



Pungu Oceanic & Construction Ltd v Tsala & 10 others (Environment & Land Case 23 of 2019) [2024] KEELC 5257 (KLR) (15 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5257 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 23 OF 2019**

SM KIBUNJA, J

JULY 15, 2024

BETWEEN

PUNGU OCEANIC & CONSTRUCTION LTD PLAINTIFF

AND

JUMA TSALA 1ST DEFENDANT
MWANAISHA MOHAMED DOLA 2ND DEFENDANT
HAMADI KIBWANA ABDALLA 3RD DEFENDANT
SAUMU MOHAMED SURA 4TH DEFENDANT
FATUMA SIASA BANDA 5TH DEFENDANT
RIZIKI ALI 6TH DEFENDANT
MZEE RAMA MZUUGU 7TH DEFENDANT
BRIAN ABEL KAZUNGU & OTHERS 8TH DEFENDANT
**PERMANENT SECRETARY MINISTRY OF LANDS & PHYSICAL
PLANNING 9TH DEFENDANT**
COUNTY GOVERNMENT OF MOMBASA 10TH DEFENDANT
NATIONAL LANDS COMMISSION 11TH DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit through the amended plaint dated 27th February 2023 seeking for the following prayers:



- a. “A declaration that the plaintiff is the rightful owner of Plot No Mombasa/MS Block III/640.
- b. A declaration that the Defendants are trespassers and are in illegal occupation of the said plot.
- c. An eviction order against the Defendants in this matter.
- d. Mesne profits.
- e. Costs and interest of this suit.”

The basis for the claim is that the plaintiff bought plot No Mombasa/ MS/Block III/640, suit property, on 12th January 2018 from Hasidi Mohamed Kongoniga and Ali Sudi Mwachama at a consideration of Kshs 30,000,000/- that it fully paid and was issued with certificate of title on 23rd February 2018. That it has been unable to take possession because invaders masquerading as squatters. That the plaintiff asked the 1st to 8th defendants to vacate the land but they declined even after being summoned to the Likoni Deputy County Commissioner [DCC] and Officer in Charge County Police Division [OCPD] offices. That the 1st to 8th defendants started alleging that the suit property was set aside by the 10th defendant for solid waste management and other social purposes with consent of 9th and 11th defendants. That the defendants have colluded with to disentitle the plaintiff of its land, and it is suffering immense damages because it cannot utilize the land.

2. The 1st to 8th defendants opposed the plaintiff’s claim through their amended statement of defence and counterclaim dated 22nd March 2023, *inter alia* averring that they have been living peacefully on the suit property for over thirty years without any interruption from any person or authority and have developed the suit property by constructing permanent houses; that the suit land has been tampered as it has/was designated for dumping purposes which purpose was being actualized at the time of filing the defence; that the said Hasidi Mohamed Kongoniga and Ali Sudi Mwachama obtained title unprocedurally and irregularly and hence could not pass good title to the Plaintiff. In their counterclaim, the 1st to 8th defendants averred that the suit property was government land No 118 and they had written to to 11th defendant to allocate it to them; that on 28th March 2007, the Likoni Quarry Association wrote to Ministry of Lands and Settlement proposing they be allocated the land, and the Commissioner of Lands approved the request vide letter dated 20th March 2008 to the District Land Officer, asking for a survey to be conducted and status report; that on 15th November 2012, the Mombasa Polytechnic University Collage wrote to the District Lands Officer, Mombasa requesting to be allocated the said land to construct a university; that the District Lands Officer wrote a letter dated the 17th April 2013, to the Commissioner of Lands indicating that the land was vacant and approving the Mombasa Polytechnic’s application for allocation; that in a letter dated the 24th April 2019, the County Government of Mombasa declared that the sit property belonged to it and the purported lease or transfer of the suit property was illegal; the 1st to 8th defendants prayed for orders:
 - a. That the title deed issued to Hasidi Mohamed Kongoniga and Ali Sudi Mwachama which was transferred to Pungu Oceanic & Construction Limited be declared null and void.
 - b. The 9th, 10th and 11th defendants be ordered to register the suit property in the names of the 1st to 8th defendants and issue title deed thereto.
 - c. In the alternative to prayer a & b above, the 1st to 8th defendants be declared to have acquired prescriptive rights over the suit property against the registered owner the Plaintiff by way of adverse possession.
 - d. Costs of the suit.



3. The 9th Defendant opposed the plaintiff's claim through the statement of defence dated the 7th March 2023, *inter alia* denying colluding with the other defendants to defraud the plaintiff of its land. The 9th defendant prayed for the plaintiff's suit to be dismissed with costs.
4. The 10th defendant opposed the plaintiff's claim through their defence and counterclaim, dated the 22nd March 2023 *inter alia* averring that the suit property belonged to it and was for solid waste, and recycling site; that Hasidi Mohamed Kongoniga and Ali Sudi did not acquire title to the land procedurally, and that there is no green card or parcel file for the suit property at the Lands Registry. In the counterclaim, the 10th defendant sought for a declaration that the plaintiff acquired title to land parcel No Mombasa/MS/Block 111/640 fraudulently, thus it should be cancelled by an order of the court and revert it to the original owner, County Government of Mombasa.
5. The plaintiff called Adan Maalim Hussein, who testified as PW1 on the 14th November 2023, stating *inter alia* that the plaintiff belongs to him and his children; that he bought the suit property at Kshs 30 million about 15 years ago, and entered into an agreement for sale dated 12th January 2018 with Mohamed Kongoniga and Ali Sudi, who represented three others; that when he was buying the suit property there were only about ninety squatters and 90 households, on it; that after buying the land, he involved the village elders and provincial administration to have the squatters removed, and offered to compensate them but he was unsuccessful; that he has not taken possession of the suit property and sought for his prayers to be granted. During cross examination, PW1 stated *inter alia* that he had entitled into the sale agreement with five people but only the two he mentioned signed; that the vendors had told him they did not have the documents of ownership and he had not conducted a search at the lands office before buying it; that he went to Nairobi and had the title documents processed and issued to him; that he was not aware the lease over the suit property had been cancelled by the 10th defendant vide a letter dated 24th April 2019; that he knew the land was government land before he bought it, and was converted to private land in 2018 when he was issued with the title documents; that there were people in occupation of the land when he bought it; He also elaborated that he had filed two cases seeking to have the squatters evicted from the land but did not inform the court on the outcome. He also admitted to knowing that the suit property was public land before he bought it. That though he had obtained the statutory approvals and consent before transferring the land to himself, he had not availed them to the court. That he had paid Kshs 10 million in cash for facilitation that was given to some people who helped him in documentations. That he could not remember how he paid stamp duty for the land. That though he had been issued with a letter of allotment by the County Government of Mombasa, he had not brought it to court. That he had not obtained a County Government resolution allocating the plaintiff the land. That though he was the purchaser of the land under the sale agreement, the title was issued in the name of the plaintiff. That the squatters came onto the land after he bought it. That he does not know how those who sold him the land had obtained it. That the photograph affixed on the transfer document on the place for spouse consent is that of his daughter.
6. The 1st to 8th defendants called Juma Mohamed Tsala, the 1st defendant, who testified as DW1, stating *inter alia* that he was testifying on behalf of the other defendants, and that they had lived on the suit property since 1990; that they have been doing quarrying business under Likoni Quarry Self Help group that was registered in 2006; that the suit property was public land and the National Government had allowed them to operate on 50 acres of land following their application for 150 acres sometime in 2008; that there is a portion of the suit land that is for Mombasa County Government dumping site; that they objected to the plaintiff's claim of title to the suit land and lodged a complaint with the ombudsperson, which wrote to the 10th defendant who responded by declaring the plaintiff's title as a fake and cancelling it; that as to them the land belongs to the government, they should be allowed to



continue their quarrying works on the portion of land given to them; during cross examination DW1 stated *inter alia* that they have been waiting to be issued with a title for the 50 acre portion given to them by the government; that the 10th defendant dumping site portion is about 10 acres of the suit property; that their self help group has 450 people who he was representing, but was testifying on behalf of 1st to 8th defendants; that he was born in 1983 and moved onto the suit property in 1990, and found some people already settled there; that he had no documentary evidence to prove that Likoni Quarry Self Help Group had been allocated 50 acres of the suit land for their quarrying operations or residence; he agreed that before the court issued the injunction order, they had been selling portions of the land to persons to settle on even though they had no title to the land; that he was not testifying on behalf of the 10th defendant.

7. The learned counsel for the 9th and 10th defendants closed their clients defence cases without calling any witnesses.
8. On the 29th January 2024, the court gave directions on filing and exchanging submissions and the learned counsel for the 1st to 8th defendants and 10th defendant filed theirs dated the 8th April 2024 and 12th April 2024 respectively, which the court has considered. The learned counsel for the 9th defendant also filed submissions dated the 25th March 2024 headed “The 11th Defendants Submissions”, which the court has also considered. As I prepare this judgement today, 10th July 2024, no submissions has been filed by the learned counsel for the plaintiff.
9. The issues for the court’s determinations are as follows:
 - a. Whether the plaintiff’s acquisition of the suit property and the registration as the proprietor thereof was lawfully, regularly and procedurally obtained.
 - b. Whether the 1st to 8th defendants’ have established a prescriptive claim over the suit property or part thereof.
 - c. Whether the 10th defendant’s counterclaim has merit.
 - d. Who pays the costs of the suit and counterclaims?
10. The court has after considering the pleadings by the various parties as summarized above, oral evidence by PW1 and DW1, submissions by the three learned counsel, superior courts decisions cited thereon come to the following determinations:
 - a. It is trite and various superior courts have held that the prima facie evidence of ownership of land is a certificate of title. This fact is buttressed by section 26 of the [Land Registration Act No 3 of 2012](#) which states 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



- a. (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
- b. In the whole proceeding of this suit, there are two parties claiming ownership of the suit property, to wit the plaintiff and the 10th Defendant. The claim by the 1st to 8th defendants over the suit land is based on adverse possession of the 50 acres of the suit property they have occupied for over many years, that the government allocated to them for quarrying activities. Their pleadings talk of 30 years while in his testimony, DW1 spoke of 20 years. They however pleaded, and DW1 conceded in his testimony that the suit property was public land and belonged to the government.
- c. Though the 9th filed a statement of defence, and 10th defendant a statement of defence and counterclaim, they both failed to call evidence to support the averments in their pleadings. Pleadings, being statements of what the party alleges, without evidence, cannot be taken to be proof of what is contained therein. Pleadings are mere allegations and a party wishing for the court to find in their favour, must tender evidence in support of their averments thereof.
- d. The plaintiffs produced a certificate of lease registered on 23rd February 2018 for a term of 99 years from 1st July 1998. The certificate of lease confirms that the 10th Defendant is the lessor. The 10th defendant, through its pleadings, disputed the plaintiff's ownership of the suit land, averring *inter alia* that the title was acquired fraudulently. It further averred that it had set aside the suit property for garbage disposal. However, the 10th defendant, despite being given the opportunity to file documents, witness statements and to tender evidence during the hearing, in support of its pleadings, failed to do so. Its allegations against the plaintiff's acquisition of ownership of the suit property and the certificate of lease remains unverified, and therefore, incapable of being a challenge to the plaintiff's claim of title.
- e. Furthermore, though the 10th defendant alleged in its pleadings that there was no green card for the suit property as well as the physical parcel file, which are documents in the custody of the Land Registry, it failed to avail the Land Registrar as a witness to verify their claim. Under section 107 (1) of the *Evidence Act*, Chapter 80 of Laws of Kenya, the person who alleges the existence of a fact or state of affairs bears the burden of proof.
- f. In the case of *Francis Otile v Uganda Motors* Kampala HCCC No 210 of 1989 the court held that pleadings are not evidence nor can they be a substitute thereof. Also, in the case of *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No 23 of 1997, the court held that where a defendant does not adduce evidence, the plaintiff's evidence is to be believed as allegations by the defence is not evidence. In *CMC Aviation Ltd. v Cruisair Ltd. (No 1)* [1978] KLR 103; [1976-80] 1 KLR 835, Madan, J (as he then was) expressed himself as hereunder:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for



knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

The party who claims ownership of the suit property in this proceeding and has tendered *prima facie* evidence in support is the plaintiff.

- e. The certificate of title the plaintiff has produced as exhibit has not been successfully impugned. Even the 9th defendant that is represented by the Office of the Attorney General, brought evidence to denounce the legality of the plaintiff’s certificate of title. In the case of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* Nairobi (Milimani) HCCC No 834 of 2002, the court, citing the case of *Autar Singh Babra and another v Raju Govindji*, HCCC No 548 of 1998 appreciated that:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail”. Having found that the plaintiff has title, it is amazing that the only witness produced by the squatter defendants has questionable testimony. Hence the counterclaim by the county government fails.”

- g. The 1st to 8th defendants presented the 1st defendant as their witness. He testified as DW1, and he told the court that he was born in 1983, and moved onto the suit property alone in 1990, after leaving his parents in another part of Likoni. He said he was seven years old then and that he found other people already settled there and has been in occupation ever since. DW1 did not strike me as one telling the truth about how he came to the suit property, and the events that unfolded thereafter. It is unfortunate that only DW1 testified on behalf of the 1st to the 8th defendants. I say so because his testimony is insufficient to prove the long occupation alleged in their pleadings, especially the counterclaim. This suit was filed in 2019, which is only one year after the plaintiff became the registered owner of the suit property. If the 1st to 8th defendants’ counterclaim based on adverse claim was against the plaintiff’s title, then it fails first because the period of 12 years had not lapsed from 2018 and secondly because adverse claim could not lie against the land for the period up to 2018 when it was in the name of 10th defendant as it was then public land. The counterclaim by the 1st to 8th defendants therefore fails.
- h. That there were squatters on the suit property when the plaintiff acquired the land in 2018, is not disputed as the plaintiff himself confirmed there were ninety households on it then. The plaintiff testified that there was an understanding between him as the purchaser, and Hasidi Mohamed Kongoniga and Ali Sudi Mwachama, the vendors, that he would obtain vacant possession of the suit property upon purchase. However, it appears the vendors reneged on their undertaking and the plaintiff efforts to talk to the squatters to get them vacate failed. The plaintiff was forced to seek the intervention of the DCC and OCPD, Likoni, who also failed prompting him to come to court. Accordingly, while the plaintiff is entitled to prayer (a), the court finds prayers (b) to (d) in the amended plaint cannot issue in his favour. This is because the plaintiff bought the suit property while well aware there were squatters occupying it, the court can only conclude it was the author of its misfortune. The plaintiff should engage the vendors, 10th and 11th defendants to sort out the squatter issue on the suit property in an amicable way.



- i. Under Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya, costs always follow the event unless where there is a good reason to depart from the general rule. In the circumstances of this case, and especially having noted the plaintiff bought the suit property while well aware there were people settled on it, the court is of the view that each party bears their own costs.

11. Flowing from the foregoing, the court finds and orders as follows:

- a. That the plaintiff^P has partially succeeded in his claim and judgement is entered in his favour and orders issued as follows:
 - i. That declaration is hereby issued in terms of prayer (a) of the amended plaint dated the 27th February 2023.
 - ii. That prayers (b) to (d) thereof are rejected.
- b. That the 1st to 8th defendants have failed to prove their counterclaim and is hereby dismissed.
- c. The 10th defendant has failed to prove its counterclaim and it is hereby dismissed.
- d. That each party to bear their own costs in the main suit and counterclaims.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 15th DAY OF JULY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiff : Mr. Ngure

Defendants : M/s Mohamed for 1st to 8th Defendant

M/s Kiti for 9th Defendant

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

