



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njuki & 8 others v Laus & 4 others (Environment & Land Case  
121 of 2021) [2023] KEELC 18316 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18316 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 121 OF 2021**

**NA MATHEKA, J**

**JUNE 20, 2023**

**BETWEEN**

**JOHNSON M'MWANGERA NJUKI ..... 1<sup>ST</sup> PLAINTIFF**  
**SHADRACK KIRUKI M'LAARIA ..... 2<sup>ND</sup> PLAINTIFF**  
**ELIZABETH KITZAO ..... 3<sup>RD</sup> PLAINTIFF**  
**JOSHUA MITHIKA M'IKIAO ..... 4<sup>TH</sup> PLAINTIFF**  
**SAMUEL NTOITI M'MBOROTHI ..... 5<sup>TH</sup> PLAINTIFF**  
**SOLOMON MUKABA MATIRI ..... 6<sup>TH</sup> PLAINTIFF**  
**MICHAEL BENJAMIN SIMBA ..... 7<sup>TH</sup> PLAINTIFF**  
**LAWI MUCHAI ..... 8<sup>TH</sup> PLAINTIFF**  
**JOHN KIPKEMOI KOSKEI (SUIING AS REGISTERED TRUSTEES OF  
METHODIST CHURCH IN KENYA) ..... 9<sup>TH</sup> PLAINTIFF**

**AND**

**MALUMBO LAUS ..... 1<sup>ST</sup> DEFENDANT**  
**RIO MAULID NYIRO ..... 2<sup>ND</sup> DEFENDANT**  
**PAUL WANYAMA ..... 3<sup>RD</sup> DEFENDANT**  
**KOMBO HASSAN ..... 4<sup>TH</sup> DEFENDANT**  
**TABITHA MUTHONI GATHUMBI ..... 5<sup>TH</sup> DEFENDANT**



## JUDGMENT

1. It is averred that the Plaintiff is and was at all material times the duly registered owner of and entitled to exclusive possession of all that parcel more particularly known as Mombasa/mn/block 12/54 hereinafter known as the suit parcel. In or about May 2021 and/or its thereabouts, the Defendants, in cahoots with other unidentified persons jointly and severally wrongfully entered and took possession of the suit properties and have thereafter, wrongfully remained in possession thereof and has thereby trespassed and continue to trespass thereon. By virtue of the Defendants' trespass and wrongful occupation of the suit properties, the Defendants have misused, damaged, wasted, destroyed, polluted and/or degraded the suit property by reason of which, the Plaintiff has been deprived of the use and enjoyment of the suit property. Furthermore, the Defendants threatens and intend, unless restrained by this Honourable Court, to continue to remain in wrongful occupation of the suit property and to trespass thereon. Despite pleas by the Plaintiffs to the Defendants to stop trespassing, the Defendants have persisted in the said trespass and continues in their occupation, unlawful demarcation and sale, and/or construction on the suit properties. By reason of the matters aforesaid, the Plaintiff has suffered loss and damage. The Plaintiff pray that judgement be entered against the Defendants for:
  - a. A permanent injunction restraining the Defendants whether by themselves, servants, agents, employees, relatives, assigns or any other person from remaining on or continuing in occupation and/or construction of perimeter walls and/or any structure thereon, selling, advertising for sale, leasing, auctioning and/or from in any way or manner interfering with all that parcel known as Mombasa/mn/block 12/54.
  - b. Vacant possession of the suit parcel.
  - c. Costs and interest of the suit.
2. That the 2<sup>nd</sup> Defendant further states that he has not disposed, occupied, taken possession and he has no interest at all in the suit property. He denies, has been in possession of the suit property consequently he has not damaged, wasted, destroyed and or polluted the suit property as alleged or at all. The 2<sup>nd</sup> Defendant denies that he has occupied, disposed and deprived the Plaintiffs' possession over the suit property
3. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants aver and state that they are not aware of any title issued to the Plaintiff or any person in respect of the suit property and the Plaintiff remain strangers to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants aver that they were born on the suit property and have enjoyed quiet possession of the property uninterrupted for a period of more than seventy (70) years. By way of Counter— claim the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants claims against the Plaintiff is that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have lived on the suit premises for more than seventy (70) years and have enjoyed quiet possession and uninterrupted. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have developed the suit property and have constructed permanent and semi-permanent houses on the suit premises. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants aver that having stayed on the suit property for more than twelve (12) years, the Plaintiff's rights over the property were extinguished and therefore, by virtue of adverse possession, acquired prescriptive rights over the suit property. That it is just and fair that the Plaintiffs title be cancelled and the property be vested in the names of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants prays for:-
  - i. The Plaintiff's claim be dismissed with costs.



- ii. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' Counter Claim be allowed for following Orders:
- a. That the Plaintiff's rights over the property known as Plot No Msa/mn/block 12/54 have been extinguished by limitation of time,
  - b. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have acquired prescriptive rights over the property by way of adverse possession.
  - c. The Registrar of land Mombasa County be ordered to cancel the Title issued to the Plaintiff in respect of the suit property Plot No Msa/mn Block 12/54 and registered the same in the names of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
  - d. Costs of the suit.
4. This court has considered the evidence and the submissions therein. The 1<sup>st</sup> and 5<sup>th</sup> Defendants were served but never entered appearance or filed any evidence. Looking at the instant case, the Plaintiffs are the appointed trustees of the Methodist Church of Kenya, they were registered by the Registrar of Documents on July 14, 2017 as seen on the Trust Deed dated July 14, 2017 (PEX-6). The Plaintiffs as the registered trustees of the Methodist Church were then registered as the proprietors of Mombasa/MN/Block 12/54 on December 10, 2020 which measures approximately 7.814ha. The Plaintiff has presented a copy of the title deed for the suit property PEX-1, while the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have produced the same title deed in the Plaintiffs' names as DEX-1. The title deed shows that the Plaintiffs are the registered proprietors of the suit property and that there are no encumbrances registered against the title. A registered proprietor has an indefensible title as stated in Section 26 of the [Land Registration Act](#):-
- 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.”
5. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants deny the Plaintiffs' title to the suit property and in their counterclaim averred that they have acquired title to the suit property by virtue of adverse possession. The Defendants' claim for adverse possession is unsuccessful for failing to prove on a balance of probabilities that they have been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owners or by the discontinuance of possession by the owners on their own volition. The Defendants have simply stated that they were born on the suit property and have enjoyed quiet possession uninterrupted for over 70 years. However, the photographs that were exhibited, Dex-2 show recent constructions and unfinished houses that are yet to be occupied. The same is an indication that the Defendants started the construction in the recent past and have not been in exclusive occupation and dispossessed the



Plaintiffs of their title to the suit property for over 12 years. The Court of Appeal in Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another (2015) eKLR stated that;

“The claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. In the Wanje case, the Court went further and took the view that in order to acquire by statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use.”

6. The Defendants cannot be said to have been in adverse possession, while in reality, they trespassed into the suit property in the recent past. They have failed to demonstrate to the court the exact period of time that their entry or stay in the suit property became adverse to the Plaintiffs’ title. Further, the Defendants have failed to demonstrate they had exclusive physical possession of the suit property and establish that their stay was open, uninterrupted, and adverse to the Plaintiffs’ title. The Defendants are therefore trespassers, into the suit property, which the Plaintiff have successfully demonstrated they have title to. In Philip Ayaya Aluchio v Crispinus Ngayo (2014) eKLR, it was held that:-

“On the issue as to whether the defendant is a trespasser, I have no difficulty in finding that he is a trespasser. The Plaintiff has succeeded to show that he has title to the suit land. The title itself amounts to constructive possession of the suit land by the plaintiff. Besides this, there is evidence that the plaintiff moved to the suit land and fenced it using a barbed wire. This in itself is an act of possession. The defendant moved into the suit land and erected a building on it. The defendant does not deny this. The defendant had not title to the land. He was not a licensee of the plaintiff. The defendant came into the property without consent of the plaintiff and without colour of right. He has since remained on it. He has constructed on it. He is clearly a trespasser who is continuing to trespass.”

7. Besides asserting their right over the Plaintiffs’ title the Defendants have raised claims that the Plaintiffs acquired title to the suit property through unlawful and unprocedural means. The onus of proving that the Plaintiffs’ title was acquired unlawfully and unprocedurally, by dint of Sections 107 to 109 of the Evidence Act is on the Defendants. The Court of Appeal for Eastern Africa in R. G Patel v Lalji Makanji (1957) EA 314 established the threshold on the burden of proof required in civil cases founded on fraud and held that;

“There is one preliminary observation which we must make on the learned judge’s treatment of this evidence: he does not anywhere in the judgement expressly direct himself on the burden of proof or on the standard of proof required. Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

8. In the present case, the Defendants have alleged fraud, though they have failed to tender any evidence in support despite having the burden of proving the allegations of fraud. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that they have acquired the rights and interest over the land by way of adverse possession. This was not established in evidence. It is, therefore, the court’s conclusion that the Plaintiffs have proved their claim on a balance of probabilities. Nonetheless, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have failed



to prove their counterclaim dated and the same is dismissed. I enter judgement for the plaintiffs against the Defendants jointly and severally and make the following orders:

- a. Permanent injunction be issued restraining the Defendants, whether by themselves, their servants, agents, employees, relatives, assigns or any other person from remaining on or continuing in occupation and/or construction or perimeter walls and/or any structure thereon, selling, advertising for sale, leasing, auctioning and/or from any way or manner interfering with Land Parcel Mombasa/MN/Block/12/54.
- b. The Defendants are hereby ordered to vacate Land Parcel Mombasa/MN/Block/12/54 and vacate the suit property within 60 days from the date of this judgement and in default eviction orders to issue.
- c. Costs of this suit and in the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' counterclaim are awarded to the Plaintiffs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20<sup>TH</sup> JUNE 2023.**

**N.A. MATHEKA**

**JUDGE**

