



**Khaki & 5 others v Juma & 4 others (Environment & Land Case
35 of 2019 & Environment & Land Miscellaneous Case E063 of 2020
(Consolidated)) [2024] KEELC 4985 (KLR) (1 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 4985 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 35 OF 2019 & ENVIRONMENT &
LAND MISCELLANEOUS CASE E063 OF 2020 (CONSOLIDATED)**

SM KIBUNJA, J

JULY 1, 2024

BETWEEN

**HUSSEINALI M. KHAKI 1ST PLAINTIFF
MOHSIN A. KHAKI 2ND PLAINTIFF
MUSLIN M. KHAKI 3RD PLAINTIFF**

AND

**SAIDI JUMA 1ST DEFENDANT
NGOLO MBAYA 2ND DEFENDANT**

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND MISCELLANEOUS CASE E063 OF 2020**

BETWEEN

**NGOLO BAYA 1ST APPLICANT
HAMISI DZUYA SAID 2ND APPLICANT
FREDRICK KARISA 3RD APPLICANT**

AND

**HUSSEINALI MOHAMED JAFFER KHAKI 1ST RESPONDENT
MOHSIN ABDULRASUL KHAKI 2ND RESPONDENT
MUSLIN MOHAMED JAFFER KHAKI 3RD RESPONDENT**



JUDGMENT

1. The Husseinali M. Khaki, Mohsin A. Khaki and Muslin M. Khaki, the plaintiffs, filed ELC No 35 of 2019 against Saidi Juma and Ngolo Mbaya, the defendants, through the plaint dated the 28th February 2019 seeking for inter alia, the following:
 - a. Declaration that the plaintiffs are legal owners of plot number 344/1/MN, [CR. 1852], suit property.
 - b. An eviction order against the defendants and or their agents, servants or other persons, and demolition of the structures on the suit property, under the supervision of Bamburi Police Station police.
 - c. Permanent injunction restraining the defendants whether by themselves, their servants, agents or otherwise howsoever from encroaching and or trespassing and or taking possession, moving into occupy, developing and constructing any structures whatsoever on the suit property.
 - d. Costs and interests at court rates

The plaintiffs avers that they are the registered proprietors of the suit property which the defendants and or their authorized agents had illegally taken possession of and commenced constructions of buildings without any colour of right. That as a result, the defendants have deprived the plaintiffs of the use and enjoyment of the said land causing them loss and damage, and hence this suit.

2. The defendants opposed the claim through the statement of defence and counterclaim dated the 12th October 2020. They averred inter alia that the suit is frivolous and an abuse of court process. They denied trespassing on the suit property averring that they have been residing thereon openly, peacefully and uninterrupted for over 17 years, and have acquired the property through adverse possession. That they live on the suit property, with 29 other families, and have built permanent residential houses. That the plaintiffs do not have physical possession of the suit property. That they had filed Mombasa ELC [OS] No 63 of 2020 against the plaintiffs claiming ownership of the land under adverse possession. In their counterclaim, the defendants sought for the following prayers:
 - a. Permanent injunction restraining the plaintiff by themselves or their agents from wrongfully entering and or trespassing and or continuing to wrongfully enter and or evicting or demolishing and or harassing and or interfering with the defendants occupation of the suit property.
 - b. A declaration that defendants have become entitled to the suit property, by virtue of adverse possession.
 - c. Costs and interest at court rates
3. The plaintiffs filed their reply and defence to counterclaim dated the 23rd October 2020 disputing that the defendants had been on the suit property for 17 years. That the counterclaim was filed without notice being served, is fatally defective and should be dismissed or struck out with costs.
4. Ngolo Baya, Hamisi Dzuya Said and Fredrick Karisa Yaa, the applicants, filed ELC Misc. Appl. No 63 of 2020 through the originating summons dated the 20th August 2020, against Husseinali Mohamed Jaffer Khaki, Mohsin Abdulrasul Khaki and Muslin Mohamed Jaffer Khaki, the respondents, seeking to be declared as entitled by virtue of adverse possession to plot No 344/1/MN, [CR. 1852], Utange



- Mombasa, the suit property and be issued with provisional certificate of title, for they have occupied the said land for 17 years from 2003. The originating summons is supported by the affidavits of Ngolo Mbaya, 1st applicant, sworn on 20th August 2020 and those of Hamisi Dzuya Said and Fredrick Karisa Yaa, the 2nd and 3rd applicants, both sworn on the 21st December 2020. They inter alia deposed that they had filed Mombasa CMELC No 1883 of 2018 and obtained temporary injunctive orders against the respondents; that on the 19th June 2020, the respondents instructed KPLC to disconnect power on the suit property, and that the applicants then learnt the respondents had filed Mombasa ELC No 35 of 2019 against them, seeking similar orders as in Mombasa CMELC No 1883 of 2018.
5. The respondents opposed the originating summons through the replying affidavits of Mohsin A. Khaki, and Husseinali M Khaki, the 2nd & 1st respondents, sworn on the 18th September 2020 and 27th July 2022 respectively, inter alia deposing that the originating summons was meant to delay ELC No 35 of 2019; that the applicants have not been in occupation of the suit property from 2003, but invaded the said land in 2019 prompting the filing of ELC No 35 of 2019; that the respondents were not parties to and had not been served with suit papers in Mombasa CMELC No 1883 of 2018. The respondents also filed a document headed counterclaim dated the 25th September 2020, terming the applicants' claim incompetent, frivolous and an affront to Article 40 of the *Constitution*. They also claimed that the applicants forcefully and unlawfully entered on the suit property in 2019 and prayed that they be evicted. They prayed for the applicants suit to be dismissed with costs, and their counterclaim be allowed with costs.
 6. The record confirms that the court ordered the consolidation of ELC Nos. 35 of 2019 and 63 of 2020 on the 27th July 2022. The hearing proceeded in ELC No 35 of 2019 with Husseinali Mohamed Jaffer Khaki, the 1st plaintiff, testifying as PW1. The plaintiffs then called Edward Malenye Kiguru, a surveyor, who testified as PW2. It is the plaintiffs' case that they own the suit property which they inherited from their father, and was transferred to their names in 1990. That they have been using the land by farming until 2019 when some people invaded it, chasing away their guard. The plaintiffs reported the incident to the police, who advised that they sue the invaders. They filed the suit against the two defendants, but other people have since come onto the land. They instructed PW2 to visit the land and prepare a report on the status on the land which they filed in court. PW1 denied that the applicants in the adverse possession claim, have been occupying the land for 17 years, insisting that they came there in 2019. He added that Mombasa CMCC No 1883 of 2018 had been filed against Abdulrasul Khaki, their uncle who has since died, and was not the registered owner of the land. That further, the plaintiffs in that suit had not sought for title to the land. The plaintiffs sought for eviction and demolition orders and the adverse possession claim to be dismissed with costs. During cross examination, PW1 stated that their grandfather had built a clay and makuti hut in the 1950's which was being used by their caretaker. That they had constructed a storage structure where they would store the fruits including coconuts and mangoes. That the plaintiffs' used to visit the land on every weekend, and when harvesting coconuts from the over 100 trees there. That the other structures captured in the surveyor's report were not in existence before 2019. PW2 produced the report he prepared on instructions of the plaintiffs, after visiting the land in January 2020. He stated that there were 15 structures scattered all over the suit property that were recently constructed and others under construction. In cross examination, PW2 told the court he had heard of demolition of houses in that area in 2018, but could not confirm whether it involved those in the suit property herein.
 7. In defence and support of the defendants/respondents case Ngolo Baya, Hamisi Said Dzuya, the 1st and 2nd defendants testified as DW1 and DW2 respectively. They also called Batholomew Mwanyumba, land surveyor, and Victor Chalo Karisa, retired Senior Assistant Chief, Mwemberegeza, who testified as DW3 as DW4 respectively. DW1 testified that his father resided on the plot No 344 in 2003 until his



death in 2006. That though he was born in Kilifi County in 1982, he was brought up on the suit land, and still lives there with his family and other 26 families. That he got to know the plaintiffs in 2018 when they came with goons and police officers to evict them without a court order. That some houses were demolished but his was not. That they should be given title to the land. In cross examination, DW1 stated that his house is mud walled and was built without any building approvals being obtained. That they had filed CMCC No 1883 of 2018 against Abdulrasul Khaki and government officers as they had not known who the registered owners of the land were. He agreed that the documents of title that they used when filing ELC No 63 of 2020 were similar, including on their markings, to those filed by the plaintiffs in the previously filed suit being ELC No 35 of 2019. He agreed that their surveyor's report does not indicate the owners of the structures thereon and the sizes of the various plots. That he had not visited the lands office to do a search on the suit property. That the land should be registered in the names of the three defendants as representatives of the 26 families on the property. That the houses on the land are more than five years old. That the photographs they have attached to their suit, were taken by one Robert after the 2018 demolition. DW2 testified that he was born on the suit land in 1993 after his father settled there in 1990. His father had found some unutilized house that he settled in, until his death in 2022. That they filed their case after the plaintiffs evicted them and has lived on the land for all his 38 years. During cross examination, DW2 stated that they buried his father at his father's land at Rabai Kilifi County, and not on the suit property. He conceded that their surveyor's report has 22 structures and not 26. That though his statement had indicated there were 29 families on the suit land, three families had since left. That he was not a party in the 2018 suit, as he was then in Nairobi and only returned to the suit property in 2019 after the demolitions had occurred. He agreed moving onto the suit property in 2019, prompting the plaintiffs to file the suit. DW3 told how he visited the suit property and prepared the report dated the 28th November 2020 that shows that there were 22 buildings thereon. That some of the buildings were permanent and others were in the process of being constructed. That he took photographs of a house that was evidently 5 to 6 years old. During cross examination, DW3 stated that two of the houses were old while the other 20 appeared to have been under construction after being demolished. That some of the houses were habited while others were not. DW4 told the court that he has been the Assistant Chief of Mwebelegeza sublocation from 1999 to 1st June 2022. That he knew the late Chalo Mukamba Said who died on 21st June 2021 leaving behind a widow and children, including Hamisi Dzuya. That the late Chalo had a house that is still on the suit property. That the house was there even before he became Assistant Chief, but could not tell when it was built. He told the court that he knew of the demolitions of 2017, but took no action after learning a suit had been filed in court. That on 18th November 2021, he wrote a letter to the chief's office Bamburi, recommending that the 26 people on the suit property be considered for land allocation, but could not confirm whether it was replied to. Answering questions during cross examination, DW4 stated that the list attached to his letter with 30 names was prepared by the residents of that area. That he could not tell when each of those people moved onto the land. That there is a church on the suit property, but he does not know who the registered owner of the land is. He added that the late Chalo was not buried on the suit land but at Rabai, Kilifi County. That he does not know which other houses were spared, during the demolition of 2017, except that of Hamisi.

8. The learned counsel for the plaintiffs and defendants filed their submissions dated the 14th February 2024 and 10th April 2024 respectively, which the court has considered.
9. The following are the issues for the court's determinations in the consolidated suits:
 - a. Whether the plaintiffs/respondents are entitled to the orders of eviction and demolition against the defendants/applicants from the suit property.



- b. Whether the defendants/applicants have been in adverse possession of the suit property for over 12 years.
 - c. What orders to issue in respect of the two suits.
 - d. Who pays the costs?
10. The court has considered the parties' pleadings, affidavit, oral and documentary evidence presented by both sides, submissions by the learned counsel, superior courts decisions cited thereon and come to the following determinations:
- a. There is no dispute that the plaintiffs are the registered proprietors of the suit property since 1990. Indeed, the defendants/applicants have through their pleadings, acknowledged the plaintiffs' proprietorship of the suit property. They have also, through the evidence of DW1 confirmed getting to know the plaintiffs were indeed owners of the property after the demolitions that occurred in 2018.
 - b. That under section 25(1) of the *Land Registration Act*, No 3 of 2012, the plaintiffs as the registered proprietors of the suit property, have the rights and privileges appurtenant thereto, free from all other interests and claims. The court takes the plaintiffs' action of filing ELC No 35 of 2019 against the defendants to be a step towards enforcing their rights as registered proprietors to the suit property. Their claim has met opposition from the defendants/applicants through their defence in ELC No 35 of 2019 and claim vide the originating summons, in ELC No 63 of 2020.
 - c. The exemptions to the registered proprietor's rights and privileges under section 25(1) of the *Land Registration Act* include;
 - “(a) ... the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.”

Section 28 (h) of the said Act provides that:

 - “28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-
 - “(h) rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;”
 - d. Section 7 of the *Limitation of Actions Act*, chapter 22 of Laws of Kenya provides that an action for recovery of land after 12 years may not be brought, and section 38(1) of the same Act state that one who claims entitlement to land through adverse possession may apply for registration to the High Court. The procedure to be followed, in seeking such registration is provided through Order 37 Rule 7 of the *Civil Procedure Rules*.
 - e. That having confirmed that the plaintiffs are the registered owners of the suit property, the next thing to determine is whether the defendants/applicants have been in adverse possession of the



suit property, and if so, for how long. Put differently, whether the defendants/applicants have been in adverse occupation of the suit land for 12 years. The defendants/applicants claim they have been on the suit property for over 17 years from 2003, while the plaintiffs/respondents insists they were the ones who have been using the suit property until 2019, when people moved in, chased away their caretaker and started erecting structures therein, prompting the filing of the suit. Before that, the plaintiffs reported to the police, and there appear to have been steps taken to evict those who had erecting structures thereon as confirmed by DW1 and DW4. As the defendants/applicants' claim of adverse possession has been disputed by the plaintiffs'/respondents', it is the responsibility of the former under section 107 of the *Evidence Act* chapter 80 of Laws of Kenya to tender proof to the standard required for the court to find in their favour.

- f. Is there any other evidence, other than the word of the defendants/applicants against that of the plaintiffs/respondents on who was in occupation/possession of the suit property from 2003 to 2019? PW2 produced his report that he prepared on instructions of the plaintiffs. He had visited the suit property in January 2020, and he told the court that he found fifteen (15) structures scattered all over the said land. Some of the structures looked to have been recently constructed, and others were under construction. DW1 stated that though he was born in Kilifi County, he was brought up on the suit land where his father resided from 2003 until his death in 2006. DW2 testimony was that he was born on the suit land in 1993, where he lived with his father, who had settled there in 1990. That his father had found an unutilized house on that land where he lived until his death in 2022. The witness confirmed that his father was not buried on the suit property, but at Rabai, Kilifi County. It is noted that DW1 and DW2 have not sued the plaintiffs/respondents on behalf of their late fathers' estates, and there is no evidence to suggest that they are the legal representatives of the said deceaseds. If it is true that their late fathers were in adverse possession of the suit property until their deaths, then DW1's and DW2's presence on the land was as sons of the said deceaseds, and their occupation could only have started to run independently of that of their late fathers' after their death. DW2's testimony appear not to be of much help as he admitted that he was not a party in the 2018 suit, as he was then in Nairobi, and only returned to the suit property in 2019 after the demolitions had occurred, and thereafter the plaintiffs filed their suit. DW3 visited the suit property and prepared the report dated the 28th November 2020 that shows that there were 22 buildings thereon. It was his testimony that he took photographs of the houses that were on the land and in his estimation, they were of 5 to 6 years old. DW4, a retired Assistant Chief of Mwebelegeza sublocation from 1999 to 1st June 2022, told of the demolitions of 2017, and that only Hamisi's house was spared. That the late Hamisi died in 2021 and was buried at Rabai, Kilifi County and not the suit property. That on 18th November 2021, he wrote a letter to the chief's office Bamburi, recommending that the 26 people on the suit property be considered for land allocation, but could not confirm whether it was replied to. That to the letter was attached a list of 30 people which had been prepared by the residents. The evidence of DW1 and DW2 is of people who were on the suit land as sons of their fathers who have since died. The testimonies of PW1, DW3 and DW4 show that the structures on the suit land were of less than 12 years and the squatters' possession had been interrupted in 2017 and 2018.
- g. From the testimony of PW2, a surveyor hired by the plaintiffs/respondents in early 2020, he found about 15 structures at different stages of construction. DW3 was hired by the defendants/applicants in late 2020, and found 22 structures on the suit land, some habited and others vacant. The testimonies of DW1, DW2 and DW4 also show differences on the number of structures and people/families on the suit property. There is apparent differences on the



nature of structures thereon. The above differences, taken together with the reported evictions of 2017 and or 2018 leads the court to conclude that the defendants/applicants claim that they had been in peaceful, continuous and uninterrupted possession of the suit property for 12 years uncertain and without the requisite proof. Their claim of title over the suit property based on adverse claim therefore fails.

- h. That under section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event unless where for good cause the court orders otherwise. In this case, and considering the orders the court will issue, I am of the view that justice will better be served, by an order that each party bears their own costs up to this stage.

11. That from the foregoing determinations, the court finds and orders as follows:-

- a. That the defendants/applicants have failed to prove their counterclaim in ELC No 35 of 2019 and adverse possession claim in ELC No 63 of 2020 to the standard required of balance of probabilities. Their claims are therefore hereby dismissed.
- b. That the plaintiffs/respondent have proved their claim in ELC No 35 of 2019 and judgement is hereby entered in their favour against the defendants as per prayers (i) to (iii) of the plaint dated 28th February 2019.
- c. That each party to bear their own costs in both suits.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 1ST DAY OF JULY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiff/respondents : Mr. Omwenga.

Defendants/applicants M/s Waithera For Obinju.

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

