



**Katana & 49 others v Awade & 2 others (Environment and Land Constitutional  
Petition 13 of 2023) [2024] KEELC 6585 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6585 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 13 OF 2023  
SM KIBUNJA, J  
OCTOBER 9, 2024**

**BETWEEN**

**JOSEPH TONGA KATANA ..... 1<sup>ST</sup> PLAINTIFF  
ROBERT KARISA MWARUNA ..... 2<sup>ND</sup> PLAINTIFF  
DAMA MUNGA DECHE ..... 3<sup>RD</sup> PLAINTIFF  
ELIZABETH SAMINI KATANA ..... 4<sup>TH</sup> PLAINTIFF  
STANSLAUS TUNJE MARUA & 45 OTHERS & 45 OTHERS ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**SALIM MOHAMMED AWADE ..... 1<sup>ST</sup> DEFENDANT  
LAND REGISTRAR, MOMBASA ..... 2<sup>ND</sup> DEFENDANT  
THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The plaintiffs filed the notice of motion dated 25<sup>th</sup> September 2023 seeking for inter alia an injunction against the “defendants by themselves, servants and or agents from selling, offering for sale, advertising, alienating, assigning rights, transferring by public auction or private treaty, disposing off or otherwise completing by conveyance, transfer of any sale concluded by public auction or private treaty, taking possession, appointing receivers or by section 90(3) of the *Land Act*, 2012, leasing, letting, charing or otherwise interfering with all that parcels known as land parcel No. 798/11/MN” pending the hearing and determination of this suit. They also seek for an order directing the 2<sup>nd</sup> defendant to prohibit or restriction dealings over the suit property pending the hearing and determination of the suit. The application is predicated on the eleven (11) grounds on its face marked (a) to (k) respectively, and supported by the affidavit of Joseph Tonga Katana, the 1<sup>st</sup> plaintiff, sworn on the 25<sup>th</sup> September 2023, among others deposing that the 1<sup>st</sup> defendant is the registered proprietor of MN/111/798



- measuring 9.067 hectares, the suit property, while the plaintiffs have been in actual, non-permissive, open, notorious and adverse use of the said land for between 20 to 40 years; that the plaintiffs have lived on that land with their families, constructed houses, carried out farming, dug water wells, planted trees, and have therefore acquired prescriptive rights over the suit property; that they have been forced to construct new structures after their houses were demolished by agents of 1<sup>st</sup> defendant; that they now live in fear due to the threats of the 1<sup>st</sup> defendant through the agent and hence this suit.
2. The application is opposed by the Salim Mohammed Awadh, 1<sup>st</sup> defendant, through his replying affidavit sworn on 17<sup>th</sup> November 2023, in which he inter alia deposed that the application is fatally defective, bad in law, incompetent, offends sections 9, 13, 17, and 38 of the *Limitation of Actions Act*, and therefore an abuse of court process; that he is the registered proprietor of the suit property, and is in possession thereof using it as his residence, and carrying on agricultural activities thereon; that plaintiffs trespassed on the suit property in August and September 2023, erected temporary structures, stole farm produce at night and he reported to Mtwapa, Kijipwa, and Ndonya police stations; that when no action was taken by the police, he engaged private security providers; that the plaintiffs' action is a security threat to the public and students who train on the farm under Imarika Foundation; that the application has no merit and should be struck out or dismissed with costs.
  3. The 1<sup>st</sup> defendant filed the notice of motion dated the 17<sup>th</sup> November 2023, seeking for among others striking out of the plaintiffs' suit with costs for it raises no cause of action, offends sections 9, 13, 17, and 38 of the *Limitation of Actions Act*, and is an abuse of court process. The application is premised on the sixteen (16) grounds on its face marked (1) to (16) and is supported by the affidavit of Salim Mohammed Awadh, the 1<sup>st</sup> defendant, sworn on the 17<sup>th</sup> November 2023, whose depositions are more or less similar to those in his replying affidavit summarized in (2) above.
  4. The application is opposed by the plaintiffs through the replying affidavit of Joseph Tonga Katana, 1<sup>st</sup> plaintiff, sworn on the 6<sup>th</sup> February 2024, inter alia deposing that the application is devoid of merit; that they have been in possession of the suit property until recently when the 1<sup>st</sup> defendant started demolishing their structures; that the photographs and documents relied upon by the 1<sup>st</sup> defendant have not been properly produced in view of section 106B of *Evidence Act*, and Court of Appeal case of County Assembly of Kisumu & 2 others versus Kisumu County Service Board & 6 others [2015] eKLR; that they have not been involved in any theft of the 1<sup>st</sup> defendant's farm produce as no evidence of criminal complaints have been lodged against them; that the application is misconceived and should be dismissed with costs.
  5. The 1<sup>st</sup> defendant filed a further affidavit that was sworn on 16<sup>th</sup> April 2024 inter alia deposing that the plaintiffs' replying affidavit is fatally defective and should be struck out; that the 1<sup>st</sup> defendant's son has taken photos that are attached reflecting the various activities on the suit property; that plaintiffs had slaughtered an expectant cow on the farm and left a dead calf.
  6. The court gave directions on filing and exchanging submissions on the two applications on the 20<sup>th</sup> November 2023, and 29<sup>th</sup> January 2024. The learned counsel for the plaintiffs filed their submissions dated the 17<sup>th</sup> November 2023, and 12<sup>th</sup> February 2024 in support of their application and in opposition to the 1<sup>st</sup> defendant's notice of motion, respectively. The learned counsel for the 1<sup>st</sup> defendant filed their submissions dated the 26<sup>th</sup> January 2024 and 16<sup>th</sup> April 2024, in opposition to the plaintiffs' notice of motion and in support of their application, respectively. The court has taken the said submissions into consideration.
  7. The issues for the court's determinations in the two applications are as follows:



- a. Whether the plaintiffs have met the threshold for the injunction and inhibition orders to issue at this interlocutory stage.
  - b. Whether the plaintiffs' suit and application are an abuse of court process, and offends sections 9, 13, 17 and 38 of the [Limitation of Actions Act](#).
  - c. Who pays the costs?
8. The court has considered the grounds on each of the two applications, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon, the pleadings and come to the following findings:
- a. That the principle prayers that are in the plaintiffs' application dated the 25<sup>th</sup> September 2023, are prayers (3) and (4) which primarily seeks to safeguard the legal title of the suit property from being adversely dealt with pending the hearing and determination of this suit. That in the 1<sup>st</sup> defendant's application dated the 17<sup>th</sup> November 2023, the principle prayer is number (3) that seeks to have the suit struck out for being an abuse of court process and offending sections 9, 13, 17 and 38 of the [Limitation of Actions Act](#).
  - b. The plaintiffs' claim vide the originating summons dated the 25<sup>th</sup> September 2023 is that they have continuously lived on the suit property without permission for periods of between 20 to 40 years, and have acquired title thereof under adverse possession. The plaintiffs' claim is vehemently opposed by the 1<sup>st</sup> defendant, and it will be the plaintiffs responsibility to prove their case on a balance of probability to succeed.
  - c. The 1<sup>st</sup> defendant has countered the plaintiffs' claim through his reply and application, pointing out that he is the one in possession of the land, his residence is situated on it, and that he carries out farming activities there. He deposed that the plaintiffs had entered onto the land in August 2023, and therefore their suit should be struck out, as there is no evidence that they have met the threshold for an order of adverse possession to be issued in their favour.
  - d. In view of the plaintiffs' averments through their originating summons, and the defence mounted by the 1<sup>st</sup> defendant, it is necessary for the parties to be given an opportunity to present their evidence through the main hearing before the court can make a determination on the contested issues. It follows that the 1<sup>st</sup> defendant's application is without merit.
  - e. For the plaintiffs to succeed in injunction order sought under prayer (3), they needed to among others present evidence of acts or threats manifesting or showing that the 1<sup>st</sup> defendant is likely to adversely deal with the land in a way that would put it beyond the reach of the court should the plaintiffs succeed in their claim, and a decree is issued in their favour. The 1<sup>st</sup> defendant has on his part shown through his deposition that he is actively using the land through farming and training activities, and his residence is situated thereon. What the plaintiffs are seeking can be attained through prayer (4) that will ensure the legal title to the suit property remains unchanged while this suit is pending hearing and determination. While I do not find reasonable cause to grant prayer (3), I find it appropriate to issue prayer (4) of the plaintiffs' application, at this stage. The parties should ensure they maintain status quo in respect of the suit property as the suit is heard and determined.
  - f. Section 27 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya, prescribe that costs follow the event unless where for good cause the court orders otherwise. In view of the contesting claims between the plaintiffs and 1<sup>st</sup> defendant, the court is of the considered opinion that justice of the case requires the costs in both application to abide the outcome of the suit.



9. Flowing from the foregoing conclusions, the court finds and orders as follows:
- a. That the plaintiffs' notice of motion dated the 25<sup>th</sup> September 2023 is granted in terms of prayer (4) only.
  - b. The 1<sup>st</sup> defendant's notice of motion dated 17<sup>th</sup> November 2024 has no merit and is dismissed.
  - c. That the costs in both applications to abide the outcome of the suit.
  - d. The parties to maintain the obtaining status quo in respect of the use of the suit property pending the hearing and determination of the suit.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 9<sup>TH</sup> DAY OF OCTOBER 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Plaintiffs : No Appearance.

Defendants : No Appearance.

Court Assistant– Leakey.

**S. M. Kibunja, J.**

**ELC MOMBASA.**

