



**Kisira & 7 others v Juma & 4 others (Environment & Land Case
88 of 2021) [2023] KEELC 22644 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 22644 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 88 OF 2021**

**AE DENA, J
OCTOBER 12, 2023**

BETWEEN

**JUMA HASSAN KISIRA 1ST PLAINTIFF
BAKARI KISIRA 2ND PLAINTIFF
HAMISI KASSIM KISIRA 3RD PLAINTIFF
RAJAB KASSIM KISIRA 4TH PLAINTIFF
MARIAMU KASSIM KISIRA 5TH PLAINTIFF
MWANAKOMBO KASSIM KISIRA 6TH PLAINTIFF
SAID KASSIM KISIRA 7TH PLAINTIFF
MWANAMKUU KASSIM KISIRA 8TH PLAINTIFF**

AND

**OMARI JUMA 1ST DEFENDANT
MOHAMED JUMA 2ND DEFENDANT
BAHATISHA JUMA 3RD DEFENDANT
HASSAN MOHAMED 4TH DEFENDANT
RASHID KIRONDA 5TH DEFENDANT**

JUDGMENT

1. The Plaintiffs filed this suit vide a Complaint dated 31/10/2011 which they amended on 19th June 2017. The Plaintiffs pleaded that they are the registered and or beneficial owners of Plot No. Kwale/



Ngunduni/275, Kwale/Ngunduni/278 and Kwale/Ngunduni/278 (hereinafter referred to a suit properties) situate in Lungalunga and which are unlawfully occupied by the defendants.

2. The Plaintiffs sought the following orders against the defendants; -
 - a. A declaration that the plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of all the parcels of land known as Plot Nos. Kwale/Ngunduni/275, Kwale/Ngunduni/278 and Kwale/Ngunduni/273 all situate in Lungalunga.
 - b. A mandatory injunction to order the Defendants either by themselves, servant and or/agent to forthwith vacate and or give vacant possession of the premises situate on land known as Plot Nos. Kwale/Ngunduni/275, Kwale/Ngunduni/278 and Kwale/Ngunduni/273 all situate in Lungalunga.
 - c. An order against the Defendants for the demolition of all structures illegally erected and standing on/upon the suit property and delivery of vacant possession to the Plaintiffs.
 - d. An order directed to the Coast Region Police
 - e. A Permanent injunction restraining the
 - f. General damages for trespass
 - g. Mesne profits for wrongful occupation of the suit property
 - h. Costs and interest thereon
 - i. Any other relief.....
3. The suit is undefended. The defendants were served with the amended pleadings and return of service filed on 18/01/2018 and 9/04/2019. The hearing proceeded on 18/5/2023. During the hearing Mr. Nyange learned counsel applied for amendment of the further amended plaint by deleting Kwale/Ngunduni/273 and replacing it with Kwale/Ngunduni/243 which I allowed.
4. The 1st Plaintiff RAJAB KASSIM KISIRA testified as PW 1. It was his testimony while adopting his witness statement dated 7/2/2018 that the rest of the plaintiffs were his siblings. That the defendants were their step brothers' children from their fathers first wife. That the plaintiffs mother inherited the suit properties from her mother and it was ancestral land. After adjudication the titles were issued in the names of the Plaintiffs. However, the defendants had denied the plaintiffs access, possession and control of the suit properties. That the dispute was filed before the Land Tribunal who found in favor of the plaintiffs.
5. In support of their case the Plaintiffs produced as exhibits copies of titles for the suit properties as per the list of documents dated 18/3/23. These were copies of title for plots Kwale/Ngunduni/275, Kwale/Ngunduni/278 and Kwale/Ngunduni/243 which were marked PExh 1-3. PW1 asked the court to give him back the land.
6. With the above the plaintiffs closed their case. Submission were filed on 24/05/2023. It was submitted that the title documents having been produced, they are prima facie evidence of ownership to land and conclusive evidence of proprietorship to land and can only be challenged on grounds of fraud or misrepresentation to which they are proved to be parties or where the certificate of title has been acquired illegally, un procedurally through a corrupt scheme as stipulated in section 26(1)(a)(b). With regard to the defendant's unlawful occupation of the suit properties, this court was referred to the case of Nyangeri Obiye Thomas Vs. Yunuke Sakagwa Nyoiza ELC Case No. 277 of 2018 where the definition of trespass in Clerk & Lindsell on Torts 18th Edition was highlighted. It was



further submitted that the plaintiffs were entitled to general damages to trespass and mesne profits for wrongful occupation.

Analysis And Determination

7. Having considered the pleadings, evidence adduced and submissions filed by counsel the issues that commend determination
 - i. Whether the plaintiffs are the registered owners of documents dated 18/3/23. These were copies of title for plots Kwale/Ngunduni/275, Kwale/Ngunduni/278 and Kwale/Ngunduni/243
 - ii. Whether the defendants have trespassed on the suit property.
 - iii. Whether the plaintiff is entitled to the reliefs sought.
 - iv. Who should bear the costs of the suit.
8. My understanding of the Plaintiffs claim is that the defendants unlawfully entered the suit properties which belong to the plaintiff constructed therein have denied the Plaintiff access and enjoyment to the same. The burden of proof lay upon the plaintiff to prove to these allegations as required under the provisions of section 107 of the *Evidence Act*.

Whether the plaintiffs are the registered owners of documents dated 18/3/23.

9. The Plaintiff testified on behalf of the rest of the plaintiffs that they are the registered owners of the suit properties. They produced the copies of the titles. During the hearing the court observed that the copies attached were not clear. Counsel attributed the same to the scanning and undertook to present clearer copies. I have noted during the writing of this judgement the clearer copies were available in the Supporting affidavit of Juma Hassan Kisira filed on 2/11/2011 in support of the Notice of Motion dated 31/10/2011. The Kwale/Ngunduni/243 is registered to Juma Hassan Kisira, Said Kassim Kisira, Bakari Kassim Kisira, Hamisi Kassim Kisira and Rajab Kasim Kisira as absolute proprietors and all of whom are named as plaintiffs in the present suit. Title Kwale/Ngunduni/275 shows Bakari Khasimu Kisira registered as absolute proprietor and who is also named as plaintiff. I noted a slight difference in the spellings but confirmed the ID number given tallied. The copy of the title for Kwale/Ngunduni/278 reflects the same proprietors as Kwale/Ngunduni/243.
10. Section 24 of the *Land Registration Act* No 3 of 2012 provides as follows:

“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.”
11. Section 25 (1) of the said Act further provides that:

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the 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 to any lawful encumbrances, set out in this section.”



12. Section 26 of the same Act provides that:

“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 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 grounds 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”.

13. The above titles have not been challenged by the defendants on the grounds provided in law. The plaintiff's evidence was not challenged at the hearing. Consequently, it is my finding that the plaintiffs are the absolute proprietor of the suit property. He is therefore entitled to protection of the said title as provided for under the [Land Registration Act](#) No. 3 of 2012.

Whether the defendants have trespassed on the suit property.

14. Section 3(1) of the [Trespass Act](#) Chapter 294 of the Laws of Kenya provides that; -

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.

15. Justice A. Omollo in ELC Civil Suit No. 583 of 2000 *Aula Ali Aula & Others Vs. Katana Shungu & 2 Others* observed that Trespass is defined by Concise Oxford Dictionary as unlawful or unwarranted intrusion especially on land or property of another.

16. Two elements must be established in a claim for trespass namely ownership of the premises/land and absence of permission to enter the land. this court has already made a finding that the suit properties belonged to the plaintiffs. PW1 evidence is that the plaintiffs have been denied access to the suit properties and which are in occupation by the defendants. This evidence has not been controverted. I find support in the holding of S. Okong'o J in *Nyangeri Obiye Thomas Vs. Yunuke Sakagwa Nyoiza* (Supra) where he stated; -

“.....In this case therefore, the Plaintiff was under a duty to prove that the defendants had unjustifiably entered the suit property which was in his possession. I am satisfied from the Plaintiff's testimony and the documents produced by the Plaintiff in evidence that the Plaintiff has proved on a balance of probability that the defendants have committed acts of trespass on the suit property. The Plaintiff proved that the suit property is registered in the name of the Plaintiff. The Plaintiff produced in evidence a title deed for the suit property in the name of the Plaintiff which confirmed the Plaintiff's ownership of the suit property and that the same was registered in his name on 29th March, 2011. The defendants did not enter appearance and as such failed to tender any evidence at the trial to challenge the Plaintiff's claim. The Plaintiff's testimony was therefore not controverted.’ (emphasis is mine).

17. It is therefore the finding of this court that on a balance of probability that the plaintiff has proved that the defendants have trespassed on the suit property.



Whether the plaintiff is entitled to the reliefs sought.

18. The plaintiffs have inter alia craved orders for general damages. From the evidence adduced I was not persuaded to grant general damages and counsel did not assist much in this regard. In Nyangeri Obiye Thomas Vs. Yunuke Sakagwa Nyoiza (Supra) the learned judge observed; -

6. ...On the issue of general damages, I am not satisfied that the Plaintiff did lay a proper basis for the same. Damages whether special or general are not to be awarded as a matter of course. The same are compensatory and must be proved. The Plaintiff had a duty to prove that as a result of the defendants' aforesaid acts of trespass; he did suffer non pecuniary loss with respect to which he is entitled to an award of general damages. I am not in agreement with the Plaintiff's submission that general damages can be used as a form of punishment against a defendant so as to teach him "a lesson". That I believe is the province of exemplary damages.

7. The foregoing notwithstanding, I am of the view that the Plaintiff is entitled to nominal damages in recognition of the fact that the defendants' aforesaid acts of trespass did interfere with the Plaintiff's proprietary rights over the suit property.

19. This court associates with the above findings and applying them to the instance case I decline to award general damages.

20. As to mesne profits for wrongful occupation, Section 2 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya defines mesne profits as follows: -

"Mesne profits", in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

21. In the case of *Karanja Mbugua & another v Marybin Holding Co. Ltd* [2014] eKLR the court had this to say with regard to mesne profits: -

"This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of *Civil Procedure Act*

22. Mesne profit is therefore special damages. No evidence was placed before this court to cement the claim for mesne profits neither were the same particularised and I will say no more.

23. In conclusion therefore, it is my finding that the Plaintiffs have proved their case against the defendants on a balance of probability. I therefore enter judgment for the Plaintiff against the defendants in the following terms; -

i. A declaration hereby issues that the Plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of all the parcels of land known as Plot Nos., Kwale/Ngunduni/275 and Kwale/Ngunduni/278 and Kwale/Ngunduni/243.

ii. The defendants either by themselves, servants, and or agents to forthwith vacate and or give vacant possession of Plot Nos. Kwale/Ngunduni/275 and Kwale/Ngunduni/278 and Kwale/Ngunduni/243 within ninety [90] days from the date hereof.

iii. The Defendants either by themselves, servants, and or agents are hereby given the option of demolishing all structures illegally erected and standing upon Plot Nos. Kwale/Ngunduni/275



and Kwale/Ngunduni/278 and Kwale/Ngunduni/243 and deliver vacant possession to the Plaintiffs within the said 90 days' failure to which demolishing orders will automatically issue against the defendants upon expiry.

- iv. A permanent injunction hereby issues against the defendants either by themselves, servants, and or agents and or otherwise howsoever from remaining on or continuing in occupation of Plot Nos. Kwale/Ngunduni/275 and Kwale/Ngunduni/278 and Kwale/Ngunduni/243.
- v. This being a suit involving family members there shall be no orders as costs.

Orders accordingly

DELIVERED AND DATED AT Kwale THIS 12TH DAY OF OCTOBER, 2023

A.E. DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

No appearance for the Plaintiff

No appearance for the defendants

Mr. Daniel Disii- Court Assistant.

