



**Salim & another v Shallo & 5 others (Environment & Land Case  
17 of 2014) [2023] KEELC 16958 (KLR) (24 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16958 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 17 OF 2014**

**MAO ODENY, J**

**APRIL 24, 2023**

**BETWEEN**

**ABDALLA MOHAMED SALIM ..... 1<sup>ST</sup> PLAINTIFF**

**ALI MOHAMED SALIM ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**OMAR MOHAMED SHALLO ..... 1<sup>ST</sup> DEFENDANT**

**FAISAL HASSAN ALI ..... 2<sup>ND</sup> DEFENDANT**

**COUNTY LAND REGISTRAR, KILIFI ..... 3<sup>RD</sup> DEFENDANT**

**COUNTY LAND REGISTRAR, MOMBASA ..... 4<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**DIRECTOR OF SURVEYS ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By an Amended Plaint dated 14<sup>th</sup> February, 2018 the Plaintiffs sued the defendants seeking the following orders;
  - a. A Declaration that the suit properties belong to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.
  - b. A Declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are trespassers to the suit properties. Ejectment of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants do issue and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants bear the cost of restoring the land to the state it was in before their trespass thereupon.
  - c. In the alternative, an order that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' title do not relate to the suit properties and if it does then the same was fraudulently obtained and therefore null and void;



and deed plan number 34817 of 29.1.2003 is cancelled and recalled for expunging by the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants as by law prescribed.

- d. A permanent injunction against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their agents, servants, employees, assignees and or any other person authorized by them from dealing with the suit properties in any way including selling, transferring, leasing, constructing thereon or occupying the same.
  - e. The 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants be ordered to restore the Takaye/ Musoloni Registry Map by effecting such changes or corrections as are necessary.
  - f. Costs of this suit.
  - g. Any other relief that this Honourable court may deem just to grant.
2. The Plaintiffs' case is that they were registered as the absolute proprietors of Plot Numbers Kilifi/ Takaye/ Musoloni 666 and Kilifi/ Takaye/ Musoloni 483 in August 1995. That sometime in January, 2014 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants alleged that they were the owners of a 99-year leasehold interest in respect of the suit properties by virtue of a title document granted to them by government on 21<sup>st</sup> February, 2013 in respect of PLOT L.R Number 13746 and registered as C.R Number 59993.
  3. The Defendants were served with summons to enter appearance and filed a defence and denied the plaintiffs 'claim.

#### **Plaintiffs' case**

4. PW1 Ali Mohamed Salim adopted his witness statement and told the court the 1<sup>st</sup> and 2<sup>nd</sup> Defendants came to his land just before this case stated. It was PW1's evidence that the Defendants had encroached into their parcel of land Kilifi/ Takaye/ Musoloni/ 483 measuring 2.8 Ha. PW1 produced List of documents dated 10<sup>th</sup> February .2014, List of documents dated 23<sup>rd</sup> March 2015 (minus the topography plans), Supplementary List of documents dated 27<sup>th</sup> November 2017 and Map Sheet No. 20 as exhibits before the court and stated that he is the registered owner of the suit parcel of land. PW1 also testified that 1<sup>st</sup> Plaintiff owns plot No. Kilifi/ Takaye/ Musoloni 666 measuring 5.7 Ha
5. PW1 confirmed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have a Certificate of Title to plot No. LR 13146 and that the two title were issued in 1995 and they took possession of the land. PW1 further told the court that he sent a surveyor to the parcels of land after filing of the suit, who surveyed the land and prepared a report which was produced in court.
6. It was PW1's testimony that his brother's name and his were on the list of allottees and acreages indicated as the first allottees and that they are currently using their respective parcels for livestock rearing.
7. On cross examination by Mr. Gicharu, he informed the court that he came to learn of the encroachment in 2013 and at the time he had nothing on the land as he was only using it to graze his livestock. PW1 also stated that their titles were issued in Kilifi while the defendants 'were issued in Mombasa Registry, further the defendants are the ones who gave him copies of their titles which he exhibited.
8. On further cross examination by Mr Munga, PW1 stated that the adjudication was done in 1992 and there were no objections filed as there was no dispute. That he did an official search and established the suit parcels are registered in their names.
9. PW2 Bartholomew Mwanyungu a Land Surveyor told the court that he was requested by Yusuf Abubakar Advocate to prepare a report in respect of Plot No. 666 Takayo/ Musoloni, Kilifi. That he was to determine the position of the property on the ground, establish its boundaries, determine the



acreage and any encroachment and the extent of such encroachment. He further told the court that he prepared a report dated 4<sup>th</sup> March 2015 which was filed in court on 23<sup>rd</sup> April 2015 as part of the Plaintiff's Further List of Documents.

10. It was PW2's testimony that the Plot was in existence using Map Sheet No. 20 which is a RIM and not a Deed Plan. That there was barbed wire fence crossing the land which fence had encroached on parcel No. 483, 657,698,695,666 and had also blocked the road reserve that was to serve other parcels. He stated that the area of encroachment of Plot No. 666 is 3.16 Ha similar to the finding in Surveyor Karanja's report. He also stated that he did not know there was a RTA title.
11. PW2 further stated that the survey in the area was done in 1995 but the allocations were done in 1995 and that the survey for the LR Number was done much later in 2013. He informed the court that the Deed plan shows it was done on 29<sup>th</sup> January 2013 and the title was signed on 21<sup>st</sup> February 2013 which shows that the RTA title was surveyed over the existing Map Sheet No. 20 which was done earlier. He produced the Survey Report dated 4<sup>th</sup> March 2015 as PEX No. 5.
12. Upon cross examination by Mr. Muli for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, he stated that the encroachment was on Plot No. 666 and that he was not aware of the existence of the RTA title.
13. On cross examination by Mr. Munga for the 3<sup>rd</sup> to 6<sup>th</sup> Defendants PW2 told the court that he conducted a topographical survey which was to determine the developments around the area and the extent of the encroachment. He further stated that such cases of RTA overlapping other titles occurs and that the RTA is processed at the Director of Surveys in Ruaraka and registered at the registry in Mombasa which results in parallel titles.
14. On reexamination he told the court that the authentication of the documents would mean the RIM was not registered on the fixed Survey System and that once that is done, there can never be an overlap.
15. PW3 Benjamin Charo a village Elder, at Kivulini Village in his statement dated 24<sup>th</sup> October, 2017 stated that Kilifi/ Takaye/ Musoloni/ 483 borders his land which is Kilifi/ Takaye/ Musoloni/669. That Plot Kilifi/ Takaye Musoloni/ 668 and 669 are registered in the name of John Kitsao Yaa which was an error that they were unable to rectify before his demise.
16. According to PW3, when the adjudication took place in Takaye Musoloni in 1986, plot Kilifi/ Takaye Musoloni/483 was originally allocated to Ali Mohamed Salim which information he confirmed having been the Chairman Takaye Musoloni Adjudication Section – Land Allocation Committee. He confirmed that the land belonged to Ali Mohammed Salim as he was allocated the land as a first allottee. That Omar Mahmud Shallo and Faisal Hassan Ali were never allocated any land in Takaye Musoloni as they were never residents of the village and they were never entered in the land Allocation register.

### **Defendants' case**

17. DW1 Omar Mohamed Shallo adopted his witness statement dated 20<sup>th</sup> February 2014 as his evidence and testified that they are the registered owners of parcel number LR. No. 13746 together with the 2<sup>nd</sup> Defendant. That he carried out a search at the land Registry which confirmed that they are the registered owners of the suit property. He also testified that they have always paid the land rates as required and were issued with a land rates clearance certificate by the Municipal Council of Malindi.
18. DW1 also told the court that they sought the help of the Assistant County Commissioner in a bid to resolve the land dispute with the Plaintiffs who directed them to the District Land Surveyor to verify the boundaries at the suit property and on 24<sup>th</sup> January, 2014 and stated that the said survey verified



- the beacons and only found their beacons on the suit property and that it was confirmed that they were the rightful owners of the suit property being LR No. 13746.
19. According to DW1, they have never trespassed into the Plaintiffs' plot as the suit property belongs to them. Similarly, that the Plaintiffs have titles that refer to other plots and not the suit property or have procured the same by fraud. Finally, it was his testimony that they put up the perimeter fence after following all the legal requirements of acquiring beacon certificate and a permit from the Municipal Council of Malindi.
  20. On cross examination by Mr. S.M. Kimani, he told the court that the title deed was issued on 21<sup>st</sup> May 2013 and the survey was done on 29<sup>th</sup> January 2013 and he was already in possession in early 2000. That he was paying land rates to the County government since 2013 and he did not have any documents before 2013.
  21. Upon DW1 being shown the Survey Report on the Plaintiffs' Supplementary List of documents, he told the court that the report did not have any basis and he did not understand the formula they used to allocate the land.
  22. DW1 also told the court that he had a different survey report that indicated that there was no encroachment and that he did not know when the boundaries were identified and that he had seen the Takaye/ Musoloni list of allottees. It was his testimony that he was present when the beacons were being verified and that he had applied for the certificate in Mombasa but the registration was done in Kilifi.
  23. Upon cross examination by Mr. Gicharu, he told the court that they obtained titles in 2013 and there was nobody on the land. He also told the court that they engaged 2 surveyors who prepared a report in 2015.
  24. DW2 Edward Kaguru informed the court that he prepared the report dated 19<sup>th</sup> March 2015 in respect to relocation of boundary of LR No. 13746 and parcels no. 483 and 666. According to his report, the plot was registered under Registration of Titles Act and the registered owners were Omar Mohammed and Faisal Hassan. In addition, there was no perimeter fence and no encroachment at the time.
  25. On cross examination by Mr. S.M. Kimani, he told the court that he was given a deed plan for LR 13746 which is always attached to the title. That the deed plan was signed and issued on 29<sup>th</sup> January .2013 and confirmed that he did not carry out the initial survey and was not shown any other report in respect of this case. According to him, Takaye Musoloni was government land which should have taken into account any other grants which were being processed in RTA registers.
  26. On further cross examination by Mr S M Kimani DW2 stated that the survey should be able to identify the issues where there are fixed surveys and overlapping and that where there is an overlap then there is something wrong.
  27. DW3 Stella Kinyua, Land Registrar Kilifi County told the court that Takaye Musoloni 666 is registered in the name of Abdalla Mohamed Salim who was issued with a title on 14<sup>th</sup> August 1995. Plot No. 483 was issued to Ali Mohamed Salim on 7<sup>th</sup> August 1995 as per the register. She testified that previously the suit lands were government land and that there were transfers from the government of Kenya through allocations after survey was done in 1995.
  28. On cross examination, by Mr. S M Kimani, she told the court that she was not aware of Plot No. 13746 and that the entire scheme of Takaye Musoloni squatters settlement scheme is at Kilifi Land Registry and that the two defendants do not appear in the register. She confirmed that Plot No 666 and 483 are on the RIM. Further that she could not identify plot No. LR 13476.



## Plaintiffs' Submissions

29. Counsel for the Plaintiffs 'filed submissions and analysed the evidence on record and stated that the evidence adduced by all the witnesses point to the fact that the survey on Map Sheet 20 for plots Takaye/Musoloni/483 and 666 and Deed plan 348107 for plot LR 13746, overlap.
30. Counsel also stated that Kilifi/Takaye/Musoloni Scheme was established and administered in 1992 while LR 13746 was created by survey done in January 2013 and an approved deed plan No. 348107 was issued in January 2013. Therefore, it follows that the title deeds for plots Kilifi/Takaye/Musoloni/483 and 666 were issued first in 1995 while the certificate of title for LR 13746 was issued in May, 2013.
31. Mr S. M. Kimani submitted on the equitable principle of priority, which states that equity first in time takes precedence hence the title deeds issued in 1995 in respect of Takaye/Musoloni/ 483 and 666, take precedence as they were in existence for over 18 years by the time the certificate of title for LR. 13746 was issued.
32. It was counsel's submission that the plaintiffs produced evidence on the genesis of their titles and how they acquired their respective parcels of land, first by being identified by the plot allocation committee then inclusion of their names in the list of allottees for squatters identified in Takaye/Musoloni Squatter Settlement Scheme, to calling the chairman of the adjudication committee to vouch for their claims; and the confirmation of the County Land Registrar (DW3) that plot LR. 13746 was not shown on the list of parcels and list of allottees, or even on the Map Sheet No. 20 for the Takaye/Musoloni area.
33. Counsel further submitted that the evidence of the Surveyors' and the Land Registrar confirmed that all three plots are in Takaye/Musoloni Squatter Settlement Scheme and that the same land allocated to the plaintiffs on Map Sheet No. 20 as parcels Takaye/Musoloni/ 483 and 666 was the same land where plot No. LR. 13746 was surveyed in 2013, and the beacons put in place.
34. According to counsel, the 1<sup>st</sup> and 2<sup>nd</sup> defendants did not explain how they were identified for allocation of land in Takaye/Musoloni Settlement Scheme as they were neither residents nor squatters during the adjudication process. Further that they did not explain how they retained a private licensed land surveyor to undertake survey in a squatter settlement scheme, and similarly they did not tender any evidence to support their claim that they were in possession of the suit land since 2000.
35. Counsel relied on the case of *Herbert L. Martin & 2 Others v. Margret J. Lamar & 5 others* (2016) eKLR where the court held that when a court is faced with a case of two or more titles over the same land then it has to make an investigation so that it can be discovered which of the two titles should be upheld and that every party must show that their title has a good foundation and passed properly to the current title holder.
36. Mr S M Kimani finally submitted that the defendants neither filed a counterclaim nor pleaded any particulars of fraud to support their plea in paragraph and urged the court to find that the plaintiffs had proven their claim against the defendants as prayed with costs.
37. The 1<sup>st</sup> and 2<sup>nd</sup> defendants did not file submissions as agreed.

## 3<sup>rd</sup> to 6<sup>th</sup> Defendants' Submissions

38. Counsel for the 3<sup>rd</sup> to 6<sup>th</sup> defendants listed the following issues for determination.
  - a. Whether the plaintiffs' titles and the 1<sup>st</sup> and 2<sup>nd</sup> defendants' title refer to the same parcel of land.



- b. Who is the legal owner of the suit land?
39. On the first issue as to whether the Plaintiff's titles and the 1<sup>st</sup> and 2<sup>nd</sup> defendants' titles refer to the same parcel of land, counsel submitted that the property namely Kilifi/Takaye/Musoloni is duly registered under registry index map sheet No. 20 of Kilifi/Takaye/Musoloni, and from an official survey undertaken on the 4<sup>th</sup> March 2014, indicates the official documents that the allocation was done to one Ali Mohamed Salim, and was done in accordance with the legal procedures, and duly entered into the records as such.
39. Mr Munga submitted that Plot No L.R No 13746, belonging to one Omar Mahamud Shallo and Faisal Hassan Ali, a demarcation and deed plan was conducted and consequently, the Deed Plan No. 348107 was curated for plot L.R No. 13746, in January 2013.
39. It was counsel's submission that from the report of PW2 and DW2 there is agreement from both surveyors that there is an overlap on the registration section called Takaye Musoloni, hence from the foregoing, it is obvious and apparent that there is an overlap between the two having the survey map sheet 20 for Plots Takaye/Musoloni/483 and 666 and deed plan 348107 referencing the same piece of land.
39. On the issue as to who is the legal owner of the suit land, counsel submitted that the Plaintiff's title was issued in 1995 which is supported by the adjudication allocation list and Registry Index Map Sheet No. 20, and that the entire registration section record was opened and is kept by the Lands Registrar Kilifi and as such it was therefore not available for allocation under the same or any other regime. Counsel relied on the case of Milan Kumarn Shah & 2 Others -vs-City Council of Nairobi & Another on indefeasibility of titles.

### **Analysis and Determination.**

39. The issues for determinations are whether the Plaintiffs' title and the 1<sup>st</sup> and 2<sup>nd</sup> defendants' title refer to the same parcel of land and who the legal/ registered owner of Takaye/ Musoloni/666 and Takaye/ Musoloni/483.
39. It is not disputed that the plaintiffs are the registered proprietors of Kilifi/ Takaye/ Musoloni / 666 and 483 and on the other hand, the 1<sup>st</sup> and 2<sup>nd</sup> defendants are the registered proprietors of L.R No. 13746. The Plaintiffs assert that their titles were issued under the repealed Registered Land Act in 1995 while the defendants title was issued on 21<sup>st</sup> May 2013 under the repealed Registration of Titles Act.
39. The evidence on record by both the plaintiff and the defendants are to the effect that both claim the same parcel of land but different title numbers granted under two registration systems.
39. I will not reproduce the evidence of the parties but it is important to note that the defendants' titles that were produced by the plaintiffs were given to them by the defendants themselves. The plaintiffs gave a chronology of events of how they were allocated their respective parcels of land, they were first identified by the plot allocation committee then their names were included in the list of allottees for squatters identified in Takaye/Musoloni Squatter Settlement Scheme, and that the chairman of the adjudication committee gave evidence to corroborate their claims.
39. This evidence was further corroborated by the evidence of the County Land Registrar (DW3) that plot LR. 13746 was not shown on the list of parcels and list of allottees, or even on the Map Sheet No. 20 for the Takaye/Musoloni area. It is therefore clear that the plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> defendants 'are one and the same parcel which is an overlap as was admitted by the Surveyors who did reports on the suit land. DW2 also confirmed that if there is an overlap then there is something wrong.



39. In the case of *Munyu Maina Vs Hiram Gathiba Maina*, Civil Appeal number 239 of 2009, the Court of Appeal held as follows; -

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

38. As earlier mentioned, this is a case where the court is face with two titles in respect of the same property, a registered proprietor who is claiming the suit land must prove how he or she acquired the suit land. The root of the title and the process must be explained clearly and in this case the plaintiffs and the defendants had an obligation to prove that their titles were legitimate and legal.

39. The plaintiff’s case was corroborated by the evidence of the chairman of the Adjudication Allocation Committee, the fact that the plaintiff’s name was in the allocation register, the source of the title which was from Kilifi Land Registry where the Takaye/ Musolini/ Settlement Scheme and not Mombasa Registry.

40. Further the oral and documentary evidence by the Land Registrar Kilifi did it all for the Plaintiffs as they are the custodians of the land records for the Settlement scheme of the suit land. The Land Registrar also stated that they did not have the record of L R No 13476 as it would be kept in the Mombasa Land Registry.

41. In the case of *Gitwany Investment ltd vs. Tajmal Ltd & 3 Others* (2006) eKLR the Court held that:-

‘...the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail’

42. Similarly, in the case of *Wreck Motors Enterprises vs. The Commissioner of Lands and others* Civil Appeal Civil Appeal No. 71 of 1997, the court held that:

‘Where there are two competing titles the one registered earlier is the one that takes priority ‘

43. From the evidence on record it shows that the Plaintiff’s title was the first in time and therefore must prevail and there was no evidence of fraud or misrepresentation. I rely of the equity maxim that states that “when two equities are equal, the first in time prevails”.

44. Further counsel for the 3<sup>rd</sup> to 6<sup>th</sup> defendants supported the plaintiff’s submission as per the evidence of the Land Registrar but stated that the Land Registry only deals with documents that are forwarded to them for registration.

45. The court is empowered under section 80 (1) of the *Land Registration Act, 2012* to order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

46. The upshot is that I find that the plaintiffs have proved their case on a balance of probabilities and enter judgment as prayed in the following specific terms:

a. A declaration is hereby issued that the suit properties belong to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.



- b. A declaration is hereby issued that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are trespassers to the suit properties and give vacant possession within 45 days failure to which eviction order to issue.
- c. A permanent injunction is hereby issued against the 1<sup>st</sup> and 2<sup>nd</sup> defendants, their agents, servants, employees, assignees and or any other person authorized by them from dealing with the suit properties in any way including selling, transferring, leasing, constructing thereon or occupying the same.
- d. An order is hereby issued to the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants to restore the Takaye/ Musoloni Registry Map by effecting such changes and corrections.
- e. Costs of this suit to be paid by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 24<sup>TH</sup> DAY OF APRIL, 2023.**

**M.A. ODENY**

**JUDGE**

