



Zumzum v Ndegwa Ngoro & 10 others (Suing as the Committee of Nguuni Power Residents and on behalf of 821 others) (Environment & Land Case 242 of 2017) [2022] KEELC 12629 (KLR) (27 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12629 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 242 OF 2017
NA MATHEKA, J
SEPTEMBER 27, 2022**

BETWEEN

ZUMZUM INVESTMENT LIMITED PLAINTIFF

AND

**NDEGWA NDORO 1ST DEFENDANT
JOSEPH KITSAO SHIDA 2ND DEFENDANT
FRANCIS KANJA 3RD DEFENDANT
KITHI KALU 4TH DEFENDANT
KATANA KIBWANA 5TH DEFENDANT
HASHIM LOWA MAKAZI 6TH DEFENDANT
JUMA RUWA ALIAS BOLUDO 7TH DEFENDANT
FREDRICK CHARO 8TH DEFENDANT
KAZUNGU KAINGU 9TH DEFENDANT
JEFF WABAYA 10TH DEFENDANT
NGAWA NDORO 11TH DEFENDANT
SUING AS THE COMMITTEE OF NGUUNI POWER RESIDENTS AND ON
BEHALF OF 821 OTHERS**

JUDGMENT

1 The Plaintiff avers that at all material times to this suit the Plaintiff has been the registered absolute owner and or proprietor of all that land known as LR No MN/II/8408 (Original No 1482/994). By a



charge dated May 18, 2010, the Plaintiff charged the suit property to Habib Bank Limited to secure a loan facility of Kshs 100,000,000/=. This facility was later varied to Kshs 60,000,000/= and thereafter the Plaintiff issued a Corporate Guarantee in the sum of USD 2,700,000/= to Habib Bank Limited to secure loan facilities to a maximum of US Dollars 1,800,000/=. The Plaintiff states that when the property was being charged to Habib Bank Limited in 2010, the Bank conducted due diligence which included the appointment of Tysons Limited to value and inspect the property which was vacant and with no development on the land at all and the Defendants have no right known in law to occupy the suit property. The Defendants, their servants, agents, employees and or persons claiming under them have since trespassed and illegally occupied the Plaintiff's property and proceeded to unlawfully: Erect and build dwellings of both a temporary and permanent nature on the suit property without any consent or authority from the Plaintiff. Subdivided the property for illegal sale. Utilize the resources of the suit property including the flora, fauna and water resources. Carried out development projects on the suit property without any consent or authority from the Plaintiff.

2. On noticing the above developments, the Plaintiff wrote to various State agencies including the National Land Commission and County Administration in order to remedy the situation on the suit property. That further upon request, the Plaintiff submitted its title documents for verification to the National Land Commission which confirmed the Plaintiff as the Registered and rightful owner of the suit property and directed that there be a stop to any invasion, physical developments and or transactions. Acting on the findings of the National Land Commission, the Deputy County Commissioner, Kisauni Sub-County wrote to the representative of the Defendants to stop further developments on the suit property but the Defendants, their servants, agents, employees and or persons claiming under them in total disregard to the law and despite being aware of the findings of the National Land Commission, refused to vacate the suit property thus occasioning great loss to the Plaintiff. The Plaintiff avers that none of the Defendants herein enjoys or has ever enjoyed peaceful, uninterrupted and/or exclusive occupation of the suit property. Accordingly, none of them can claim any right to the suit property. The Plaintiff prays for judgment against the Defendant for:
 1. A declaration that the Plaintiff is entitled to exclusive and unimpeded rigid of possession and occupation of all that parcel of land known as LR No MN/II/8408.
 2. A declaration that the Plaintiff is the lawfully registered owner of all that parcel of land known as LR No MN/II/8408.
 3. A declaration that the Defendants whether by themselves or their servants or agents and/or otherwise howsoever are wrongfully in occupation of the suit property and are accordingly trespassers on the same.
 4. A declaration that the Defendants whether by themselves or their servants or agents and/or otherwise however are not entitled to remain on the suit property.
 5. An order that the Defendants and all other trespassers do forthwith vacate and deliver vacant possession of the suit property to the Plaintiff.
 6. An order of eviction against each of the Defendants, their agents, servants as well as any other parties to whom the Defendants or any of them have permitted to occupy any part of the suit property.
 7. A permanent injunction restraining the Defendants whether by themselves or their servants or agents and/or otherwise howsoever from remaining on or continuing in occupation of the suit property.
 8. General damages for trespass.



9. Mesne profits for the wrongful occupation of the suit property as trespassers.
 10. An order directed to the Officer Commanding Police Division (OCPD), Kisauni Division to execute the orders of this Honourable Court and evict all trespassers and unauthorized occupants of the suit property including the Defendants' and their servants and agents.
 11. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.
 12. Any such other or further relief as this Honourable Court may deem appropriate.
- 3 The 12th to 21st Defendants aver and state that they have acquired the portion of the suit property measuring approximately 100 acres by way of adverse possession after occupying the parcel of land for over 12 years. The Defendants pray for a declaration that they have acquired the ownership of the suit property by way of adverse possession and the Plaintiff's suit be dismissed with costs.
- 4 This court has considered the evidence and the submissions therein. It is a finding of fact that the Plaintiff is the registered proprietor of the suit property known as LR No MN/II/8404 (Original No 1482/994) having produced a Certificate of Title dated November 13, 1999. Section 26 of the [Land Registration Act](#) states that;
- ' 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—
- (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 issue for determination is whether or not the Defendants have acquired the same by way of adverse possession. The 1st to 11th Defendants entered appearance through the firm of Mwaniki Gitahi and Partners but never filed a defence nor did they attend court. The 12th to 821st Defendants entered appearance through the firm of Okanga & Company Advocates and averred in their counterclaim dated May 28, 2018 that they have acquired ownership to the suit property by way of adverse possession. Adverse possession is a limitation to the rights of a registered proprietor of land, provided by Section 7 of the [Limitation of Actions Act](#), which states that, an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. Where a land owner has been out of possession and a stranger has been in possession for 12 years, the owner is barred from re-entering to recover possession by action. Where the land is registered, title does not extinguish but the registered proprietor holds it in trust for the person who by virtue of adverse possession has acquired title. Adverse possession does not give the intruder any title but prevents the owner from asserting his title, the owner can no longer claim interest over the suit property.
- 6 Where a person claims to have become entitled by adverse possession to land registered, as the suit property is, he ought to by Section 38 of the [Limitation of Actions Act](#) to apply to this court for an order that he be registered as the proprietor of the land in place of the person then registered as the



proprietor. The Defendants claiming right by adverse possession must make physical entry and be in actual possession for the statutory period. Which starts to run when there is a person in adverse possession, time does not run merely because the land is vacant.

7 Possession is a matter of facts, DW1, DW2 and DW3 all testified that they have resided and occupied the suit property for over 12 years, however their National Identification cards show that they were born in Kaloleni, Kwale and Kilifi respectively. Their occupation has not also been peaceful and it is clear they invaded the suit property and refused to vacate even after being warned by the administration. I find that the Defendants in their evidence have failed to prove that they were in exclusive and actual possession, which requires proof of physical occupation for 12 years. The Defendants have also failed to prove that they occupied the suit property without permission from the Plaintiff, for a period of 12 years. In the case of *Gabriel Mbuvi vs Mukindia Maranya (1993) eKLR* the court stated that;

' The mere fact that for 12 years or more there has been no suit brought against the defendants or the fact that the defendants have been in actual possession for more than 12 years is not enough to invoke adverse possession. There has to be exclusive possession for the statutory period, there must be shown that the title holder has been dispossessed or has discontinued his possession of the land for more than 12 years. The defendants must prove that they were in exclusive possession and the plaintiff was out of possession, which has not been done.'

8 The Plaintiff has established that they charged the suit property to Habibi Bank on May 18, 2010 for a loan facility of Kshs 100 million and the land was unoccupied. PW2 Mr Kyambi testified that he conducted due diligence for the bank on the suit land which was to be used as security for a loan and visited the property on the October 30, 2009 and confirmed that the suit land had no developments. This was further confirmed by google earth photographs filed in court on January 20, 2022. Therefore, the Plaintiff was still in possession and in use of the suit property exercising different acts of ownership. PW1 testified that the Defendants started encroaching on the land in 2013 and he immediately informed the relevant authorities but no remedy was availed. Indeed, a letter dated May 25, 2016 was produced as an exhibit written by the Deputy County Commission to the Chairman of the squatters notifying them that it was an offence to invade/squat/occupy others persons land whether it is private or public. This suit was filed in 2017. The Defendants have failed to establish that their possession was inconsistent with the Plaintiff's ability to enjoy his proprietor rights. The Defendants ought to have demonstrated that their possession commenced prior to 2010.

9 From the facts and evidence on record, the Defendants have failed to prove that they are in actual possession of the suit property in an open, visible, notorious and exclusive manner; in a continuous and uninterrupted period of 12 years. There has been no factual proof of when they took possession, the nature of the possession and for how long the possession when on for. Questions of facts have to be asserted and proved. For these reasons their counterclaim fails and I dismiss it with cost. The claims for general damages and mesne profits have not been proved and the same will not be awarded. I find that the Plaintiff has proved their case on a balance of probabilities and I grant the following orders;

1. A declaration that the Plaintiff is entitled to exclusive and unimpeded rigid of possession and occupation of all that parcel of land known as LR No MN/II/8408.
2. A declaration that the Plaintiff is the lawfully registered owner of all that parcel of land known as LR No MN/II/8408.
3. A declaration that the Defendants whether by themselves or their servants or agents and/or otherwise howsoever are wrongfully in occupation of the suit property and are accordingly trespassers on the same.



4. A declaration that the Defendants whether by themselves or their servants or agents and/or otherwise however are not entitled to remain on the suit property.
5. An order that the Defendants vacate and deliver vacant possession of the suit property to the Plaintiff within 180 days (one hundred and eighty) upon service of this order and in default of eviction to issue against each of the Defendants, their agents, servants as well as any other parties to whom the Defendants have permitted to occupy any part of the suit property.
6. A permanent injunction restraining the Defendants whether by themselves or their servants or agents and/or otherwise whosoever from remaining on or continuing in occupation of the suit property.
7. Costs of this suit to the Plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF SEPTEMBER 2022.

N.A. MATHEKA

JUDGE

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