



Issa v County Government of Kilifi (Environment & Land Case 153 of 2018) [2023] KEELC 17289 (KLR) (9 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17289 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 153 OF 2018**

NA MATHEKA, J

MAY 9, 2023

BETWEEN

ABDI IBRAHIM ISSA PLAINTIFF

AND

COUNTY GOVERNMENT OF KILIFI DEFENDANT

JUDGMENT

1. The Plaintiff avers that he is and was at all material times the duly registered owner and entitled to the possession of the property known as LR No Kilifi /Mtwapa/3201 and LR No Kilifi/ Mtwapa/ 3202 situate at Mtwapa within Kilifi County. That on or about May 2015, the Defendant wrongfully entered and took possession of the portion of the suit properties and have thereafter ,wrongfully remained in possession thereof and have thereby trespassed and continue to unlawfully occupy portions of the suit properties. The Defendants illegally and without permission or authorization trespassed into and set up container offices in the Plaintiff's property in which they claimed that portions of the suit properties were located along the road reserve. The Kenya National Highways Authority conducted demarcation and survey of the property and found that the portions of the suit properties were not situated along the road reserve. The Defendant has been using the said offices to conduct County business, being point of collection for county revenues from vehicles passing through the County, albeit on a private land owned by citizen without express permission or otherwise. The Defendant occupied the portion of suit properties unlawfully without following any due procedure as required by the law. The Defendant did not serve the Plaintiff a preliminary notice of the intention to enter and compulsory acquire land required for any public purposes. The Defendant through National Land Commission were required to publish the notice in the Gazette and the County Gazette which shall be delivered to the Registrar and every person who has an interest in land. The Plaintiff has not received any notice till now. Furthermore, the Defendant through the Commission has not conducted any inquires or summoned the Plaintiff to any inquiries in relation the compulsory acquisition to the aforesaid portion of portions of the suit properties. The Plaintiff was never consulted about the



intended compulsory acquisition of the portions of the suit properties. That by virtue of the Defendant trespass and unlawful occupation of the portions of the suit properties, the Defendant has misused, damaged, wasted, destroyed, polluted and degraded the suit properties by reason of which, the Plaintiff has been deprived of the use and enjoyment of the portions of the suit properties.

2. The Plaintiff prays that judgment be entered against the Defendants for;
 1. A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the portions of the suit properties;
 2. A declaration that the Defendant, whether by themselves or their servants or agents or otherwise howsoever, are unlawfully in occupation of the portions of the suit properties and are accordingly, trespassing on the portions of the suit properties;
 3. A declaration that the Defendant, whether by themselves or their servants or agents or otherwise howsoever, are not entitled to remain on the portions of the suit properties;
 4. A permanent injunction restraining the Defendants, whether by themselves or their servants or agents or otherwise howsoever, from continuous unlawful occupation of the land;
 5. An order evicting the Defendant from the portions of the suit properties;
 6. Vacant Possession of portions of the suit properties;
 7. General Damages for trespass and unlawful occupation of private land;
 8. Costs of this suit together with interest thereon at such rate and for such period of time as this Honorable Court may deem fit to grant;
 9. Any such other or further relief as this as Honorable Court may deem appropriate.
3. DW1, Thomas Tembo the Defendant's Revenue Officer based in Mtwapa testified that sometime in 2017 the Defendant approached the Kenya National Highway Authority with a view of formalizing and in some instances, establishing the erection of temporary cess container stations on various KeNHA road reserves along the Mombasa - Kilifi - Malindi - Garsen highway. The Defendant wrote to KeNHA seeking all the requisite approvals, which requests on September 25, 2017, after considering the Defendant's application, KeNHA approved and a copy of the letter of approval from KeNHA dated September 25, 2017 was produced as the DEx1. He also produce the Defendant's acceptance of conditions letter dated October 5, 2017 as the DEx2. In making the said approvals, KeNHA confirmed that the proposed developments were to be undertaken on road reserves which KeNHA has the right/mandate to manage and control. He produced a copy of the letter of acknowledgement of acceptance from KeNHA dated 19th
4. October 2017 as the DEx3. That prior to the erection of the cess stations and subsequent to the approvals, the Defendant conducted all the necessary ground surveys in fulfillment of the conditions set out in the approval letter by KeNHA, thereby confirming the location of the station. On the material day of placement of the containers as had been advised by KeNHA in various correspondences, the Plaintiff was notified and of the exercise and he in turn hired his private surveyors who were at all times present. It is therefore not correct that the cess stations at Mtwapa encroached on the Plaintiffs land. DW2 produced the report and satellite images to corroborate DW1's evidence.



5. This court has carefully considered the evidence and submissions therein. The *Land Registration Act* is very clear on issues of ownership of land and Section 24(a) of the *Land Registration Act* provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the *Land Registration Act* states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... 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
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
6. The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
7. This court in considering this matter referred to the case of *Elijah Makeri Nyangw’ra v Stephen Mungai Njuguna & Another* [2013] eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The Judge in the case while considering the application of section 26(1) (a) and (b) of the *Land Registration Act* rendered himself as follows;

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

8. It is not in dispute that the Plaintiff was the registered proprietor of the property known as LR No Kilifi /Mtwapa/3201 and LR No Kilifi/ Mtwapa/ 3202 situate at Mtwapa within Kilifi County. The issue to be determined is whether or not the Defendant has encroached and or trespassed on the said property. PW2 a licensed land surveyor testified that he did not find any encroachment in terms of buildings and that the Defendant’s foundation was on the road reserve. He produced the survey report as PEx3. He stated that the container was on the road reserve. In cross examination he stated there is a slight encroachment of about 10 inches but he did not state so in his report. DW1 testified that said the cess stations at Mtwapa are on the road reserve (which KeNHA has the right/mandate to manage and control) and have not encroached on the Plaintiff’s land. He produced all the relevant approvals from KeNHA. DW2 produced the report and satellite images to corroborate DW1’s evidence. PW2 the Plaintiff’s surveyor confirms as such and no encroachment has been stated in his survey report. I find that the cess stations at Mtwapa are on the road reserve and not on the Plaintiff’s property. I find that the Plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs.



It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 9TH DAY OF MAY 2023.

N.A. MATHEKA

JUDGE

