



REPUBLIC OF KENYA



Hardy Dvelopment Company Limited v Shee (Environment & Land Case E007 of 2021) [2022] KEELC 15692 (KLR) (15 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15692 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E007 OF 2021**

AE DENA, J

NOVEMBER 15, 2022

BETWEEN

HARDY DVELOPMENT COMPANY LIMITED PLAINTIFF

AND

HAMISI SHEE DEFENDANT

JUDGMENT

1. By a plaint dated 10/11/21 the plaintiff commenced this suit against the defendant seeking for the following orders; -
 - a. Eviction of the defendant from all that parcel of land known as Kwale/Diani/1744
 - b. Vacant possession of all that parcel known as Kwale/Diani/1744
 - c. Costs of this suit
2. It is the plaintiff case that at all materials times the plaintiff was the sole registered proprietor of all that parcel of land known as Kwale/Diani/1744 (suit property) having purchased the same when it was originally Kwale/diani 309 on or about 14th March, 2001.
3. That sometime in March, 2005, the defendant wrongfully entered and took possession of portions of the suit property and continues to trespass thereon.
4. It is pleaded that on 14th August 2014 Kwale/Diani 309 was subdivided into Kwale/Diani/1744 – 1753 and the defendant has continued to wrongfully remain on parcel Number Kwale/Diani/1744 and has misused, damaged, wasted, destroyed, polluted and degraded the suit property depriving the plaintiff of its use and enjoyment. Further that there has been persistent confrontations with the defendant and the plaintiff has never enjoyed peaceful, uninterrupted and/or exclusive occupation of the suit property.



5. The plaintiff claims to have suffered loss and damage as result of the foregoing as follows; -
- Particulars of loss and Damage
- a. The plaintiff has been deprived of the use and quite enjoyment of the property.
 - b. The defendant misuse of the suit property including erecting of permanent structures on the suit property has occasioned detriment to the Plaintiff.
 - c. The Defendant has prevented the Plaintiff from accessing the suit property to erect a fence thereon.
 - d. The defendant has threatened the Plaintiff agents with physical violence whenever the agents attempt to enter the suit property.
 - e. The Defendants erection of houses, fence, cultivation and other structures is an eye sore and has therefore defaced and devalued the suit property.
6. This defendant did not enter appearance despite service. An affidavit of service was filed on 11/02/022 in this regard. The suit was heard on 19/7/22. PW1 was Anthony Mailu Nzau a director of the plaintiff and a retired civil servant. He adopted his witness statement dated 10/11/21 as his evidence in chief. He also produced as part of his evidence a copy of a title to parcel Kwale/Diani/1744 issued on August 14, 2007 registered in the name of Hardy Development Company Limited, demand letter dated 25/5/2011 and an Ordinary Resolution passed on 14/6/2012 to commence these proceedings through Anthony Mailu Nzau which were admitted as PEX 1- 43 as listed in the plaintiffs list of documents dated 10/11/22. In the witness statement it is also stated that the original parcel No Kwale/Diani/309 was purchased from National Bank of Kenya who were exercising their statutory power of sale over a charge registered in their favor in 1995. That the defendant occupied parcel 1744 herein and had refused to leave despite several requests by the plaintiff.

Submissions

7. The plaintiff filed submissions on 9/09/22. The court was referred to several authorities to the effect that failure of the defendants to defend the suit meant that the evidence adduced against them is uncontroverted and therefore unchallenged. That the defendant had no basis to remain in the suit property which belonged to the plaintiff by dint section 26 and 24 of the *Land Registration Act*. That the certificate of title held was prima facie evidence that the plaintiff was the registered proprietor. Further nothing had been presented by the defendant to impeach the title on grounds stipulated under the law.

Analysis And Determination

8. The suit is not defended, however the burden of proof still rests on the plaintiff to prove its case to the required standard as he who alleges must prove see Section 107(i) of the *Evidence Act*. In the case of *Susan Mumbi v Kefala Grebedhin*; (Nairobi HCC No 332 of 1993 Justice Juma stated in the following simple words; -

“The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the Plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial.”



I will therefore proceed to determine whether the Plaintiff has established its case on a balance of probabilities and if so whether the reliefs sought should be granted.

9. The Plaintiff through PW1 told this court that he first purchased parcel No Kwale/Diani/309 from National Bank of Kenya in exercise of the statutory power of sale and produced the green card for plot 309 showing it was charged to National Bank of Kenya Limited on 21/7/95. A copy of the title deed for Kwale/Diani/1744 was also produced in the name of Hardy Development Company Limited the plaintiff herein as the absolute registered proprietor. The provisions of Sections 24(a) [Land Registration Act, 2012](#) provide as follows; -

Section 24(a); -

‘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.’

10. It was also stated in evidence that the defendants unlawfully entered the land and has refused to vacate. I have seen a demand notice dated May 25, 2011 addressed to Hamisi Shee who is the defendant herein noting his unlawful entry, trespass upon the suit property. The defendant has not challenged the plaintiff's title the burden was on him justify his entry and explain to this court his insistence to occupy the suit property and refusing to vacate the same as complained by the plaintiff.
11. Going by the above provision of the law I'm in total agreement with the plaintiff's contention that by virtue of the plaintiff's ownership of the suit property, he is entitled to exclusive occupation and or possession of the same.
12. This court therefore finds that the plaintiff has proved his case on a balance of probabilities and I enter judgement against the defendant as follows;
- a. Eviction of the Defendant from all that parcel of land known as Kwale/Diani/1744
 - b. Vacant possession of all that parcel of land known as Kwale/Diani/1744.
 - c. The above orders shall be enforced in accordance with the law but not less than 90 days from the date of this judgement
 - d. Costs of this suit shall be to the plaintiff.

Orders accordingly.

DELIVERED AND DATED AT KWALE THIS 15TH DAY OF NOVEMBER, 2022.

A.E. DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Maundu for the plaintiff

Denis Mwakina Court Assistant

