



**Tomlison v Lugogo & 3 others (Environment & Land Case
48 of 2020) [2024] KEELC 506 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 506 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 48 OF 2020
EK MAKORI, J
FEBRUARY 8, 2024**

BETWEEN

IVAN TOMLISON PLAINTIFF

AND

IBRAHIM LUGOGO 1ST DEFENDANT

CHARLES MBIGO 2ND DEFENDANT

DICKSON MAITHA 3RD DEFENDANT

EUNICE SALAMA CHILUMO 4TH DEFENDANT

JUDGMENT

1. The plaintiff in this action against the defendants seeks the following reliefs(s):
 - a. A declaration that the plaintiff is the legal owner of land known as LR No. 21105 Kilifi – CR 27631 in Kilifi District.
 - b. The defendants or any other 3rd parties' actions entering into possession, occupying, developing, renting out, excavating, harvesting coral blocks, leasing, handing over possession, or dealing in any other way with the said property are unconstitutional, unlawful, illegal null, and void.
 - c. The said property be declared a freehold property and any other purported agreement involving the same be declared a nullity.
 - d. An order of injunction to issue against the defendants from further trespass on the suit property.
 - e. Eviction or vacant possession to issue.



- f. The OCS Kilifi to affect the orders.
 - g. Costs of the suit.
2. The defendants have counter-claimed seeking the following prayers:
 - a. Permanent injunction against the plaintiff and or his servants or agents from laying claim, trespassing encroaching, alienating, constructing, or in any other manner dealing adversely with the suit property.
 - b. A declaration that the defendants are the lawful owners of the suit property and a lease obtained by the plaintiff was illegally procured.
 - c. An order compelling the plaintiff to demolish structures already erected on the suit property and give vacant possession to the defendants.
 - d. Special damages for demolition of a house belonging to the defendants at Court rates.
 - e. Costs and any other relief(s) the Court may deem fit to grant.
 3. The plaintiff who testified s PW1 stated that he bought the land LR No. 21105 Kilifi – CR 27631 – approximately 5 hectares from one David Wainaina at a consideration of Kshs, 20,000,000/=. The transfer was done on 19th February 2015 to his name after payment of the necessary Stamp Duty.
 4. His grievance against the defendants is that they entered his land and started to harvest sand. They were not living permanently on the suit property but were living in temporary makeshifts and persist in their acts to date hence the orders sought in the plaint.
 5. The 1st defendant Ibrahim Lugogo who testified as DW1 – adopted his witness statement and stated that he has lived on the land since 2000. His children live in Kwale where his ancestral home is situated. The house he had built on the ground was demolished. He does farm on the land but not sand harvesting. He said the land is owned by the Government and they were in the process of acquiring it. He was permitted to stay there via a community group called Ufuoni.
 6. The 2nd defendant Charles Mbigo who testified as DW2 said that he works with a group that deals with cutting stones based at Tezo. He did not know why he was sued he had never entered the land in question. Dickson Maitha and Eunice Salama Chilumo the 3rd and 4th defendants who testified as DW3 and DW4 respectively like DW2 said they had never been on the land in question the only person they knew who lived there was the 1st defendant here.
 7. The plaintiff through Ms. Chesaro averred that he is entitled to the protection of *the Constitution* and the exclusive use of his land cannot be gainsaid because he acquired it through purchase which is a known mode of acquisition of land in this Country. The defendants have failed to demonstrate how their rights in the land were acquired with the 1st defendant stating that Ufuoni Community Group was and had petitioned the Government to allot them this land. It is submitted that the land in question is not Government land.
 8. Ms. Chesaro further submitted that the counter-claim should fail because the land is not Government land and is not available for allocation. The following cases are cited for this Court’s consideration – *Jengo Katana v Protus Evans Masinde* [2013] eKLR, a decision about setting aside settlement schemes. This land does not fall under that category. On the protection of land rights, the plaintiff referred the Court to the decision of Kimaru J. in *William Peter Mayaka v Richard Kipkorir Mutai and 7 Others* Nakuru HCCC No. 24607 of 2004, and *Wrecks Motors Enterprise v Commissioner of Lands*, Civil Appeal No. 71 of 1997.



9. The plaintiff further submitted that the defendants did not show that the land in dispute is Community land within the meaning of Section 8 of the [Community Land Act](#) which ought to have been adjudicated on behalf of the community.
10. Ms. Chesaro further submitted that the defendants did not demonstrate any of their rights that had been infringed by the plaintiff who is the registered owner of the land in question.
11. I did not see any submissions from the defendants.
12. The issue that falls for the determination of this Court is whether the plaintiff has established his claim on ownership of the suit property as against the defendants and whether the defendants have also proved their claim of ownership of the suit property as counter-claimed.
13. Section 7 of The [Land Act](#), 2012 is the law that frameworks several ways to acquire legitimate title and ownership of land in Kenya:

“Methods of acquisition of title to land.

7. Title to land may be acquired through—

- (a) allocation;
- (b) land adjudication process;
- (c) compulsory acquisition;
- (d) prescription;
- (e) settlement programs;
- (f) transmissions;
- (g) transfers;
- (h) long term leases exceeding twenty-one years created out of private land; or
- (i) any other manner prescribed in an Act of Parliament.”

a) Transfer of property

The common way of acquiring a valid title deed to land in this country is through the process of transfers. This is where a buyer through an elaborate legal process buys land before the seller transfers the same to his ownership.

b) Government allocation

Allocation is where the Government transfers public land to an individual for a specific time and use with conditions.

c) Adjudication

This is undertaken by the Government – it mainly concerns ascertaining and recording rights and



interests in areas of community land for purposes of registration.

d) Compulsory acquisition

Ownership of land can also be acquired through compulsory acquisition whereby the Government acquires private land for a public purpose or good say in infrastructural development, after following the legal processes and compensating the private owner. There is an elaborate legal regime and procedure on how this is done. The government must first issue sufficient notice to land owners and even publish the same in the Kenya Gazette.

e) Adverse possession

Land can be acquired legitimately through a doctrine called adverse possession or prescription. Adverse possession comes about when a person stays and uses land that is not his or hers for a continuous period of 12 years without opposition from the registered owner - nec vi, nec clam, nec precario (no force, no secrecy, no persuasion) the 'intruder' can move to court and claim valid ownership and title of the land since the original owner had acquiesced on his rights.

f) Settlement programs

Ownership of land can also be passed through settlement programs. The most noticeable is the Settlement Fund Trustee (SFT), a scheme to settle the landless and even squatters.

g) Land transmission

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Transmission happens when land passes to others following death. The property passes to the deceased personal representative(s) who is/are registered as the proprietor(s).

14. When one has acquired a title document, it confers indefeasibility rights on the owner. Under Section 26 of the [Land Registration Act](#), that title is said to be held in awe and offered protection as follows:

“(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.”

15. Equally, the [Land Registration Act](#) Section 24(a) stipulates the following:

- “(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;”

16. The Court of Appeal reaffirmed this view in [Dr. Joseph Arap Ngok v Justice Moiwo Ole Keiwa & 5 Others](#) Civil Appeal No. CA 60 of 1997, saying as follows:

“Section 23 (1) of the Act gives 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 title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such 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”.

17. The plaintiff has shown how he acquired the land in question through purchase for consideration from one Wainaina. He had undertaken due diligence. The people who were on the ground were stone cutters who were not permanently staying on the land. DW1 attempted to assert that he has been on the ground since 2000 and was expecting to be allotted this land by the Government but then it turned out the land was private. DW2 through DW4 said they had never entered that land and were wrongfully sued. It remained then for DW1 to justify his claim over the land. He admitted the structures he had placed had long been demolished. His rights over this land cannot be protected since, if there were any – he could not prove the same. Perhaps he could have pleaded adverse possession. It is not available since the owner of the land asserted his rights and had them evicted.

18. In the end the plaintiff's claim succeeds as pleaded in the plaint. The counterclaim is hereby dismissed.

19. On the issue of costs, the 1st defendant in his testimony fully litigated this claim. The 2nd to 4th defendants bolted out. The proceedings show they filed a joint defence and counter-claim pleading prolonged stay on the suit land and awaiting allocation by the Government. They later during testimony turned back and claimed not to have set foot on the suit land. It is an afterthought. All the defendants will bear the costs of the main suit and the counterclaim. The final orders will look as follows:

- a. A declaration be and is hereby issued that the plaintiff is the legal owner of land known as LR No. 21105 Kilifi – CR 27631 in Kilifi County.
- b. The defendants or any other 3rd parties' actions entering into possession, occupying, developing, renting out, excavating, harvesting coral blocks, leasing, handing over possession, or dealing in any other way with the said property are unconstitutional, unlawful, illegal null, and void.
- c. The property is a freehold owned by the plaintiff and any other purported agreement involving the same entered by any 3rd parties is declared a nullity.



- d. An order of injunction is issued against the defendants from further trespass on the suit property.
- e. Eviction or vacant possession to issue, in case of any party on the property.
- f. The OCS Kilifi to affect the outlined orders.
- g. Costs of the main suit and counterclaim awarded to the plaintiff.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 8TH DAY OF FEBRUARY 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Chesaro for the Plaintiff

Court Clerk: Happy

In the absence of:

Mr. Komora for the Defendants

