



**Said & 3 others v Bakari; National Land Commission & another (Interested Parties)  
(Environment and Land Case 221 of 2021) [2025] KEELC 5982 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 5982 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT AND LAND CASE 221 OF 2021**

**AE DENA, J**

**MAY 30, 2025**

**BETWEEN**

**MWANAHAMISI SAID ..... 1<sup>ST</sup> PLAINTIFF  
FATUMA SAID ..... 2<sup>ND</sup> PLAINTIFF  
MWANAMWINYI SAID ..... 3<sup>RD</sup> PLAINTIFF  
MWANAHALIMA SAID ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**MWINYI BAKARI ..... DEFENDANT**

**AND**

**NATIONAL LAND COMMISSION ..... INTERESTED PARTY**

**OFFICE OF THE ATTORNEY GENERAL ..... INTERESTED PARTY**

**JUDGMENT**

1. The plaintiffs commenced this suit vide a plaint dated 17<sup>th</sup> July 2017. The allege to be the registered owners of the unregistered land in Shikaadabu location Kwale County measuring approximately 9.1 acres having been born, raised and buried their deceased clan members from as early as the year 1965. They claim customary land rights over the land. They allege that on diverse dates the 1<sup>st</sup> defendant threatened to unjustly evict them.
2. The plaintiffs seek the following reliefs from the court
  - a. A declaration that the plaintiffs are the legal owners of the suit property
  - b. A permanent injunction against the defendant by themselves, their servants, agents or any person acting on their behalf restraining them from trespassing, entering into the suit premises



or in any other manner interfering with the plaintiffs quiet possession of the suit property as delineated on the survey map report of E. Kiguru.

- c. Orders that the plaintiffs customary rights be recognised and orders directed to the Lands Registrar Kwale to demarcate, register and issue Title Deed over the suit property
  - d. General damages for trespass
  - e. Costs and interest at the current court rates
  - f. Any other relief that this Honourable court may deem fit and just to grant
3. In response to the suit the 1<sup>st</sup> defendant filed defence and counterclaim dated 17/08/2017 denying all the allegations in the plaint. The defendant avers he is the sole owner together with his other family members of the unsurveyed parcel measuring approximately 9.1 acres situated in Kibundani Village Ziemani Sublocation within Mombasa County. In the counterclaim the defendant prays that the plaintiffs suit is dismissed and he be declared the owner thereof. The plaintiff in further response denied the allegations as pleaded by the defendant and wants the counterclaim dismissed.
  4. The 1<sup>st</sup> Interested party never entered appearance.
  5. The 2<sup>nd</sup> Interested Party filed a defence dated 4/05/2018 on 11<sup>th</sup> May 2018 stating he was a stranger to most of the contents of the plaint and denied all the allegations therein. The plaintiff was put to strict proof.

#### **Evidence Of The Parties**

6. The matter was heard on 31/01/2024 virtually, 29/05/24 in open court. during the hearing the Plaintiffs were represented by Mr. Musyimi from the firm of Mulwa Nduya & Company Advocates, the Defendant by Mr. Okanga of Okanga & Company Advocates and the 2<sup>nd</sup> Interested Party by Ms. Kiti State Counsel.

#### **Plaintiffs Case**

7. PW1 was Mwanamwinyi Ali Mwasarai. The witness adopted her witness statement dated 15/3/2023 and produced the documents listed in the plaintiffs list of documents dated 23/03/2019 and the photographs in the list dated 28/5/2019 (PEx 1-9). She told the court she lived together with her children in a family house in the suit property. That Mwinyi Bakari sued as the 1<sup>st</sup> defendant is her neighbour. The suit property used to belong to her father Saidi Mwasarai who was deceased and was buried in the suit property together with PW1 mother and 5 of their children. That she and the rest of the plaintiffs have lived in the suit property since they were born. She testified that the 1<sup>st</sup> defendant does not have a house, trees neither does he farm in the suit property. He is not a relative and should stay in his land.
8. Cross examined by Mr. Okanga for the defendant on the surveyors report prepared by Edward Kuguru PW1 noted it was prepared on her lawyers instructions and the surveyor did not work for the government. On annexure MS 6 in her affidavit dated 15/8/2018 she conceded the agreement bore no plot number and that the land belonged to the government.
9. Cross examined by Ms Kiti for the 2<sup>nd</sup> Interested party PW1 told the court she did not have a title though they were following up on the same.
10. PW2 was Hamadi Juma Gonda is the 2<sup>nd</sup> plaintiffs son. He adopted his witness statement filed on 25/10/2023. His evidence was that he as well as the plaintiffs live in the suit property which measures



approximately 9.1 acres. On being shown PEx7 he informed the court it was obtained from a private surveyor who showed them the beacons. That the defendant has never lived in the suit property neither has his children or grandchildren. The coconut and mango trees in the suit property were planted by the plaintiff's father. That he has lived therein since he was born. On being shown letter dated 22/05/2018 (PEx 8) the witness confirmed he was present during the proceedings which featured a complaint by the defendant. The chief referred them to the D.O where the defendant indicated he didn't want the land anymore which to meant he didn't want it because it was not his land. On the charge sheet (PEx 2) the witness affirmed the complainant was the 1<sup>st</sup> defendant and accused who was one of the children in the family was never convicted since the court found the trees belonged to the plaintiffs. That PEx 4 was a Resettlement Action Plan consent letter relating to the construction of the Dongo Kundu bypass where some of the trees in the suit property were to be affected by the construction. The defendant was present during the tree identification exercise. His prayer was that the plaintiff are issued with title to end the disturbance.

11. On cross examination by Mr. Okanga the witness conceded that his evidence that the 1<sup>st</sup> defendant stated before the DO that he did not want the land was not included in his witness statement. The proceedings of the criminal matter were not part of his documents. He conceded Mr. Kuguru was not a government surveyor. Though neighbours were present during the survey he had no letter of their invitation. The witness conceded he did not have a deed plan, the sale agreement bore no plot number nor any reference to a title deed. He reiterated the defendant was not a relative to the plaintiffs. On being shown the photos annexed to defendants affidavit of 1/02/2018 he identified all the houses as belonging to the plaintiffs children, grand children (15 houses) and family members including his own.
12. Cross examined by Ms. Kiti the witness informed the court that after the survey they did not write to the lands office to issue them with title. He clarified in re-examination that the accused named in the charge sheet was free and at home.
13. With the above the plaintiffs case was marked as closed.

### **Defendants Case**

14. The defendant Mwinyi Bakari Mwabibo testified as DW1. He adopted his witness statement dated 17/8/2017. He testified that the plaintiffs were his fathers sisters. That the land belonged to his grandfather Juma Kufuja. That the houses seen in the photos belong to people who have bought plots and who proceeded with construction despite his objections and court order to stop. He used to take the photos piecemeal as the structures came up.
15. Cross examined by Mr. Musyimi for the plaintiff DW1 stated he was a beneficiary (successor) to his grandfather. That his grandfathers name is not mentioned in his witness statement and pleadings. He did not know the size of the land he was claiming. He had no evidence before court to show where his shamba is situate nor its acreage. He confirmed the plaintiff have lived on the land since time immemorial. Further that PW2 and the plaintiffs children also live in the suit property. He indicated he had brought no photo of the house he lives in though it was within the suit property. That the DO stated the land belonged to the witness though he did not have a written communication.
16. With regard to the agreement witnessed by the chief he told the court chiefs are not allowed to sign anything in respect of unadjudicated land. While he has a son he was not a witness in the matter. He was not given any letter by the CAS consultants as only those with houses were targeted and he was on another side of the road. That while he was the complainant in the charges he never followed up on the outcome of the criminal proceedings though he gave evidence and was later told the case was dismissed. He admitted the photos he adduced bore no dates of when they were taken.



17. Cross examined by Ms. Kiti DW1 indicated the entire suit property was one but with boundaries for each one of them. He agreed the shamba belonged to the plaintiffs father. That none of the parties can therefore claim the land.
18. The witness clarified in re-examination that according to him the land belonged to neither of the parties and he was waiting for the GoK to conduct survey. That photos are not evidence of title.
19. With the above evidence the defendant's case was closed.
20. The court inquired from the witness whether he has children and if they have built in the suit property. The witness told the court he had 7 children out of which three are females and married and 5 males who do not live in the suit property. On why he didn't see the importance of calling them as witnesses he informed the court the 1<sup>st</sup> born was at work and was not aware of the proceedings. That his lawyer did not ask him to bring them as witnesses.
21. The 2<sup>nd</sup> Interested party did not call any witness.

### **Submissions**

22. The parties filed and exchanged written submissions in support of their respective cases. The plaintiffs submissions are dated 24/07/2024, the defendant 12/9/2024 and the 2<sup>nd</sup> Interested Party 14/07/2024.

### **Plaintiffs Submissions**

23. The plaintiff identified three issues for determination 1) whether at all times relating to this suit the plaintiffs and their families were always in occupation and ownership of the subject property herein 2) whether at all times relating to this suit the defendant and his family were always in occupation and ownership of the subject property herein and 3) whether the plaintiff is entitled to the prayers sought in the plaint dated 14/07/2017.
24. It is submitted that while the plaintiffs had presented in evidence a survey report showing the exact location and size of the land they claim, the defendant did not, neither did he present any evidence to show he lived in the suit property and gave contradicting evidence of the size of land he claimed.
25. It is further submitted that a trust had been proved on a balance of probability by the plaintiff. That section 3 of the *Land Adjudication Act* read together with section 30 thereof the ELC is conferred with jurisdiction to perform the duties of the Minister in section 2 and ascertain and order the registration of the property rights of the plaintiffs as per the survey report. That the charge sheet produced was evidence of harassment warranting the orders of permanent injunction. It is urged that the plaintiffs are entitled to the reliefs sought in the plaint.

### **Defendants Submissions**

26. The defendants submitted that the plaintiff has failed to prove their case to the required standard of a balance of probabilities. That they did not have title deed to the unsurveyed piece of land, plot card number, letter of allotment, rates payment issued by the government of Kenya linking them to the land. The survey report produced is by a private surveyor. There was no evidence of root title. That the prayers sought cannot issue as the court cannot rely on the report of private surveyor in respect of land still owned by the government. That the orders for general damages cannot issue as the plaintiffs evidence is that the defendant does not reside in the suit property. Reliance is placed on the case of ELC Appeal No.13 of 2019 Festo Ogeda Agutu Vs. Richard Odumbe & Another on how to prove ownership of un-registered land.



## 2<sup>nd</sup> Interested Party's Submissions

27. The 2<sup>nd</sup> interested party's submissions are dated 14/07/2024. It is submitted that based on the evidence in court the land belongs to the parties grandfather and the plaintiffs and the defendants are relatives living on the suit property. That deceased members of both families are buried in the suit property. The 2<sup>nd</sup> Interested Party therefore submitted on whether both parties have proved a trust. That this is a matter of evidence and a trust cannot be imputed. Reliance is placed in the case of *Re Estate of John Muiruri Kamau (2018) eKLR*. That the condition for a resulting trust as set out in the case of *Jutelabi African Adventure Ltd & Another Vs Christopher Michael Lockley (2017) eKLR* have been met and therefore the plaintiffs hold the land in trust for themselves, the defendants and the entire family emanating from their grandfather. It is proposed that the court orders for a proper survey, a determination be made as to the proper boundaries of the 9 acres and occupation of the defendant in or without the same. A report be filed and order for conduct of the appropriate succession proceedings and once concluded a subdivision of the land and registration. The defendant be given a portion of the land he occupies.

## Analysis And Determination

28. I have carefully considered the pleadings, examined the evidence together with the submissions of the rival parties. The following issues commend determination
1. Whether the Plaintiffs have proved occupation and ownership of the suit property to warrant the orders sought
  2. Whether the defendant has proved occupation and ownership of the suit property to merit the orders sought in the counterclaim
  3. What orders should issue
  4. Who bears the costs of both the suit and Counterclaim
29. The plaintiffs claim to be the owners of the suit property in dispute located in Kibundani Kwale where they have been born and raised and occupied for over 60 years. According to the witness statement of PW1 which was adopted as her evidence in chief, they claim to have acquired customary land rights over the suit property. That they have a right as owners to deal with the suit property in the manner they deem fit yet the defendant has used all means possible to interfere and threaten the plaintiffs continued use and occupation.
30. The burden of proof lay on the Plaintiffs to prove their claim on a balance of probabilities as required under the provisions of section 107 of the *Evidence Act* which states that whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exists. Simply put, he who alleges must prove.
31. PW1 produced a copy of a Survey Report dated 27/6/2017 prepared by Edward M.J. Kiguru whose objective was to pick the boundary of the land the subject of the plaintiffs claim as it is on the ground and determine its acreage. This brings clarity on the subject of this suit. The report confirms the land is unregistered.
32. The plaintiffs were required to prove their interest in the property amidst the defendants claim that the land belonged to the defendants grandfather and their alleged customary rights . PW1 evidence is that the suit property belonged to her father Saidi Mwasarai who died and buried therein together with some of their deceased siblings. That they have lived there as a family together with their children and



other family members. This was corroborated by PW2 who testified in his evidence in chief that he was the 2<sup>nd</sup> plaintiff son and had also lived in the suit property for over 60 years and that their deceased clan members have been buried thereon. Photos depicting houses and graves were adduced as part of the plaintiffs evidence (Pex 8). I have noted the defendant's submission that graves are not proof of ownership. But I must state they depict occupation.

33. Moreover DW1 confirmed in cross examination that the plaintiffs have lived on the land since time immemorial and that PW2 and the plaintiffs children also live in the suit property. Indeed the Resettlement Action Plan for Mombasa Bypass Road consent letter signed by Mwanamisi Said Mwaravino and CAS Consultants Ltd buttresses their presence in the suit property and the portion of the land and the trees they were to be compensated for which I note were mature trees listed as Mango 18, Coconut 31 and others 40.
34. The court finds the plaintiffs have proved their occupation as a family on the suit property for a long period of time.
35. What about the defendant? DW1 evidence is that the land belonged to his grandfather Juma Kufuja yet he testified during cross examination by Ms. Kiti that the shamba belonged to the plaintiffs father. On the question of occupation he testified in cross examination that he had not brought any photo to show his house in the suit property. The witness also testified that he was not given a consent letter under the resettlement action plan because only those with houses were targeted and he was on another side of the road, but even then I had no evidence produced identifying the property he was claiming and whether it is the suit property albeit on the other side of the road. He had no evidence that any of his children occupied part of the suit property even those that had financial capability. He informed the court he did not find it necessary to call any of his children to give evidence but instead purported to pass the blame for not doing so on his counsel.
36. It is the finding of this court that the defendant did not prove his claim that he was in occupation of the suit property or even any part thereof. The counterclaim is a separate suit and the defendant equally bore the burden of proof to prove his case.
37. Having made the foregoing findings on occupation it is pertinent to discuss about the ownership including the doctrine of customary land rights pleaded by the plaintiffs at paragraph 6 of the plaint. The 2<sup>nd</sup> Interested Party has also suggested existence of a trust.
38. Section 2 of the *Community Land Act* defines customary land rights to mean rights conferred by or derived from African Customary law, customs or practices provided such rights are not inconsistent with the law or constitution or any written law.
39. The Supreme Court in the case of Isack M'Inanga Keibia Vs. Isaaya Theuri M'Lintari & Another (2018) eKLR rendered itself on recognition of customary land rights thus:-  

'Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

  1. The land in question was before registration, family, clan or group land
  2. The claimant belongs to such family, clan, or group



3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
  4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
  5. The claim is directed against the registered proprietor who is a member of the family, clan or group.
40. Guided by the above holding the court notes that customary land rights are never conferred by registration and this resonates with the circumstances of the case. The burden of proof lies on the party pleading, see *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR. I have already analysed the evidence led by the plaintiffs and it is clear that the land which belonged to the Plaintiffs family patriarch is held by his children the plaintiffs, their families, siblings, their children and grandchildren. It is trite that customary trust has the flavor of intergenerational equity, thus even their future generation stand to benefit from the land on the basis of that principle of intergenerational equity – see *Patrick Gitonga M’ikiara v Ruthson Mangati M’ikiara & 5 others* [2020] eKLR. The claim therefore fits within some of the criteria summed up above and therefore these rights should be recognised as they have been proved to exist by the evidence led.
41. I must observe however the defendant has failed to prove a nexus to this family. While DW1 stated the plaintiffs were sisters to his father , the plaintiffs denied it. DW1 evidence in this regard was not corroborated by any witnesses. I also had no evidence that what DW1 claims is within the suit property as described in the survey report herein. The plaintiffs have identified their land and its boundaries as seen in the survey report. On the other hand the defendant had all the years within the pendency of this suit to facilitate the filing of his evidence in this regard yet he failed to do so.
42. The upshot of the foregoing is that the Plaintiffs stand in a better position. They have provided sufficient evidence to prove their claim on occupation and ownership of the suit property . I am inclined to find that the Plaintiffs have discharged the burden of proving their case on a balance of probabilities as required in law. The defendant has failed to prove his counterclaim.
43. This then takes me to the prayers sought by the plaintiff which are rehashed at the beginning of this judgement. I must caution that even where the court finds a claimant has proved their case not all prayers can be granted as presented. The court has found that the plaintiffs customary rights should be recognised as they have been proved. The plaintiffs now want the said recognition of their customary rights be in addition to orders directed to the Lands Registrar Kwale to demarcate, register and issue Title Deed over the suit property. This is opposed by counsel for the defendant.
44. Mr Okanga submitted that the prayers sought in the plaint cannot issue as the plaintiffs are asking the court to peg its judgement on a survey carried by a private surveyor in respect of land which is still owned by the government of Kenya and proceed to issue a title to them. Referring to article 61(1) (2) of *the Constitution* Mr. Musyimi submitted that the argument that the land belongs to the government cannot hold. The said provisions provide;-
- 61(1) All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals
  - (2) Land in Kenya is classified as public, community or private.
45. Mr. Okanga did not expound on his position above. However for me the question that should concern us is what next after this courts finding on customary land rights or trust. PW2 stated in cross examination that after the survey they did not write to the lands office to issue them with title.



Had the land been registered the court would have ordered rectification of the register pursuant to the powers conferred under section 80 of the [Land Registration Act](#). In the instant case the suit property is unregistered. I have seen the 2<sup>nd</sup> Interested Party suggestion that the court orders for a proper survey, establish the parties occupation including the defendants culminating issuance of a separate titles including for the portion that is occupied by the defendant.

46. Mr. Musyimi submitted that since adjudication is yet to commence within the suit property under section 30 of the [Land adjudication Act](#), section 3 grants the court jurisdiction to carry out the functions granted to the Minister in section 2 and ascertain and order the registration of the property rights to the plaintiffs.
47. Firstly, let me state that Customary land rights are indeed recognized as already seen in Isack M’Inanga Keibia (supra). Customary land rights also can be adjudicated (officially determined) to be documented for registration purposes. This is seen in the objectives of the [Land Adjudication Act](#) Chapter 284 of the laws of Kenya which is to provide for the ascertainment and recording of rights and interests in Trust land, and for purposes connected therewith and purposes incidental thereto.
48. I have considered Mr. Musyimis argument on the provisions of section 30 of the [Land Adjudication Act](#) which reads;-
30. Staying of land suits
- (1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29 (3) of this Act.
  - (2) Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.
  - (3) Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty-eight days after the refusal, appeal in writing to the Minister whose decision shall be final.
  - (4) The foregoing provisions of this section do not prevent a final order or decision of a court made or given in proceedings concerning land in an adjudication section being enforced or executed, if at the time this Act is applied to the land the order or decision is not the subject of an appeal and the time for appeal has expired.
  - (5) A certificate signed by an adjudication officer certifying land to be, or to have become on a particular date, land within an adjudication section shall be conclusive evidence that the land is such land.
  - (6) Every certificate purporting to be signed by an adjudication officer shall be presumed to be so signed unless the contrary is shown.
49. I’m not persuaded that the above provisions read together with section 3 allows this court to exercise the functions of the Minister. The provisions in my view anticipate a subject matter within a land adjudication area. I have not been led to any evidence that the area herein has been declared a land adjudication area. I will not usurp the functions of the Minister or purport to circumvent the application of the provisions of the [Land Adjudication Act](#). To issue an order directing the land registrar to issue title in the circumstances would be to set a very bad precedent in my view.



50. On the prayers for permanent injunction against the Defendants, it is trite that this would be the right stage at which to grant prayers for permanent injunction. A permanent injunction defines the rights of the parties after the suit is heard on merit. The plaintiffs seek orders of permanent injunction against the defendant restraining him from trespassing, entering into the suit premises or in any other manner interfering with the plaintiffs quiet possession of the suit property as delineated on the survey map report of E. Kiguru. Having found that the plaintiffs have established customary rights over the property I would not hesitate to grant the orders of injunction. The court is however inclined to limit this to the Plaintiffs quiet enjoyment of occupation and their customary land rights and doing any act on the suit property that would go against these rights.
51. In respect of the prayer for damages for trespass, this court was not led to any proposals or basis upon which the court would award this relief. I decline to entertain this prayer.
52. The upshot of the foregoing is that I'm inclined to find that the Plaintiffs have discharged the burden of proving their case on a balance of probabilities against the 1<sup>st</sup> defendant as required in law.
53. The following orders therefore issue to dispose of this suit
  1. A declaration hereby issues that the plaintiffs by dint of their customary rights are the owners of the suit property as delineated on the survey map report of E. Kiguru dated 27/06/2017.
  2. The court recommends to the Cabinet Secretary responsible for matters relating to land that the area Shika Adabu/Kibundani be declared and gazetted for adjudication and the Plaintiffs customary rights in 1 above be taken into consideration when the adjudication commences.
  3. Pending implementation of the recommendation in 2 above a permanent injunction hereby issues against the 1<sup>st</sup> defendant restraining him from interfering with the plaintiffs quiet possession of the suit property and or doing any act over the property that would go against the Plaintiffs rights as delineated on the survey map report of E. Kiguru above.
  4. The 1<sup>st</sup> defendants Counterclaim is dismissed.
  5. To promote good neighbourliness each party shall bear its own costs of the main suit and counterclaim.

Orders accordingly.

**JUDGEMENT DATED SIGNED AND DELIVERED THIS 30<sup>TH</sup> DAY OF MAY 2025**

**HON. LADY JUSTICE A.E. DENA**

**JUDGE**

**30/5/2025**

Ms. Wasike holding brief for Mr. Musyimi for the Plaintiffs

Mr. Okanga for the 1<sup>st</sup> Defendat

No appearance for the 1<sup>st</sup> Interested Party

No appearance for the 2<sup>nd</sup> Interested Party

Ms Asmaa Maftah – Court Assistant

