



Rahimkhan & another v Attorney General & 2 others (Environment and Land Case Civil Suit 218 of 1997) [2023] KEELC 22295 (KLR) (13 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22295 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT 218 OF 1997
SM KIBUNJA, J
DECEMBER 13, 2023**

BETWEEN

ABDULKADIR- AHMED KHAN RAHIMKHAN 1ST PLAINTIFF

JEBEEN AHMED KHAN RAHIMKHAN 2ND PLAINTIFF

AND

THE ATTORNEY GENERAL 1ST DEFENDANT

THE MUNICIPAL COUNCIL OF MOMBASA 2ND DEFENDANT

SHAZNEER ENTERPRISES LIMITED 3RD DEFENDANT

JUDGMENT

1. The plaintiffs commenced this suit through the plaint dated the 22nd July 1997, seeking for:
 - a. A declaration that the survey and demarcation of plot No. Mombasa/Mainland South Block 1/1829, and the subsequent lease thereof to 3rd defendant was null, void and unlawful.
 - b. An order directing the Registrar of Titles, Mombasa to withdraw and cancel any title deed and certificate of lease issued to the 3rd defendant.
 - c. An order directing the 3rd defendant to surrender to the Registrar of Titles, Mombasa any title deed and or certificate of lease that may be issued to it for cancellation.
 - d. An injunction restraining the 3rd defendant from entering, remaining, altering or in any other way interfering with the plaintiff plot No. Mombasa/Mainland South Block 1/1690.
 - e. Damages.
 - f. Costs of the suit and interest thereon at court rates.
 - g. Any other and further relief this honourable court deem fit to grant.



- The plaintiffs averred that the 2nd defendant was the registered proprietors of leasehold interest over Mombasa/Mainland South/Block 1/1690, the suit property, for 99 years from 1st August 1971 from the Government of Kenya, while the plaintiffs are the registered proprietors of sublease over the said land for 99 years from 5th May 1995. That sometimes in April 1997, the Commissioner of Lands wrongly, illegally and in contravention of the law caused the suit property to be surveyed and registered as Mombasa/Mainland South Block 1/1829 in the name of 3rd defendant. That in June 1997, the 3rd defendant entered onto the suit property and erected a boundary wall without the plaintiffs' consent or authority and declined to allow the plaintiffs' access.
2. The 3rd defendant opposed the plaintiff's claim through its statement of defence dated the 30th July 1997 seeking for the suit to be dismissed with costs. The 3rd defendant disputed that the 2nd defendant was at any time the registered proprietor of the suit property and averred that the parcel as described was non-existent and unknown in law. It averred that the Commissioner of Lands regularly, legally and procedurally issued it with a lease over MSA/MS/Block 1/1829 dated 16th June 1997.
 3. The 1st defendant opposed the plaintiffs' claim through their statement of defence and counterclaim dated the 30th March 1998 inter alia disputing that the 2nd defendant was ever the registered proprietor of "Mombasa/Mainland South/Block 11/1690" insisting that the said land was at all material times government land; that if there was a sublease over the said land, it had been unlawfully and irregularly issued; that the allocation of Mombasa/Mainland South Block 1/1829 was lawfully issued. The 1st defendant sought for the plaintiffs' suit to be dismissed. In their counterclaim, the 1st defendant sought for the cancellation of Mombasa/Mainland South/ Block 1/1690, that the leasehold so described be declared unlawful and costs.
 4. The plaintiffs filed a reply to the 1st defendant's defence and counterclaim dated the 22nd April 1998 filed through Ms. Khatib & Company Advocates reiterating their averments in the plaint and insisting that Mombasa/Mainland South/Block 1/1829 was illegal and was not indicated in the Registry Index Map. They denied the 1st defendant's counterclaim and sought for it to be dismissed and judgement be entered in terms of the plaint. I have also seen another defence to the 1st defendant's counterclaim dated 9th May 2012 filed through Ms. Kadima & Company Advocates.
 5. Rukiya Ahmed Khan testified as PW1 on behalf of the plaintiffs', on the 27th November 2018. It was her testimony that the plaintiffs are her children and that they reside outside the country. That she bought the suit property for them from Abdullariff, who was the former mayor of Mombasa on the 14th June 2016. That she took possession and when preparing to erect a perimeter wall, she was chased away by the 3rd defendant who alleged that she was attempting to build in front of their plot which it claimed was a road reserve. She disputed the 1st defendant's claim that the 3rd defendant is true owner of the plot. During cross examination, PW1 stated that she did not conduct an official search before buying the plot as she trusted the seller. That the suit property is not on road reserve as there are other plots between the plot and the road. That she joined the 2nd defendant in the suit because the vendor of the plot had died. That the 2nd defendant had however not wronged her or stopped her from entering onto the plot. That the relationship she had with the vendor was such that it was not necessary to put the sale transaction in writing. That she has not done a search to confirm whether the suit property was registered in the names of the plaintiffs.
 6. The 1st defendant called Silas Kiogora Mburugu, Principal Land Administration Officer, National Land Commission, who testified as DW1. He told the court that the suit property was a subdivision from parcel 4665 which had been surrendered to the government by the original owner in 1975. That the surrendered parcel was re-planned under PDP No. 12/6/CT/21/97 of 14th March 1997 to create



a residential plot. That PDP was approved by the Commissioner of Lands and the plot allocated to Shariff Nazzir and letter of allotment prepared in the name of 3rd defendant. The offer was accepted, payment made and lease forwarded to the Mombasa Land Registry for registration and issuance of certificate of lease. He stated that though the plaintiffs had been issued with a sublease over the plot by 2nd defendant in 1995, there were no document in the headquarters to confirm that the 2nd defendant had been issued with a lease over the said property upon which it could have created a sublease. That as plot 4665R was only subdivided in 1975 to create plot 1829, it follows that plot 1690 did not exist and the sublease issued by the 2nd defendant to the plaintiffs was questionable. During cross examination, DW1 testified that Shariff Nazzir had written to the Commissioner of Lands asking that the plot be registered in the name of 3rd defendant.

7. The plaintiffs closed their case on the 27th November 2018 while the 1st defendant's case was closed on the 8th May 2019. The 2nd defendant had not filed any statement of defence and its case and that of 3rd defendant were closed without calling witnesses. The court then directed parties to file submissions. The learned counsel for the plaintiffs, 1st and 3rd defendants filed their submissions dated the 29th June 2019, 8th October 2019 and 3rd June 2020 respectively. The record show that the suit was thereafter mentioned severally and directions given on the 28th April 2022 that the suit be reopened and the Director of Surveys and District Land Registrar called to availed some specified documents.
8. Sheila Soita, the District Land Registrar Mombasa, testified on the 26th July 2022 that from the records in the registry, Mombasa/ Mainland South /Block 1/1690 measuring 0.1817 Ha was allocated by the 2nd defendant to the plaintiffs while Mombasa/Mainland South/Block 1/1829 measuring 0.1765 was allocated by the Government of Kenya to the 3rd defendant. That the two described plots are distinct but whether or not they are located on the same ground position, only a surveyor can determine that. During cross examination, the Land Registrar stated that there are no records to show how the 2nd defendant acquired the plot it leased to the plaintiffs. That there was no entry on when the RIM for plot 1829 was amended, and that she had no documents to show that survey plan FR NO. 222/176 was authenticated.
9. Tendi Mulusa, a surveyor at the Legal Liaison & Surveyors Department, Survey of Kenya Nairobi, testified on the 19th September 2023. He produced a survey report signed by Wilfred Muchae, head of Legal Section for the Director of Surveys of Kenya. It was his evidence that from documents at their office, the contested location belongs to Mombasa/ Mainland South/Block 1/1690 and not 1829, whose position is supposed to be at another spot about two (2) kilometres away. During cross examination the witness testified that survey documents prepared by a surveyor called Kiguru for plot 1829 had been presented to the Director of Surveys but rejected as the parcel being created was overlapping on parcel 1690. That FR 322/149 claimed to have been used in registering parcel Mombasa/ Mainland South/Block 1/1829 is according to the Director of Surveys for a property in Parklands, Nairobi. He confirmed that the Director of Surveys has all the documents and records, including FR No. 266/13 relating the creation of parcel 1690.
10. The counsel for the parties sought for and were granted time to file additional submissions but during the subsequent mention, they all indicated that they were content with what they had already filed.
11. The following are the issues for the determinations by the court:
 - a. Which parcel, between Mombasa/Mainland South/Block 1/1690 and 1829 was lawfully created.
 - b. Which of the two parcels is lawfully located on the contested ground position?



- c. Whether the plaintiffs are entitled to the prayers sought in their plaint.
 - d. Whether the 1st defendant is entitled to the prayers sought in their counterclaim.
 - e. Who pays the costs?
12. The court has carefully considered the pleadings as summarized above, evidence tendered by all the witnesses, submissions by the learned counsel and come to the following determinations:
- a. This suit is about the same spot or ground location claimed by the plaintiffs to be Mombasa/Mainland South/Block 1/1690, and by the 1st and 3rd defendants to be Mombasa/Mainland South/Block 1/1829. The plaintiffs' case is that they got a sublease for Mombasa/Mainland South/Block 1/1690 from the 2nd defendant, while the 3rd defendant got the allocation and lease over Mombasa/Mainland South/Block 1/1829 from the Commissioner of Lands. The parties who tendered evidence to support the averments in their filed pleadings are the plaintiffs, who called PW1 and the 1st defendant, who called DW1. Though the 3rd defendant had filed its statement of defence, it did not call any evidence and its averments remains mere allegations without proof.
 - b. The plaintiffs and the 1st defendant called one witness each in support of their respective cases. The plaintiffs' position is that the contested ground position is the site for their plot Mombasa/Mainland South/Block 1/1690, but that is challenged by the 1st defendant's witness, DW1. The plaintiff's position was supported by the testimony of Tendi Mulusa from the Director of Surveys office, and one of the two independent witnesses, called on the court's own initiative. The witness confirmed that their office has the survey documents creating parcel Mombasa/Mainland South/Block 1/1690 unlike parcel 1829. It was Tendi Mulusa's evidence that from the documents at their office, the contested site belongs to Mombasa/Mainland South/Block 1/1690 and not 1829, whose position is supposed to be at another spot about two (2) kilometres away. That the survey documents prepared by a surveyor called Kiguru for plot 1829 had been presented to the Director of Surveys but rejected as the parcel being created was overlapping on parcel 1690. That FR 322/149 claimed to have been used in registering parcel Mombasa/Mainland South/Block 1/1829 is according to the Director of Surveys for a property in Parklands, Nairobi. He confirmed that the Director of Surveys has all the documents and records, including FR No. 266/13 relating the creation of parcel 1690 in 1994. The copies of the registers produced by Sheila Soita, Mombasa Land Registrar, and one of the independent witnesses, confirms that Mombasa/Mainland South/Block 1/1690 was first registered on the 21st October 1994 in the name of Municipal Council of Mombasa, 2nd defendant, and later transferred to the plaintiffs on 5th May 1995. The 3rd defendant did not tender any evidence in support of their claim or to rebut the testimony presented by the plaintiffs and corroborated by the Director of Surveys through the testimony of Tendi Mulusa.
 - c. Though DW1 had in his evidence claimed the contested site belonged to Mombasa/Mainland South/Block 1/1829 and not Mombasa/Mainland South/Block 1/1690, it is important to appreciate that the witness had come from National Land Commission where he is deployed as a Land Administration officer. According to Sheila Soita, Land Registrar Mombasa, the surveyor is the only one who can ascertain which plot between Mombasa/Mainland South/Block 1/1690 and 1829 is sited on the location in contest. Tendi Mulusa, a surveyor in his testimony confirmed that Mombasa/Mainland South/Block 1/1690 is the one situated on the contested site, while Mombasa/Mainland South/Block 1/1829 location is about two (2) kilometres away. No other surveyor was availed by the 1st and or the 3rd defendant as witness to



contest the testimony of Tendi Mulusa on the ground locations of the two plots, Mombasa/ Mainland South/Block 1/1690 and 1829. The 3rd defendant should therefore stop interfering with the plaintiffs' use and access to their plot, Mombasa/ Mainland South/Block 1/1690, which is the one positioned or situated on the contested site. Instead, the 3rd defendant should pursue the relevant Government office to help it in identifying or positioning their plot once its legal status is sorted.

- d. The in view of the evidence tendered by Sheila Soita and Tendi Mulusa, the Mombasa Land Registrar and Surveyor from Survey of Kenya directorate respectively, defending the legality Mombasa/ Mainland South/Block 1/1690, the 1st defendant's counterclaim has no merits and is hereby dismissed with costs.
- e. There is no doubt that it was the actions of the 3rd defendant of stopping the plaintiffs from accessing their plot, Mombasa/ Mainland South/Block 1/1690, that prompted them to file this suit. Among the prayers they sought was (e) for damages. There were no particulars for damages set out in the plaint. The learned counsel for the plaintiffs has through the submissions particularized at paragraph 16 the rates and rent of Kshs.95,364 and 132,000 respectively. I am of the view these should have been particularised in the plaint as special damages and then receipts evidencing payments availed during the testimony of PW1. The learned counsel has also proposed damages for trespass be assessed at Kshs.15,000 per month for 264 months as of June 2019, bringing a total of Kshs.3,960,000. Trespass is actionable per se, and the 3rd defendant has not rebutted the plaintiffs' evidence that it took over the plot and erected a fence without the plaintiffs' permission, consent or authority, on the mistaken brief that the plot was the site for their plot Mombasa/ Mainland South/Block 1/1829. It has since been clarified through the testimony of Tendi Mulusa, that Mombasa/ Mainland South/Block 1/1690 is the one sited on that position. The 1st and 2nd defendants did not play any role in keeping the plaintiffs away from their plot. The action by the 3rd defendant has kept the plaintiffs from their plot from June 1997 to today. It is only fair that the plaintiffs be compensated with an award of damages by the 3rd defendant. An award of Kshs.15,000 per month from 1st July 2019, when this suit was filed until payment in full would be fair and just.
- f. The way the 3rd defendant took over the suit property and stopped the plaintiffs from accessing it from 1997 makes the court to find favour in granting the prayer for injunction to keep the 3rd defendant from any further interference with the plaintiff's use of the plot.
- g. On prayers (a) and (b) of declaring Mombasa/ Mainland South/Block 1/1829 a nullity and ordering its cancellation, I have considered the contesting testimonies of DW1 from National Land Commission, Tendi Mulusa from the Director of Surveys and Sheila Soita, Mombasa Land Registrar on its legality or otherwise. I am of the view that time has come for the concerned Government agencies to take up their responsibilities and take action in accordance with the enabling legislation to confirm the legal status of the survey plans used to create and register that plot and those others reportedly created and registered under the same documents. This should be done urgently to confirm whether the title documents held by the 3rd defendant are worth more than the paper they are written on and to assure other property investors of their investments.
- h. That on costs, section 27 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya guides that it follows the events unless for good cause otherwise ordered by the court. I find no good cause to deviate from that guidance. The plaintiffs' cost will be met by the 3rd defendant whose acts precipitated the filing of this suit.



13. That flowing from the above conclusions, the court finds and orders as follows:
- a. That the 1st defendant has failed to prove their counterclaim against the plaintiffs to the standard required by the law. The counterclaim is therefore dismissed with no order as to costs.
 - b. The plaintiffs have established their claim on a balance of probabilities in accordance with the requirements of the law. Judgement is therefore entered for the plaintiffs against the 3rd defendant in the following terms;
 - i. That a declaration is hereby issued that Mombasa/ Mainland South/Block 1/1690 is the one situated or positioned on the contested location as confirmed by Tendi Mulusa, surveyor.
 - ii. That the 3rd defendant to vacate and give vacant possession of the site where Mombasa/ Mainland South/Block 1/1690 is situated, after restoring the ground to the way it was before its encroachment in 1997, within thirty (30) days from today and in default eviction order to issue and to be executed in accordance with the law.
 - iii. That an injunction order is hereby issued restraining the 3rd defendant, its employees and or agents from interfering with the plaintiffs use of Mombasa/ Mainland South/ Block 1/1690 upon the 3rd defendant giving vacant possession or being evicted.
 - iv. That the 3rd defendant to pay the plaintiffs damages assessed at Kshs.15,000 per month from 1st July 1997 when this suit was filed, until payment in full.
 - v. The 3rd defendant to pay the plaintiffs costs in the suit and interest at court rates.
 - c. The plaintiffs claim against the 1st and 2nd defendants is dismissed with no order as to costs.
 - d. Parties reminded of their right of appeal.

It is so ordered.

DATED AND VIRTUALLY DELIVERED ON THIS 13TH DAY OF DECEMBER 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiffs: M/s Muyaa.

Defendants : M/s Takah for 3rd Defendant.

Wilson – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

