manner interfering with the Plaintiff's rights over the same. The Plaintiff avers that the Defendants have jointly and severally encroached and or trespassed into the Plaintiff's parcel of land above mentioned without any consent and or authority from the Plaintiff and as such their occupation is illegal and unlawful. The Plaintiff avers that as a result of the said encroachment and trespass the Plaintiff has been deprived of and denied his rights to use utilize and enjoy his property and he has consequently suffered loss and damage as he has been unable to utilize the property for any purpose whatsoever. In addition, the Plaintiff avers that the said encroachment, trespass and illegal construction by the Defendants into the Plaintiff's parcel of land is wrongful, illegal, unlawful and without any justification whatsoever. The Plaintiff is the lawful registered proprietors of the suit prime/parcel of land and stand to suffer irreparably through a breach of constitutional right to private property if injunctive orders are not issued. The Plaintiff avers that as a result of the said illegal, unlawful and wrongful encroachment, and trespass by the Defendants, the Plaintiff could not proceed with the use, occupation of his land as the Defendants have encroached the whole parcel of land that it they have frustrated and scuttled the Plaintiff's investment plans.

2 The Plaintiff prays for judgment against the Defendants jointly and severally for:-

- a. A declaration that the Plaintiff is the lawful, absolute proprietors of the land known as Plot No. Mn/III/83/Mtwapa held by Certificate of Title registered as Number CR.4391 measuring approximately 6.26 acres subject to such of the overriding interest as may for the time being subsist and affect the land stipulated by law.
- b. A declaration that the Defendants have illegally, unlawfully, wrongfully and without any colour of right encroached and trespassed into the Plaintiff's parcel of land No Sub Division No. 572/2 Section III Mainland North CR No. 57684.
- c. An order of permanent Injunction do issue to retain the Defendant by themselves, their servants, workmen, agents, heirs, personal representatives or otherwise howsoever from dealing with, purporting to enter, access remain on, getting ingress into or trespassing into the Plaintiff's land Plot No. Mn/III/83Mtwapa held by a Certificate of Title registered as Number CR.4391 measuring approximately 6.26 acres and/or from erecting or causing to be erected any structures thereon whether temporary or permanent in nature or from in any way interfering with the Plaintiff's peaceful possession and enjoyment of the said suit Land.
- d. Costs of the suit.

3 Kazungu Kimando the 3rd Defendant testified that he is a resident of Mtwapa on the suit property. That he was born on the suit property in 1968 and has lived there all his life. His father the late Mzee Kimando Nzola is the one who moved into the property before he was born and established a home thereon. His is now married and have been blessed with seven children who all live with him on the property together with his wife. They have cultivated the land over the years and depend on it for their subsistence. That the Government has provided the community with the following services, Water supply, Electricity, Security lighting and boreholes. That is a community Library has also been built on the property by a non-governmental organization. There is also a community football ground which is greatly used by the youth. That these amenities have been provided by reason of the fact that there is a big community residing on the suit property who are in need of the said amenities. That by the time this suit was being filed they had resided on the property for a period well in excess of the statutory period of 12 years. That his stay on the property over the years have never been interrupted or challenged. That



there are about 67 people residing there. DW2 and DW3 corroborated DW1's evidents. They state that they too are residence on the suit land and have stayed there for over 12 years without any interruption.

- 4 This court has carefully considered the evidence and submissions therein. PW1 testified that they are the registered owners of all that parcel of land subject of Plot No. Mn/III/83-Mtwapa held by a Certificate of Title registered as Number CR.4391 measuring approximately 6.26 acres situated at Mtwapa Township within Kilifi County of the Republic of Kenya. He produced the provisional certificate of title PEx1. In Civil Appeal No. 246 of 2013 between *Arthi Highway Developers Limited v West End Butchery Limited and Others* the Court of Appeal the Court expressly declared the indefeasibility of title except on allegation of fraud. It declared;

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.”

- 5 Section 24 of the *Land Registration Act* provides that subject thereto;
- a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of lease”

- 6 Section 25 of the *Land Registration Act* states as follows;
- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an Order of Court, shall not be liable to be defeated except as provided in this *Act*, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
 - (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

- 7 Section 26 states as follows;
- (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—



- (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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”.
- 8 Section 107 of the [Evidence Act](#) Cap 80 of the laws of Kenya states 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”.
- 9 Therefore, the onus is on the Plaintiff to tender evidence proving the facts he alleges on a balance of Probability. The Plaintiffs herein has produced evidence which stands unchallenged that they are the registered proprietors of parcel of land Plot No. Mn/III/83-Mtwapa held by a Certificate of Title registered as Number CR.4391 measuring approximately 6.26 acres. In view of the foregoing Sections 24, 25 and 26 of the [Land Registration Act](#), the Plaintiffs title to the suit property would only be challenged successfully on allegations of fraud, where the Plaintiffs are a party to the fraud.
- 10 Be that as it may, Section 4 of the [Limitation of Actions Act](#), Cap 22 of the Laws of Kenya prescribes the limitation period for the institution of suits in regard to various causes of action. In regard to actions founded on contract the limitation period is six years whereas in regard to actions founded on tort the limitation period is three years. The limitation period in regard to an action to recover land under section 7 of the [Limitation of Actions Act](#) is twelve years. Section 7 of the [Act](#) provides as follows;
7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, it first accrued to some persons through whom he claims, to that person.”
- 11 Under the provisions of Section 7 of the [Limitation of Actions Act](#), Cap 22 Laws of Kenya, an action for the recovery of land cannot be brought after the expiry of twelve years. In the case of [Gathoni v Kenya Co-operative Creameries Ltd](#) (1982) KLR 104 Potter, JA stated the rationale of the Law of Limitation as follows;
- 12 The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”
- 13 Again also in the case of [Rawal v Rawal](#) (1990) KLR 275 the court held as follows;
- The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. See also the case of [Melita v Shah](#) (1965) EA 321 cited with approval by Bosire, J in the above case.”
- 15 The Plaintiff testified that it was in 2013 when they went to try and fence the suit land when they found youth playing football and they were chased away. The Defendants stated that the Government has provided the community with the following services: Water supply, Electricity, Security lighting and boreholes. That is a community Library has also been built on the property by a non-governmental organization. There is also a community football ground which is greatly used by the youth. That these amenities have been provided by reason of the fact that there is a big community residing on



the suit property who are in need of the said amenities. There is also a private school there. Some of the Defendants have buried their keens there and many families reside there. Where were that Plaintiffs when all this development was taking place? I am satisfied that the Defendants have been residing on the suit land continuously and uninterrupted for a period of over 12 years. I find that this suit is not sustainable on account being statute barred under the *Limitation of Actions Act*. I find that the Plaintiffs have failed to establish their case on a balance of probabilities and I dismiss it with costs.

16 It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF MARCH 2023.

N.A. MATHEKA

JUDGE

