



**Kazungu v Gede Secondary School & 3 others (Environment & Land Case 112 of 2015) [2022] KEELC 13513 (KLR) (6 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13513 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 112 OF 2015**

**MAO ODENY, J  
OCTOBER 6, 2022**

**BETWEEN**

**ANTHONY NDUNDI MWAMBIRE (SUING AS THE LEGAL  
REPRESENTATIVE OF THE ESTATE OF MARTHA PAUL  
KAZUNGU ..... PLAINTIFF**

**AND**

**GEDE SECONDARY SCHOOL ..... 1<sup>ST</sup> DEFENDANT  
COUNTY GOVERNMENT OF KILIFI ..... 2<sup>ND</sup> DEFENDANT  
LAND REGISTRAR KILIFI ..... 3<sup>RD</sup> DEFENDANT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By a Complaint dated July 13, 2015, the plaintiff herein sued the defendants jointly and severally seeking the following orders: -
  - a. A declaration order be issued that the suit property belongs to the estate of Martha Paul Kazungu.
  - b. An order be issued against the district surveyor to establish and/or place beacons in regard to the parcel of land owned by the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant respectively as per their green cards records held by the 3<sup>rd</sup> defendant.
  - c. An order be issued adopting the Kilifi land Registrar report made on July 29, 2008 resolving boundaries dispute among the plaintiff and the defendants.
  - d. An order directing the land registrar Kilifi to register and issue title documents to the plaintiff in regard to the suit property.



2. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants who filed Statements of Defence, Amended Defence and Counterclaim seeking the following orders: -
  - a. An order of mandatory injunction do issue to compel the plaintiff, his servants, agents, beneficiaries, assigns or advocates to demolish the structures erected on plot no 24159 Kilifi (hereinafter referred to the “suit property”) and vacate the suit property.
  - b. A permanent injunction do issue to restrain the plaintiff by himself, his servants, agents or advocates or any of them or otherwise from clearing the land, cutting down trees, tilling the land, erecting structures and/or interfering with the 1<sup>st</sup> defendant’s quiet possession of the suit property.
  - c. Any other relief that the court may deem just and convenient.
  - d. Costs of the suit and counter-claim.

### **Plaintiff’s case**

3. PW1 Antony Ndundi Mwambire adopted his statement together with the list of documents filed as Pex No 2 to 6 and marked a survey report as PMFI 1. It was PW1’s testimony that his dispute is about the implementation of the boundary between him and the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
4. It was PW1’s evidence that the boundary dispute between the parties was determined by the district land registrar on March 17, 2008. It was PW1’s testimony that the family of Paul Kazungu has been and still in occupation of the disputed suit property since 1950 without interruption until 2008 when the 1<sup>st</sup> and 2<sup>nd</sup> defendant obtained title deeds.
5. On cross examination by Mr Munga, PW1 told the court that he had sued Gede Secondary School in respect of plot no Kilifi/ Mbaraka/ Chembe/ 1 and further that the school is on Kilifi/ Mbaraka/ Chembe/3 and does not have title to Kilifi/ Mbaraka/ Chembe/1.
6. PW1 stated that during the adjudication and issuance of titles in 1973, their title was not issued and further that they live on different parcels of land with the school whom he has sued due to encroachment.
7. According to PW1 the school has a title deed whose acreage measures 4.4 Ha. and is not aware that the school has filed a counter claim for him to be evicted to enable the school to expand.
8. On cross examination by Ms Mulongo PW1 confirmed that he neither stated the parcel number in contention nor that he had a previous case at the tribunal and a judicial review. PW1 also admitted that he does not have any title documents and that his claim is against the county Government is because they have been encroaching and cutting trees.
9. PW2 Boaz Juma the county land registrar confirmed that the report dated March 17, 2008 emanated from their office and that public utilities like schools are provided for at the beginning of the settlement scheme.
10. It was PW2’s testimony that the Green Card for plot no 3 was reserved for Gede Secondary School and that the sketch map indicates that there are 6 homesteads within the area.
11. On cross examination by Mr Mkalla, he told the court that he was not aware that the report was subject of a court decision, further that from the sketch map he could not ascertain whose parcels of land were marked.



## **Defendants' case**

12. DW1 Mwachanya Josiah adopted his statement dated September 1, 2021 together with his List of Documents dated February 13, 2017 and a further List of Documents dated February 27, 2017 which he produced as Dex no 1 to 13.
13. DW1 stated that the suit property was allotted to the 1<sup>st</sup> defendant on July 15, 1997 and registered in the name of the school on June 27, 2006. It was DW1's testimony that the school was built by the community on a piece of land that was set aside for public utility on the Gede/ Mbarakachembe Scheme initially bordering the Manyeso Farmers demonstration plot.
14. According to DW1, when Manyeso demonstration project was functional the plaintiff's grandfather was employed as a carpenter and when the project ended, all the employees were released but the plaintiff's grandfather remained as a squatter on the land.
15. It was DW1's further testimony that the school later expanded and was allocated the Manyeso Section where it built dormitories and staff quarters. He confirmed to the court that the school has a title deed that has never been challenged by anyone.
16. DW1 finally stated that he is conversant with the school boundaries whereby they have exclusive occupation save for the plaintiff who is a squatter occupying the land without authority which is a security risk and has affected the development of the school.
17. DW2 the county land surveyor told the court that she conducted a survey for Gede Secondary School and prepared a report dated November 30, 2020 which was produced as Defence Exhibit no 14.
18. It was her evidence that the report explains the boundary of LR no 24159 which is supported by Deed Plan no 258653 that shows the acreage of 9.554 hectares and that she established the beacons of the suit parcel of land.
19. DW2 stated that there was a section of the land measuring 3.26 hectares which is not occupied by the school and the same was shown in the sketch map.
20. On cross examination, DW2 stated that mark sheet no 3 belonged to Gede Secondary School and that plot no 3 and 1 are on mark sheet no 4.
21. DW3 Margaret Munga adopted her statement dated March 3, 2022 and told the court that she is aware of the report dated March 17, 2008 which was set aside by the court. That Gede Secondary School was allocated plot no 3 which is neighboring plot no 1 and that the school was added a portion by the county.
22. It was her testimony that the survey report shows that the Ministry of Lands gave the school 4.4 hectares and the municipality gave additional 5.15 hectares totaling 9.55 Hectares. Her testimony was that there are illegal squatters on 3.26 hectares of the school land.

## **Analysis and determination.**

23. The issues for determination are as follows; -
  1. Who is the legal proprietor of plot no 24159 which forms part of plot no 3 and part of plot no 1 of Gede/MbarakaChembe;
  2. Whether the plaintiff is entitled to the reliefs sought in the Plaint;
  3. Whether the 1<sup>st</sup> defendant is entitled to the orders sought in the counterclaim; and



4. Who should bear the costs of the suit?
24. The plaintiff's claim is premised on the ground that his late mother inherited the same from his father and further they have lived there since 1950.
25. DW2 told the court that she conducted a survey for Gede Secondary School and prepared a report dated November 30, 2020 which she produced as an exhibit in court. This evidence was crucial as it showed the boundary of LR no 24159, and Deed Plan no 258653 that indicated that the acreage is 9.554 hectares.
26. From the evidence on record DW3 confirmed to the court that 1<sup>st</sup> defendant was allocated plot no 3 a plot next to plot no 1 measuring 4.4 hectares by the Ministry of Lands and was added a portion measuring 5.15 hectares by the Municipality making a total of 9.55 hectares. DW3 also confirmed that there are illegal squatters on the school land on 3.26 Hectares.
27. The plaintiff's evidence did not establish that he has a right to the suit property either as a beneficial owner or a registered owner of the suit property. There is evidence that the school was allocated the suit land and has a title deed. The green card that was produced indicates that the school is the registered owner of the suit land.
28. The 1<sup>st</sup> defendant was issued with a grant for a term of 99 years with effect from July 1, 1997 following a survey. The 1<sup>st</sup> defendant also produced a certificate of title for plot no 24159 and a land survey plan number 258653 dated February 22, 2005.
29. Section 26 (1) of the [Land Registration Act](#), which provides 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. '
30. There is no evidence that the title was procured by fraud or misrepresentation therefore the same cannot be impeached. The 1<sup>st</sup> defendant has proved that it is the legal owner of plot no 24159 which forms part of plot no 3 and part of plot no 1 of Gede/MbarakaChembe.
31. It is also my finding that the plaintiff has not established that he has any priority rights over that of the 1<sup>st</sup> defendant's title and further that the plaintiff has not exhibited any right or interests over the property. Mere claim that they have been staying on the suit land does not entitle him to the suit land taking into account that the claim is not for adverse possession.
32. From the evidence on record the court is satisfied that the 1<sup>st</sup> defendant is the rightful owner of the suit land having proved how it acquired the suit land and issued with a title deed.
33. In the circumstances I find that the plaintiff has failed to prove his case on a balance of probabilities and is therefore dismissed with each party bearing their own costs.



34. I find that the 1<sup>st</sup> defendant has proved its case and therefore the Counterclaim is allowed as prayed in the following terms.
- a. An order of mandatory injunction is hereby issued to compel the plaintiff, his servants, agents, beneficiaries or assigns to demolish the structures erected on plot no 24159 Kilifi and vacate the suit property within 45 days failure to which eviction order to issue.
  - b. A permanent injunction is hereby issued to restrain the Plaintiff by himself, his servants, agents or any of them or otherwise from clearing the land, cutting down trees, tilling the land, erecting structures and/or interfering with the 1st Defendant's quiet possession of the suit property.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 6<sup>TH</sup> DAY OF OCTOBER, 2022.**

**M A ODENY**

**JUDGE**

NB: In view of the Public Order no 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

