



REPUBLIC OF KENYA



Omari & 3 others v Kalama & 4 others (Environment & Land Case E007 of 2022) [2025] KEELC 1221 (KLR) (12 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1221 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E007 OF 2022**

**EK MAKORI, J
MARCH 12, 2025**

BETWEEN

**RIZIKI ALI OMARI 1ST PLAINTIFF
MWANAMWINYI OMAR ALI (SUING ON AS LEGAL REPRESENTATIVE
AND HEIR OG OMAR ALI OMAR) 2ND PLAINTIFF
MWANGARO ALII OMAR 3RD PLAINTIFF
BINDU ALI OMAR 4TH PLAINTIFF**

AND

**ANDREW KALAMA 1ST DEFENDANT
TABU KARISA NZAI 2ND DEFENDANT
ROBERT CHANGAWA 3RD DEFENDANT
SAFARI NGALA 4TH DEFENDANT
SELESTINA KACHE KADZONDO 5TH DEFENDANT**

JUDGMENT

1. The plaintiffs filed a plaint dated 20th January 2022 seeking judgment against the defendants jointly and severally for:
 - a. That there be a permanent injunction against the defendants, their agents, successors or assigns or anyone claiming through them stopping them from entering upon, building, selling or in any way dealing with the parcel of land Plot No. 37/Mida/Mzizima.
 - b. A declaration that the defendants' occupation of Plot No. 37/Mida/Mzizima is unlawful and illegal and amounts to trespass.



- c. Vacant possession of the suit property.
 - d. Demolition of all structures erected by the defendants on the suit property at their own cost.
 - e. The OCS Watamu Police Station is to offer security when effecting the above orders.
 - f. Mesne profits.
 - g. Costs of the suit together with interest thereon at court rates.
2. The 1st, 2nd, and 3rd defendants failed to enter appearance - the plaintiff filed a request for an interlocutory judgment, which was endorsed on 5th April 2022.
 3. The 4th and 5th defendants entered appearance and filed a Statement of Defence dated 16th February 2022, which was filed on 21st February 2022. The matter proceeded to a hearing on July 3, 2024. The defendant's advocates failed to appear in court on the said day. The 1st plaintiff testified as PW1 on behalf of the other plaintiffs, and the plaintiffs' case was closed. The defendants' case was also deemed closed given non-attendance and the plaintiffs were directed to file their submissions.
 4. The 2nd plaintiff is the legal representative and heir of the estate of Mohamed Omar (Deceased), one of the registered owners of plot No.37/Mida/Mzizima measuring approximately 7.49 acres situated at Mida within Kilifi County.
 5. The plaintiffs' parents, Suleiman Omar, Ali Omar, Mohamed Omar, Khamis Mwinyi Kombo, Abdulla Jaffar Salim, Salima Said, and Fatuma Bakari (all deceased), were the original owners of that parcel of land known as plot No.37.Mida/Mzizima and were registered as proprietors of the said land in the early 1960s. The parcel of land was transferred to the plaintiffs upon successful succession at the Kadhi's Court in Kilifi.
 6. From the evidence by the plaintiffs, in 2020, the defendants trespassed onto the plaintiffs' parcel of land, plot No.37/Mida/Mzizima, without any right or authority and purported to erect some structures on it. The plaintiffs aver that the defendants' entry onto the plaintiffs' parcel of land and the purported erection of structures thereon is illegal and has not been condoned.
 7. The plaintiffs contend that they have made numerous attempts to halt the defendants' construction activities on their land, but their pleas have been ignored.
 8. In September 2020, a land survey confirmed that parcel No.37/Mida/Mzizima rightfully belongs to the plaintiffs.
 9. The plaintiffs assert that, despite their demand for the defendants to vacate the parcel of land, the defendants have refused, neglected, and/or otherwise failed to vacate the plaintiffs' parcel of land, necessitating this suit.
 10. I frame the issues for this court's determination as to whether the plaintiffs have proved ownership of the suit property, whether the defendants have encroached/trespassed upon the suit property, whether the plaintiffs' reliefs are sustainable, and who is to bear the costs of the suit.
 11. As alluded to, the plaintiffs' suit went unanswered, and much of what they averred was uncontroverted.
 12. The 2nd plaintiff is the Legal Representative and heir of the estate of Mohamed Omar (Deceased), one of the registered owners of plot No.37/Mida/Mzizima measuring approximately 7.49 acres situated at Mida within Kilifi County. The parcel of land was transferred to the plaintiffs upon successful succession at the Kadhi's Court in Kilifi. The plaintiffs produced an original copy of the certificate



of title and a Certificate of Postal Search dated 28th October 2021 as plaintiff's Exhibits 1 and 4, respectively.

13. Counsel for the plaintiffs Mr. Kilonzo submits that the plaintiffs have recognized rights under Article 40 of *the Constitution* of Kenya 2010, read together with Sections 24, 25, and 26 of the *Land Registration Act* No. 3 of 2012. Indeed, and in fact under Section 26 (1) of the *Land Registration Act* No 3 of 2012 aforesaid the title of the plaintiffs concerning the suit property is conclusive proof that they are the indefeasible proprietors of the suit property and that proprietorship can only be questioned on the basis of fraud or misrepresentation or illegality under Section 26 (1) (a) and (b) of the *Land Registration Act* No 3 of 2012. That is the purport and effect of Section 80 (1) and (2) of the *Land Registration Act*, 2012. No evidence has been presented to impugn the plaintiffs' title over the suit property.
14. Counsel refers this court to the decision in *Muchendu v Waita* [2003] eKLR where the court in interpreting the provisions of Section 23 (1) of the Registration of Titles Act Cap 281 Laws of Kenya (Repealed) which is similar to Section 26 of the *Land Registration Act* No 3 of 2012 held as follows:

“The fourth issue which the defendant raised is that, she is the registered owner of the suit premises under the provisions of the Registration of Titles Act cap 281 of the Laws of Kenya. The plaintiff had of course sought for specific performance against the defendant without laying the basis of his claim against the defendant. The defendant has exhibited a copy of the certificate of title to prove ownership. The provisions of section 23(1) of the Registration of Titles Act reads:

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as a proprietor of the land is the absolute and indefeasible owner thereof. Subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

The plaintiff has not pleaded misrepresentation and fraud in his pleadings against the defendant henceforth the defendant is a bonafide legal owner of the suit premises. Hence to me the plaintiff has not proved that he has a prima facie case with a probability of success against the defendant.”

15. Counsel further proceeded to state that the Court of Appeal interpreted the provisions of Section 23(1) of Cap 281 of the Laws of Kenya in the case of *Dr NK Arap Ng'ok v Justice Moiwo Ole Keiwa and 5 others* Nairobi Civ. App No 60 of 1997(27/ 97 UR) where it was stated:

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of the title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.....”

16. Counsel contends that this goes hand in hand with Section 35 (1) of the *Land Registration Act* No 3 of 2012, which provides that every document purported to be signed by a Registrar shall in all proceedings be taken to have been so signed unless the contrary is proved. The plaintiffs have produced a certificate



of title in respect to the suit property which sufficiently demonstrates to this court that they obtained the suit property legally and procedurally as mandated by the law. That evidence of the Certificate of title remains unchallenged by the defendants.

17. The submissions and authorities cited by the plaintiffs are persuasive and stand uncontroverted on the ownership status by the plaintiffs as opposed to the defendants.
18. On the encroachment issue, the plaintiffs produced photographs showing the defendants' developments on the suit property. They also showed a copy of a demand letter to the defendants dated 3rd September 2021 informing them that they were in the plaintiffs' property illegally and should vacate it. Further, the plaintiffs produced a Survey Report dated 31st January 2022, which found squatters or illegal structures on the plaintiffs' property.
19. As correctly stated by the plaintiffs, the evidence adduced was never traversed by the defendants, who never appeared in court to tender any evidence. The 4th and 5th defendants merely filed defence and witness statements in which they denied being within the suit property but never adduced any evidence to support their claim.
20. Concerning the filed defence, Mr. Kilonzo cited the decision in the case of Nyukuri & another v Omochar & 5 others (Environment & Land Case 160 of 2015) [2022] KEELC 2530 (KLR) (21 July 2022) (Ruling), Nyagaka J. was of the view that:

“A defence that raises triable issues is, in my view, at the extreme opposite side of a defence that consists of mere denial. On mere denial defence, it has been held that it is not a sufficient defence. Thus, in the Raghbir Singh Chatte vs. National Bank of Kenya Limited Civil Appeal No. 50 of 1996, the Court of Appeal held:

“If a general traverse...were held to be sufficient and effectual, that would render meaningless provisions such as Order VI Rule 9(3) of the Civil Procedure Rules and even the decisions of this Court such as Magunga General Stores vs. Pepco Distributors Limited [1988-92] 2 KAR 89. The position of the law...is that a mere denial or general traverse in defence is not sufficient and a defendant who does not specifically plead to all the issues raised in a plaint risks the probability of his defence being struck out or being held to constitute an admission of the issues raised in the Plaint.”

21. I agree with the plaintiffs that the defendants provided no evidence to support their averments. The mere general term of traverse in a defence is not sufficient. The defendants failed to produce evidence to counter the plaintiffs' claim.
22. Based on the foregoing, I will find for the plaintiffs and make the following final orders:
 - a. a permanent injunction be and is hereby issued against the defendants, their agents, successors or assigns or anyone claiming through them stopping them from entering upon, building, selling or in any way dealing with the parcel of land Plot No. 37/Mida/Mzizima.
 - b. A declaration be and is hereby issued that the defendants' occupation of Plot No. 37/Mida/Mzizima is unlawful and illegal and amounts to trespass.
 - c. The Defendants be and are hereby ordered to give vacant possession of the suit property – within 90 days of this judgment
 - d. A Demolition be and is hereby issued directing that all structures erected by the defendants on the suit property be removed at their own cost – within 90 days of this judgment



- e. An order that The OCS Watamu Police Station is to offer security when effecting the above orders.
- f. Mesne profits – declined, not prosecuted nor proved
- g. Costs of the suit together with interest thereon at court rates to the Plaintiffs.

DATED, SIGNED, AND DELIVERED AT MALINDI ON THIS 12TH DAY OF MARCH 2025.

E. K. MAKORI

JUDGE

n the Presence of:

Ms. Oloo, for the Plaintiffs

Happy: Court Assistant

In the absence of:

Mr. Katsoleh for the Defendants

