



**Mbogho & another v Kazungu & another (Environment & Land Case
164 of 2018) [2023] KEELC 21926 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21926 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 164 OF 2018
NA MATHEKA, J
NOVEMBER 29, 2023**

BETWEEN

MIRIAM CHARI MBOGHO 1ST PLAINTIFF

DONALD MJOMBA MBOGHO 2ND PLAINTIFF

AND

ASHA SIDI KAZUNGU 1ST DEFENDANT

THE COUNTY GOVERNMENT OF MOMBASA 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs aver that they are the duly registered proprietors of all that plot known as [particulars withheld] situated in Mombasa County having bought the same jointly in June 1991 and a transfer duly issued on 26th September 2002 after fully liquidating the balance. The 1st Defendant together with the family without consent or permission of the Plaintiff encroached and/ or trespassed into the Plaintiff's plot known as [particulars withheld] in the year 2004 and are continuing trespassing the Plaintiff's plot where they have squatted and erected illegal structures therein depriving the Plaintiffs access for purposes of development. That despite several notices from the County Government of Mombasa Lands Department and the area chief to demolish and the illegal structures and grant vacant possession, the Defendant has been adamant and has continued trespassing the Plaintiff's plot for a period of 14 years. The plaintiffs pray for judgment against the 1st Defendant for;
 - 1) An order of Permanent injunction restraining the defendant either by herself, her servants, employees, agents and/or anyone authorized by her from encroaching and/ or continuing trespassing onto the Plaintiffs' Plot No. [particulars withheld].
 - 2) An order of Permanent injunction directing the defendant either by herself, her servants, employees, agents and/or anyone authorized by her to demolish all the illegal structures erected on the said plot.



- 3) An order of Permanent injunction directing the defendant either by herself, her servants, employees, agents and/or anyone authorized by her to grant vacant possession of the Plot to the Plaintiffs.
 - 4) Damages and mesne profits,
 - 5) Costs of this suit.
2. The 1st Defendant avers that she had been living on the parcel of land with her late husband since the year 1980. The 1st Defendant further avers that the Plaintiffs have illegally claimed possession of the parcel of land and are therefore trespassing on the same. The 1st Defendant avers that in the year 1980 the World Bank Organization came to their area in Chaani and assigned and allotted the people living within the area parcels of land. The Municipal Council of Mombasa was tasked with the work of subdivision of the lands and awarding to the people living in Chaani. The 1st Defendant avers that her and her late husband one Kazungu Dena were living in Chaani and had already constructed their house when the Municipal Council of Mombasa came and demarcated the plot they were living in with the house along with the bordering plot which belonged to them but it was not developed with any structures. The Defendant further avers that on 30th September 1981 they received a letter from Municipal Council of Mombasa concerning the monthly rent payment of the plot they were living in. The 1st Defendant avers that on 3rd May 1991 they wrote a letter to the Municipal Council of Mombasa regarding plot No. [particulars withheld] and No. [particulars withheld] in which the Municipal Council of Mombasa responded with a letter dated 20th May 1991. The 1st Defendant further avers that the sale agreement that the Plaintiffs entered into for the sale of the suit property was illegal and a fraud as the vendor, Kilonzo Chiema, was not the owner of the suit property and was not allotted the suit property. The 1st Defendant avers that the allotment letter issued to the Plaintiffs on 26th September 2001 was obtained through illegal and fraudulent means. The 1st Defendant states that the Plaintiffs obtained registration to the subject land illegally and through fraudulent means to deprive the 1st Defendant her right to the land which belongs to her. The 1st Defendant prays that the Plaintiffs suit be dismissed with costs to the 1st Defendant and for judgment to be entered against the Plaintiff as follows;
- 1) An order and/or declaration that the 1st Defendant as the legal/beneficial. Registered owner of the property known as Plot No. [particulars withheld]
 - 2) A Permanent injunction restraining the Plaintiffs herein by themselves and/or servants and/or agents and/or employees from subdividing, selling, disposing, transferring, constructing, evicting, threatening and/or interfering in any other manner with the property known as Plot No. [particulars withheld].
 - 3) Any other Order that the Court may deem fit to grant.
 - 4) Costs of this suit and interest at Court rates.
3. It is the plaintiffs' case that the 1st defendant has trespassed into their Plot No. [particulars withheld] Chaani and erected illegal structures, denying them physical access to the suit premises. The 1st defendant denied trespassing and contended that she has a beneficial interest in the suit premises having occupied the same in 1980, together with her late husband under a World Bank Organization program in Chaani which allocated persons living in the area parcels of land. She averred in her counterclaim that then Municipal Council of Mombasa was tasked with subdivision to the residents. She maintained that Plot No. [particulars withheld] was allocated to her late husband Kazungu Dena since they were already on the suit premises and were paying rent to the Municipal Council of Mombasa. She claimed the plaintiffs fraudulently entered into an agreement of sale with Kilonzo Chimea who was neither



the owner nor was he allocated the suit premises. She maintained that the plaintiffs had obtained the registration of the suit premises in an illegal and fraudulent manner and urged the court to find that she is the legal and beneficial owner of the suit premises.

4. There are two issues herein for court to determine
 - a) Whether the 1st defendant has proved that plaintiffs acquired title to Plot No. [particulars withheld] through fraud.
 - b) Whether the 1st defendant has trespassed into Plot No. [particulars withheld].
5. The 1st defendant claimed in her counterclaim that the plaintiffs executed an illegal agreement of sale and obtained registration of the suit premises in a fraudulent manner. It is trite law that fraud is a serious accusation which has to be pleaded and proved to a standard above a balance of probabilities but not beyond a reasonable doubt. The 1st defendant ought to demonstrate to the court through evidence that the plaintiffs have been involved in some deceitful practices when acquiring title to the suit premises with the intention of obtaining an unjust advantage over her.
6. The 1st defendant produced a letter dated 30th September 1981 from the then Municipal Council of Mombasa addressed to Kazungu Dena, which required him to pay Ksh 600/= for the plot he occupied in Chaani as well as produce registration documentation for the plot. This letter does not in any way mention that Kazungu Dena occupied Plot No. [particulars withheld], as well as the letter dated 12th May 1983 also from the Municipal Council of Mombasa. In this letter, Kazungu Dena is being informed that he is in rent arrears of Kshs 960 for Plot No. [particulars withheld]. The 3rd letter produced by the defendant dated 20th May 1991 from the Municipal Council of Mombasa to Kazungu Dena is requesting him to produce registration documents in relation to Plot No. [particulars withheld] and [particulars withheld]. These letters do not prove that Kazungu Dena or the 1st defendant had any legal or beneficial interest in the suit premises.
7. The plaintiffs on the other hand have demonstrated that they entered into a sale agreement with one Kilonzo Chiema Kinyumo for the purchase of Plot No. [particulars withheld] Mainland North for a consideration of Kshs 20,000/= in June 1991. They were then issued with a Letter of Allotment by the then Mombasa Municipal Council for Plot No. [particulars withheld] on 26th September 2001. Soon after Kilonzo Chiema Kinyumo (the vendor) executed a transfer of the suit premises in favour of the plaintiffs on 8th November 2002.
8. It is trite law that that possession is not title and it is not proof of ownership. The burden of proof laid with the 1st defendant to prove she was the lawful and/or beneficial owner of Plot No. [particulars withheld], measuring 32ft by 48ft situate at Kadzandani within Mombasa County. In *James Muigai Thungu v County Government of Trans-Nzoia & 2 others* (2022) eKLR it was held that;

“It is now settled law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may expressly exempt him or her. Section 107 of the *Evidence Act* Chapter 80 Laws of Kenya succinctly states:

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.

Also, further, Section 108 of the *Act* states thus:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Again Section 109 of *Act* refers to the burden of proof of a particular fact. It states that:



The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

9. The 1st defendant has pleaded fraud, however, she has failed to clearly and distinctly prove it. Fraud cannot be inferred from facts pleaded, instead fraud must be distinctly alleged and distinctly proved. The 1st defendant has made general allegations of fraud which are insufficient to amount to averments of fraud. The plaintiffs on the other hand have adduced evidence that gives a chronological sequence of how they acquired title to the suit premises. The 1st defendant has pleaded that the plaintiffs' vendor Kilonzo Chiema was not allocated the land and he acquired the title illegally. However, she has failed to establish to the court how Kilonzo Chiema acquired the suit premises illegally or even how the registration of the plaintiffs as the registered proprietors was done fraudulently.
10. The Court of Appeal in *Jose Estates Limited v Muthumu Farm Limited & 2 others* (2019) eKLR held that;

"In *Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another* (1979) eKLR, this Court took the view that the onus to prove fraud in a matter is on the party who alleges it. Similarly, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, Tunoi JA (as he then was) stated as follows:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts." Emphasis ours.

Given the seriousness of the allegations, the onus was on the 1st and 2nd respondents who alleged fraud to provide evidence in court that meets the standard of proof which was underscored by this Court in *Central Bank of Kenya Limited v Trust Bank Limited & 40 others* [1996] eKLR as being beyond that of a balance of probabilities but below beyond reasonable doubt. In that case, the Court rendered itself as follows:

"The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case."

11. It is the finding of this court that the 1st defendant has failed to tender evidence to show that Kilonzo Chiema was not the registered owner of the suit premises prior to selling it to the plaintiffs and that the plaintiffs acquired the same through fraudulent means. The plaintiffs have demonstrated to the court that they are the registered owners of the suit premises, they have produced an official search from the County Government of Mombasa dated 28th May 2018 which states they have a lease term of 99 years over Plot No. [particulars withheld]. The 1st defendant, on the other hand, has not produced any title document that would warrant the court to consider their beneficial interest in the suit premises. Fraud is a matter of evidence and the 1st defendant has failed to meet the high legal threshold of fraud.,



12. The official search dated 28th May 2018 produced by the plaintiffs is sufficient evidence of their ownership of the suit premises. The court is therefore satisfied that the suit property belongs to the plaintiffs, as the absolute and indefeasible owner of the property, they are conferred with all the rights and privileges accruing as stated in Sections 24 and 25 of the Land Registration Act including the right to possession, to a quiet and peaceful occupation and right to use of their property.
13. The 1st defendant admitted in evidence that they have been in occupation of the suit premises under the belief it belonged to the late Kazungu Dena, her husband. The Director, Housing Development Department of the Municipal Council of Mombasa, plaintiff wrote to Kazungu Dena on 18th October 2004 demanding the removal of the illegal structures on the suit property. The plaintiff also wrote to the 2nd defendant requesting for their invention to remove the illegal structures of the suit premises. It is clear to the court that the 1st defendant's occupation of the suit premises was not warranted by the plaintiffs nor the 2nd defendant. Therefore the 1st defendant's occupation of the suit premises amounted to trespass as defined in Section 3 (1) of the Trespass Act, Cap 294 which provides that:

Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.

14. Having found the 1st defendant is guilty of trespassing onto the plaintiffs' land, it is obvious that they denied the plaintiffs from using, occupying, possessing and enjoying it. In their plaint, the plaintiffs have sought eviction of the 1st defendant, a permanent injunction restraining the defendant from remaining on the land as well as damages and mesne profits. It is trite law that trespass to land is actionable per se, the plaintiff need not prove that he suffered any specific loss or damage. The court will however assess the damages to award depending on the facts and circumstances of each case. In Duncan Nderitu Ndegwa v Kenya Pipeline Company Limited & another (2013) eKLR, it was held that;

“On the issue and quantum of general damages, once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary to for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendant's trespass.”

15. The 1st Plaintiff stated in evidence that she has never taken possession of the suit premises as the defendant was in illegal occupation of the same. This evidence was not contradicted by the 1st defendant, the court finds therefore that the plaintiff is entitled to Kshs 100,000/= as general damages. To the court, this will be sufficient compensation to the plaintiffs for the continued illegal occupation and for the erected structures on the suit premises by the 1st Defendant. The claim for mesne profits is declined as she did not offer any evidence as to the quantum of such a claim. The actions of the 1st defendant of trespassing on the suit property ought to be permanently restrained, the plaintiffs are entitled to an order of eviction as well as a permanent injunction restraining the 1st defendant from remaining on the suit premises.
16. Consequently, this court finds that the plaintiffs have proved their case on a balance of probabilities and the 1st defendant's counterclaim is unmerited and is dismissed with costs. The court proceed to make these final orders:
 - 1) An order of Permanent injunction restraining the defendant either by herself, her servants, employees, agents and/or anyone authorized by her from encroaching and/ or continuing trespassing onto the Plaintiffs Plot No. [particulars withheld].



- 2) An order that the defendant either by herself, her servants, employees, agents and/or anyone authorized by her is to vacate the suit property Plot No. [particulars withheld] within the next 90 days from the date of this judgement and in default eviction order to issue.
- 3) Kshs 100,000/= general damages for trespass.
- 4) Costs of this suit to the Plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 29TH DAY OF NOVEMBER 2023.

N.A. MATHEKA

JUDGE

