



**Mwaniki ((Suing through his attorney and/or agent) Annah Njeri Mureithi) v Abdille & another (Environment & Land Case 195 of 2016) [2022] KEELC 3437 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3437 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 195 OF 2016**

**JO OLOLA, J  
JULY 28, 2022**

**BETWEEN**

**NGURE MWANIKI (SUING THROUGH HIS ATTORNEY AND/OR AGENT)  
ANNAH NJERI MUREITHI ..... PLAINTIFF  
(SUING THROUGH HIS ATTORNEY AND/OR AGENT) ANNAH NJERI  
MUREITHI)**

**AND**

**GEDI ABDILLE ..... 1<sup>ST</sup> DEFENDANT  
HAWA ABDI GEDI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. By the Plaint dated and filed herein on July 29, 2016, Ngure Mwaniki suing through his attorney and/or agent Annah Njeri Mureithi (the plaintiff) prays for judgment to be entered against the two defendants for:
  - (a) A permanent injunction restraining the defendants by themselves, their servants, agents, representatives, assigns or any other person claiming under them from trespassing and intruding into the plaintiff's land, from laying a claim of ownership, interfering with, cultivating, carrying on development or adversely dealing with the plaintiff's part of the parcel of land situated at Safirisi in Mokowe village within Lamu County;
  - (b) A declaration that the land in dispute measuring ten (10) acres situated at Safirisi in Mokowe village within Lamu County is the property of the plaintiff and vacant possession;
  - (c) Costs of the suit; and



- (d) Any other or further relief as the court shall deem fit and just to grant.
2. These prayers arise from the plaintiff's contention that at all times material, the plaintiff was the owner of all that surveyed but unregistered land measuring 10 acres having purchased the same from one Athman Omar Fadhili at a consideration of kshs 1,500,000/-.
  3. The plaintiff avers that sometime in May, 2014 the defendants who are a husband and wife maliciously and without any justification started laying claim to six (6) acres of the plaintiff's parcel of land and have now forcefully occupied the same. Despite demand made for them to cease, the defendants have persisted in their forceful occupation and malicious claim to the land.
  4. The defendants do not however admit the plaintiff's claim. In their joint Statement of Defence dated and filed herein on September 16, 2016, Gedi Abdille and Hawa Abdi Gedi deny that the plaintiff is the owner of the said parcel of land. The defendants assert that the suit property is their own and that together with their children, they have constructed a house thereon and have cashew nuts and casuarina trees which have since matured.
  5. The defendants further deny that they migrated to the property in May, 2014 as stated by the plaintiff. On the contrary they assert that they have lived on the land without interruption since 1979.

### **The plaintiff's case**

6. At the trial herein, the plaintiff called a total of nine (9) witnesses who testified in support of his case.
7. PW1 Annah Njeri Mureithi is a resident of Lamu and the donee of the power of attorney from one Ngure Mwaniki. PW1 told the court that she had bought the suit land for the said Ngure Mwaniki pursuant to a sale agreement they executed on April 16, 2014 with one Athman Omar. The 10 acres of land which had no title at the time was sold to Ngure for kshs 1,500,000/-. A month after buying the land which was then unsurveyed and unregistered, PW1 went to place beacons thereon when she found the defendant's son by the name Omar clearing the land.
8. PW1 told the court that since then, they have tried to resolve the issue with various authorities urging the defendants to vacate the land in vain.
9. In cross-examination, PW1 testified that she is the one who had executed the sale agreement. She told the court that while the agreement shows she was selling the land on behalf of Athman Fadhili, she was actually buying the land for Ngure Mwaniki.
10. PW2 – Athman Omar Fadhili is a farmer and a resident of Mokowe. He told the court he sold the plaintiff 17 acres of land for kshs 1,500,000/-. PW1 was buying on behalf of Ngure Mwaniki. The parties executed an agreement before an advocate.
11. PW1 further testified that he knew the 1<sup>st</sup> defendant many years ago and that the 1<sup>st</sup> defendant and his wife Hawa had settled in Mokowe a long time back. PW2 told the court that the 1<sup>st</sup> defendant who has since died had previously sold his 6 acres of the land to one Abdinassir and that he no longer had any land that he could sell.
12. On cross-examination PW2 testified that the 1<sup>st</sup> defendant was his neighbor for about 8 years. PW2 told the court it is the said Abdinassir who told him that the 1<sup>st</sup> defendant had sold to him (Abdinassir) the 6 acres. PW2 testified that in 2006, he went to some old men who gave him some 5 acres of land in a bushy area. PW2 then joined his parcel of land with that of a neighbor by the name Mzee Omar Mohamed to create the 10 acres for the purposes of sale.



13. PW3 – Omar Mohamed Shahasi is also a farmer in Mokowe, Lamu. He told the court there is a time PW2 told him there was someone looking for 10 acres of land. Since PW3 had some 5 acres of land neighbouring that of PW2, he agreed to sell his portion together with that of PW2 which was also 5 acres. PW3 told the court they were paid kshs 1,500,000/- in cash for the land in the year 2014 and that they shared the money equally.
14. On cross-examination, PW3 told the court the land initially belonged to his grandfather Omar Said. He conceded he had not taken out Letters of administration for the estate of his grandfather. PW3 further conceded he did not know Ngure Mwaniki and told the court he sold the land through PW1 with whom they executed an agreement.
15. PW3 further told the court the 1<sup>st</sup> defendant had sold his portion of land to Abdinassir although he did not see the agreement of sale and nobody told him so. PW3 told the court they came to know of the sale because they are neighbours and that they saw the new person using the land. He further told the court it was PW2 who executed the agreement of sale with PW1.
16. PW4 – Mohamed Omar Ali is a farmer in Shehe Gambo in Mokowe. He told the court that the 1<sup>st</sup> defendant who has since passed on had sold his portion of land to one Abdinassir. He denied that the land sold to the plaintiff belonged to the defendants,
17. PW5 – Mohamed Abushiri Jumaa is a farmer in Mokowe and doubles up as a village Headman at Mkunguni in Mokowe. He told the court he was present when the 1<sup>st</sup> defendant sold his land to Abdinassir.
18. PW5 told the court he was invited by PW2 on April 16, 2014 to go and witness the sale of PW2's land. The assistant chief Athman Ngure Bilali and other people were present. PW5 told the court that both PW2 and PW3 were each selling their 5 acres of land and that the same was sold for kshs 500,000/-.
19. PW6 – Salim Billi Adam is also a farmer in Mokowe. He told the court when PW2 moved into the area, he found him there and that they are the ones with PW4 and others who showed him the land to cultivate. PW2 took 5 acres of land. By then, the 1<sup>st</sup> defendant has already taken his portion. The 1<sup>st</sup> defendant later sold his portion to Abdinassir.
20. PW7 – Athman Ngure Bilali is a senior assistant chief Kilimani Sub-Location, Mokowe Location of Lamu. He told the court he knew the plaintiff some 4 years back and that she had bought land from PW2 at kshs 1.5 Million. PW7 was a witness to the sale agreement.
21. PW7 further told the court the defendant's parcel of land is adjacent to that of the plaintiff and that the 1<sup>st</sup> defendant's land had since been sold to one Mohamed Aden.
22. PW8 – Mohamed Abushiri Jumaa is a farmer in Mokowe. He told the court that Mzee Omar Athman (PW2) sold his land to the plaintiff. The said parcel of land neighbours that of the 1<sup>st</sup> defendant. He further told the court the 1<sup>st</sup> defendant had sold his land to Abdinassir.

### **The defence case**

23. On their part, the defendants called a total of three witnesses at the trial.
24. DW1 – Fatuma Gedi Abdille is the daughter to the two defendants. She told the court that his father Gedi Abdille who was sued as the 1<sup>st</sup> defendant passed away and that she had been issued with Letters of Administration and had the authority of her mother (the 2<sup>nd</sup> defendant) to testify on her behalf.



25. DW1 told the court the plaintiff had sued her parents over a parcel of land which belonged to his father. DW1 testified that her father had been on the land and had developed the same over a number of years. His father took up the land in 1979 and that she used to help her father to clear the land and to plant crops thereon since the year 1990.
26. DW1 told the court that at some point in time, one Athman Omar Fadhili started laying claim to the land. DW1 told the court his family had never sold the land to Omar Fadhili or the plaintiff herein. Accordingly they told the plaintiff to go look for her money from the said Omar as the land did not belong to him.
27. DW1 further testified that she knew the man called Abdinassir but he had no land in their area. DW1 told the court her brother Farrah Gedi used to live on the land but now they have a caretaker thereon.
28. On cross-examination, DW1 testified that the 2<sup>nd</sup> defendant was once summoned by the elders. The said elders made an unjust decision to the effect that the land belonged Athman Omar Fadhili. The family was not happy with the decision but they never went to court.
29. DW2 – Rashid Ali Abahon is a resident of Mokowe. He told the court he knew Gedi Abdille around 1992. By then Gedi was already on the land. Somebody later sold the same land to the plaintiff had no land there to sell.
30. On cross-examination DW2 told the court he has a 2 acre parcel of land in the neighbourhood of the disputed parcel. The 1<sup>st</sup> defendant’s parcel of land was 6 acres. He had not sold it to Mzee Abdinassir or anyone else.
31. DW3 - Abdi Daib Sugow is a casual labourer in Mokowe. He told the court he has previously worked as a shamba boy in the year 2000 for the defendants. He worked on the disputed property for 10 years. For those years he never saw anyone else claim the land.
32. On cross-examination, DW3 told the court he knew Mzee Abdinassir but had no recollection of him buying any parcel of land from the defendants. Abdinassirs is just a caretaker of some parcels of land in Mokowe. Those parcels were not sold to anyone by the defendants.

### **Analysis and determination**

33. I have carefully perused and considered the pleadings filed herein, the testimonies of the many witnesses called by the disputants as well as the evidence adduced at the trial. I have similarly perused the rival submissions and authorities placed before me by the Learned Advocates representing the parties herein.
34. The plaintiff herein prays for an order of a permanent injunction restraining the two defendants from trespassing into, laying a claim of ownership, cultivating or in a manner whatsoever dealing with a parcels of land said to be belonging to the plaintiff and situated at Safirisi in Mokowe village within Lamu County. The plaintiff is further seeking a declaration that the said parcel of land is his property and that the defendants be ordered to vacate therefrom.
35. It was the plaintiff’s case that at all times material, he was the owner of all the surveyed but unregistered parcel of land measuring 10 acres or thereabout having purchased the same from one Athman Omar Fadhili at a consideration of kshs 1,500,000/-. He accused the original 1<sup>st</sup> defendant Gedi Abdile (now deceased) and his wife Hawa Abdi Gedi (the 2<sup>nd</sup> defendant) of trespassing upon the land sometime in May, 2014 and proceeding to maliciously lay claim to some six (6) acres of the said parcel of land which they have now forcefully occupied.



36. The defendant on their part deny that they have trespassed upon the plaintiffs parcel of land as alleged or at all. On the contrary it is the defendants case that the portion of land they occupy measures six (6) acres and that they have always occupied the said parcel of land since 1979 and have constructed a house thereon and have been cultivating the same for their subsistence.
37. In support of his case, the plaintiff produced inter alia, a sale agreement dated April 16, 2014 executed between Athman Omar Fadhili (PW2) who is incidentally identified herein as the vendor and shown to be acting through Annah Njeri Mureithi on the one part and Ngure Mwaniki as the purchaser on the one part. It is the same Annah Njeri Mureithi who has now instituted the suit herein against the defendants acting on a power of attorney donated to her by the purchaser in the said sale agreement Ngure Mwaniki.
38. While the vendor (PW2) is shown in the agreement to have sold his 10 acres of land to the purchaser, it was apparent that all the land that was said to have been sold to the plaintiff did not all originate from PW2. Explaining how he came to acquire the said 10 acres of land that were sold, PW2 told the Court that in the year 2006, he approached one Mzee Mohamed Omar Bakari Bin Tausi (PW4) and Salim Billi Adam (PW6) who informed him that they were the headmen of the area and therefore since he needed land, the two showed and identified to him an unoccupied bushy land measuring 5 acres.
39. Mohamed Omar Shahasi (PW3) had similarly acquired another 5 acres of land from the same elders and it is these parcels that were consolidated and sold to the plaintiff. It was however not clear to me how the PW2 and PW3 together with the elders came to the conclusion that the land which they were dishing out were of the measurements that were being cited. I say so because it was the testimony of the plaintiff that the land that was being bought was both unsurveyed and unregistered.
40. The particulars of the parcel of land that was being sold are captured at Paragraph 2 of the sale agreement thus:

“Whereas

The vendor is the owner in the community in Mokowe of all that unregistered and unsurveyed land in Mokowe Area of Lamu county measuring 10 acres, and whereas the vendor is desirous of selling the said portion of the said land to the purchaser at an agreed price of kshs 1,500,000/- And whereas, the said land will be demarcated and surveyed someday as part of government service but an individual can have their portion surveyed earlier or privately and whereas within Mokowe area and even in this specific case, each person or family know their portions and the local administration consisting of the area chief, his assistant, the village elder and other community and religious leaders and neighbours know who owns what land:

Now this agreement witnesseth

That ...”

41. That statement clearly in my view pointed to the fact that there were no clear beacons demarcating the parcels of land in question and that the determination of the boundaries depended on how many witnesses one could produce in support of their position.
42. According to the plaintiffs, the 1<sup>st</sup> defendant had prior to his death sold his six (6) acres of land to one Abdinassir. While all the seven (7) plaintiffs witnesses repeated this position, there was no sale agreement produced and/or a clear indication of where the 6 acres had been located. The defendants denied selling their portion to the said Abdinassir and it was then incumbent upon the plaintiff to



produce cogent evidence that the portion occupied by the defendants had been his land and that the defendants' land was situated elsewhere. In a situation where the land was unsurveyed and unregistered, this court could not determine with any exactitude which of the parties had intruded into the other party's portion of land.

43. From the material placed before me, it was also doubtful whether any of the parties herein individually owned the parcel of land to which they lay claim. That much is clear from a perusal of paragraphs 5 and 6 of the sale agreement wherein the Vendor and the Purchaser "agreed" as follows:

5. That also by this agreement, the Government of Kenya, the Lamu County, the Ministry of Lands, Lands Commission and all its Departments and all local/County and ward authorities are hereby authorized jointly and severally to issue the letter(s) of allotment and subsequent title(s) of such documents as people will be issued within this area, to the said purchaser. That also, all the parties to this agreement also agree that our Courts shall have power to enforce every step of this agreement herein and in law in favour of the purchaser to enable him acquire the said legal document;

6. The family and the community of the vendor have no objection to the sale.

44. How the parties intended to bind third parties who were not signatories to the agreement is but a matter of conjecture. What was clear from the said paragraphs and other documents produced herein was that the subject matter herein was community land which had not been allotted to any private individuals and the parties to the agreement were basing the same on the hope that the same would be allotted at some future stage to the individuals in occupation thereof.

45. The question which then arises is whether PW2 and PW3 had any disposable interests in the land which they passed to the plaintiff and which the plaintiff could claim in the manner purported herein. That question can only be answered in the negative. Article 63(3) of *Constitution* is clear that any unregistered community land shall be held by the county government on behalf of the communities for which it is held. Article 64 of the same *Constitution* prohibits the disposition of such community land except in the manner provided by legislation.

46. Arising from the foregoing, it was apparent that the subject matter of this dispute is land vested in the county government of Lamu and that the witnesses who testified herein had no right to alienate, dispose of and/or sell the same.

47. Arising from the foregoing, it was clear to me that the plaintiff's suit is misconceived and without any basis. The same is dismissed with costs to the defendants.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 28<sup>TH</sup> JULY, 2022.**

**In the presence of:**

**Ms Mona holding brief for Gekamana for the defendant**

**Ms Minyazi holding brief for Omwanicha for the plaintiff**

**Court assistant - Kendi**

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**J O Olola**

**JUDGE**

