



REPUBLIC OF KENYA



Salim & another v Maganga & 2 others (Environment & Land Case 79 of 2017) [2022] KEELC 2930 (KLR) (29 June 2022) (Judgment)

Neutral citation: [2022] KEELC 2930 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 79 OF 2017**

**NA MATHEKA, J
JUNE 29, 2022**

BETWEEN

**KASSIM KATANA SALIM 1ST PLAINTIFF
HUSSEIN SALIM MWAGOSI (SUING AS AN ADMINISTRATOR OF SALIM
MAKINA HUSSEIN (DECEASED) 2ND PLAINTIFF**

AND

**NATHANIEL MAGANGA 1ST DEFENDANT
KACHE KATANA CHENZERE 2ND DEFENDANT
FUNDI WANYONYI 3RD DEFENDANT**

JUDGMENT

- 1 The Plaintiffs aver that at all material times the 1st Plaintiff and 2nd Plaintiffs the late Salim Makina Hussein were the registered owners of Plot Land Reference Number 11492/268 and Plot Reference Number 11492/269 respectively measuring 0.0503 ha each in Mariakani Township in Kilifi (herein after known as “suit properties”). The Plaintiffs aver that the Defendants have illegally and unlawfully encroached into the suit properties and erected permanent structures thereon and are currently operating businesses and/or residing on the suit properties without any legal rights, permission and/or justification to do so. The Plaintiffs further contend that the said unlawful acts by the Defendants have denied them their Constitutional and proprietary rights to occupy, develop, or in any other manner exercise their rights as lawful owners of the suit properties. The Plaintiffs further aver that due to the actions of the Defendants, the Plaintiffs have been unable to acquire their income since the Defendants are misappropriating the suit properties and therefore costing them money. The Plaintiffs pray for;
- a. A declaration that the 1st Plaintiff and 2nd Plaintiff the estate of the late Salim Makina Hussein are the bonafide, legal and respective owners of the suit properties known as Plot Land



Reference Number 11492/268 and Plot Reference Number 11492/269 measuring 0.0503 ha each in Mariakani Township in Kilifi;

- b. An order of permanent injunction to issue restraining the Defendants, their servants agents from encroaching, trespassing, alienating developing, selling, transferring and/or in any other manner by themselves, their agents, servants or whosoever claiming through them interfering with the quiet enjoyment of the suit properties by the Plaintiffs 1st Plaintiff and the Estate of the late Salim Makina Hussein;
 - c. An order of eviction of the Defendants from the suit properties known as Plot Land Reference Number 11492/268 and Plot Reference Number 11492/269 respectively measuring 0.0503 ha each in Mariakani Township in Kilifi; and/or
 - d. Costs of the suit; and
 - e. Any other further relief that this Honourable Court may deem fit.
- 2 The Defendants, aver and state that the Plaintiffs had filed CMM No. 51 of 1995, against the Defendants, which said suit was dismissed in favour of the Defendants. The Defendants aver and states that the Plaintiffs having failed in the 1995 suit, have now purported to file the current suit against the Defendants which is an abuse of the courts process. The Defendants aver that they are the legal owners of the portions of the portions of land which their houses stand and have been paying the requisite occupational rates to the then Mariakani Municipal Council and now the County Government of Kilifi. The Defendants, further state that the Plaintiffs suit as drawn and filed, before the Honourable Court, is time barred under the Limitations of actions Caps 22 Laws of Kenya. The Defendants aver state that they have acquired the possession of plots No. 11492/269 and 1149/268 by way of adverse possession. The Defendants state that the suit brought against them by the Plaintiffs is an abuse of the Court process as the Defendants continue to occupy the two parcels of land being plot Number 11492/269 and 1149/268 for the last thirty(30) years without any interference from any third party. The Defendants pray for this suit to be dismissed with costs and judgment entered against the Plaintiffs as per their prayer in counter claim.
- 3 This court has carefully considered the evidence and submissions therein. The [Land Registration Act](#) is very clear on issues of ownership of land and Section 24(a) of the [Land Registration Act](#) provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

- 4 Section 26 (1) of the [Land Registration Act](#) states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”



5 The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

6 This court in considering this matter referred to the case of *Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another* (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of section 26(1) (a) and (b) of the *Land Registration Act* rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

7 1st Plaintiff and 2nd Plaintiff on behalf of the late Salim Makina Hussein have testified that they are the registered owners of Plot Land Reference Number 11492/268 and Plot Reference Number 11492/269 respectively measuring 0.0503 ha each in Mariakani Township in Kilifi. The Plaintiffs has produced their title PEx 7 and 8. The issue for determination is whether or not they hold good titles by virtue of the Defendants' claim of adverse possession. Be that as it may, in determining whether or not to declare that a party has acquired land by adverse possession, there are certain principles which must be met as quoted by Seron J in the case of *Gerald Muriithi vs Wamugunda Muriuki & Another* (2010) eKLR while referring to the case of *Wambugu v Njuguna* (1983) KLR page 172 the Court of Appeal held as follows;

1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.
2. The limitation of Actions Act, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not the claimant has proved that he has been in possession for the requisite number of years.
3. Where a claimant pleads the right to land under an agreement and in the alternative seeks adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least 12 years after such payment.



8 The court was also guided by the case of *Francis Gicharu Kariri vs Peter Njoroge Mairu*, Civil Appeal No. 293 of 2002 (Nairobi) the Court of Appeal approved the decision of the High Court in the case of *Kimani Ruchire vs Swift Rutherford & Co. Ltd.* (1980) KLR 10 where Kneller J, held that;

“The Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)”.

9 In applying these principles to the present case, The Plaintiffs testified that the Defendants have illegally and unlawfully encroached into the suit properties and erected permanent structures thereon and are currently operating businesses and/or residing on the suit properties without any legal rights, permission and/or justification to do so. That the squatters were already there and so they could not take possession. That they had another case with them in 1995 and they do not know what became off it as their lawyer went abroad. PW2 states that the 1st Defendant put up a house there in 1974 and hence they could not build anything. DW2 testified that indeed his parents moved there in 1974 and the 2nd Defendant is a neighbour. That the 2nd and 3rd Defendants moved there in 1980s. DW2 confirms that she moved there in 1987 and has lived there peacefully. I find that it is not disputed that there was a similar matter filed in the lower court in 1995 that is, CMCC No.51 of 1995. This court has not been advised as to what became of it by either party and hence cannot conclude that this matter is res judicata or sub judice and will proceed to determine this case. Besides some of the Defendants are different. I find that the Defendants have proved that they have been in occupation of the suit land from 1974 and 1980s and the current suit was filed in 2017. Even if there was an interruption in 1995, the Plaintiffs did not pursue the matter until 2017 which is well over 12 years. I find that the Plaintiffs have failed to prove their case on a balance of probabilities and I dismiss the same with costs. I find that the Defendants have established that their possession of the suit land was continuous and not broken for any temporary purposes or any endeavours to interrupt it for a period of 12 years. I find that the Defendants have established their counterclaim on a balance of probabilities against the Defendant and I grant the following orders;

1. A declaration that the Defendants are entitled to a portions of the suit properties known as Plot Land Reference Number 11492/268 and Plot Reference Number 11492/269 which they occupy by virtue of adverse possession.
2. Costs of this suit to be paid by the Plaintiffs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 29TH DAY OF JUNE 2022.

N.A. MATHEKA

JUDGE

