



Hatimy Group Limited & another v Mwangambo & 14 others (Environment & Land Case 69 & 76 of 2007 (Consolidated)) [2023] KEELC 21349 (KLR) (8 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21349 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 69 & 76 OF 2007 (CONSOLIDATED)**

SM KIBUNJA, J

NOVEMBER 8, 2023

IN THE MATTER OF PARCELS NO. 204/1/MN AND 203/1/MN

AND

**IN THE MATTER OF AN APPLICATION FOR DECLARATION THAT THE
APPLICANT/PLAINTIFF HAS OBTAINED OWNERSHIP OF 3.86 ACRES
OF THE ABOVE SAID LAND BY WAY OF ADVERSE POSSESSION.**

BETWEEN

HATIMY GROUP LIMITED PLAINTIFF

AND

DZOMBO MWAGAMBO 1ST DEFENDANT
ATHMAN HASSAN MGANGA 2ND DEFENDANT
SALIM SAID KOI 3RD DEFENDANT
KAINGU SANGA 4TH DEFENDANT
SAFARI KAHINDI 5TH DEFENDANT
MARGARET M. MUTUNGI 6TH DEFENDANT
ABDULRAHMAN AMIGO 7TH DEFENDANT
HAMADI KOI 8TH DEFENDANT
TOLLE ALSO KNOWN AS ABAA 9TH DEFENDANT
SEIF MOZA 10TH DEFENDANT
SAFARI MANZI 11TH DEFENDANT
SAID MUSA 12TH DEFENDANT



ADAM ABAAS SWALEH 13TH DEFENDANT
HASSAN MOHAMED NASSIR 14TH DEFENDANT

AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 76 OF 2007

BETWEEN

SALIM SAID KOI PLAINTIFF

AND

HATIMY GROUP LIMITED DEFENDANT

JUDGMENT

1. Hatimy Group Limited, the plaintiff, commenced the claim against the fourteen (14) named defendants, seeking for:
 - a. Declaration that the plaintiff is the registered proprietor of plot Nos. 203, 204, 967 and 222/1.MN, Kisauni, Mombasa.
 - b. Perpetual injunction to issue restraining the defendants by themselves, agents, servants or employees from trespassing or entering on said plots and harvesting sand, building thereof or continuing to erect any structure thereon or leasing or selling any part thereof and from demolishing or destroying the perimeter fence or wall around those plots.
 - c. Demolition of any buildings or structures on the suit properties and eviction of the defendants from thereof.
 - d. General, punitive and aggravated damages for trespass on the said plots.
 - e. Order that the defendants to level and fill up the holes and craters left on the suit properties by the sand harvesters.
 - f. Costs.

The plaintiff averred that it is the registered proprietor of the said suit properties and that the defendants had trespassed thereto, erected unauthorised and unapproved structures thereon and were harvesting sand therefrom without plaintiff's consent. That the 1st to 5th defendants were disposing portions of the suit properties without consent of the plaintiff and the plaintiff has suffered and continues to suffer damages.

2. In their joint statement of defence dated the 24th April 2007, the defendants denied the plaintiff's claim and sought for the suit to be dismissed with costs. They inter alia averred that they disputed that the plaintiff was the registered proprietor of the suit properties, and even if it was, its claim was time barred under the *Limitation of Actions Act*, as over twelve (12) years has lapsed from the dates of their entry between 1990 and 1993 onto the lands. That they had entered onto the suit properties peacefully, without consent and remained thereon uninterrupted, continuously, openly and their occupation was adverse to the title of the registered owner. That the defendants have dispossessed the plaintiff of its properties, and its possession discontinued by their constructive and or actual possession. That



the plaintiff has no structure on the suit properties but had in 2006 sought police assistance and demolished a few houses belonging to some of the defendants. That one of the defendants was charged with forcible detainer but later acquitted

ELC Case No. 76 of 2007.

3. Salim Said Koi, plaintiff, filed ELC No. 76 of 2007 against Hatimy Group Limited, defendant, through the originating summons dated the 5th April 2007 seeking to be declared to have been in adverse possession of 3.86 acres of plot No. 204/1/MN and 203/1/MN for over fourteen (14) years, be registered as proprietor, issued with certificate of title and costs. The originating summons is supported by the affidavit of Salim Said Koi, sworn on the 5th April 2007 to which is attached fourteen (14) photographs with various structures. He inter alia deposes that he entered on the suit properties in 1992 and has constructed permanent house where he has lived since. That he constructed a Shauri Moyo Academy in 1998 that had 280 students by 2006. That he had been charged with forcible detainer in Criminal case No. 1066 of 2006 after the defendant lodged a complaint with Bamburi Police Station but was acquitted under section 206 of the *Criminal Procedure Code* after the prosecution witnesses failed to attend. That after his arrest, he had been made to sign an agreement that he had surrendered the land to the defendant. That defendant had also had him charged in MCR No. 507 of 2007 for constructing the school without an approved plan, but before the case was determined, the academy was demolished by the defendant assisted by police, forcing him to relocate the school to some adjacent facility that he hired. That the demolition of the school in 2006 took place after he had been in occupation of the said land for over twelve (12) years, and the defendant had lost its right to repossess.
4. In his replying affidavit sworn on the 28th April 2008, Mohamed Mohamed Hatimy, a director of the defendant, among others deposed that the originating summons had not been taken out under Order XXXV1 Rule 8 and was therefore a nullity; that the demolition of the structures on the land was done by the Municipal Council of Mombasa for lack of approved building plans; that the demolished buildings had not been erected by the plaintiff, but by Hassan Mohamed Nassir to whom the plaintiff had sold a portion of the land at Kshs.70,000; that the demolished structures were not on the suit properties but plot numbers 222 and 967 that are not subject matter of this suit and the plaintiff has not lodged any claim against them; that the structures on the photographs attached to the supporting affidavit appear to have been built after the filing of the suit; that this suit is subjudice ELC No. 69 of 2007 that was filed against the plaintiff and thirteen (13) others as defendants, and in which injunction order had been issued.
5. In support of Hatimy Group Limited, hereinafter referred as the plaintiff, case, Abdulrahman Mohamed Hatimy, a manager, testified as PW1 and adopted the contents of his statement dated the 2nd March 2017 and 7th June 2022 as his evidence in chief. He also produced as exhibits the documents in the lists dated 20th March 2012 that was filed in ELC No. 76 of 2007 and further list dated 7th June 2022 except the letters by the chief appearing as items 13 and 14. He confirmed that plot numbers 203, 204, 967 and 222 belong to the plaintiff, and testified that the defendants entered onto the land in 2004 and started excavating soil for sale without the plaintiff's permission. That they lodged a complaint with the chief the same year who wrote to the defendants to stop entering onto the lands but they did not. The defendants then started selling portions of the land to other people. They reported the matter to the police on many occasions, and in 12th May 2006 the 3rd defendant, who is also the plaintiff in ELC No. 76 of 2007 signed the agreement to vacate from the four plots. However, the 3rd defendant did not vacate and continued selling plots. That among those who had bought portions of the plots lodged complaints with the police against the 3rd defendant and Dondo Mkalla and were charged with obtaining money by false pretences. That Barke Koi and her husband, Adam were the plaintiff's



caretakers on the suit properties. That the 3rd defendant had come on the suit properties with his brother's permission on recommendation of Barke Koi who was his sister when she got sick while her husband Adam was away. He denied that the 3rd defendant had come on the properties in 1998 and that he had constructed a house. He added that they are the ones who allowed 3rd defendant to use a house they had there to teach madrassa, which he later illegally converted to Shauri Moyo School. That the Ministry of Education issued notice to the 3rd defendant to close the school. He asked for the defendants to be evicted from the suit lands. During cross examination, PW1 stated that the madrassa was started by Barke Koi, and that it is the Municipal Council that had demolished the structures on the suit properties. That the 3rd defendant had been charged in criminal case No. 47 of 2010 in which the complainant was Thomas Mkambi. That by the time the plaintiff filed ELC No. 69 of 2007, none of the defendants had been on the suit properties for more than 12 years. That the agreement of 4th May 2006 in which the 3rd defendant agreed to vacate from the suit properties was signed in his presence by his brother, Mohamed Hatimy now deceased, Mariam Koi, wife to 3rd defendant and Lewis Mwadime, an architect with the Mombasa Municipal council and relative to the 3rd defendant. That he had minutes in which the plaintiff allowed him to testify for the plaintiff in ELC No. 69 of 2007. That the 3rd defendant had left the suit properties after the plaintiff filed the suit. That he cannot tell who among the defendants they sued is still on the suit properties as he no longer goes there after he was beaten and threatened after the last visit. That he has learnt there are more people on the suit properties now than the 14 defendants that the plaintiff had filed the suit against. That those people had settled on the land on the authority of the 3rd defendant, but without the permission of the plaintiff.

6. The defendants called Salim Said Koi, Safari Kahindi and Dondo Mkalla, alias Tolle alias Abaa, the 3rd, 5th and 9th defendants, who testified as DW1 to DW3 respectively. DW1 adopted his statement dated the 20th June 2022 as his evidence in chief and produced as exhibits the documents in the lists dated the 13th December 2017 and 20th June 2022. He disputed that he entered on the properties with the permission of his sister, insisting that he moved there in 1992 by establishing Shauri Moyo Academy and playground on parcels 203 and 204. That he has not sold plots on the properties but has leased portions thereof to some people to stop the destruction of the land through mining. That in 2006, he and another person were charged with forcible detainer of 13 acres but acquitted due to lack of evidence. He denied entering into an agreement to demolish the school and vacate from the land. He testified that he had been arrested with his wife and while in the cells, he was asked to sign a document promising to demolish the school and vacate from the land and he did so as he had been threatened to be charged with a capital offence if he failed to sign. That he had been served with notice to demolish the school by the Municipal council enforcement officers and later charged, but before the period in the notice expired the late Mohamed Hatimy came with some people and police and demolished it to the ground. That there has been three demolitions of the structures on the suit properties during which his school and other structures were brought down. He prayed that he be declared the owner of the land under adverse possession. During cross examination DW1 testified that he was born in Margarin, in Kilifi County in 1971 and went to school up to form four in 1989. That though he did not have money to start the school in 1992 he had received assistance from his brother Hamisi and his parents. That he did not obtain the Mombasa Municipal Council approval on the building plans. That though the school had students up to class eight, it was registering candidates for KCPE through other schools, as he had not obtained the requisite licence from the Ministry of Education to start it. That plots 203 and 204 are about 3.86 acres. That the school and playground occupy 2.5 acres, his home occupy 50 by 50 feet plot and the church owned by Pastor Sarah, Mwajumbe, Nyantiki, Margaret, Mutingi and others all totalling 15 occupy about one acre. That Mohamed had been charged for constructing unapproved developments and after he pleaded guilty, the eviction and orders were issued and the houses were demolished before DW1 filed his suit. That he was charged with DW3 for obtaining Kshs.130,000 by



false pretences from Margaret in criminal case No. 47 of 2010 and convicted. That he filed an appeal but lost. That the documents available confirms plots 203 and 204 are registered with the plaintiff and that he has never paid the plaintiff for any portion of the said plots. That the 15 people occupying portions of the two plots came there with his permission and he did not need to join them in his suit as co-plaintiffs. That he was given a copy of the agreement he signed while at the police station and that he took a copy thereof to his advocates.

7. DW2 adopted his statement dated the 17th October 2022 as his evidence in chief. He testified that he came to plot 222 in 1985 accompanying his father, a wine tapper. That they lived there peacefully and in 2001 his father got ill and returned to his father's home at Bamba, Kilifi County. That he continued residing there and in 2005 Mohamed and PW1 visited the land wanting to know how he came to be on the land. He told them that the land was his and they left. That he met the two four months later when they offered to build a 12 roomed house for him on a portion of the land and they take over the rest for their developments. He requested for time to consult the other residents on the land. Then in 2006 Mohamed, PW1 and other people came to the land and demolished all the houses there except three that had electricity connections. DW2 informed the court that the 1st, 2nd, 6th, 7th, 12th, 13th, and 14th defendants are not known to him. That the 4th and 10th defendants are deceased and the 8th defendant does not reside on the suit properties. The 11th defendant was living on the suit properties but has since left and the 3rd and 9th defendants are residing on the said properties. That he has lived on the land for 37 years and should not be evicted. During cross examination DW2 stated that his identity card indicates that he resides in Kikambala, Kilifi County. That he cannot tell whether his father had title documents over the land or recall the year his father died and that he has not filed a succession cause in relation to his estate. That there had been previous demolitions of houses on the suit properties before that of 2006. That he did not report the demolition of his houses to the police or sue Mohamed Hatimy, PW1 and those others involved in the demolition because they had said the properties were theirs and they had the support of the council and court. That he had not sold any portion of the suit properties to Adam Abas Swaleh or anybody else.
8. DW3 adopted his statement dated 17th October 2022 as his evidence in chief. He stated that he lives on plot number 967, and that the plaintiff had demolished his house and those of other people in 2009 while the suits were pending in court. That he had been charged in criminal case No. 47 of 2010 for obtaining by false pretences, was convicted and sentenced to a year imprisonment on a complaint by one Thomas Mukabi in relation to selling part of the suit properties. That the plaintiff has never used or fenced the suit properties and the prayers it seeks should not be granted. That there are about 250 men on the suit properties and each of them has women and children who are entitled to the said properties. During cross examination DW3 stated that he came to the land, then vacant in 1992 while aged 31 years old. That he did not know the 1st, 2nd, 4th, 6th, 7th, and 8th defendants. That the 10th defendant used to live on the suit land but had passed on. That there had been other demolitions of houses on the suit properties before that of 2009. That he was born in Wundanyi but he has no land there as his deceased parents had sold their land. That after the demolition of his two houses in 2009, he repaired one which is one roomed that he continued living in.
9. The learned counsel for the plaintiff and the defendants filed their submissions dated the 20th March 2023 and 24th April 2023 respectively, which the court has considered.
10. The following are the issues for the determination by the court:
 - a. Whether the plaintiff, Hatimy Group Limited, is the proprietor of any of the four suit properties listed.



- b. Whether the plaintiff has been dispossessed from the suit properties or any part thereof by the 3rd defendant or any other defendant. Alternatively, whether the 3rd defendant has established a claim of adverse possession over plot numbers 203 and 204 or any part thereof against the plaintiff.
 - c. What orders to issue under the circumstances.
 - d. Who pays the costs in each of the two suits.
11. The court has carefully considered the pleadings in each of the two suits, evidence tendered, submissions by the learned counsel, superior courts decisions cited thereon and come to the following determinations:
- a. The ownership of the four plots MN/1/203, 203, 222 and 967 have been established by the PW1, through the production of the original and copies of the respective documents of title that they are all registered in the name of the plaintiff. It is important to note that none of the three defendants who testified as DW1 to DW3 claimed to be the registered owner or contested the plaintiff's registration with the suit properties. What the three defendants claimed is that they had been occupying portions of some of the suit properties that they listed for over twelve years, and that by the time the plaintiff was attempting to repossess the suit properties, their rights as adverse possessors had crystalized.
 - b. The plaintiff's suit, ELC No. 69 of 2007 was filed before that by Salim Said Koi, the 3rd Defendant and plaintiff in ELC No. 76 of 2007. The latter suit being a claim over two of the plots under adverse possession can only be taken as the 3rd defendant's reaction to the former suit seeking for among others his eviction from the suit properties. The other defendants in ELC No. 69 of 2007 did not mount a similar claim like the 3rd defendants and were content to defend the suit preferred against them, inter alia stating that the plaintiff's claim is statute time barred. The two suits were consolidated by consent and the way the proceedings have been conducted makes the 3rd defendant's claim in ELC No. 76 of 2007 a counterclaim to the plaintiff's claim in ELC No. 69 of 2007.
 - c. The plaintiff has through PW1 taken the position that the defendants first entered onto the suit properties in 2004, started to erect structures to live in and harvesting soil for sale. The plaintiff reported to the chief who did letters that same year to the defendants to stop their activities but they did not. The plaintiff also reported to the then Municipal Council of Mombasa among others, who issued some notices for failure to obtained approvals of building plans of the structures thereon. That was followed with criminal prosecutions and demolitions of the structures in 2007 and 2009. If the court was to be convinced by the version given by the plaintiff, then it would not be difficult to come to the finding that a period of more than 12 years had not lapsed from 2004 to 2007 when these two suits were filed. It would therefore mean the plaintiff's suit is not statute time barred and the 3rd defendant's claim, and that of DW2 and DW3 that they have been on the listed plots for more than 12 years was without basis.
 - d. On his part the 3rd defendant who is also the plaintiff in ELC No. 76 of 2007 pleaded and testified as DW1 that he entered onto the suit properties in 1992. That in 1998 he constructed Shauri Moyo Academy which occupies 2.5 acres of the 3.86 acres of plots 203 and 204. That his home is on a 50 by 50 feet plot while the remaining portion is occupied by a church and about 15 others people he has leased portions of the parcels to. This claim was disputed by the plaintiff who deposed and testified through PW1 that the 3rd defendant came onto the suit properties with their permission to assist his sister, Barkle Koi, who was their caretaker.



That the plaintiff had allowed the caretaker to operate madrasa classes on their building on the suit properties, and with their permission the 3rd defendant took it over. The 3rd defendant later changed the madrasa classes facility to Shauri Moyo School without their permission and prior license from the Ministry of Education. DW2 testified that he initially came to the suit land with his father who was a coconut wine tapper [mgema], in 1985. That in 2001, his father got ill and left for his parents' home leaving him [DW2] behind. That in 2005 PW1 and others came asking him on what basis he was residing on the land, and four months later they returned and offered to construct for him a 12 roomed house on a portion of the land and they use the rest. The following year, 2006, the same people came with other people and demolished the houses of those residing on the suit properties. That he did not know whether his late father had title documents of the land. DW3 testified that he came to plot 967 that was then vacant in 1992. That his houses were demolished in 2009. That other than the copies of the photographs taken after the demolition exercise of the structures on the suit properties that were availed by the 3rd defendant, there is no other evidence tendered by the defendants that can help the court determine the probable time or year that either of them started occupying or being in possession of the suit properties. That it is surprising that Barkle Koi, the plaintiff's caretaker at the suit properties and sister to the 3rd defendant was not availed as a witness. Her evidence could have helped to dispel the plaintiff's claim that it was through her recommendation that 3rd defendant came to the said properties. Her evidence would also have probably helped to determine when the permission granted to 3rd defendant to stay on the suit properties was ended or withdrawn, and his continued occupation of the properties became adverse the title of the registered proprietor, the plaintiff.

- e. The 5th Defendant, DW2, was sued in his personal capacity not as legal representative of his late father. His testimony is that he initially accompanied his father to the suit properties in 1985 and stayed together until 2001 when his father left and returned to his father's home. It appears all through that period, DW2 believed the land they occupied belonged to his father, and there is no way he could therefore have been in adverse possession of a portion of land he believed they owned. From his own testimony, he came to know the land did not belong to his father in 2005 when PW1 and his team visited the suit properties and asked him how he came there. The same team visited him four months later with an offer to build him a 12 roomed structure on a portion of the land to enable them use the rests. He testified that he requested for time to consult the other residents, but though he did not give further details on what transpired next, there appears to have been no positive resolutions on the matter as in 2006 their houses were demolished. That even if the court was to take 2001, which is the year DW2 started living on the land independently of his father, or 2005 when he learnt of the plaintiff's claim over the plots, as the time his occupation of the suit properties became adverse to the title of the owner, a period of 12 years had not lapsed by the time the plaintiff filed its suit against him and others in 2007. The 5th defendant's, DW2, defence of adverse possession to the plaintiff's claim therefore fails.
- f. As already pointed out above, DW3 testified that he came to plot 967, that was then vacant in 1992. That his houses were demolished in 2009. The court has already noted that other than the copies of the photographs taken after the demolition exercise of 2009 of the structures on the suit properties that were availed by the 3rd defendant, there is no other evidence tendered by the defendants that can help the court determine the probable time or year that either of the defendants started occupying or being in possession of the suit properties. The plaintiff's position is that the defendants started settling on the suit properties in 2004, and has availed evidence that they reported to the area chief and Mombasa Municipal Council and detailed the



steps taken by the various agencies leading to demolitions of the structures on the said land in 2006, 2007 and 2009 among others. The plaintiff has also testified that some of the defendants were selling portions of the suit properties to third parties and following complaints lodged to the police, the 3rd and 9th defendants, who testified as DW1 and DW3 respectively, were arrested, charged, convicted and sentenced to jail term in Mombasa Criminal Case No. 47 of 2010 for the offence of obtaining by false pretences by selling portions of the suit properties herein. The two defendants confirmed that conviction and that their appeal to the High Court was dismissed. The foregoing facts do not support the claim by the defendants that their occupation and or possession of the suit properties was peaceful and uninterrupted, as there could not have been peace and or continuity when frequent demolitions and evictions were being carried out as detailed. That having observed the three defendants who testified as DW1 to DW3, they did not strike me as truthful witnesses. It is no wonder that DW1 and DW3 had been convicted for obtaining by false pretences for selling portions of the suit properties when they knew or ought to have known they were not the registered owners, and had no good title or any title that they could pass to the buyers. As a matter of fact, DW1 admitted in cross examination that he has been leasing portions to third parties to settle on yet he knew he had no title to the land or authority of the registered owner to do so. The plaintiff's witness who testified as PW1, appeared to have been telling the truth about the activities on the plots and the year when the people started moving on the suit properties without the plaintiff's consent. The court has therefore no difficulty in coming to the conclusion that the people including DW2 and DW3 started moving onto the suit properties in 2004 and not earlier. That by the time the plaintiff filed ELC No. 69 of 2007 to repossess its plots, none of the defendants had been in adverse possession of any portion of the suit properties for more than the 12 years prescribed by the law for the right of the registered proprietor to reclaim the plots to be said to be statute time barred.

- g. That during the hearing of the two consolidated suits, it became apparent from the testimony of PW1 that the only defendants he knew were the 3rd and the 9th defendants. It was his testimony that the names of the other defendants were provided by the area chief who however was not availed as a witness. DW2 informed the court that the 1st, 2nd, 6th, 7th, 12th, 13th, and 14th defendants are not known to him. That the 4th and 10th defendants are deceased and the 8th defendant does not reside on the suit properties. The 11th defendant was living on the suit properties but has since left and the 3rd and 9th defendants are residing on the said properties. On his part DW3 testified that he did not know the 1st, 2nd, 4th, 6th, 7th, and 8th defendants. That the 10th defendant used to live on the suit land but had passed on. Though the exact dates or years of death of the 4th and 10th defendants have not been disclosed, it would be unsafe to assume that they were alive when the suit was filed and that they were served with summons. The plaintiff's suit against the two is therefore for striking out.
- h. Though the plaintiff has in prayers (d) and (e) sought for damages and order to restore the land from the damages caused by sand harvesters, no evidence was tendered towards establishing the two prayers and the court will take them to have been abandoned.
- i. That on costs, section 27 of the *Civil Procedure Act* Chapter 21 of Laws of Kenya directs that it follows the event unless otherwise for good cause ordered by the court. I find no good cause to deviate from that dictate.

12. Flowing from the above determinations, the court find and orders as follows:



- a. That the plaintiff's claim in ELC No. 69 of 2007, against the 4th and 10th defendants, who are reportedly deceased, is hereby struck out.
- b. That the plaintiff has proved its claim against the other defendants in ELC No. 69 of 2007 on a balance of probabilities and judgement is entered in its favour in terms of prayers (a) to (d) and costs.
- c. That the plaintiff in ELC No. 76 of 2007 has failed to establish his case against the defendant to the standard required by the law, and his case is hereby dismissed with costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 8th DAY OF NOVEMBER 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

PLaintiff: Mr. Kinyanjui for Gikandi

Defendants : Mr Nyange.

Wilson - Court Assistant

S. M. KIBUNJA, J.

ELC MOMBASA.

