



REPUBLIC OF KENYA



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**Gilani v Bandumila & others (Environment & Land Case 124 of 2017)  
[2022] KEELC 15011 (KLR) (25 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15011 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 124 OF 2017  
MAO ODENY, J  
NOVEMBER 25, 2022**

**BETWEEN**

**MUNIRA AMIN GILANI ..... PLAINTIFF**

**AND**

**MIA BANDUMILA & OTHERS ..... PLAINTIFF**

**JUDGMENT**

1. By an amended Plaintiff dated 28<sup>th</sup> June, 2017 the Plaintiff herein sued the Defendant seeking the following orders; -
  - a. A Declaration that the Plaintiff is the registered and lawful owner of all that parcel of land known as title Number Lamu/Block11/25 and that the continued trespass by the Defendants on the same is illegal.
  - b. A permanent injunction to restrain the defendants, their agents or servants or any other person acting through their direction or order from continued trespassing, occupation, interfering with and/or in any other manner whatsoever dealing with the Plaintiff's property title number Lamu/ Block11/25.
  - c. An order of Eviction of the defendants from the suit property and demolition of all structures thereon laid by the defendants.
  - d. General damages against the defendants for trespass.
  - e. Costs of this suit.
  - f. Interest on (e) and (d) above from the date of filing this suit until payment in full.
  - g. Any other award that the court may deem fit, just and expedient in the circumstances to award.



## **Plaintiff's Case**

2. PW1 Munira Amin Gilani adopted her statement and the list of documents in respect of the suit land dated 5<sup>th</sup> June, 2017, 21<sup>st</sup> October 2021 and 28<sup>th</sup> October 2021 respectively.
3. It was PW1's evidence that her father who was the original proprietor of Parcel No. Lamu Block/11/25 bequeathed her the said parcel of land. She produced a copy of title issued on 18<sup>th</sup> November 2008, official search of the property and copies of transfer by transmission by Tadjin Kassam Jivraj who was the executor of the will and administrator of the estate. PW1 stated that Tadjin Kassam then transferred the suit property to her.
4. PW1 stated that when she went to the parcel of land she found five people had encroached on the suit land and further stated that she had previously visited the suit land and the same was vacant.
5. It was PW1's testimony that she contacted the District Surveyor Lamu to re-establish the boundaries who went and placed beacons and confirmed that the 1<sup>st</sup> to 5<sup>th</sup> Defendants had encroached onto the suit parcel of land vide a report and map which were produced in court to show the extent of the trespass.
6. PW1 also gave evidence that she reported the matter to the Local Authority and the County Council Clerk issued a demolition notice vide a letter dated 12<sup>th</sup> May 2010 to the Defendants but they did not take heed.
7. Upon cross examination by Mr. Olaba, PW1 told the court that the property belonged to her and that she was relying on the transfer document transmitting the suit property to her in 2008. That the application to be registered as proprietor by transmission was executed by her mother due to the fact that she was the executor of the Estate of her father, that the original owner was her father but subsequently her mother later gifted her the plot.
8. DW1 Bwanadumia Miji Mohamed adopted the contents of the affidavit dated 13<sup>th</sup> September 2017 which was in respect of an application for injunction restraining the Defendants from dealing with the suit land as his evidence in chief and the attached annexures 1 to 5 as exhibits.
9. On cross examination by Mr. Yogo for the Plaintiff, DW1 stated that he did not receive any notice from the County Council to vacate the suit property. DW1 further stated that he made an application for approval for development on 19<sup>th</sup> January 1999 which approval was subject to not encroaching on other land and Bye laws.
10. DW1 further stated during cross examination that he neither knew the Plot No. which he is occupying nor had a title deed as it was government land. Further that the plan was approved for development and no one has ever come to evict them.
11. DW2 testified that there was an application for plan approval and that approval was recommended on 21<sup>st</sup> March 2006 and later granted.

## **Plaintiff's Submissions**

12. Counsel for the Plaintiff filed submissions, however counsel for the Defendant did not file any submissions.
13. Counsel identified the following issues for determination; -
  - a. Whether the Plaintiff has established ownership of parcel No. Lamu/11/25 as per the law



- b. Whether plaintiff has established trespass onto parcel No. Lamu/11/25 and if so is the plaintiff entitled to eviction orders against the defendants.
  - c. Whether the defendants have proved adverse possession to Parcel No. Lamu/11/25
  - d. Whether the plaintiff is entitled to the orders in the amended plaint.
  - e. Who bears costs of this suit.
14. On the first issue whether the plaintiff has established ownership of the suit land, counsel submitted that the plaintiff produced all the relevant documents required in law to show the process of how she acquired the suit property as hence she is entitled to the suit property by virtue of Article 40 of the Constitution.
  15. Counsel relied on the case of Funzi Island Development Ltd & 2 Others vs County Government of Kwale & 2 Others (2014) eKLR, Kassim Ahmed Omar & Another vs Awuor Ahmed Abel & Others Malindi ELC No. 18 of 2015 Kenya National Highway Authority v Shalieu Masood Mughal & 5 others [2017] eKLR on indefeasibility of title and further cited the provisions of Sections 24, 25, and 26 of the Land Registration Act
  16. Counsel submitted that the Defendants have raised the issue of adverse possession in their defence and enumerated the ingredients of the doctrine which a claimant must prove to be able to be granted such orders. Counsel submitted that an Applicant must prove that he or she has been in actual open occupation, possession without consent of the registered owner, the occupation must have been for a period of not less than 12 years uninterrupted and time stops running when the owner of the parcel of land asserts his or her right of ownership which under the current Land Registration Act occurs when the person takes any legal steps to assert such right.
  17. Mr. Yogo submitted that the only evidence by the Defendants was the approval letters forwarded to the Lamu County Council for approval of some building plans by Somoe Seif which was lodged and approved on 11<sup>th</sup> December 2007, Fatuma Abubakar Abdurahman on 15<sup>th</sup> January 2009, Omar Athman Maumoki on 16<sup>th</sup> December 2005, Mia Bandumia Miji on 19<sup>th</sup> January 1999 and Martin Butembu Akech on 21<sup>st</sup> March 2006. This was to show when they moved into the property.
  18. Counsel submitted that the Plaintiff reported the matter to Lamu County Council Clerk vide a letter dated 12<sup>th</sup> May 2010 which was duly acknowledged by Steve Kodiagga advocate acting for the Defendants and that the Plaintiff filed this case on 5<sup>th</sup> June 2017 therefor time is calculated as follows: -
    - a. Somoe Seif got approval on 11.12.07 to 12.5.2010 which means 3 years from when the plaintiff wrote a letter while 10 years to when the plaintiff moved to court.
    - b. Fatuma A, Abdurahman got approval on 15.1.09 to 12.5.10 which means 1 year from when the plaintiff wrote a letter while 8 years to when the plaintiff went to court.
    - c. Omar Athman Maumoki got approval on 16.12.05 to 12.5.2010 which means 5 years while 11 years 4 months to when the plaintiff went to court.
    - d. Martin Butembu Akech got approval on 21.3.06 to 12.5.2010 which means time is 4 years from when the plaintiff wrote a letter while 11 years when the plaintiff went to court.
    - e. Mia Bandumia Miji got approval on 19.1.99 to 12.5.2010 is 11 years from when the plaintiff wrote a letter



19. Counsel therefore submitted that the Defendants have not proved adverse possession as required by law and urged the court to allow the Plaintiff's case as prayed.

### **Analysis And Determination**

20. The issues for determination is whether the Plaintiff has proved that she is the rightful owner of the suit land and whether the Defendants have established a right over the suit land.
21. The Plaintiff testified and told this court that she was the registered and lawful owner of all property title number Lamu/Block11/25 measuring approximately 2.29 acres which she acquired from her father Tajdin Kassam Jivraj and has a titled deed issued on 18<sup>th</sup> November 2008 which she produced in court. It was also her testimony that the Defendants despite being issued with a notice to vacate, have continued to occupy the suit land illegally.
22. 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.”
23. Section 26 of the *Land Registration Act*, 2012 on the other hand provides that; -
- (1) 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
24. It should be noted from the onset that although the Defendants filed a written statement of defence, they did not adduce any evidence in support of their claims and therefore all the averments in their Defence remains mere allegations as averments in pleadings are not evidence. The Defendants did not file any witness statements and during the hearing DW1 adopted a Replying Affidavit which was filed in response to the Plaintiff's Notice of Motion dated 5<sup>th</sup> June 2017 for injunctions restraining the Defendants from interfering with the suit parcel known as Lamu/Block II /25.
25. The Defendants also relied on the doctrine of adverse possession in their defence but did not file a counterclaim to be declared as such had they proved their case for adverse possession. They did not lead any evidence to prove that their occupation was adverse to the Plaintiff's title hence extinguished.
26. I find that the Plaintiff has proved that she is the rightful owner of the suit land and that he Defendants entered the suit land without lawful excuse. The Defendants having entered onto the Plaintiff's suit land without any lawful or justifiable cause, I find that the Defendants are trespassers and therefore the Plaintiff is entitled to general damages for trespass.



27. It is trite that trespass is actionable per se as was held in the case of *Duncan Nderitu Ndegwa -vs- KPLC & Another* [2013] eKLR where the court held :-

“...once a trespass to land is established, it is actionable per se and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of kshs. 100,000/= as compensation of the plaintiff’s denial of the right to use and enjoy the suit property occasioned by the 1st and 2nd defendants trespass.”

28. Similarly in the case of *Park Towers Ltd -vs- John Mithamo Njika & 7 Others* [2014] eKLR the court held thus :-

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages awardable depending on the unique facts and circumstances of each case.”

29. I therefore award the Plaintiff a sum of Kshs 1,000, 000/- (Kenya Shillings One Million only) as general damages which is reasonable in the circumstances.

30. Consequently, I make the following specific orders: -

- a. A Declaration is hereby issued that the Plaintiff is the registered and lawful owner of all that parcel of land known as title Number Lamu/Block 11/25 and that the continued trespass by the Defendants on the same is illegal.
- b. A permanent injunction is hereby issued restraining the Defendants, their agents or servants or any other person acting through their direction or order from continued trespassing, occupation, interfering with and/or in any other manner whatsoever dealing with the Plaintiff’s property title number Lamu/ Block11/25.
- c. The Defendants to give vacant possession of the suit land and demolish the structures thereon within 60 days failure to which eviction notice to issue.
- d. Defendants to pay general damages for Kshs. 1,000,000/- (Kshs One Million) for trespass.
- e. Costs of this suit.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 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*.

