



**Lone Palm Limited v Charo & 5 others (Civil Suit 46 of 2017)
[2024] KEELC 1249 (KLR) (4 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1249 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CIVIL SUIT 46 OF 2017**

**MAO ODENY, J
MARCH 4, 2024**

BETWEEN

LONE PALM LIMITED PLAINTIFF

AND

MTSONGA KABILA CHARO 1ST DEFENDANT

KHAMIS MOHAMMED 2ND DEFENDANT

EMMANUEL FADHILI JEFWA 3RD DEFENDANT

MASHA MRAMBA MASHA 4TH DEFENDANT

ESTHER TSOROMBA TSULU 5TH DEFENDANT

BARANI POLE POLE SELF HELP GROUP 6TH DEFENDANT

JUDGMENT

1. By a plaint dated 20th February, 2017 the Plaintiff sued the Defendants seeking the following orders;
 1. An order of vacant possession of Plot Title No. 1605/III/MN.
 2. A mandatory injunction compelling the defendants, their family members, their agents and/ to servants to vacate plot No. 1605/III/MN.
 3. Costs of the suit.

Plaintiff's Case

2. PW1 Catherine Mundia adopted her Witness Statement dated 20th February, 2017 and produced documents in the list of documents as PEX No.1 to 7. PW1 also produced a Power of Attorney to represent the Plaintiff.



3. It was PW1's evidence that the Plaintiff acquired the suit property comprising of 2.5 acres in 1993 and was issued with a title deed. She further testified that the Plaintiff had developed the suit property by building a perimeter wall and a storied villa that was fully furnished and a caretaker Benson Mwaura was in occupation.
4. PW1 stated that the Defendants invaded the property in March, 2015, and chased away the Plaintiff's caretaker, partially demolished the villa, constructed temporary structures on the suit land and purported to sell portions to third parties.
5. PW1 also testified that she was unable to enforce the Court's injunctive orders in 2018 due to interference by politicians. She further stated that the Defendants had filed a suit Malindi ELC NO. 75 OF 2015 (OS) against the Plaintiff claiming that the suit land was ancestral land but the same was dismissed on 26th September 2019.
6. It was her testimony that the estimated value of the perimeter wall and the house was Kshs. 3.5 million. She urged the court to issue an eviction order against the squatters as prayed for in the plaint.

Defendants' case

7. DW1 Mtsonga Kabila Charo adopted his Witness Statement dated 6th September, 2017 adopted as his evidence and stated that he occupied the suit property in 2014 whereby they constructed mud houses. He testified that no one had stopped them from constructing the houses.
8. On cross-examination by Mr. Mkomba, he stated that he is a member of the 6th Defendant and that the suit property measures 130 hectares. He confirmed that he knew neither the mother title number nor the location of the plot No. 1605.
9. DW1 further stated that he took occupation in 2014 and left the same year and does not have any evidence on where he had built his house on Plot No. 337 section 111.
10. DW2, Emmanuel Fadhili Jefwa testified that they have been in occupation of the suit land since 1992 until they were evicted. Upon cross-examination by Mr. Mkomba, DW2 stated that he was aware of Plot no. 337 whereby subdivisions had been done but he did not know the Plaintiff's title number. DW3 Khamis Mohammed also testified that they have been in occupation of the suit land since birth and that they have buried their people on the same land.
11. On cross-examination, he stated that he is the secretary of Barani Self-help group but did not know the plot number he has been in occupation of. He also testified that he had built a temporary and a permanent house but did not have any evidence of electricity payments or graves. He admitted that he is in occupation of plot no. 1605 together with members of Moonlight Self-help group.

Plaintiff's Submissions

12. Counsel relied on Section 25 and 26 of the *Land Registration Act* and submitted that the Plaintiff being the owner of the suit land had the right to seek for an eviction order against the Defendants and that there was no challenge to the Plaintiff's title on account of fraud or misrepresentation.
13. Counsel argued that the Defendants did not file a counterclaim on the issue of adverse possession and that they only pointed out the Malindi ELC No. 75 of 2015 which was dismissed by the court.
14. Counsel relied on the Court of Appeal case of Kenneth Nyaga Mwigie V Austin Kiguta & 2 Others [2015] eKLR, Wilson Kazungu Katana & 101 Others v Salim Abdalla Bakshwein & another [2015] eKLR, Gabriel Mbui V Mukindia Maranya (1993) eKLR Civ. No. 283 of 1990 and submitted that



the Defendants adduced no evidence of their use or occupation of the suit land for a period of 12 years as they entered the suit land in 2014.

15. Counsel urged the court to find that the Plaintiff had proved its case for trespass and grant the prayers as per the plaint.
16. The Defendants did not file submissions as had been directed by the court.

Analysis and Determination

17. The issues for determination are whether the Plaintiff is the rightful owner of the suit land, whether the Defendants are trespassers and if so whether the Plaintiff is entitled to the orders sought in the plaint.
18. The Plaintiff gave evidence that it acquired the suit property Plot No. 1605/III/MN in 1993 and was issued with a title deed which it produced in court as an exhibit. The Defendants never challenged this evidence.
19. The Defendants were not certain of the exact location where they allegedly constructed their houses. Further, the evidence on record is that they entered the suit property in 2014 but were later evicted.
20. This court notes that the Defendants filed a case against the Plaintiff vide Malindi ELC case No. 75 of 2015 claiming adverse possession which was dismissed on 26th September 2019. The Defendants could therefore not rely on a case that had been dismissed and further that they did not file a counterclaim for adverse possession. The court can only craft issues that emanate from pleadings and therefore cannot grant orders that have not been pleaded.
21. In the case of the case of Galaxy Paints Co. Ltd V Falcon Guards Ltd (2000) EA 885 the court held that:

“The issue of determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court’s determination. Unless pleadings were amended, parties were confined to their pleadings. Gandy vs. Caspair (1956) EACA 139 and Fernandes vs. People Newspapers Ltd (1972) EA 63.”
22. The Plaintiff produced a title to the suit land which shows that it is the registered owner and there was no challenge on grounds of fraud or misrepresentation. Sections 24, 25 and 26 of the [Land Registration Act](#) provides for indefeasibility of title.
23. Section 26(1) provides that:

“...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
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”



24. The Plaintiff tendered evidence of ownership of the suit property, which was not challenged, by the Defendants' evidence. The Plaintiff had the burden of proof to establish that it was the rightful owner of the suit land and therefore entitled to the orders sought for injunction and vacant possession.
25. In the case of *Miller v Minister of Pensions* [1942] 2 ALL ER 372 the court held as follows:
- “The(standard of proof).....is well settled. It must carry a reasonable degree of probability..... If the evidence is such that the tribunal can say ‘we think it more probable than not’ the burden is discharged, but if the probabilities are equal, it is not.”
26. In the case of *Kenya Breweries Limited & another v Washington O. Okeyo* [2002]eKLR where the Court of Appeal set the principles for consideration before grant of a mandatory injunction as follows:
- “The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury’s Laws of England 4th Edn. para 948 which reads:
- “A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application”.
- Also in *Locabail International Finance Ltd. V. Agro export and others* [1986] 1 ALL ER 901 at pg. 901 it was stated:- “A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”
27. The Plaintiff had testified that they had obtained orders of temporary injunction against the Defendants vide a ruling dated 31st July 2018 which they were unable to enforce. The Plaintiff has proved that it is entitled to the orders sought for an injunction and vacant possession.
28. I have considered the pleadings, the evidence and submissions by counsel together with relevant authorities and find that the Plaintiff has proved its case against the Defendants and make the e following specific orders:
- a. The Defendants and their families to vacate the suit Plot Title No. 1605/III/MN within 30 days failure to which eviction to issue.
 - b. A mandatory injunction is hereby issued compelling the defendants, their family members, their agents and/ to servants to vacate plot No. 1605/III/MN within 30 days.
 - c. Costs of the suit to the Plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 4TH DAY OF MARCH 2024.



M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 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.

