



REPUBLIC OF KENYA



**Haji & another v Pamba & 4 others (Environment & Land Case
6 of 2023) [2025] KEELC 3321 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3321 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 6 OF 2023**

AE DENA, J

APRIL 24, 2025

BETWEEN

HAMADI MOHAMED HAJI 1ST PLAINTIFF

OMAR MOHAMED HAJI 2ND PLAINTIFF

AND

OMAR PAMBA 1ST DEFENDANT

ALI BARAKI SHAMBI 2ND DEFENDANT

MOHAMED BILLOW 3RD DEFENDANT

RASHID KIBWANA 4TH DEFENDANT

DISTRICT LAND REGISTRAR KWALE 5TH DEFENDANT

JUDGMENT

1. The plaintiffs filed the present suit seeking for judgement against the defendants for
 1. A declaration that the plaintiffs are the lawful and absolute owners of the parcels of land Kwale/Ngo'mbeni/1664
 2. An order of permanent injunction restraining the Defendants by themselves their servants, assigns, agents or any other person appointed by them from entering, remaining on, trespassing and/or dealing with in the manner the property interest of the plaintiffs in Kwale/ Ngo'mbeni/1664
 3. General damages for trespass
 4. Costs of this suit
 5. Any other or further relief this honourable court may deem fit to grant



2. The plaintiffs' case is that they are the registered proprietors of Kwale/Ngo'mbeni/1664. That the 1st defendant has trespassed and encroached on the said property and erected a structure and is running an Islamic school therein denying them quiet possession. Omar Mohamed Haji the 2nd plaintiff testified as PW1 and adopted his witness statement dated 17/12/2018. He told the court that the 1st and 4th defendants are the ones in the plaintiff's property. He stated in cross examination that it is the 2nd defendant who leased the land to the 1st defendant and was being paid for it, though he did not have any proof. On being shown the lease dated 24/4/2009 PW1 confirmed it was in respect of Kwale/Ngombeni/1663 and not 1664. The witnesses took the position that the 2nd defendant has built small houses on the suit property which does not belong to him and must move. He confirmed he had no proof that the houses were built by the said defendant.
3. The 1st plaintiff Hamadi Mohamed Haji testified as PW2 and adopted his witness statement dated 17/12/2018. He told the court in cross examination by Mr. Bwika for the 2nd defendant, that the 2nd defendant brought in the 1st defendant into the plaintiff's land to use the madrasa. That the 2nd and 1st defendant are one and the same and run the place though they are not the owners. He stated he did not have proof that they were one and the same. On being shown the lease he confirmed it was in respect of Kwale/Ngombeni/1663 and that the plaintiffs title is different. He denied the school is built in plot 1663 and reiterated it is in 1664. He admitted the 2nd defendant has not built anything in the two properties and does not live therein.
4. Cross examined by Mr. Mwinyi for the 1st defendant PW2 confirmed the lease was in of Kwale/Ngombeni/1663 which belonged Bakaris children. On being shown the map in the 1st defendants bundle he confirmed plots 1663 and 1664 were adjacent to each other and were distinct. According to PW2 the defendant should stick in 1663.

1st defendants' case

5. The 1st defendants responded to the suit vide defence dated 21st February 2019. It is his case that he the Director of Darul Tawheed which comprises a secondary school madrasa and mosque spread over plots 1663, 1664 and 992. It was his evidence that he joined in 2007 when the facilities were dilapidated and renovated them with authority from the chief. In 2008 he started running the madrasa and commenced a primary school which due to its success he later upgraded to secondary school in 2012 at the behest of the community. That the lease dated 24/4/2009 was to facilitate government authorization. Due to emerging disputes at the school the lease was never renewed on its expiry in 2019. DW1 position was that the portion of land was declared a waqf in 1983 before he joined in 2007. That the mosque, school madrasa and staff houses are waqf properties and should be curved out to have their own title. The witness reiterated the facilities are in plot 1663 and not 1664.
6. On cross examination by Ms. Okumu for the plaintiff, DW1 confirmed the lease has expired. That he did not have proof of the waqf. On being shown a letter dated 25/01/83 by the County Council of Kwale DW1 confirmed the facility was to be in plot 38. Though he was a director of Tawheed Academy the academy did not have an agreement with the waqf. That the lease was to facilitate students registration.
7. Upon cross examination by Mr. Bwika the witness stated the 2nd defendant is not in plot 1664 and has not trespassed thereon. That it is a lie that he has encroached into the school and his only interest is the buildings and not the land.



The 2nd Defendants Case

8. The 2nd defendant responded to the suit through a defence dated 21st January 2020. It is his case that he is one of the beneficial owners of Kwale/Ngombeni/1663 wherein the family donated a portion (plot 38) to Waqf. That the mosque and Islamic institution are built on the said plot and that the only pending issue was determination of the boundaries.
9. During cross examination by Ms. Okumu DW2 Ali Bakari Shambi testified that there had been boundary disputes between him and the plaintiffs. The dispute before the Kadhis court involved plots 1663,1664 and 38 however the survey ordered was never undertaken. Upon cross examination by Mr. Mwinyi the witness reiterated that his family donated plot 38 as a waqf and this is where Dar Twaheed was built. The witness clarified in re-examination that the waqf was given the plot in 1982.
10. The 3rd, 4th and 5th Defendants did not enter appearance despite service.

Submissions

11. Parties filed and exchanged submissions. The plaintiffs' submissions are dated 25/07/2024, the 1st defendants 2/08/2024 and the 2nd defendants 19/08/2024. The court has taken into consideration the submissions.

Analysis and Determination

12. Having reviewed the pleadings, the evidence tendered in court I see the main issue for determination is Whether there was trespass by the Defendants in plot Kwale/Ngombeni/1664 and if an Order of Permanent Injunction should issue. This is so because the ownership of plot Kwale/Ngombeni/1664 is not in dispute.
13. It is therefore important to understand what constitutes trespass in law. Section3(1) of the [Trespass Act](#) Chapter 294 of the Laws of Kenya 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. The Act further defines Private land as interalia land which is owned or occupied by any person by virtue of a freehold title, a certificate of ownership or lease.
15. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership - see Clerk & Lindsell on Tort (21st Edn) page 1345. Therefore, there must be entry into another's land, such entry must be without permission of the owner of the land and or without reasonable excuse.
16. Section 107(1) of the [Evidence Act](#) Chapter 80 of the Laws of Kenya provides that; -

“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.”
17. The burden of proof was upon the plaintiff to prove their interest over Kwale/Ngombeni/1664 and that the Defendants were trespassers therein. PW1 produced in court a copy of a title deed dated 8/12/2015 for Kwale/Ngombeni/1664 registered in the names of Jumaa Mohamed Jausi, Hamadi Mohamed Haji and Omari Mohamed Haji. Having reviewed the evidence of the defendants there is no contestation about the ownership of Kwale/Ngombeni/1664.



18. It is trite a title should be treated as prima facie evidence of ownership. Section 26(1) of the [Land Registration Act](#) states; -

Certificate of title to be held as conclusive evidence of proprietorship

- (1) 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 on grounds of fraud.

19. The court is therefore satisfied that the plaintiffs have on a balance of probabilities established their interest as being among the registered proprietors of the Kwale/Ngombeni/1664 for purposes of the claim for trespass.
20. The next task was for the plaintiffs to prove trespass on the part of the defendants. One ingredient is want of permission from the owner of the land. Both PW1 and PW2 state that they have never sold their land or a portion thereof. However, it had come to their notice the 1st defendant has trespassed and encroached into their land and erected a structure and is running a school.
21. The 1st defendant denied all the allegations in the plaint. It was DW1 and DW2 evidence that said school is in plot 38 which is curved out of plot 1663 and not 1664. While DW2 stated they donated part of plot 1663 to a waqf there was no evidence of the Waqf. In any event even assuming there was a waqf the same would be for the portion of the land excised from plot 1663 and not 1644.
22. The location of the Madrasa and the school therefore became pertinent. From the proceedings it is clear that there had been a dispute filed before the Kadhis Court pitting the plots 1663, 1664 and 38. The Kadhi made an order for survey which was never effected. However pursuant to the orders of Justice Yano issued on 1/10/2020 in the presence of counsel for the plaintiffs and Mr. Mwinyi for the 2nd defendant the District Surveyor Kwale visited plot Kwale/Ngombeni/1663 to identify its boundary limits.
23. The report is dated 1/2/2021 and forms part of the record. Mr. Bwika for the 1st defendant was granted an opportunity to familiarise with the report whereupon he informed the court he had instructions to proceed with the matter. The findings of the report were as follows;-
- ‘Some permanent structures including the whole of Daarul Tawheed Mosque and part of its Madrasa buildings encroaches plot number Kwale/Ngombeni/1664 while others spill over to Kwale/Ng’ombeni/1663.’
24. The court will rely on the above report under the provisions of section 173 of the [Evidence Act](#) which grants the court extended powers to obtain proper evidence. There is no doubt therefore the entire mosque and madrasa is in Kwale/Ngombeni/1664. The plaint states at paragraph 8 that the 1st defendant has trespassed and/ encroached in the Plaintiffs property and erected a structure and is running a school therein. DW1 evidence was that he came in 2007 and carried out extensive restoration of the mosque, madrasa and staff quarters which were already existing. Infact this is corroborated by PW1 who in his evidence in chief told the court the 1st Defendant found the Madrasa and made it a secondary school. In my view based on this evidence the 1st defendant did not therefore erect any structure on Kwale/Ngombeni/1664 the suit property.



25. Can the 1st defendant therefore be termed a trespasser given the circumstances of the case. I would not call the 1st defendant's entry an intrusion for purposes of trespass. From what I gather from DW1 testimony is that he entered with the reasonable belief that this was a waqf and was in fact not interested in the plot details but all he was interested in was the buildings. Again the 1st defendant produced a copy of a lease between the Academy and Ali Bakari Mwakileo which though not renewed upon expiry also indicated the facility was in plot 1663 and not 1664. He also produced a sketch map which showed the school was in plot 1663. A letter dated 25/01/1983 has also been produced by the 2nd defendant from County Council of Kwale to buttress the facilities were on plot Kwale/Ngombeni/38. This therefore buttresses that the 1st defendant reasonably believed the facilities were not in Kwale/Ngombeni/1664.
26. It also got me wondering where the plaintiffs were in the year 2007 when the 1st defendant entered the premises and undertook the renovations without them raising a complaint. Could they also have believed there was a waqf. It is also noteworthy the plaintiffs title was issued in the year 2015 way after the 1st defendant had come into the picture and the buildings having existed.
27. For the foregoing reasons I decline to find the 1st defendant a trespasser.
28. What about the 2nd defendant? According to paragraph 6 of the plaint the 2nd defendant is stated to reside on plot Kwale/Ngo'mbeni/1663. At paragraph 9 it is stated that the plaintiffs have been denied peaceful and quiet enjoyment by the 1st to 4th defendants. The pleading is not specific as to the wrongs committed by the 2nd defendant. I agree with the submission made on behalf of the 2nd defendant that the plaintiffs have not particularised how the 2nd 3rd and 4th defendants have trespassed into the land belonging to the plaintiffs. It is trite that a party is bound by its pleadings see *Raila Amolo Odinga & Another vs. IEBC & 2 others* (2017) eKLR. In addition, PW1 stated in cross examination that the 2nd defendant does not live on the suit property. It became apparent during the oral testimony that the plaintiffs believe that the 2nd defendant has leased the premises to the 1st defendant and is being paid for it though PW1 admitted in cross examination he had no proof of such arrangement between the 1st and 2nd defendant except that the 2nd defendant would always accompany the 1st defendant at all meetings. For me this cannot suffice as evidence that the 2nd defendant leased the premises to the 1st defendant. PW2 admitted the 2nd defendant has not built anything in the two properties and does not live therein. The 1st defendant's testimony is that he was authorised by the chief though he stated he lost the letter.
29. In view of the foregoing, it is this court's finding that there was no evidence placed before court to link the 2nd defendant to the allegations of trespass in the plot Kwale/Ngombeni/1664. I decline to find that he is trespasser or that he has denied the plaintiffs the quiet enjoyment of their suit property.
30. About the 3rd and 4th defendants, I have already observed that no particulars of the allegations levelled against them have been given in the plaint. I will therefore not belabor the point. There is no cause of action against them.
31. Having declined to find that the 1st defendant is a trespasser, the court must still resolve the issue of the buildings which it is now clear are largely in plot Kwale/Ngombeni/1664 as per the survey report on record. This therefore brings me to the prayer for permanent injunction. The plaintiffs seek to restrain the Defendants by themselves their servants, assigns, agents or any other person appointed by them from entering, remaining on, trespassing and/or dealing with the suit property. This is quite wide.
32. I will not deal with the structures in plot 1663 as the owners of the said property have no issue with them. The court notes that the facilities have been in existence before the year 2007. DW1 stated further in cross examination that his interest is not the land but the buildings. These buildings it is now apparent were not built by the plaintiffs but by well-wishers and the 1st defendant only renovated them.



- PW2 testified in cross examination the 2nd and 1st defendant are one and the same and run the place though they are not the owners this is of course subject to my findings on the 2nd defendant herein.
33. PW1 stated categorically during cross examination that the plaintiffs do not want the school but that the madrasa should remain on the land. That it should just remain a religious institution and not the other kind of education. The court infers from this that the madrasa can remain in the location, provided that it is used for the purpose of madrasa and not integrated as a school for non religious education.
34. PW1 having confirmed he has no issue with the buildings and that his problem is the introduction of the other aspects of schooling then I must revisit the pleadings. My review of the plaint does not show that this is a dispute on whether the facility should include a school in addition to the Madrasa. This is another matter altogether and cannot be determined in this forum. Let the Daarul Tawheed Academy deal with the matter. It is the plaintiffs and Daarul Tawheed Islamiyah Academy to agree on the terms of engagement moving forward.
35. But the plaintiff having proved the ownership of the suit property they are entitled to no further interference of the same in terms of additional constructions therein without their consent.
36. I have noted the invitation that the court should carve out the portion of the Mosque, school, Madrasa and staff quarters to have their own titles. It is the courts view that such orders cannot issue in the absence of a counterclaim duly prosecuted and proved.
37. What orders should therefore issue in the circumstances of this case and in view of the nature of buildings/facilities erected on Kwale/Ngo'mbeni/1664 and the courts finding hereinabove that the plaintiffs have proved on a balance of probabilities that they are the lawful and absolute owners of the parcel of land Kwale/Ngo'mbeni/1664. The court is also careful not to disrupt learning activities in the academy and Madrasa. In considering the orders to issue I will be guided by the following dictum Nancy Makokha Baraza vs Judicial Service Commission & 9 Others [2012] eKLR where the Court expressed itself inter alia as follows:
- “The New Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises.”
38. This suit is disposed of in the following terms: -
1. A declaration be and is hereby issued that the plaintiffs are the lawful and absolute owners of the parcels of land Kwale/Ngo'mbeni/1664
 2. The Plaintiffs have failed to prove trespass against the Defendants on a balance of probabilities but in view of the declaration (1) above an order of permanent injunction shall issue against the 1st defendant and its servants or agents from making any further construction on Kwale/Ngo'mbeni/1664 without the consent of the plaintiffs.
 3. Having found the 1st and 2nd defendant are not trespassers the prayers for general damages are declined.
 4. The Plaintiffs shall be at liberty to engage Daarul Tawheed Islamiyah Academy on acceptable terms of engagement.
 5. The suit against the 2nd 3rd 4th and 5th Defendants is struck out.



6. Costs are at the discretion of the court. The dispute touches on facilities that benefit the larger community around the Denyenye area the court orders that each party shall bear its own costs.
7. It is so ordered.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 24TH DAY OF APRIL 2025.

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A.E DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of: -

Ms. Okumu for the Plaintiffs

No appearance for 2nd Defendant

Mr. Mwinyi for the 1st Defendant

No appearance for the 3rd, 4th and 5th Defendant

