



REPUBLIC OF KENYA



KENYA LAW
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**Mohamed v Kenga & 13 others (Environment & Land Case 41 of 2018)
[2022] KEELC 14837 (KLR) (16 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14837 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 41 OF 2018
MAO ODENY, J
NOVEMBER 16, 2022**

BETWEEN

MWANAISHA HABIB MOHAMED PLAINTIFF

AND

JACKSON KENGA 1ST DEFENDANT
BARAKA KOYO 2ND DEFENDANT
THOMAS MAITHA 3RD DEFENDANT
EDWARD RANDU MARKO 4TH DEFENDANT
EMMANUEL MOSES 5TH DEFENDANT
PRISILA SHIDA CHIVALI 6TH DEFENDANT
FRANCIS MASHA 7TH DEFENDANT
DHAHABU MASHA 8TH DEFENDANT
NIXON MRAMBA 9TH DEFENDANT
JUMWA CHARO 10TH DEFENDANT
KACHE NYANJE 11TH DEFENDANT
JOAN KIBIBI 12TH DEFENDANT
JANET DHAHABU 13TH DEFENDANT
NYANJE HINZANO 14TH DEFENDANT



JUDGMENT

1. By a plaint dated February 15, 2018 the plaintiff herein sued the defendants jointly and severally seeking the following orders: -
 - a. A declaration that the plaintiff is the absolute and indefeasible proprietor of parcel of land Reference No. 434 Malindi Title No. LT.21 Folio 668 file 3536 situate in Malindi.
 - b. A declaration that the defendants jointly and severally have illegally, unlawfully, wrongfully and without any colour of right encroached and trespassed into the plaintiff's parcel of land Reference No. 434 Malindi Title No. LT.21 Folio 668 file 3536 situate in Malindi.
 - c. An order of mandatory injunction be issued compelling and or requiring the defendants, their agents, servants, relatives and any other person under their instructions to immediately demolish and or pull down and remove the illegal structures constructed and or erected on Parcel of land Reference No. 434 Malindi Title No. LT.21 Folio 668 file 3536 situate in Malindi which the defendants and or their agents have erected and built and thereafter remove the debris therein, failing to which the plaintiff and or his agents, contractors and or servants be authorized to demolish and remove the illegal structure and the costs incurred thereby be paid by the defendant within a specific time to be specified by this honourable court.
 - d. A permanent injunction to issue restraining the defendants, their agents, servants, relatives and or any other person under instructions from the defendant from further constructing, farming, interfering, encroaching, trespassing and or in any way dealing with the plaintiff's Parcel of land Reference No. 434 Malindi Title No. LT.21 Folio 668 file 3536 situate in Malindi.
 - e. General damages for trespass and unlawful encroachment onto the plaintiff's parcel of land Reference No. 434 Malindi Title No. LT.21 Folio 668 file 3536 situate in Malindi from April 2016 until vacant possession is rendered.
 - f. The Officer Commanding Station, Malindi Police station to provide security to the plaintiff in enforcing the orders of the honourable court.
 - g. Costs of this suit and interest thereon.

Plaintiff's Case

2. PW1 adopted her witness statement and stated that she is the registered owner of the suit land known as No. 434 Malindi Title No. LT. 21 FOLIO 668 FILE 3536 situated in Malindi which she bought from Justus Njuki Nyaga vide an indenture dated December 15, 2014 and registered on January 19, 2016.
3. PW1 further testified that on diverse dates between the year 2016 and 2017, the defendants jointly and severally unlawfully trespassed on the suit land, constructed temporary structures and began cultivating depriving her the right to utilize the parcel of land.
4. It was the plaintiff's evidence that she could not develop the suit land due to the defendants' invasion and her attempts to occupy the land have been met by hostility and threats by the defendants. She also stated she wrote a letter dated April 7, 2016 to the National Lands Commission to which the Chairman of the Commission responded on June 6, 2017 and
 - a. That the suit land belongs to the plaintiff



- b. that the plaintiff had offered 2 acres to the defendant squatters.
 - c. That the defendant squatters vacate the remaining 22 acres with immediate effect.
 - d. The County surveyor to provide a survey report that had been done.
 - e. The Deputy County Commissioner to ensure that the Plaintiff enjoys quiet possession of her property.
 - f. All developments, construction and illegal transfers and sale of any part of the land by the Defendant squatters be stopped.
5. PW1 stated that she had sat three times with the squatters who never adduced any evidence of ownership of the land and even offered to give them 2 acres of the suit land. She also produced exhibits to show ownership of the suit land and urged the court to allow her claim.
 6. On cross examination, PW1 stated that the seller Mr. Nyaga showed her the land before she purchased it and that there were neither squatters nor houses on the suit land. That the houses that are currently on the suit land were constructed after she purchased the land. Further that a permanent structure was constructed on the land 3 years after she had bought the land without her permission.
 7. DW1 Jackson Kazungu Kenga gave evidence and stated that they are the lawful occupiers of suit property and have resided thereon since time immemorial without any notice of a dispute in title. DW1 further stated that the plaintiff was not a bona fide purchaser for value without notice and that had she carried out due diligence she could have noticed that the defendants were already in occupation of the suit land.
 8. DW1 also stated that the plaintiff came with the Chief and surveyor to the suit land in the year 2015 and after he conducted a search he was informed that the suit land did not belong to the plaintiff.
 9. On cross examination he informed the court that he occupied the suit land in the year 2000 and there were some people on the land before him while others came after him. He stated that the title was a leasehold but he has no evidence of the same and he is not aware whether the plaintiff's title is a freehold. he also stated that the defendants have not claimed that the title was fraudulently acquired.

Plaintiff's Submissions

10. Counsel filed submissions and identified three issues for determination as follows:
 - a. Whether the plaintiff have established any right to the suit property;
 - b. whether the defendants have unlawfully and illegally encroached onto the plaintiff's property;
 - c. whether the plaintiff is entitled to the reliefs sought.
11. On the first issue on the ownership of the suit land, counsel submitted that the plaintiff has proved that she is the rightful owner of the suit land as per the postal search conducted on April 6, 2016 and an indenture in the name of the plaintiff.
12. It was counsel's submission that the defendants have no evidence that they own the property and they admitted that they had no proof that the property was acquired fraudulently.
13. Counsel relied on the cases of *Vijay Morjaria v Nansigh Madbusigh Darbar & another* [2000] eKLR Civil Appeal no. 106 of 2000, *Justine Magare Bosire v Isaac Omboga* [2018] eKLR and *Philip Ayaya Aluchio v Crispinus Ngayo* [2014] eKLR.



14. Counsel further relied on the plaintiff's letter April 7, 2016 to the National Land Commission seeking assistance in having the squatters vacate the property, the NLC response letter dated April 19, 2017, letter dated June 6, 2017 where the Commission noted the plaintiff was the owner of the suit land which letter was copied to DW 1 Jackson Kenga on behalf of the defendants.
15. On the issue for general damages for trespass counsel submitted that the plaintiff had proved trespass and relied on the case of *Philip Ayaya Aluchio v Crispinus Ngayo* [2014] eKLR and urged the court do assess the damages at Kshs. 500,000/- for the period the Plaintiff has not utilized the suit property with costs.

Defendants' submissions

16. The defendants submitted that the plaintiff is the owner of the suit property but has never been in actual possession of the suit property. That her willingness to give the defendants 2 acres is an admission and recognition that the defendants having been residing and still reside on the suit property.
17. It was the defendants' argument that the sale of the suit land was irregular and fraudulent and cited the cases of House of Lords *JA Pye (Oxford) Ltd v Graham* (2000) CH 676 and Malindi ELC No. 229 of 2018 *Kilifi South Cooperative Society v Kabindi Nyafula & 144 others* and urged the court to dismiss the case.

Analysis and Determination

18. 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 any right to be on the suit land.
19. The plaintiff produced a Sale Agreement and an indenture to the suit land in her name which is not disputed. What the defendants dispute is that they have been in occupation of the suit land.
20. From the various letters from the National Land Commission, it is evident that the plaintiff filed complaints which the NLC address and found that the land belongs to the plaintiff. It is further on record that the defendants were part of these processes to find a solution to the dispute. Further the plaintiff was also willing to give the defendants 2 acres of the suit land but they did not take the que.
21. The defendants claim to have acquired the land through adverse possession but the neither filed a counterclaim nor gave evidence to show that at they are entitled to such orders. It is not enough to squat on any land and claim to have acquired such through the doctrine of adverse possession.
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 (1) of the *Land Registration Act* states as follows: -

“The Certificate of Title issued by the Registrar upon registration ... 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... 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. The plaintiff proved that she is the registered owner of the suit land by producing a an indenture dated January 19, 2016, a search certificate and there was no evidence that the land was acquired fraudulently.
25. The defendants attempted to put forth an argument that the plaintiff’s title was acquired fraudulently but they did not plead this specifically and never gave evince to prove this.
26. It is trite law that for a claim of adverse possession to succeed, a party must concede and acknowledge that such party is the registered owner and lawful owner of the suit land as was held in the case of *Haro Yonda Juaje v Sadaka Dzenge Mbauro & Kenya Commercial Bank* (2014) eKLR;-
- “One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the plaintiff’s averment is that the title which was issued to the defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of section 143 of the Registered Land Act and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.”
27. I have considered the pleadings, the evidence and submissions and find that the plaintiff has proved her case against the defendants. Trespass is actionable per se and find that Kshs 300, 000/ is a reasonable amount as general damages.
28. I therefore make the following specific orders: -
- a. A declaration is hereby issued that the plaintiff is the absolute and indefeasible proprietor of parcel of land Reference No. 434 Malindi Title No. LT.21 Folio 668 file 3536 situate in Malindi.
- b. A declaration is hereby issued that the defendants jointly and severally have illegally, unlawfully, wrongfully and without any colour of right encroached and trespassed into the plaintiff’s parcel of land Reference No. 434 Malindi Title No. LT.21 Folio 668 file 3536 situate in Malindi.
- c. An order is hereby issued compelling or requiring the defendants, their agents, servants, relatives and any other person under their instructions to demolish and or pull down and remove the illegal structures constructed and or erected on Parcel of land Reference No. 434 Malindi Title No. LT.21 Folio 668 file 3536 situate in Malindi within 45 days failure to which the plaintiff and or his agents, contractors and or servants be authorized to demolish and remove the illegal structure and the costs incurred thereby be paid by the defendants.
- d. A permanent injunction is hereby issued restraining the defendants, their agents, servants, relatives and or any other person under instructions from the defendant from further constructing, farming, interfering, encroaching, trespassing and or in any way dealing with the plaintiff’s Parcel of land Reference No. 434 Malindi Title No. LT.21 Folio 668 file 3536 situate in Malindi.



- e. General damages of Kshs 300,000/- is hereby awarded for trespass and unlawful encroachment onto the Plaintiff's parcel of land Reference No. 434 Malindi Title No. LT.21 Folio 668 file 3536 situate in Malindi from April 2016.
- f. The defendants to give vacant possession of the suit land within 45 days failure to which eviction order to issue.
- g. Costs of the suit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF NOVEMBER, 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](#).

