



**Kalola & 4 others v Baya & 5 others (Environment & Land Case
135 of 2015) [2023] KEELC 495 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 495 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 135 OF 2015
MAO ODENY, J
FEBRUARY 2, 2023**

BETWEEN

**KAZUNGU CHEA KALOLA 1ST PLAINTIFF
EZEKIEL THOYA BAYA 2ND PLAINTIFF
LENLY MSANZU BAYA 3RD PLAINTIFF
KARISA BAYA 4TH PLAINTIFF
JOSPHAT KATANA CHEA 5TH PLAINTIFF**

AND

**KATHENGI BAYA 1ST DEFENDANT
DAUD KITSAO MWAIVU 2ND DEFENDANT
WAIRINA WANGESHI 3RD DEFENDANT
STENLY MGOROI 4TH DEFENDANT
DAUD MUTETI 5TH DEFENDANT
GARAMA KITSAO 6TH DEFENDANT**

JUDGMENT

1. By a Plaint dated 14th July 2015 and filed on 6th August 2015, the Plaintiffs herein sued the Defendants jointly and severally seeking for the following for: -
 - a. A permanent injunction restraining the Defendants by themselves their agents, servants, legal representatives, administrators or anyone claiming interest through them from trespassing, remaining, encroaching, developing,



cutting down trees cultivating and/or dealing with the suit property in any manner whatsoever.

- b. Costs of the suit.
- c. Interest at the court rates.
- d. Any other reliefs this Honourable Court may deem fit to grant in the circumstances.

PLAINTIFFS' CASE

2. PW1 adopted his witness statement and stated that they are the legal and beneficial owners of all that unsurveyed land measuring about 500 acres situated at Magarini in Kilulu Bungale area.
3. PW1 also stated that the 1st Defendant owns land of an equal acreage bordering the suit land and that sometime in March 2015, PW1 discovered that the 1st Defendant had encroached on the suit land and had started curving out portions which he sold to the 2nd to 6th Defendants.
4. PW2 and PW3 also adopted their witness statements and reiterated PW1's evidence and urged the court to grant the orders as prayed.
5. The Defendants entered appearance and filed a defence denying the claim but did not participate in the hearing despite being served with the hearing notice.
6. Counsel for the Plaintiffs reiterated the evidence by the Plaintiffs and urged the court to allow the orders as prayed as the claim is uncontroverted.

ANALYSIS AND DETERMINATION

7. The issue for determination is whether the Plaintiffs have proved that that they are entitled to an order of a permanent injunction against the Defendants. It is trite law that a party who desires that a court should give a judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist as per Section 107 of the *Evidence Act*.
8. Similarly, in Halsbury's Laws of England, 4th Edition, Volume 17, at Paragraph 13 is stated as follows: -
 - “ 13. ” The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.”
9. It follows that it was incumbent upon the Plaintiffs provide evidence of ownership of the suit property that entitled them are to bring the suit against the Defendants. The suit property was described as unsurveyed land measuring about 500 acres situated at Magarini in Kilulu Bungale area. According to the Plaintiffs' evidence, the 1st Plaintiff acquired the suit land from his forefathers but the 1st Defendant has since March 2015 invaded the suit property despite there being clear marked boundaries.
10. The description of the suit land does not properly locate the land. When talking of unsurveyed plots, there should be proper identification of the suit parcels. Most are identified by letters or by landmarks.
11. The Plaintiff's claimed that the defendants invaded unsurveyed land measuring 500 acres which belonged to their forefathers. It is not clear how the Plaintiffs arrived at the acreage of 500 and how much land has been invaded by the Defendants.



12. The Plaintiffs also claimed that the Defendants have sold portions of the suit land to other people, there were no sale agreements or photographs of such invasion, the parties who have so invaded the suit land and the extent of the invasion.
13. Counsel submitted that the parcel of land is unsurveyed and that the Plaintiffs are awaiting demarcation by the government. This means that even the Plaintiffs are not aware of the boundaries that they can hinge their claim on. Is this land adjudicated or is awaiting adjudication?
14. For an equitable order of injunction to issue a party must have a legal claim and the same must be proved. In the case of Kenya Power & Lighting Co. Ltd -vs- Sheriff Molana Habib (2018) eKLR the court stated thus:-

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”

15. In the case of Gichinga Kibutha Vs Caroline Nduku (2018) eKLR the Court held that; -

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

16. The Plaintiff did not discharge the burden of proof to entitle them to the orders sought. The court cannot give orders in vain which cannot be implemented or may cause injustice by issuing orders in respect of property that does not belong to the parties.
17. I have considered the pleadings, the evidence and the submission by counsel and find that the Plaintiffs have not proved their case and is therefore dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 2ND DAY OF FEBRUARY, 2023.

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.

