



Dzila v Telkom Kenya Limited & another (Environment & Land Case 39 of 2021) [2023] KEELC 20338 (KLR) (2 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20338 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 39 OF 2021**

**AE DENA, J
OCTOBER 2, 2023**

BETWEEN

OMARI SEFU DZILA PLAINTIFF

AND

TELCOM KENYA LIMITED 1ST DEFENDANT

KENYA POWER & LIGHTING CO. LIMITED 2ND DEFENDANT

JUDGMENT

Pleadings

1. The Plaintiff commenced this suit against the defendants, vide a plaint dated 12/4/2002 which was amended on 29/10/2009. He avers that he is at all times the registered proprietor of plot No. Kwale/ Golini/1025 (herein suit property) in Kwale District (now Kwale County). That the 1st defendant unlawfully entered and took possession of the suit private freehold property and thereafter leased the same to the 2nd defendant. The 2nd defendant proceeded to develop the suit property without the Plaintiffs consent and or approval. It is averred that the occupation, possession, development, renting and or leasing out of the suit property by the 1st defendant is unconstitutional, invalid, illegal, unlawful, unenforceable, null and void on grounds that the land is private freehold, the 1st defendant has been illegally collecting rent from the 2nd defendant which ought to be paid to the Plaintiff for the illegal occupation. That the 1st defendant has no legal and or equitable right over the private freehold to occupy, possess, develop, alienate, trespass and or grant a lease. That the plaintiff's actions violated the Plaintiff's fundamental rights guaranteed under section 75 of *the Constitution* (repealed).
2. The Plaintiff states that despite written and oral demands by the Plaintiff, the defendants have failed and or neglected to hand over vacant possession of the suit property to the Plaintiff. The Plaintiff craves the following reliefs against the defendants; -



- a) A declaration that the Plaintiff is the legal and rightful owner of the property known as Kwale/Golini/1025 in Kwale District and that the 1st defendant and the 2nd defendant actions of entering onto, possessing, occupying, developing, renting out, leasing, handing over possession and or dealing in any way with the said property are unconstitutional, unlawful, illegal, un-procedural and null and void and any purported agreement, lease, document, letter, deed plan and or any other interest/deed issued by and or between the 1st defendant and the 2nd defendant and or any other party should be revoked, cancelled, and annulled as the same is ineffective and un-operative as regards to the said Private Freehold property which is not subject to any powers exercisable by the 1st defendant and or any other party and to restore the condition of the said property to its original state and to revert the to the Plaintiff who is the rightful owner of the property.
- b) An order restraining both the 1st and 2nd defendants and or any other party whether by themselves, their servants, agents, employees and or others from further possession and or otherwise from dealing with and or interfering in any other way with the Plaintiffs title and property known as Plot No.Kwale/Golini/1025
 - b
 - (ii) Special damages from the illegal and or unlawful rental income collected by the 1st defendant from the 2nd defendant and or any other party whether by themselves, their servants, agents, employees, from the Plaintiffs property known as Plot No. Kwale/Golini/1025 plus interest on the above payments at the Commercial rates prevailing from time to time from the respective due dates until payment in full.
 - c. Any other and or further relief that this Honorable court may deem fit and just to grant
 - d. Costs of this suit together with interest thereon at such rate and for such period of time as this Honorable court may deem fit and just to grant
3. The 1st defendant responded vide amended Statement of Defence and Counterclaim dated 2/12/2009 wherein it is averred that the 1st defendant has without secret been occupation of the suit premises since the year 1970 and carried out extension development which has been enjoyed by its employees' agents and servants since 1977. It is denied that the handover of the suit premises to the 2nd defendant is unlawful. That the 1st- defendant having been in occupation of the suit property since 1977 it is the only one that has the legal right to it. It is further stated that the Plaintiffs suit is time barred by Limitation of Action Act. The rest of the allegations in the Amended Plaintiff are denied.
4. The 1st defendant further vide a counterclaim claims it is entitled to the suit property by way of adverse possession, having been in possession of the suit property for over 12 years preceding the Plaintiffs claim, openly and peacefully. The 1st defendant prays that it be registered the sole proprietor of the suit property and the Plaintiff to execute a transfer and do all necessary acts to convey the said title to it and in default the deputy registrar be authorized to sign the relevant papers on behalf of the Plaintiff.
5. The 2nd defendant by the amended defence dated 22/10/2022 denied the allegations in the amended plaintiff. It is averred that the suit property was leased to the 2nd defendant by the 1st defendant and has always been part of public land. That its occupation of the suit property has been open and without hinderance from the Plaintiff and the developments thereon have been erected and enjoyed by the 2nd defendant since 1st November 1997. That there is no contractual privity between the 2nd defendant



and the Plaintiff. The 2nd defendant seeks indemnity against the 1st defendant for any loss, liability or judgement arising from the plaintiff's claim and prays the Plaintiff suit be dismissed with costs.

Hearing And Evidence

6. This suit was first partly heard by Justice Njagi on 22/4/09 but started denovo before Justice Mohamed Ibrahim on 14/4/2011 who heard the evidence of the Plaintiff and thereafter after his elevation to the Court of Appeal by Justice Edward M. Murithi on 5/12/2011 and 6/12/2011.

The Plaintiffs Evidence

7. PW1 the Plaintiff testified on his behalf. He testified that he was a farmer. That his land the suit property had been taken away by Telkom in 1970. The witness testified that he used to work in Garisa. That he came home and found people constructing on his plot Kwale/Golini 1025 and who informed him that they had been contracted by Telcom. That he complained vehemently and Telkom stated they would resolve the issue. PW1 further testified that he visited the Post & Telecommunication offices Mombasa, where he spoke to the Assistant Manager one Richard Kilango. He was referred to W.Y. Medy. That he also saw Mr. Boringo the Regional Manager at the station who accompanied him to the suit property in 1997 and he promised to write to the Plaintiff. PW1 added that he complained to the Njonjo Commission but he was referred to Nelson Mwanzanje, the General Manager Telkom Kenya who referred him to Mr. Borigo.
8. The witness further testified that he saw the Joel Kiilu Technical Manager KP LC who informed him they were tenants. PW1 told the court that he had built a house and fenced the property and had not given the suit property to anybody. That he had not been paid compensation. The witness produced as part of his evidence P. EX 1 Land Certificate issued on 7/06/1983; P. EX 2 Search and P. EX 1 Demand Letter dated 27/12/2001. The witness testified he had conducted a valuation of the property whose value was placed at Kshs. 1,200,000/- which valuation report dated 16/05/2009 was produced by PW2. PW1 stated that the land had been adjudicated in May 1969. He told the court he wanted his land back including legal costs, damages or mesne profits.
9. In cross examination by Ms Chesaro Counsel for the 1st defendant, PW1 indicated that during land adjudication he was in Garissa. His brother registered the land in his name and later he transferred it to PW1 before the Land Control Board (LCB). He confirmed that KPLC was in occupation, the 1st defendant having moved out. On cross examination by Mr. Obura counsel for the 2nd defendant, PW1 stated his title was issued in 1985. That KPLC were not in the property but had a transformer. The property held two buildings. PW1 clarified in reexamination that he saw the electricity supply and telephone services after 1970 and which were built by Telcom. That the land was his land and not family land.
10. PW2 Paul Wambua T/A Paul Wambua valuers a registered surveyor gave evidence on behalf of the plaintiff. He testified that on the instructions of the Plaintiff he undertook a valuation of Kwale/Golini/1025 and prepared a report dated 10/05/2009. It was his opinion that the property was worth 1.2 million at the time but which could be higher due to passage of time (3 years). That he had undertaken an earlier valuation in the year 2003. He produced the report as PExh 4, receipt dated 20/6/2009 for Kshs. 20,000 for the report, receipt dated 5/12/11 for Kshs.5000 for the court attendance and receipt dated 10/3/2003 for the earlier valuation as PExh 5, 6 and 7 respectively.
11. In cross examination by Ms. Chesaro the witness stated that in 2003 the property had a permanent house and power pylons though he did not visit it. That in 2009 the developments were more less the same including a latrine. He attributed the Kshs. 800,000 difference in value to appreciation in value



after the 2002 elections. Upon cross examination by Mr. Obura he stated the value given was only in respect of the land. That he was informed the developments were done by Telkom Kenya.

12. With the above the Plaintiff closed his case.

1st Defendants Evidence

13. DW1 was Godfrey Thingiri Theuri a retired employee and former property Manager of the 1st defendant employed in the year 1978. He stated that he was in charge of all properties of Telkom countrywide and was aware of the status of Kwale/Golini/1025. He produced a letter dated 27/8/1997 (DExh 2) by the plaintiff claiming ownership of the property and that KPTC had taken up possession on tenancy arrangements and asked KPTC to help resolve the dispute. DW1 testified that the letter was handled by the 2nd defendant's legal department. At the time there existed a radio telecommunication tower and equipment which served Kwale and Tanzania. He produced photographs of the property as at August 1997 (DExh2) which he stated he had taken. He also produced letters from 1959 -1977 showing the station had been existing since 1959(Dexh 3). That the purpose of the station is to boost frequencies to Tanzania and also served Kwale region and was still operational. He produced a demand notice date 27/12/2001(DExh 4) from the plaintiff's lawyers claiming trespass.
14. DW1 informed court that the Plaintiff had also supplied an extract of the Green card (DExh 5) showing Omar Sefu was registered owner in 1978, and on 26/5/83 the name changed to Omar Sefu Dzila. That the green card had only 4 entries covering 1978 – 1983. His evidence was that Telkom did not obtain title to the property which process they commenced but did not finalize upon learning of the Plaintiffs registration. That the property had not been surveyed then. No one resided on the land which is fenced and is guarded to avoid vandalism of the Telkom equipment. That Telkom had been in possession for 12 years before the 1997 claim and continues to be in occupation. The witness stated that Kwale station was still in use and was not being phased out in the foreseeable future and was still important to the communication network in Kenya. The witness confirmed the contents of the agreement arising from a request by KPTC to occupy unutilized space which the witness allowed in writing and which was also authorized by Telkom's Management at a token rent of Kshs. 1000/= per month.
15. Cross examined by Ms. Waithera, Mr. Theuri stated that he was not aware of the action taken by the legal department. He was not aware that the plaintiff grazed cattle on the property. That by the time the suit was filed the 1st defendant had not moved the court for adverse possession.
16. On cross examination by Mrs. Obura, Mr. Theuri confirmed he offered the suit property to KPLC vide letter dated 24/6/97 though he could not recall when they took possession. He stated he was not aware whether a formal lease was signed and if the rent was paid, which should have been dealt with by the legal department.
17. DW2 was Mzee Omar Mwajabe property assistant with KPLC in charge of securing company properties. He said KPLC received a letter dated 24/6/97(DW2 Exh 1) confirming they could lease the property. That KPLC accepted the offer vide a letter dated 24/11/97 (DW2 EXh. No.2) and requested for a formal tenancy agreement. They took possession of part of the station but no lease was prepared. The witness added that no rent was ever paid and there had been no court order to stop KPLC operations. That there existed radio equipment and shelter for the equipment which was very expensive.
18. On cross examination Mr. Mwajabe stated they moved into the suit premises on the basis of the letter and they had not paid any rent. That they did not conduct the search to prove ownership of the property. Upon cross examination by Ms. Chesaro she confirmed KPLC did not have a lease. That there existed radio equipment and 2 masts.



19. With the above the defense case was marked closed.

Submissions

20. Parties filed and exchanged submissions.

Plaintiffs Submissions

21. The plaintiff's submissions are dated 29/04/2013. On whether plot Kwale /Golini 1025 belongs to the plaintiff it is submitted that by dint of the provisions of section 143 (1) of the Registered [Land Act](#) (repealed) the plaintiff's title is indefeasible. That the same could only be defeated if obtained by fraud or mistake. Further that at the time of filing the suit the defendants had not established any overriding interests as envisaged under section 30 of the RLA. Reliance was placed on the case of Obiero Vs. Opiyo & Others (1972) EA 227.
22. On whether the 1st defendant unlawfully, illegally and unconstitutionally entered into possession and or trespassed onto the suit property, it is submitted that the 1st defendant did not seek authority and approval of the Plaintiff to occupy and erect the mast on the suit premises. There was no proof that the masts were erected in 1959 including easements or entry of prohibition/caveat on the land. It is also urged that alleged quiet possession by the 1st defendant does not confer rights over the suit property.
23. On whether the 1st defendant unlawfully and illegally rented or leased and or handed over vacant possession of the suit property to the 2nd defendant, it is submitted that no evidence was presented before court to support the said arrangements.
24. On the claim for adverse possession referring to the holding in Ahmed Abdulkarim and Another Vs Minister for Lands and Minerals and Another (1958) 1EA 435 it is submitted that the 1st defendant did not discharge the burden of proof of denial of the plaintiff's title.

1st Defendants Submission

25. The 1st defendant's submissions are dated 13/2/2013. On the 1st defendant's claim for adverse possession it is stated that the same has been proved by correspondence dating back to 1959 showing the defendant as having been in occupation and using the same as VHF Booster station of radio and telephone transmission. That the 2nd defendant is not entitled to indemnity as they led no evidence to prove the existence of a lease agreement and receipts for payment of rent. It is contended that the Plaintiff was guilty of laches having done nothing since 1970 until the year 2001 (22 years) considering that the 1st defendant's transmitters were raised up and visible. The plaintiff failed to verify if the land was available for allotment to him before obtaining the title. It is urged that the 1st defendant having enjoyed the use of the land openly for uninterrupted period of over 12 years is entitled to the suit property by adverse possession.
26. It is further stated that the issuance of title to the plaintiff was a mistake and or a fraud as the plaintiff had never lived, used or occupied the land. That he was estopped from claiming any loss. It is submitted that should such order be granted the 1st defendant and the public will suffer great loss and damage the former due to interruption of the satellite system around Kwale and Tanzania.
27. To buttress its case the 1st defendant relied on MSA HCCC No. 732 of 1991 Mwinyi Hamisi Ali Vs. AG & Philemon Mwaisaka, Court of Appeal No. 27 of 2002 Mbugua Njuguna Vs. Elijah Mburu Wanyoike & Ano.



2nd Defendants Submissions

28. The 2nd defendants' submissions are dated 29/4/2013. On whether plot Kwale /Golini 1025 belongs to the plaintiff it is submitted that even though the plaintiff held title as per the title and certificate of official search, it was granted way after the 1st defendant occupation of the suit property and title is questionable.
29. On whether the 1st defendant unlawfully, illegally and unconstitutionally entered into possession and or trespassed onto the suit property, it is submitted that the 1st defendant cannot be said to have unlawfully and or illegally entered the suit property since by the time the 1st defendant occupied the same it had not been surveyed neither had title been issued. Further that the 1st defendant cannot be said to have trespassed in a property he occupied before title was issued.
30. On whether the 1st defendant unlawfully and illegally rented or leased and or handed over vacant possession of the suit property to the 2nd defendant it is submitted notwithstanding the absence of lease agreement and rent payments, the 2nd defendant being still in occupation with consent of the 1st defendant, the occupation cannot be deemed unlawful.
31. On whether the 1st and or the 2nd defendant have been illegally and unlawfully constructing structures and or developing the property without the consent of the Plaintiff it is urged that the telecommunication and radio station were done before the plaintiff was issued with title. That the Plaintiff slept on his rights and complained 14 years after he had been issued with title and filed the proceedings herein 22 years after he became aware of the 1st defendant's occupation of the suit property and who was constructing thereon. Additionally, that the 2nd defendant did not require any consent from the plaintiff since they have never recognized the plaintiff as the owner of the suit premises. As to adverse possession the 2nd defendant supports the 1st defendant in this regard.
32. With regards to indemnity it is submitted that the 2nd defendant was entitled to the same from the 1st defendant for any loss, liability or judgement from the present proceedings as the 2nd defendant relied on the 1st defendant's representation that they were the proprietors of the suit property. the 2nd defendant further prays the suit is dismissed with cost for failure on the part of the Plaintiff to prove its case.

Analysis

Issues For Determination

33. On 14/4/2011 parties filed the following Agreed Issues dated the same day; -
 - 1) Whether plot Kwale /Golini 1025 belongs to the plaintiff
 - 2) Whether the 1st defendant unlawfully, illegally and unconstitutionally entered into possession and or trespassed onto the suit property,
 - 3) Whether the 1st and or the 2nd defendant have been illegally and unlawfully constructing structures and or developing the property without the consent of the Plaintiff
 - 4) Whether the 1st defendant has a right to ownership of the suit property vide adverse possession.
 - 5) Whether the 2nd defendant occupation of the land as lessee is legal
 - 6) Whether the 2nd defendant is entitled to indemnity from the 1st defendant



- 7) Who shall bear the costs of the suit.
34. Having considered the pleadings, the evidence and submissions I will adopt the issues as agreed with some slight amendments and include the issue of costs on the counterclaim.

Whether the Plaintiff is the legal and rightful owner of the property known as Kwale/Golini/1025

35. The plaintiff's case is that he is the lawful registered owner of the suit property. He testified in support of his case as PW1. In evidence he produced Land Certificate issued on 7/06/1983 and a certificate of official search dated 11/4/2011. The land certificate is dated 7th June 1983 and relates to Title Number Kwale/Golini 1025 and which shows Omari Sefu Dzila ID. No. 1168809/64 as the absolute proprietor having been so registered on 26/5/83. The certificate of official search applied on 20/3/2002 by the said Omari Sefu Dzila shows that he was registered on 26/5/83 as proprietor (entry No.3) and was issued with Land Certificate on 7/6/83 (entry no.4). Prima facie these documents appear to confirm the Plaintiff as the registered proprietor as at 26/5/83. Why then has the Plaintiff filed these proceedings?
36. PW1 testified he was in court as his land was taken by Telkom. That one day in the year 1970 he came home and found some people constructing on the suit property who told him they were contractors of the 1st defendant. That though he complained to the 1st defendants the issue was never resolved. That subsequently the 2nd defendant informed him that they occupied the premises as tenants with permission of the 1st defendant. The 1st defendants' case is that they have been in occupation of the suit property since 1959. DW1 produced a bundle of letters from 1959 -1977 (DEXH 3) demonstrating the suit property hosted a repeater station where VHF equipment installed by the 1st defendant's predecessor since 1959.
37. Upon this courts close scrutiny of the above bundle it is noted that the correspondence touches on maintenance of various Repeater Stations in Kenya belonging to the East African Posts & Telecommunication Corporation. Among the stations is the Kwale VHF Repeater Station which is the subject of this litigation and is situate on the suit property. Of specific reference are the letters dated 10/9/1959 and 14/09/1959. The former is on VHF Repeater Stations Electrical Re-wiring to be carried out at Kwale and others. Again re-wiring connotes works on existing installations. The one dated 14/09/59 is on VHF Repeater Station Kwale and refers to a number of works required at the station. I observed the same depicted repairs of existing infrastructure and or installations including additional works. They entailed interalia removing, redecorating and making good defects noted on site.
38. Additionally, DW2 who supported the 1st defendants' case through DW2 produced a bundle of photographs showing the masts and the supporting infrastructure. This is not denied by the Plaintiff except that he states in cross examination that he saw the masts after 1970. Should I be wrong on the above observations, I'm further emboldened with the Plaintiff own admission that the 1st defendant was in occupation of the suit premises since 1970. The Demand Letter dated 27/12/2001 which the plaintiff produced as (PExh 1) addressed to Telcoms Kenya Limited by his lawyers in respect of Plot No. Kwale/Golini/1025 states thus ' My client informs me that you have been in occupation of his property from 1970 without.....'
39. Clearly the above confirms occupation by the 1st defendant as early as 1959 and or 1970 as admitted both predating the Plaintiffs title. I then asked myself what this would signify to the plaintiffs Land certificate produced in these proceedings. The Plaintiff in his evidence in chief traces the history of the registration to land adjudication. I noted from the title produced the 1st edition was opened on 17/4/1974 which is supported by the green card produced as DEXH 5 by DW1. The green card shows



the 1st entry to Muhendato was made the same day. This again based on my finding on the defendant's occupation of 1959 and or 1970 predates the opening of this register.

40. It is urged by the Plaintiff that the title issued is indefeasible by dint of the provisions of Section 143 (1) of the repealed Act and further that the 1st defendant's installations did not qualify as overriding interests as envisaged under the provisions of Section 28 of the said Act. It is clear that the Registered Land Act Chapter 300 (now repealed) was the applicable law then. In terms of land adjudication, the Land Adjudication Act Chapter 284 of the laws of Kenya whose commencement date was 28th June 1968 is the applicable law but I will not dwell much on it because after registration the substantive law became the RLA. Section 143 (1) provides as follows; -

143.

- (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

41. According to the above provisions title can be impeached on grounds of fraud or mistake. For the former this court notes that no grounds of fraud have been specifically pleaded against the 1st defendant. It is trite that fraud must be specifically pleaded and proved and on a slightly higher standard than the usual one applicable in civil proceedings (see.....). However, mistake is also a ground upon which title may be impeached and or rectified. This court has already made a finding that the 1st defendant was already in occupation as early as 1959 and or even 1970. How then would the government allocate and issue title to land that is already occupied and hosts government installations in this case the VHF station and the supporting infrastructure. Indeed, the 1st defendant is described in the Amended Plaintiff as Parastatal body established in the Republic of Kenya and therefore a government of Kenya institution. The allocation can only have been done by mistake ab initio and I find as such.

42. Assuming I'm wrong on the above I will address the issue from the overriding interest perspective as urged by the plaintiff. Section 28 of the repealed law, provides that; -

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

- (a) a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.



43. Section 30 referred to above is important to this discourse and states as follows

Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -

- (a) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
- (b)
- (c)
- (d)
- (e)
- (f)
- (g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;
- (h) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law.

44. The structures and infrastructure that have been shown by the defendants to exist in the suit premises fit within the description of the items listed in (h) above read ejusdem generis. They also did not require to be noted in the register. As earlier noted the defendant's installations belonged to the government through the government parastatal and would affect title if any.

45. But having made the above finding would the 1st defendant's occupation of the property since 1959 or even 1970 as stated by the Plaintiff, entitle the 1st defendant to the land? It is no doubt that the land has been in use as Repeater VHF station. DW1 evidence is that the VHF station is being utilized to date and that there were no plans of decommissioning the same. These utilities are public utilities being the VHF station with the requisite supporting infrastructure and the photographs of the same were shown by the defence. It was not therefore available for allocation at adjudication. PW1 informed the court that the land was originally registered in his brother's name since during adjudication he PW1 was away at work in Garissa but subsequently his brother transferred the land to him. PW1 however contradicts himself while under cross examination that he acquired the suit property by clearing the forest, cultivation and it was ancestral land which he again clarified in reexamination that the land was not family land. There was no evidence to show that the same was ancestral land. This coupled with contradictions diminished the plaintiff's evidence. I did not buy his narrative.

46. In the case of Kenya Anti-Corruption Commission Vs Frann Investment Limited & 6 Others (2020) eKLR the court cited with approval the case of Kenya Anti-Corruption Commission Vs. Paulina Kemuma Anunda & Another (2022) eKLR where the court was of the view that where land had been specifically assigned for a public purpose, then so long as the purpose remained, that land ought to be considered to be part of government land that cannot be alienated to private individuals for private use regardless of whether or not an allotment letter or lease had been issued. The suit property was already being enjoyed by the government.



47. It therefore follows that the issuance of the title in 1974 was void abinitio and the subsequent transfer to the plaintiff was of no consequence. The Plaintiffs title is therefore not lawful.

Whether the 1st defendant unlawfully, illegally and unconstitutionally entered into possession and or trespassed onto the suit property.

48. I think the above discussion sufficiently addresses the issue of whether the 1st defendant unlawfully entered the suit property. The 1st defendant cannot be deemed trespassers nor can they be deemed to have unlawfully entered the suit premises. I will add that the 1st defendant was in situ way before 17/4/74 when the 1st edition of the register for the suit property was opened and way before any of the entries in the green card.

Whether the 1st defendant unlawfully and illegally rented or leased and or handed over vacant possession of the suit property to the 2nd defendant

49. The plaintiff by its letter dated 27/8/1997 (1st DEXH1) addressed to the Area Manager Kenya Posts & Telecommunication Co-op Mombasa states that before the corporation started using the plot Kwale/ Golini 1025 he had already obtained the documents. He expresses shock on the entry of the 2nd defendant into the picture ostensibly on rental basis. A demand notice dated 27/12/2001 is issued to Telkoms Kenya Ltd by the plaintiffs lawyers claiming the 1st defendant had unlawfully, illegally and without right leased the premises to the 2nd defendant. For me based on the finding that the 1st defendants occupation of the land was not illegal, then as a matter of course they were entitled to enter into the arrangements with the 2nd defendant. Infact it does not matter that there was no formal lease since the Plaintiff himself recognizes the existence of the arrangements. DW2 confirms that he is the one who authorized the same as property manager. This appears to have been recognized by the headquarters as evidenced in the bundle of communication produced by the 1st defendant herein. Consequently, as to whether the 1st defendant unlawfully and illegally rented or leased and or handed over vacant possession of the suit property to the 2nd defendant my finding is that they did not. This finding speaks to whether the 2nd defendant occupation of the land as lessee is legal and I will not belabor the point. I think it is appropriate for the court to address the issue of 2nd defendants claim of indemnity against the 1st defendant.

Whether the 2nd defendant is entitled to indemnity from the 1st defendant

50. The 2nd defendant seeks indemnity against the 1st defendant for any loss, liability or judgement arising from the plaintiffs claim. DW1 confirmed in cross examination by Miss Obura that he offered the suit property to Kenya Power and Lighting Company. In any case it is not in contestation that the 1st defendant entered into the arrangements leading to the occupation of the suit property by the 2nd defendant. DW2 could not confirm if rent was paid and produced no evidence that rent was paid. This court in the absence of such evidence cannot make any orders of indemnification. In any event this claim was conditional upon a positive finding by this court in favor of the Plaintiff. The court is making no such finding as is already apparent in this judgement. On this issue I make a finding the 2nd defendants claim for indemnity fails.

Whether the 1st defendant has a right to ownership of the suit property vide adverse possession.

51. The 1st defendant filed a counterclaim craving a finding that they are entitled to the suit property by way of adverse possession. It is urged that the 1st defendant having enjoyed the use of the land openly for uninterrupted period of over 12 years is entitled to the suit property by adverse possession. The



Court of Appeal in the case of Gideon Mwangi Chege Vs. Joseph Gachanja Gitutho (2015) eKLR explained the concept of adverse possession as follows; -

Simply put, adverse possession is the process by which a person can acquire a title to someone else's land by continuously occupying it in a way that is inconsistent with the right of the owner. If the person in adverse possession continues to occupy land, and the owner does not exercise his right to recover it by the end of the prescribed period of 12 years, the owner's remedy, as well as his title to the land, are extinguished.

Also see the decision of Kneller J in *Kimani Ruchine v/s Swift, Rutherford & Co. Ltd* (1980) KLR 10 12.

52. Having stated the above, I will not spend a lot of time on this issue. It is now established that a government entity cannot benefit from the doctrine of adverse possession over private land and just like in the same way an individual cannot acquire claim adverse possession over a government title see *Wilfred Juma Wasike & 11 others v Ministry of Interior And Co-ordination & another* [2022] eKLR. In any case for the purpose of the present case, I have already stated that the land was not private land. The 1st defendants claim of entitlement of the suit property by way of adverse possession is a nonstarter.
53. In the case of *Kenya Anti-Corruption Commission Vs Bernsoft Limited & 2 Others* (Environment & Land Case 168 of 2009) (2003) KEECL 16159 (KLR) (16 February 2023) Justice L. Naikuni in a suit filed by the plaintiff now the EACC for recovery of property belonging to the Government of Kenya having been persuaded to invoke the doctrine of Public interest vis-à-vis private interest as espoused in "Nbi Misc. Civil Application No. 158 of 2005 – John Peter Mureithi & Another –Versus- The Republic eKLR (2006) Stated thus;-
- 47The suit property was already being used for a specific purpose. It was un-alienated Government Land. In this case the public interest of the Department of Customs (now KRA) and Directorate of Meteorological and the Public as a whole should take precedence over the right of the 1st, 2nd and 3rd Defendants herein who had unlawfully, illegally and wrongfully benefited from the suit premises since year 2002 which was over 22 years todate.
54. I'm persuaded by the above dictum and it is my view that even though in the present case the Plaintiff has not been in occupation or use of the property the public interest of the Telkom Kenya, the KPL& C and the Public as a whole should take precedence over any alleged right of the Plaintiff. In this case I have found there was no right accruing to the plaintiff.
55. The upshot of the foregoing is that the Plaintiff has failed to prove his claim against both the 1st and 2nd defendant to the required standard to warrant the grant of the orders it is seeking. The Plaintiff suit is hereby dismissed with costs to the defendants.
56. An order shall hereby issue directing the Land Registrar Kwale to cancel the registration of the Plaintiff as the absolute proprietor of all that piece of land known as Plot No. KWALE/GOLINI/1025 measuring approximately 0.43 Ha and all the entries predating this registration and register the 1st defendant TELCOM KENYA LIMITED as proprietor.
57. There shall be no costs on the counterclaim. Leave to appeal is hereby granted.

DATED AND DELIVERED VIA EMAIL THIS 2ND DAY OF OCTOBER 2023.

LADY JUSTICE A.E. DENA

JUDGE

