



REPUBLIC OF KENYA



**Hemed & 18 others v Constituency Development Fund Board & 5 others; Jumaan & 17 others (Interested Parties) (Environment & Land Case 18 & Counter Claim 18 of 2013 (Consolidated)) [2023] KEELC 21197 (KLR) (1 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21197 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT & LAND CASE 18 & COUNTER CLAIM 18 OF 2013 (CONSOLIDATED)**  
**SM KIBUNJA, J**  
**NOVEMBER 1, 2023**

**BETWEEN**

**BREK SULUM HEMED ..... PLAINTIFF**

**AND**

**CONSTITUTUENCY DEVELOPMENT FUND BOARD ..... 1<sup>ST</sup> DEFENDANT**

**KENYA RURAL ROADS AUTHORITY ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**ABDALLA SAID JUMAAN ..... INTERESTED PARTY**

**NURIA OMAR ..... INTERESTED PARTY**

**SWALEH ISLAM SAID ..... INTERESTED PARTY**

**MBARAK MOSOUD ..... INTERESTED PARTY**

**FATMA ABEID SLUM ..... INTERESTED PARTY**

**AHMED AWADH SALIM ..... INTERESTED PARTY**

**AHMED JUMAA YUNUS ..... INTERESTED PARTY**

**MOHAMED HASSAN MOHAMED ..... INTERESTED PARTY**

**ABBAS MUHSIN ABDALLA ..... INTERESTED PARTY**

**RUBEYA ABDALLA RUBEYA ..... INTERESTED PARTY**

**SWABRI BASHIR SALIM ..... INTERESTED PARTY**

**FAHNI BASHIR SALIM ..... INTERESTED PARTY**

**CORNEL MBOGHOL RIGHA ..... INTERESTED PARTY**

**ABDURAHMAN ABUBAKAR MOHAMED ..... INTERESTED PARTY**



ASIA JUMAAN KARAMA ..... INTERESTED PARTY  
SHEIKH ALI ABDALLA ..... INTERESTED PARTY  
SHAMAWIYA MZEE SHAMAWIYA ..... INTERESTED PARTY  
MAHFUDH SAID AMBER ..... INTERESTED PARTY

AS CONSOLIDATED WITH  
ENVIRONMENT & LAND CASE COUNTER CLAIM 18 OF 2013

BETWEEN

ABDALLA SAID JUMAAN ..... 1<sup>ST</sup> PLAINTIFF  
NURIA OMAR ..... 2<sup>ND</sup> PLAINTIFF  
SWALEH ISLAM SAID ..... 3<sup>RD</sup> PLAINTIFF  
MBARAK MOSOUD ..... 4<sup>TH</sup> PLAINTIFF  
FATMA ABEID SLUM ..... 5<sup>TH</sup> PLAINTIFF  
AHMED AWADH SALIM ..... 6<sup>TH</sup> PLAINTIFF  
AHMED JUMAA YUNUS ..... 7<sup>TH</sup> PLAINTIFF  
MOHAMED HASSAN MOHAMED ..... 8<sup>TH</sup> PLAINTIFF  
ABBAS MUHSIN ABDALLA ..... 9<sup>TH</sup> PLAINTIFF  
RUBEYA ABDALLA RUBEYA ..... 10<sup>TH</sup> PLAINTIFF  
SWABRI BASHIR SALIM ..... 11<sup>TH</sup> PLAINTIFF  
FAHNI BASHIR SALIM ..... 12<sup>TH</sup> PLAINTIFF  
CORNEL MBOGHOL RIGHA ..... 13<sup>TH</sup> PLAINTIFF  
ABDURAHMAN ABUBAKAR MOHAMED ..... 14<sup>TH</sup> PLAINTIFF  
ASIA JUMAAN KARAMA ..... 15<sup>TH</sup> PLAINTIFF  
SHEIKH ALI ABDALLA ..... 16<sup>TH</sup> PLAINTIFF  
SHAMAWIYA MZEE SHAMAWIYA ..... 17<sup>TH</sup> PLAINTIFF  
MAHFUDH SAID AMBER ..... 18<sup>TH</sup> PLAINTIFF

AND

BREK SULUM HEMED ..... 1<sup>ST</sup> DEFENDANT  
AWADH SALEH SAID ..... 2<sup>ND</sup> DEFENDANT  
SAID SALEH SAID ..... 3<sup>RD</sup> DEFENDANT  
DISTRICT LAND REGISTRAR, MOMBASA ..... 4<sup>TH</sup> DEFENDANT



## JUDGMENT

1. Brek Sulum Hemed, the plaintiff, commenced this suit against the Constituency Development Fund Board and Kenya Rural Roads Authority, the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively, through the plaint dated the 24<sup>th</sup> January 2013 and filed on the 25<sup>th</sup> January 2013 seeking for *inter alia*:
  - a. Declaration that defendants' action of encroaching onto plaintiff's land parcel MSA/Block XV1/564, suit property, and constructing a road thereon was unlawful and illegal.
  - b. Interlocutory injunction pending the hearing and determination of this suit.
  - c. Permanent injunction restraining the defendants from entering or interfering with the suit property, at Majengo Estate, Mombasa Island.
  - d. Mandatory injunction compelling the defendants in person or their contractors to wit, Ms. Roffins Investment Ltd, to pull out at their expense the portion of the road found to have been constructed on the suit property, remove the debris and restore the land to the state it was before encroachment. Alternatively, the plaintiff be allowed to pull out such portion of the road and the cost be recovered from the defendants.
  - e. Damages.
  - f. Cost.
  - g. Interest in (e) and (f) at courts rate from date of judgement till payment in full.
  - h. Any other relief the court may deem fit and just to grant.
2. The claim is opposed by the 1<sup>st</sup> defendant through its statement of defence dated the 6<sup>th</sup> March 2013 among others denying any involvement in what the plaintiff had alleged, either directly or through agent and sought for the suit to be dismissed with costs.
3. The plaintiff's claim was also denied by the 2<sup>nd</sup> defendant through its statement of defence dated the 11<sup>th</sup> December 2013 inter alia averring that it was only a project manager due to its technical expertise and prayed for the suit to be dismissed with costs.
4. That vide the application dated the 11<sup>th</sup> December 2013 and determined through the ruling delivered on the 25<sup>th</sup> February 2014, the eighteen (18) Applicants were allowed to join in the proceedings as necessary or interested parties and to file their defence and counterclaim if any in the specified timelines. They then filed the defence and counterclaim dated the 12<sup>th</sup> March 2014 in which they inter alia averred that the suit property is a nullity as it was curved out of a road reserve; that the defendants action of constructing the road was lawful and the defendants had not encroached onto the plaintiff's land; that the Municipal Council of Mombasa had through its Town Planning and Works Committee resolved to recommend to the Council that no building plans in respect of plots on road reserves, including that of the plaintiff, should be approved; and that the plaintiff's suit should be dismissed with costs.
5. The necessary parties' counterclaim is against Brek Sulum Hemed, Awadh Saleh Said, Said Saleh Said and District Land Registrar as the 1<sup>st</sup> to 4<sup>th</sup> defendants respectively. They inter alia averred that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had sold to the necessary parties their parcels of land at Mwembe Tanganyika and were issued with title documents. That the 2<sup>nd</sup> to 4<sup>th</sup> defendants later fraudulently dealt with the road reserves which was public property. They among others sought for:



- a. Dismissal of original petition with cost.
- b. Declaration that the plaintiff's title to Mombasa/Block XV1/564 was null and void.
- c. Permanent injunction restraining the plaintiff from interfering with the road reserve existing in Mwembe Tanganyika.
- d. The 4<sup>th</sup> defendant be directed to cancel the title deed for Mombasa/Block xv1/564.
- e. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the counterclaim to meet the costs of restoring the road reserve to its original form.

Leave to serve the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the counterclaim through advertisement was sought through the application dated the 21<sup>st</sup> August 2019 and obtained vide the order of 29<sup>th</sup> October 2019.

6. The plaintiff opposed the counterclaim through the answer to the defence and defence to the counterclaim dated the 24<sup>th</sup> March 2014 inter alia denying that the suit property lies on road reserve; that the counterclaim is defective and unprocedural as it introduced new parties who were not part of those granted leave of joinder in the ruling of 25<sup>th</sup> February 2014 and seeks dismissal of a petition that is not part of this suit.
7. The hearing commenced on the 3<sup>rd</sup> March 2021 with Brek Sulum Hemed, the plaintiff, testifying as PW1. He told the court that while working in Saudi Arabia, he received a call from his wife on the 5<sup>th</sup> January 2013 telling him that the defendants wanted to construct a road on his plot that he had bought from Said Swaleh "Nguru" and had been issued with title document in 2002. He came back to Kenya and on finding the construction going on, he filed this suit. He produced copies of his title, search certificate to the suit property, receipts for rates payments and approved development plans among others annexed to his lists of documents as exhibits. He sought for the cabro on the road made on his plot to be removed to enable him develop his plot. He also prayed for damages. During cross examination, PW1 testified that his advocate applied for and obtained a copy of the tender the 2<sup>nd</sup> defendant had awarded to Rollings Ltd to build cabro road on the suit property. That Swaleh Nguru had subdivided the land in 1991 and that all the plots have access to the roads.
8. The 1<sup>st</sup> defendant's case was marked closed on the 20<sup>th</sup> September 2021 after they failed to attend court for defence hearing.
9. The affidavit sworn by Ali Omar Ali for the 2<sup>nd</sup> defendant on the 30<sup>th</sup> May 2013 and filed on 10<sup>th</sup> June 2013 was adopted as the witness' evidence in chief on the 20<sup>th</sup> September 2021 awaiting his cross examination. The witness was availed on the 24<sup>th</sup> September 2021 for cross examination and he told the court that the 1<sup>st</sup> defendant had asked the 2<sup>nd</sup> defendant to supervise the road construction. That a conflict arose between the plaintiff and 1<sup>st</sup> defendant making the 2<sup>nd</sup> defendant withdraw from the project after being served with the suit papers. That the project was for improvement of an already existing road and not construction of a new one. That the works were not completed by the time the 2<sup>nd</sup> defendant withdrew from the road project.
10. The case for the necessary parties commenced on the 9<sup>th</sup> June 2022 with Sammy Wambua Juma, Regional Surveyor Coast, testifying that the dispute in court involves plots subdivided from the original plot number 19 that was subdivided into several plots, roads of access provided and an open space numbered 316/XV1/Mombasa Island created. That the road in dispute is the one running from Parsee road to Shariff Nassir road. That the road is 15 meters wide that was subsequently subdivided without a survey scheme by a physical planner. He confirmed to the court that he had visited the locus and found a building protruding onto the road more than the others, hence hindering access



by other plot owners. The witness was stood down to avail a legible copy of the report dated the 17<sup>th</sup> January 2013 that his office had prepared. The witness was recalled on the 23<sup>rd</sup> November 2022 and he produced the letter and the layout of the area showing that the suit property was among the plots created on the road reserve leaving a road of 5 meters as exhibits. That he visited the suit property and confirmed it was positioned between two roads, one of seven meters and the other eight meters. That he had not seen an approved survey scheme of that area with a 15-meter road. The second necessary parties' witness was John Wambua, County Physical Planner, who produced the minutes of 24<sup>th</sup> July 1995 containing a resolution that the Commissioner of Lands be asked to revoke the plots on the roads of access. The witness confirmed that the minutes did not specifically mention the suit property and that he could not tell whether it was forwarded to the Commissioner of Lands. The third necessary parties' witness was Fahmi Bashir, 12<sup>th</sup> necessary party, who told the court that they asked to join in the suit to understand why the construction of a road had been ordered to stop. He adopted his statement dated the 10<sup>th</sup> June 2020 as his evidence in chief. He relied on the documents on the list of documents dated the 29<sup>th</sup> April 2024 and 19<sup>th</sup> June 2020. During cross examination the witness stated that his plot is number 979 and is still in his late father's name. That if the plaintiff is allowed to develop his plot, it will block the road of access to his plot. The next necessary parties' witness was Abdalla Said Jumaan, the 1<sup>st</sup> necessary party. He adopted his statement dated the 29<sup>th</sup> April 2014 and produced a copy of the title to his plot as exhibit.

11. The 4<sup>th</sup> defendant to the counterclaim, Land Registrar, Mombasa, testified as DW1. She testified that from the documents in her office, there is nothing to show that the suit property was on a road reserve. That if the said property was on a road reserve or set aside for public road or use, the title documents would not have been issued. She produced copies of the green card, transfer document and the old cancelled title of the suit property as exhibits. During cross examinations, DW1 testified that she had not seen the survey plans under which the suit property was created, but added that the documents she had produced over the suit property were genuine. That her office had not received any correspondence from the survey office to the effect that the suit property was on a road reserve. That the documents in her office shows that the plot was originally allocated to the person who transferred it to the plaintiff herein.
12. The learned counsel for the plaintiff, necessary parties, 1<sup>st</sup> defendant, the A/G for 2<sup>nd</sup> defendant and 4<sup>th</sup> defendant in the counterclaim filed their submissions dated the 14<sup>th</sup> April 2023, 26<sup>th</sup> May 2023, 8<sup>th</sup> June 2023 and 13<sup>th</sup> June 2023 respectively which the court has considered.
13. The following are the issues for the court's determinations:
  - a. Whether the plaintiff's title to the suit property has been successfully impugned.
  - b. Alternatively, whether the suit property has been shown to be part of the road reserve.
  - c. Whether the plaintiff has proved that the defendants trespassed onto the suit property.
  - d. Whether the plaintiff and or the necessary parties are entitled to the prayers sought.
  - e. Who pays the costs.
14. The court has carefully considered the pleadings by the parties, the evidence tendered, submissions by the learned counsel for the parties and come to the following conclusions:
  - a. The evidence availed by the plaintiff, defendants and necessary parties has confirmed that Ruffins Investments Ltd had been contracted by the 1<sup>st</sup> defendant to do some works on Mwembe Tanganyika access road. The letter dated the 13<sup>th</sup> November 2012 from the 1<sup>st</sup>



defendant's Accounts Manager in the 1<sup>st</sup> defendant's list of documents confirms that position and also show that the 2<sup>nd</sup> defendant was appointed as the works project manager.

- b. The plaintiff's position is that in the execution of the said road project works, his perimeter fence on his plot number Mombasa/Block XV1/564, the suit property, was demolished by the contractor has not been disputed by the defendants. Indeed, the necessary parties confirmed that the road project was being done on the plot which the plaintiff claim as his but which to them was part of the road reserve.
- c. The plaintiff testified how he acquired the suit property and insisted it was not part of the road reserve. It was his testimony that he got the title to the suit property registered in his name in 2002. The Land Registrar, DW1, produced copies of the green card and certificate of official search over the suit property confirming that the said plot was transferred to the plaintiff and was registered in his name on the 28<sup>th</sup> October 2002 by the first registered owner. To the Land Registrar, the plaintiff's title documents over the suit property are genuine and there is no evidence presented to her office to suggest that the land was part of a road reserve as alleged by the necessary parties.
- d. The available evidence further shows that the land in that area was initially Plot number 19, a private land, owned by the Swaleh Ngurus who later subdivided it into undisclosed number of plots and disposed them to the various people including the plaintiff and necessary parties. The court was told that roads of access were provided for during the said subdivision exercise. Some of the roads in the neighbourhood of the suit property now in dispute are of seven and eight meters. That was according to the testimony of Sammy Wambua Juma, the Regional Coast Surveyor, who was the first witness for the necessary parties. Has there been similar claims over the plots adjacent to the seven and eight meter roads like the one raised in relation to the suit property that is adjacent to a reportedly five meter road? If this is a general concern by the residents in the adjoining plots, possibly they should consider petitioning the County Government of Mombasa and the National Land Commission to help address the issue in a wholesome way. If there is evidence of fraud in the transactions leading to the widths of the roads there shrinking, then they should consider lodging a formal complaint with the Ethics and Anti- Corruption Commission and or the Director Criminal Investigations for appropriate investigations and action.
- e. The necessary parties' claim that the Mwembe Tanganyika access road was meant to be a 15-meter road and that the suit property was fraudulently curved out of the road reserve needed to be proved to the standard required before the court can make a finding in their favour. The standard of proof in fraud matters is above that of balance of probabilities and below that of beyond reasonable doubts. That as the defendants have not in their statements of defence alleged fraud attributed to the plaintiff, that burden of prove fell upon the necessary parties. Under sections 107 to 109 of the *Evidence Act* chapter 80 of Laws of Kenya, the one who alleges a fact has the duty to tender proof. The necessary parties at paragraph 11 of their defence and counterclaim pleaded fraud attributed to the 2<sup>nd</sup> to 4<sup>th</sup> defendants in the counterclaim. The plaintiff is the 1<sup>st</sup> defendant in the said counterclaim and there are no averments relating to fraud that were alleged against him in the counterclaim. The necessary parties have also failed to tender proof of fraud in the creation of the suit property and its registration in the name of the plaintiff. The necessary parties counterclaim therefore fails in total.
- f. The 1<sup>st</sup> defendant never tendered evidence but had at paragraph 4 of their defence dated 6<sup>th</sup> March 2013 averred that "1<sup>st</sup> defendant never instructed any of the mentioned agents as claimed



in the plaint.” That as the 1<sup>st</sup> defendant did not tender evidence to support its averments and challenge the evidence presented by the plaintiff and 2<sup>nd</sup> defendant that it was indeed the one funding the road project, procuring the contractor and appointing the project manager, then its claim of innocence in what befell the plaintiff has no basis. Indeed, the 1<sup>st</sup> defendant is the one liable for the damages caused on the plaintiff’s plot by its agent, the duly appointed contractor for the road project in dispute. The involvement of the 2<sup>nd</sup> defendant in the project has been shown to have been as a project manager, also appointed by the 1<sup>st</sup> defendant, but cannot avoid blame considering its statutory role in matters roads. The 1<sup>st</sup> defendant therefore takes full responsibility for the actions or omissions of its agents and if either of them went beyond the instructions given, then it is for the 1<sup>st</sup> defendant to initiate the appropriate action in law for reimbursements.

- g. That though the plaintiff has at prayer (e) of the plaint sought for damages, he has not tendered evidence that could assist the court assess the appropriate level of damages to award. However, as there is evidence of trespass which is actionable, the court is of the view that an award of Kshs.100,000/= would be fair and just in the circumstances of this case.
- h. That considering the counterclaim herein is in nature of a public litigation, and even though it has failed, the court is of the view that each party to bear their own costs the provisions of section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya notwithstanding. However, in respect of the plaintiff’s suit, his costs should be paid by the 1<sup>st</sup> defendant.

15. Flowing from the above conclusions, the court finds and orders as follows:

- a. That the necessary parties have failed to prove their counterclaim to the standard required by the law. The counterclaim is therefore dismissed with an order that each party to bear their own costs.
- b. The plaintiff has proved his claim on a balance of probabilities and judgement is hereby entered for him in terms of prayers (a), (b), (c), (d) and (f) of the plaint dated the 24<sup>th</sup> January 2013.
- c. That the 1<sup>st</sup> defendant to pay the plaintiff Kshs.100,000/= as general damages for trespass.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 1<sup>ST</sup> DAY OF NOVEMBER 2023.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Plaintiff: M/s Abdi for Odongo

Defendants : Mr. Muriuki for Opondi for 1<sup>st</sup> defendant.

Necessary Parties Mr. Hamza.

