



**Mzee v Lamu County Government & another (Environment & Land Case
33 of 2019) [2023] KEELC 17504 (KLR) (22 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17504 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 33 OF 2019**

**MAO ODENY, J
MAY 22, 2023**

BETWEEN

OMAR TWALIB MZEE PLAINTIFF

AND

LAMU COUNTY GOVERNMENT 1ST DEFENDANT

MARTIN DIKET' 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated May 21, 2019 the plaintiff herein sued the defendants seeking the following orders; -
 - a. A declaration that the defendants are trespassers on to the plaintiff parcel of land known as Plot No. 27270 Mpeketoni/Lamu CR No. 42662.
 - b. An eviction order do issue against any possession of the plaintiff property known as Plot No. 27270 Mpeketoni/Lamu CR No. 42662.
 - c. A permanent injunction do issue restraining the defendants, their agents or servants or any other person under their authority from entering, surveying, subdividing, leasing, selling or in any other manner interfere with the plaintiff suit property known as Plot No. 27270 Mpeketoni/Lamu CR No. 42662 unless with order of the court.
 - d. Costs of this suit.
 - e. Any other relief this honourable court deems fit to grant.



2. The 1st and 2nd defendant filed a joint defence and counter claim denying the plaintiff's claim as the registered owner of the suit property. The defendants sought the following prayers in the counterclaim:
 - a. A declaration that the plaintiff's plot No. 27270 Mpeketoni C.R 42662 is irregular, illegal and wrongfully issued.
 - b. An order that the Registrar of Lands Mombasa do cancel and revoke the registration of Title No. CR 42662 Plot No. 27270 Mpeketoni.

Plaintiff's Case

3. PW1 Omar Twalib Mzee adopted his Witness Statement and produced as exhibit 1 -3 as per the list of documents dated 21st May 2019 and PEX 4-13 as per the supplementary list of documents dated 23rd October 2020.
4. PW1 stated that vide a Letter of Allotment dated May 5, 1998 the Commissioner of Lands (now the Chief Land Registrar) allotted him the property known as Plot No. 27270 Mpeketoni Lamu CR. No. 42662 of which PW1 complied with the conditions set out in the allotment letter and was therefore issued with a Certificate of Lease for a term of 99 years from May 1, 1998.
5. It was PW1's testimony that in 2016, without his knowledge, the 1st defendant commenced the process of planning, surveying and settlement of squatters as per approved Part Development Plan No. 01 Ref No. LMU/1281/01/16.
6. PW1 stated that he is the registered owner of the suit property and that the actions by the Defendants' amount to trespass.
7. On cross examination PW1 stated that he made an application for allocation of land from the government and was given an allotment letter dated May 5, 1998. PW1 further stated that he paid the premiums and has been paying land rates to the county.
8. On further cross examination, PW1 stated that there was cancellation and rectification whereby he surrendered the deed plan and the title to the Director of Surveys. He also stated that he has a ground report by the Surveyor and nobody is on the suit land.

Defendant's Case

9. DW1 Paul Muyendo the County Physical Planning Assistant adopted his Witness Statement dated July 19, 2021 as his evidence and produced DEX 1-3 as per the list of documents dated July 15, 2021.
10. DW1 told the court that the suit land is located in Kiongwe which is 8 Kilometers from Mpeketoni away from Lake Kenyatta Settlement Scheme. He added that the Certificate of lease by the Plaintiff shows that it is located on Lamu Island while Kiongwe is on Lamu mainland.
11. It was DW1's further evidence that the upon due diligence he ascertained that they do not have the PDP in their records in Lamu office and at the National office.
12. On cross-examination DW1 admitted that he had not brought any correspondence that the PDP does not exist in the national office. He also stated that he did not raise the issue of where the land is situated either in the statement and the counterclaim.



13. It was DW1's testimony that the property is registered in the Plaintiff's name and that the PDPs were done and approved in 2016 and that DW1 also confirmed that he had not produced a parcel file in respect of the suit property. He stated that he was just defending the Physical Planning Office

Plaintiff's Submissions

14. Counsel identified the following issues for determination: -
- a. Whether the Plaintiff is the legal owner of parcel of land known as Plot No. 27270 Mpeketoni Lamu CR. No 42662.
 - b. Whether the Defendants have proved the allegations of fraud and illegality against the Plaintiff.
 - c. Whether the Defendants have made up a case for being granted the orders sought in the counter-claim.
 - d. Whether the Defendants' actions of interference constitute actionable trespass and whether the Defendants should be permanently evicted?
 - e. Whether the Plaintiff is entitled to reliefs sought hereto?
15. On the first issue whether the Plaintiff is the owner of the suit land, counsel submitted that it is not in dispute that the Plaintiff is the registered owner of the suit property as he produced a letter of allotment, receipts, Certificate of lease, copy official search and receipt to confirm ownership of Plot No. 27270 Mpeketoni Lamu CR. No 42662.
16. Counsel relied on the provisions of sections 24, 25 and 26 of the *Land Registration Act* which provides for indefeasibility of title unless it is challenged on grounds of fraud, misrepresentation, certificate of title acquired illegally, unprocedurally or through a corrupt scheme.
17. It was counsel's submission that the law presumes that all the acts done by the Land Registrar in effecting the transfers was regular unless otherwise proved and that the burden is upon the defendants to bring evidence to rebut the said presumption and relied on the case of *Kibos Distillers Limited & 4 others v Benson Ambuti Adegwa & 3 others* [2020] eKLR.
18. on the second issue whether the defendants have proved fraud against the plaintiff counsel relied on the cases of *Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & another* [2013] eKLR and *Peter Lavatsa Kabwoya V Nicholas G Karira & another* [2021] eKLR and submitted that the defendants have not met the threshold for proof of fraud.
19. Mr. Mwanzia submitted that during the hearing, the 1st defendant diverted its case from what is pleaded and the evidence it supplied in support of the said pleadings and alleged that the suit property is situated in Lamu Town as opposed to Mpeketoni which issue does not flow from the pleadings filed by the defendants.
20. Counsel therefore submitted that parties are bound by their pleadings and any evidence led by any of the parties which is at inconsistent with the averments of the pleadings must be disregarded and cited the case of *John Mungai & another v. Jeremiah Kiarie Mukoma* [2015] eKLR and *Independent Electoral and Boundaries Commission & another v. Stephen Mutinda Mule & 3 others* [2014] eKLR where the Court of Appeal echoed the principle of law on parties being bound by their pleadings.
21. On the issue whether the defendants have proved fraud, counsel submitted that for the court to properly find any fault in the registration of the certificate of title issued to the plaintiff, it was



incumbent upon the defendants to enjoin the Land Registrar and the National Land Commission which would be tantamount to condemning the parties unheard contrary to article 47 of the Constitution of Kenya, 2010.

22. Counsel relied on the cases of Edward Mwangi Irungu v. Chief Land Registrar & 3 others [2018] eKLR, Nemchanda Lagbhir Shah & 2 others v Appollos Hiram Muna & another [2007] eKLR and Transposrt & Allied Workers Union v Comarco Properties EPZ Limited & 2 others [2017] eKLR where the court was of the view that orders cannot be made against persons who have not been properly cited in case and submitted that the 1st defendant had a duty to make the Chief Land Registrar, the National Land Commission and the Director of Survey parties to the counter-claim as the 1st defendant sought orders against the said persons.
23. Counsel further submitted that the plaintiff has proved he is the absolute, rightful and indefeasible owner of the suit property herein and the defendants' actions constitute trespass that infringes on the use and all incidental rights of the plaintiff and cited the case of Keiyian Group Ranch v Samuel Oruta & 9 others [2021] eKLR and urged the court to grant the orders sought in the plaint as prayed.
24. The defendants did not file any submissions as was ordered.

Analysis and Determination

25. The issues for determination are whether the plaintiff is the registered and the indefeasible owner of the suit land, whether the defendant has proved any fraud against the plaintiff as per the counterclaim, who between the plaintiff and the defendants are entitled to the orders sought.
26. From the evidence on record the plaintiff gave a chronology of how he applied for allocation of the suit land, the processes that he went through from application, allotment letter from the Commissioner of Lands, paid the premium, land rates, clearance certificate and was issued with a Certificate of lease which he produced as evidence before the court.
27. These documents have not been challenged by the defendant who alleged fraud but did not adduce any evidence to support such allegation. DW1, the only witness who was an Assistant Physical Planning Officer just gave oral evidence without documentary proof that the PDP in respect of the suit land does not exist. The witness neither produced any correspondence in respect of the suit land nor the parcel file to assist the court determine whether what he was saying was factual or just mere allegations.
28. The witness also confirmed that the suit land is registered in the plaintiff's name and that the issues raised on location of the land were neither stated in the statement nor in the counterclaim. Parties are bound by their pleadings and issues arise from the pleadings.
29. In the Court of Appeal case of Independent Electoral and Boundaries Commission & ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....”



...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

30. The defendant departed from the pleadings and brought in extraneous matters which were not part of the issues to be dealt with. In an adversarial system there is no trial by ambush, parties must know what issues to reply to in advance hence the pretrial procedure before the suit is set down for hearing.

31. Similarly, in the Supreme Court of Kenya case of *Raila Amolo Odinga & another v IEBC & 2 others* (2017) eKLR held that -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

32. The upshot is that the Defendant could not be allowed to travel outside the pleadings which he had an opportunity to amend to include all the issues that he wanted to rely on including joining parties who the orders sought in the counterclaim were directed to.

33. The Defendant was under a duty to prove the allegation of fraud against the Plaintiff as pleaded in the counter claim. Section 26(1) of the *Land Registration Act*, which 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. ’

34. In the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR the court held that: -

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my



view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part

35. The evidence on record as stated by the Plaintiff, revealed that there was no occupation of the suit land hence there would be no need to issue orders of eviction in vain.
36. I have considered the pleadings, the evidence on record together with the submissions by counsel and find that the Plaintiff has proved his case on a balance of probability. The court therefore grants orders as per the plaint but declines to issue an order of eviction since it will be superfluous.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF MAY, 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

