



**Khadondi v Charo (Civil Suit 86 of 2013)**  
**[2023] KEELC 21451 (KLR) (8 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21451 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**CIVIL SUIT 86 OF 2013**  
**MAO ODENY, J**  
**NOVEMBER 8, 2023**

**BETWEEN**

**PATRICK KHADONDI ..... PLAINTIFF**

**AND**

**JAPHET NOTI CHARO ..... DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 29<sup>th</sup> May, 2013, the Plaintiff herein sued the Defendant seeking the following orders:
  - a. A declaratory order that the Plaintiff is the bona fide legal owner of all that parcel of land known as unsurveyed plot no 9 delineated in development plan no 150 (departmental reference no 55/MLD/5/2001) allocated as unsurveyed plot no 9 under the auspice of SABAKI SQUATTER UPGRADING.
  - b. An eviction order directed against the defendants by himself, agents, servants or anyone whomsoever from the subject land herein and the court bailiff assisted by the OCS Malindi to hand vacant possession thereof to the plaintiff.
  - c. An order of permanent injunction do issue against the defendant by himself, his agents, servants or anyone whomsoever acting under him from interfering with the subject land known as plot no 9 delineated in development plan no 150 (departmental reference no 55/MLD/5/2001) allocated as unsurveyed plot no 9 under the auspice of SABAKI SQUATTER UPGRADING, or the quiet enjoyment of the same by the Plaintiff, or conducting any dealings howsoever and in whatever manner without the consent of the Plaintiff.
  - d. Costs of the suit.
2. The Defendant filed a statement of defence and counterclaim dated 7<sup>th</sup> October 2015 seeking the following orders:-



- a. Vacant possession of all that land parcel known as portion no 14034 CR 52004 Malindi.
- b. A permanent injunction restraining the Defendant in the counter-claim from entering, remaining, trespassing, building, encroaching, alienating, selling and/or dealing with the suit property being land portion no 14034 CR 52004 Malindi in any manner whatsoever.
- c. Costs of this suit and those on the counter-claim.
- d. Interest at court rates on 3 above.
- e. Any other relief this Honourable court may deem fit to grant in the circumstances

### **Plaintiff's Case**

3. PW1 Patrick Khadondi adopted his statement dated 15<sup>th</sup> February 2019 and produced the documents annexed thereto as PEX 1-6. PW1 told that court that has been the legal and beneficial owner of all that parcel of Land known as un-surveyed Plot no 9 identified in the Development Plan no 150 (departmental reference no 55/MLID/5/2001 allocated under the auspice of Sabaki Squatter upgrading.
4. PW1 further stated that he has been in full and uninterrupted possession, occupation and utilization of the suit land from 1993 to date having been allocated by the Municipal Council of Malindi. It was his testimony that on or about the year 2010, he made an Application to the Commissioner of Lands for change of user of the land from commercial use in form of a bar and restaurant to the construction of a church when it was discovered that the land had been allocated to someone else in the names of S.K KENGA which prompted him to approach the Municipal Council of Malindi for clarification.
5. PW1 testified that the Municipal Council of Malindi arbitrated on the double allocation and inconsistency of records in the two offices i.e the Municipal Council records and the records at the Office of Commissioner of Lands, whereby they reached a compromise that S.K Kenga transfer his rights as the allottee of the Plot by the Commissioner of Lands to the Plaintiff. This culminated to a consent signed by both the Plaintiff and the said S.K Kenga dated 12<sup>th</sup> January 2011, and S.K Kenga agreed to transfer his interests to the Plaintiff and consented to it by appending their signatures.
6. It was PW1's evidence that he was in peaceful occupation of the suit property until 3<sup>rd</sup> March 2013 when the Defendant illegally entered the suit property attempting to evict him.
7. PW2 Luke Omondi a Land surveyor at the District Survey Office, testified that he made a report upon the Plaintiff's instructions to interpret the documents in respect to title deed for Plot no 14034 and a PDP for an unsurveyed plot no 9 Malindi. He stated that the PDP covered the area around Malindi Showground, Malindi Bus Park and other adjacent facilities. He added that the deed plan for Plot no 14034 described a different property, as it was a creation of subdivision no 546 Malindi that is located in Kivuhiu area, Mayungu about 8kms from Malindi.
8. According to PW2, the acreage indicated on the title to plot 14034 did not correspond to its physical location. On cross-examination, he told the court that Sabaki Squatter Upgrading Scheme is located in Sabaki.

### **Defendant's Case**

9. DW1 Japhet Noti Charo adopted his statement filed on 14<sup>th</sup> October 2015 and produced the documents in the list of documents dated 10<sup>th</sup> June 2013 as DEXH 1-8 and urged the court to dismiss the Plaintiff's case and allow his counterclaim as prayed.



10. On cross-examination, DW1 stated that he had given out the land to be used as a showground but did not have any documents to that effect. He further stated that he has not seen the survey report dated 9<sup>th</sup> July 2018 which indicates that the deed Plan is inconsistent with the Survey plan.
11. DW2 Tsuoma, a surveyor told the court he was requested to do a report on Plot no 14034 Malindi whereby he identified its physical location to be behind Epic Petrol Station, Malindi. According to DW2, the suit property was located about 5kms from Malindi Town.
12. On cross-examination, DW2 testified that he worked in the same office as PW2 and that PW2 saw his report before preparing his own report. He told the court that deed plan no 401352 was in reference to portion no 219322, which is a land in Kajiado. He explained that according to the map portion no 14034 was situated in Kajiado.
13. DW2 further stated that FR no 334/136 and 397/97 were both in Malindi behind Epic Petrol Station and Mayungu respectively. He added that Plot no 14034 was in Mayungu, about 3kms from Epic Petrol Station but LR 14034 behind Epic Petrol Station. He confirmed that he was in agreement with finding 4, 5 and 7 of the survey report by PW2 dated 9<sup>th</sup> July 2018.

#### **Plaintiff's Submissions**

14. Counsel reiterated the evidence of the Plaintiff and relied on the case of *Charterhouse Bank Limited (under statutory management) v Frank N. Kamau* [2016] eKLR, and submitted that the Plaintiff had adduced evidence to prove that he is the owner of the suit land which has not been controverted by the Defendant and urged the court to allow the prayers sought in the plaint.
15. Counsel also urged the court to dismiss the Defendant's counterclaim with costs.

#### **Defendant's Submissions**

16. Counsel listed 6 issues for determination by the court as follows:
  - a. Whether or not the plaintiff is the actual owner of plot no 9 delineated in development plan no 150(departmental reference no 55/MLD/5/2001 allocated as unsurveyed plot no 9 under auspice of SABAKI SQUATTER UPGRADING?
  - b. Whether or not the Defendant is the Registered owner of all that parcel of land known as LR no 14034 Malindi.
  - c. Whether plot no 9 delineated in development plan no 150(departmental reference no 55/MLD/5/2001 allocated as unsurveyed plot no 9 under auspice of SABAKI SQUATTER UPGRADING and land Reference number 14034 overlap each other?
  - d. Whether or not the plaintiff is entitled to the orders sought in his plaint?
  - e. Whether or not the Defendant is entitled to the reliefs sought in his counter-claim?
  - f. What orders as to costs?
17. On the first issue, counsel submitted that the Plaintiff might have been allocated the suit plot but does not have ownership documents. That whilst the Defendant had produced title documents, the Plaintiff failed to produce any ownership documents in support of his claim.
18. On the location of plot no 14034, and whether that plot and the suit property were overlapping, counsel urged the court to be guided by the Court of Appeal decision in *Samuel Otieno Otieno v*



*Municipal Council of Malindi* Civil Appeal no 135 of 2012 where the dispute was in relation to Sabaki Squatter Upgrading Scheme as is the case herein.

19. Counsel submitted that the Defendant is the registered owner of the suit plot having produced a Title deed in respect land parcel known as LR no 14034 Malindi in the names of JAPHET NOTI CHARO registered in Mombasa as CR no 52004.
20. Counsel urged the court to dismiss the Plaintiff's case and allow the Defendant's counterclaim with costs.

### **Analysis and Determination**

21. The issues for determination is whether the Plaintiff is the legal and beneficial owner of the suit property identified as Plot no 9 under PDP ref no 55/MLD/5/2001 Sabaki Squatter Upgrading Scheme, whether plot no 9 delineated in development plan no 150(departmental reference no 55/MLD/5/2001 allocated as unsurveyed plot no 9 under auspice of SABAKI SQUATTER UPGRADING and land Reference number 14034 overlap each other, whether the Plaintiff is entitled to the orders sought and whether the Defendant has proved his counterclaim.
22. The basis of the Plaintiff's claim was that he was allocated the suit property by the then Malindi Municipal Council. The Plaintiff further averred that as per the records in the office of the Commissioner of Lands, he discovered that the suit property had been allotted to one S.K. Kenga and through the intervention by the Municipal Council, the said Kenga agreed to transfer his interest to the Plaintiff vide a consent signed by both parties dated 12<sup>th</sup> January 2011.
23. This position was as per a letter dated 26<sup>th</sup> November 2010 by the Commissioner of Lands; letter dated 10<sup>th</sup> January 2011 from the Municipal Council to the Commissioner which was produced in court. The Defendant never controverted this evidence.
24. It should be noted that the evidence of PW2 and DW2 are crucial in this case as they were the surveyors who prepared reports on the location of the suit parcel of land. PW2 stated that the deed plan for Plot no 14034 described a different property, as it was a creation of subdivision no 546 Malindi that is located in Kivuhui area, Mayungu about 8kms from Malindi. Further, that the acreage indicated on the title to plot 14034 did not correspond to its physical location.
25. DW2 on the other hand agreed with the contents of PW2's report dated 9<sup>th</sup> July 2018 as stated above on the inconsistencies and further confirmed that the deed plan no 401352 was in reference to portion no 219322, which is a land situated in Kajiado.
26. The evidence by the two surveyors who were called by the Plaintiff and the Defendant respectively clarifies the location of the suit property and defeats the Defendant's claim that his parcel was surveyed and a grant no CR 52004 issued in his favour identified as LR no Portion no 14034 and under a deed plan no 401352. The witnesses explained that the identified plot is situated in Kajiado as per the records and the acreage do not tally with the physical location.
27. The Defendant did not have a Part Development Plan that comes with the letter of allotment. Showing the location of the property allotted. The procedure of allocation of land by the Commissioner of Lands has to be adhered to for a process to be valid.
28. Section 3 of the then Government Lands Act, only the President through the Commissioner of Lands had the power to make grants or disposition of any estate or interest over unalienated government land for various purposes. The Defendant neither explained how he acquired the grant nor produced a letter of allotment, or even a part development plan to show the exact location of the portion no 14034.



29. Before a grant is issued, a duly approved part development plan must be prepared and the Commissioner of Lands records must show the names of the allottees and thereafter a cadastral survey is carried out where the Director of Survey issues a reference number and a deed plan is prepared which should tally with the survey plan in all respects. The deed plan is annexed to the grant before it is issued to the allottee. There is no evidence that the Defendant followed these procedures and that is why he did not have a letter of allotment, deed plan and part development plan.
30. According to that report dated 9<sup>th</sup> July 2018, it is evident that the deed plan relied upon by the Defendant does not tally with the survey plan number; and that portion no 14034 Malindi was a result of subdivision of another portion identified as number 5468 Malindi, with a computation survey number 66036. The exact location being a different area identified as Kivulini, towards Mayungu area. The Defendant's own witness, a surveyor admitted as much.
31. In the circumstances, I find that the Plaintiff has proved that he is the legal and beneficial owner of the suit property. The Defendant's title had discrepancies, which were highlighted by the two surveyors called as witnesses for both parties.
32. The Plaintiff's case therefore succeeds and the Defendant's counterclaim is dismissed with costs to the Plaintiff. The court therefore makes the following specific orders:
  - a. A declaratory order is hereby issued that the Plaintiff is the bona fide legal owner of all that parcel of land known as unsurveyed plot no 9 delineated in development plan no 150 (departmental reference no 55/MLD/5/2001) allocated as unsurveyed plot no 9 under the auspice of SABAKI SQUATTER UPGRADING.
  - b. The defendant by himself, agents, servants or anyone whomsoever from the subject land herein do vacate the suit property within 45 days failure to which an eviction order to issue and the court bailiff assisted by the OCS Malindi to hand vacant possession thereof to the plaintiff.
  - c. An order of permanent injunction is hereby issued against the defendant by himself, his agents, servants or anyone whomsoever acting under him from interfering with the subject land known as plot no 9 delineated in development plan no 150 (departmental reference no 55/MLD/5/2001) allocated as unsurveyed plot no 9 under the auspice of SABAKI SQUATTER UPGRADING, or the quiet enjoyment of the same by the plaintiff, or conducting any dealings howsoever and in whatever manner without the consent of the plaintiff.
  - d. Costs of the suit to the plaintiff
  - e. Defendant's counterclaim is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 8<sup>TH</sup> DAY OF NOVEMBER 2023.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order no 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

