



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Issa v Kambi & 18 others (Environment & Land Case 8 of 2016)
[2022] KEELC 4809 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4809 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 8 OF 2016
JO OLOLA, J
SEPTEMBER 22, 2022**

BETWEEN

ABDALLA MOHAMED ISSA PLAINTIFF

AND

**CHRISTOPHER MUMBA KAMBI 1ST DEFENDANT
KATANA MWILO 2ND DEFENDANT
SHIDA THOYA 3RD DEFENDANT
SANGA MULUKI 4TH DEFENDANT
EMMANUEL KAHINDI 5TH DEFENDANT
CHARE MWAMBUA 6TH DEFENDANT
KATANA VUKO KALAMA 7TH DEFENDANT
MARY KADZO KALELI 8TH DEFENDANT
CHARO MWAMBUA 9TH DEFENDANT
KAHINDI YONGI 10TH DEFENDANT
KALELI NGALA 11TH DEFENDANT
SAMMY KABUKA 12TH DEFENDANT
LAST KABWERE 13TH DEFENDANT
MARGARET K. KALELI 14TH DEFENDANT
KALUME BINGARI 15TH DEFENDANT
MKARE ANDAU 16TH DEFENDANT
NYEVU KARISA KALOMBA 17TH DEFENDANT**



KAHINDI NGOWA 18TH DEFENDANT

RIZIKI FRED 19TH DEFENDANT

JUDGMENT

Background

1. By a plaint dated and filed herein on January 14, 2016, Abdalla Mohamed Issa (hereinafter “the plaintiff”) prays for an order of vacant possession against the 19 defendants from land portion No 371 – Malindi. That prayer arises from the plaintiff’s contention that at all times material, he is the sole registered proprietor of the said piece of land measuring 30 acres.
2. The plaintiff accuses the defendants of encroaching upon the suit land and inviting their relatives thereon without his consent. The plaintiff avers that the said unlawful acts of the defendants have caused him prejudice as he is unable to exercise his ownership rights over the suit property.
3. But in their joint statement of defence dated February 22, 2016, the 19 defendants contend that the plaint as drawn and filed does not disclose any reasonable cause of action against them. They deny that the plaintiff is the registered owner of land portion No 371 – Malindi and invite him to strict proof.
4. The defendants deny having encroached on the suit land and aver that some of them were born on the land while others have been living on the land for some 40 to 70 years without any disruption until recently when the plaintiff attempted to meet them with an objective of selling the land to themselves.
5. The defendants aver that a majority of them have built permanent houses and structures on the portions that they occupy and they know no other placed of abode.

The Plaintiff’s Case

6. The plaintiff – Abdalla Mohammed Issa testified as the sole witness in his case. Testifying as PW1, the plaintiff adopted his statement dated and filed herein on September 18, 2017. He told the court he was the sole registered proprietor of all that parcel of land known as portion No 371 – Malindi measuring approximately 30 acres having inherited the same through Malindi Kadhi Court succession case No 3 of 1995 as confirmed in Malindi High Court succession cause No 55 of 2007.
7. PW1 testified that before the year 1995, the suit property was free from any squatters. Sometime between 1985 and 1995, one Mohammed Abbas Abdulla unlawfully assumed ownership of the property and even went ahead to obtain title thereto PW1 told the court he challenged the title through the case before the Kadhi and the dispute was determined in his favour.
8. PW1 further testified that after he obtained title to the property, squatters invaded the land and constructed structures thereon. He told the court he had severally approached the squatters to vacate the property in vain. Sometimes in the year 2015, PW1 received a letter from Nyakoe Macharia & Company Advocates who stated he was acting for the squatters and that the squatters were willing to buy the land. Since then, the squatters have been committing themselves to have an intention to purchase the property but have never done so.
9. PW1 told the court the squatters have sold portions of the land to strangers who have constructed permanent houses thereon. PW1 further told the court that every time he visits the land, the squatters have threatened to kill him and that their continued trespass has made him to incur lots of unnecessary losses.



10. On cross-examination, PW1 denied that there were people who had lived on the land for decades. He however conceded there were many people living on the land and that some of them had built permanent houses thereon.

The Defence Case

11. The 19 defendants equally called one witness who testified in support of their case at the trial.
12. DW1 – Christopher Mumba Kambi is the 1st defendant and a teacher by profession. He told the court that though only 19 people were sued as defendants, there were more than 600 families living on the suit property.
13. DW1 testified that he was a stranger to the plaintiff as he had never met or known him. He told the court in the year 1941, there were 5 original occupants of the land who later in 1962 tried to purchase the land from one Omar Makanyira at a consideration of Kshs 7,930/-. Though the sale was never properly completed after the said Omar demanded for more money, DW1 told the court the 5 original occupants remained on the land and that due to social problems they started selling portions of the land. Today there are about 600 people on the land.
14. DW1 further told the court they had been raised up on the land even though their forefathers were never issued with any documents of title. During all that period, DW1 told the court he was unaware of any case that had been filed to evict them. He further told the court some of the people sued herein by the plaintiff such as the 7th, 9th, 14th and 15th defendants had since died. He told the court he had personally lived on the land for 52 years and urged the court not to evict the defendants even if it were to find that the land belonged to the plaintiff.
15. On cross-examination, DW1 conceded he had once been charged with a criminal offence in relation to the land. He further conceded he was aware there was an order giving the plaintiff possession of the land and that some sections thereof were unoccupied and undeveloped.
16. DW1 denied that there was an attempt by the defendants to settle the matter before it came to court. He however conceded their advocate Nekoye Macharia wrote a letter inviting the plaintiff for a discussion of the matter. DW1 stated that it was true some of the squatters were selling the land. He told the court he was in occupation of less than half-an-acre of the suit property.

Analysis and Determination

17. I have carefully perused and considered the pleadings filed herein, the testimonies of the two witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the rival submissions placed before me by the learned advocates representing the parties.
18. The plaintiff herein prays for an order of vacant possession against the 19 defendants from land portion No 371 – Malindi. It is the plaintiff's case that he inherited the parcel of land measuring some 30 acres by virtue of inheritance through Malindi Kadhi's Court succession cause No 3 of 1995 which was subsequently confirmed in Malindi High Court succession cause No 55 of 2007.
19. The plaintiff accused the defendants of encroaching upon the suit property and proceeding to erect permanent and semi-permanent structures thereon without his consent or authority.
20. As it were, the defendants do not deny being on the suit property. It is however their case that they have lived on the suit land for a period of 40 to 70 years without any disruption after their forefathers entered the land following a failed attempt to purchase the suit property from the original owners.



21. In support of his case, the plaintiff told the court that between the years 1985 to 1995 one Mohammed Abbas Abdulla had unlawfully assumed ownership of the land and had even obtained a title thereto. The plaintiff challenged that ownership *vide* the said Malindi Kadhi's Court succession cause No 3 of 1995.
22. I have read the judgment of the Chief Kadhi Hammad M Kassim delivered in the said succession cause on March 20, 2004. It is apparent from the perusal thereof that the plaintiff herein was claiming the land as the heir of one Omar Sheikh Bin Athman. The said Omar Sheikh Bin Athman passed on in the year 1918, some 82 years before the case before the Kadhi was determined and it was not clear from a perusal thereof who had been in charge of the suit property for the intervening period.
23. According to the plaintiff, the defendants herein invaded the suit land and started constructing structures thereon after he obtained titles to the suit property. The plaintiff does not however state when exactly the defendants entered the land and/or who was in occupation and/or control of the land before then.
23. This court had occasion to visit the *locus in quo* on April 30, 2021. The court noted that the vast parcel of land was largely occupied with semi-permanent houses and cultivated fields of cassava. It was in fact apparent that while only 19 people had been sued as being in occupation of the land by the plaintiff, the inhabitants of the suitland were much more than that. The impression created was that of a well settled village with old permanent and semi-permanent buildings that appeared to have been on the land for many years.
24. It was further evident that since he acquired title to the suit property, the plaintiff had not been in possession and or occupation of the suit property. Following a consent adopted herein in court on March 13, 2018, the parties agreed that the plaintiff would assume possession of those areas that were vacant and/or open on the suit land as identified by a qualified surveyor.
25. The plaintiff subsequently engaged Messrs Edward Kiguru land surveyors to carry out a cadastral and topographical survey of the suit land. In their report dated June 12, 2018, the surveyors found that the total area in use by the defendants and other squatters was 5.3382 Ha while the open or vacant area was 6.2052 Ha.
26. Arising from this court's observations when the court visited the *locus in quo*, many of the defendants had lived on the suit land for more than 12 years as at the time this suit was filed and it would be intrinsically unfair and unjust to require them to vacate the land given that the plaintiff and his predecessors in title had failed for a considerable period of time to take control of and/or to remove them from the land. While it may be true that some of the defendants had in the year 2015 approached the plaintiff to purchase a portion of the land, that did not change the fact that the defendants and many other squatters on the land who have not been sued herein had been thereon for a period in excess of 12 years thereby acquiring interest thereon by way of adverse possession.
27. In the circumstances herein, I hereby find and declare that the defendants are entitled to the portions of land they occupied as per the survey report of Messrs Edward Kiguru surveyors dated June 12, 2018 measuring 5.3382 Ha. The plaintiff is accordingly entitled to vacant possession of the area that was found to be vacant by the surveyor measuring 6.2052 Ha and it is so ordered.
28. Each party shall bear their own costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 22ND SEPTEMBER, 2022.

In the presence of:



Ms Leah Exekiel holding brief for Willis Otieno for the Plaintiffs

Mr. Omwancha for the Defendants

Court assistant - Kendi

.....

J. O. OLOLA

JUDGE

