



REPUBLIC OF KENYA



**KENYA LAW**  
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**Teja & 5 others v Munga & 12 others (Environment & Land Case 62 & 109 of 2013  
(Consolidated)) [2023] KEELC 21159 (KLR) (1 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21159 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT & LAND CASE 62 & 109 OF 2013 (CONSOLIDATED)**  
**SM KIBUNJA, J**  
**NOVEMBER 1, 2023**

**BETWEEN**

**HAIDERALI POPAT TEJA ..... PLAINTIFF**

**AND**

**ALPHONCE MUNGA ..... 1<sup>ST</sup> DEFENDANT**

**MORRIS DZUYA ..... 2<sup>ND</sup> DEFENDANT**

**KASSIM ABDALLA ..... 3<sup>RD</sup> DEFENDANT**

**BARASA WESONGA ..... 4<sup>TH</sup> DEFENDANT**

**KAKUCHA CHENGO ..... 5<sup>TH</sup> DEFENDANT**

**KALUME CHEA ..... 6<sup>TH</sup> DEFENDANT**

**SULUHI KAHINDI ..... 7<sup>TH</sup> DEFENDANT**

**SAMMY KULUMBA ..... 8<sup>TH</sup> DEFENDANT**

**THOYA KAVIHA ..... 9<sup>TH</sup> DEFENDANT**

**BAKARI SAFARI ..... 10<sup>TH</sup> DEFENDANT**

**KENYA POWER & LIGHTING CO. LTD ..... 11<sup>TH</sup> DEFENDANT**

**MOMBASA WATER SUPPLY & SANITATION CO. LTD ..... 12<sup>TH</sup> DEFENDANT**

**AS CONSOLIDATED WITH**  
**ENVIRONMENT & LAND CASE 109 OF 2013**

**BETWEEN**

**FESTUS CHARO GONA ..... 1<sup>ST</sup> DEFENDANT**



SULUBU MWAVITA NGOMBO ..... 2<sup>ND</sup> DEFENDANT  
MRS RECHO MWALEKWA ..... 3<sup>RD</sup> DEFENDANT  
GONA CHONDO GONA ..... 4<sup>TH</sup> DEFENDANT  
JULIUS OKUMU ..... 5<sup>TH</sup> DEFENDANT

AND

HAIDERALI POPAT TEJA ..... DEFENDANT

*(Suing on their own behalf and on behalf of the squatters/residents of Kajiweni Estate, residing upon the suit property/plot No. 380/11/MN, Title No. CR.1921 numbering 120 people whose names appears in the Schedule of List of Members of Kajiweni Development Group attached to the Originating Summons)*

## JUDGMENT

### ELC CASE NO. 62 OF 2013.

1. The plaintiff in ELC NO. 62 OF 2013 initiated the suit through the plaint dated the 14<sup>th</sup> April 2013 and amended on the 13<sup>th</sup> May 2013 seeking for injunction orders against the 1<sup>st</sup> to 10<sup>th</sup> defendants to demolish all the semi-permanent structures on his land number MN/11/380 registered as title No. CR. 1921; the 11<sup>th</sup> and 12<sup>th</sup> defendants to remove all the electricity poles, wires, water pipes and fill up the trenches dug on the suit land; defendants to be restrained from interfering with his use of the said land; damages for trespass and costs. The plaintiff averred that he was the registered proprietor of the suit land measuring about 54 acres in Mshomoroni, Mombasa and that in or about 2011 the 1<sup>st</sup> to 10<sup>th</sup> defendants unlawfully and without his consent moved onto the land and erected structures. That the 1<sup>st</sup> to 10<sup>th</sup> defendants instructed the 11<sup>th</sup> and 12<sup>th</sup> defendants to connect electricity, water and sewerage lines on the suit land without his authority and hence this suit.
2. There appear not to have been any appearances and or defence filed in respect of the defendants in that case.

### ELC CASE NO. 109 OF 2013.

3. The plaintiffs commenced ELC NO. 109 OF 2013 through the originating summons dated the 27<sup>th</sup> May 2013 seeking that they be registered as proprietors in common of the land comprised in title No. 380/11/MN, CR. 1921 in place of the defendant, and that the defendant be permanently restrained from entering onto the said land or demolishing the developments thereon or in any other manner whatsoever interfering with the plaintiffs' peaceful occupation of the land. The summons was filed with the supporting affidavit sworn by Festus Charo Gona, the 1<sup>st</sup> plaintiff, on the 27<sup>th</sup> May 2013 deposing inter alia that he was born on the suit land some 38 years ago, and has lived on the land with his parents and other squatters their entire lives. That the defendant has no houses or other developments on the suit land and that he has never met him. That they have lived on the land openly and peacefully without interruption and are entitled to be registered as owners under adverse possession.
4. The defendant opposed the plaintiffs' claim through the "defendant's statement of defence dated the 29<sup>th</sup> October 2013 and replying affidavit sworn by Haiderali Popat Teja, the defendant, on the 1<sup>st</sup> November 2013 denying that the plaintiffs have been in continuous uninterrupted possession of the



suit property for more than 12 years. That he got to know of the plaintiffs' encroachment onto the suit land in 2011 and he filed ELC No. 62 of 2013 against them, and that they are trespassers and suit should be dismissed and they meet the costs of the suit.

5. The record confirms that the two suits herein were consolidated on application of the plaintiff in ELC No. 62 of 2013, who is also the defendant in ELC No. 109 of 2013, on the 14<sup>th</sup> March 2018 with directions that "the claim in 109 of 2013 shall be treated as a counterclaim. No. 62 of 2013 becomes the lead file..." The record further confirms that on the 18<sup>th</sup> January 2022, Mr. Amadi, counsel for the Plaintiff in ELC No. 62 of 2013 informed the court that the plaintiff had died. The matter was thereafter mentioned on the 7<sup>th</sup> February 2022, 12<sup>th</sup> July 2022, 26<sup>th</sup> September 2022, and 21<sup>st</sup> November 2022 to give the counsel time to file and serve an application to substitute the deceased plaintiff but none was filed. The matter was then confirmed for hearing on the 7<sup>th</sup> February 2023. The plaintiff in ELC No. 62 of 2013 and his counsel did not attend court and that suit was dismissed for non-attendance. The plaintiffs in ELC No. 109 of 2013 were allowed to prosecute their claim which was in terms of the consolidation order of 14<sup>th</sup> March 2018 to be treated as a counterclaim to the plaintiff's claim in ELC No. 62 of 2013.
6. In support of their case, the plaintiffs in ELC No. 109 of 2013 called Gona Chondu Gona and Sulubu Mwavita Ngombo, the 4<sup>th</sup> and 2<sup>nd</sup> plaintiff, who testified as DW1 and DW2 respectively. They also called Edward Kiguru, a surveyor, who testified as DW3. It is the testimony of DW1 that he moved onto the suit land, then vacant, in 1951 and has lived there with his family all his life. That other people also moved onto the said land and there are now about 260 people. That initially, the people were erecting semi-permanent houses but recently, some have started putting up permanent ones. That on the land is St. Bernard Primary School that was started in 2013 and another school whose name he could not recall had also started. On the land shops, water boreholes, mosque and a church whose denomination he could not recall have also been erected. The people living on the land have come together under Kajiweni Development Group that has been registered. That he occupies about 20 acres out of the 54-acre parcel. DW2 testified that he was born on the suit land in 1974 and has lived there since. That his parents occupy about 8 acres and he constructed his house next to that of his parents in 1997. That other people have also settled on the land and the registered owner has never come to interfere with their occupation. He testified that on the land are shops, mosque, church, 4 water boreholes, St. Bernard Primary School and St. Harris Primary School that have been erected on it. That they got to know about ELC No. 62 of 2013 after filing their case and serving the defendant through advertisement. That the people named as defendants in ELC No. 62 of 2013 do not reside on the suit land and are unknown to him. That they have been paying rates for the land to the then Municipal Council and now to the County Government. That they had prepared a document with the sizes of the portions of land occupied by each of the people on the suit land but had not come with it to court. DW3, the surveyor, told the court how he received instructions from the advocates representing the people settled on the suit land and prepared a survey report dated the 6<sup>th</sup> February 2017. He also obtained a goggle satellite maps of the property in 2017 and 2022 that show iron sheet roofed houses, a school in the middle, and a church at a corner among others.
7. The learned counsel filed his submissions dated the 18<sup>th</sup> April 2023 which the court has considered.
8. The following are the issues for the court's determinations:
  - a. Whether there is evidence of death of Haiderali Popat Teja, the plaintiff in ELC No. 62 of 2013 and defendant in ELC No. 109 of 2013, before the court, and if so, the date of his death and the legal implication to the suits.



- b. Whether the plaintiffs in this suit, ELC No. 109 of 2013, have established an adverse claim in accordance with the law over the suit property.
  - c. What orders to issue.
  - d. Who pays the costs.
9. The court has carefully considered the pleadings, oral and documentary evidence tendered, submissions by counsel and come to the following determinations:
- a. That this suit, ELC No. 109 of 2013, and the ELC No. 62 of 2013 that was filed earlier and later consolidated with is one on the 14<sup>th</sup> March 2018 had been filed in the year 2013 and relate to the same land Mombasa North/11/380 measuring about 54 acres, that is registered in the name of Haiderali Popat Teja. Haiderali Popat Teja was the plaintiff in ELC No. 62 of 2013 that was dismissed for non-attendance on the 7<sup>th</sup> February 2023 and the defendant in ELC No. 109 of 2013 that is subject matter of this judgement.
  - b. That as noted elsewhere above, the court was first notified on the 18<sup>th</sup> January 2022 that Haiderali Popat Teja had died on some undisclosed date. His counsel requested for and was granted time to take steps to substitute the deceased but no progress was made. I have in the process of preparing this judgement seen a copy of certificate of death number 673871 dated the 20<sup>th</sup> May 2002 indicating that Haiderali Popat Teja died on 12<sup>th</sup> March 2002 at the Aga Khan Hospital. This copy had not been brought to my attention by the time I made the order dismissing ELC No. 62 of 2023 on the 7<sup>th</sup> February 2023, and there is therefore need to revisit that order.
  - c. The certificate of death referred to in (b) above has serious ramifications to the two suits herein. This is because the suits were filed about eleven (11) years after the death of Haiderali Popat Teju, who died on 12<sup>th</sup> March 2002. It is inconceivable how the same Haiderali Popat Teju, having died on the 12<sup>th</sup> March 2002, came back to life to instruct M/s Ameli Inyangu and Partners Advocates, who filed ELC No. 62 of 2013 through the plaint dated the 14<sup>th</sup> April 2013 for him, and the verifying affidavit filed with the plaint and indicated to have been sworn by Haikderali Popat Teju and commissioned on the 15<sup>th</sup> April 2013 by Daniel M. Ngonze Advocate & Commissioner of Oaths as the certificate of death confirms he had died about eleven years earlier. Likewise, the said deceased could not have been the one who instructed M/s Ameli Inyangu & Partners Advocates to draw and file the defence dated 29<sup>th</sup> October 2013 in ELC No. 109 of 2013 and the replying affidavit sworn by Haiderali Popat Teju and commissioned by Veronica W. Nduati Advocate on 1<sup>st</sup> November 2013. The deponent signature on the replying affidavit has no obvious similarities with the verifying affidavit filed with the plaint in ELC No. 62 of 2013 though they are both meant to be by the same person, Haiderali Popat Teju. Had the fact of death of Haiderali Popat Teju on the 12<sup>th</sup> March 2002 been brought to the attention of the court on or before the 7<sup>th</sup> February 2023, the court would have struck out ELC No. 62 of 2013 instead of dismissing it for non-attendance. There is no way a dead person could have been expected to come physically in court for the hearing of his case, unless through a legal representative.
  - d. That while there is no evidence to show that the plaintiffs in ELC No. 109 of 2013 were aware that Haideral Popat Teju had already died by the time the sued him as the defendant, the fact that he had by then been dead for about eleven (11) years makes their suit a non-starter, null and void and therefore a nullity. Its trite that a dead person cannot be sued in his/her name



but through a legal representative. Had the fact that the said defendant had died long before the filing of this suit against him been brought to the attention of the court earlier, the court would have struck it out instead of wasting scarce judicial time and resources going through the process of hearing witnesses and writing this judgement.

- e. The need to safeguard the integrity of the court processes and the findings in (c) and (d) above commends to the court that investigations be carried out by the Directorate of Criminal Investigation [DCI], Mombasa County to among others confirm;
    - i. When Haiderali Popat Teju died.
    - ii. If indeed Haiderali Popat Teju died on the 12<sup>th</sup> March 2002 as indicated in the certificate of death detailed above, who instructed counsel to file the pleadings and affidavits in ELC No. 62 of 2013 and 109 of 2013 in the deceased's name.
    - iii. Whether the deponent's signature in the replying and verifying affidavits attributed to Haiderali Popat Teju, were his.
    - iv. Whether recognisable criminal offences have been committed in the transactions involving these two suits, and by whom.
  - f. That should there be sufficient evidence after investigations revealing that recognisable criminal offences were committed, the Directorate of Criminal Investigations [DCI], Mombasa County be at liberty to initiate the appropriate criminal prosecutions against the identified culprits in accordance with the law.
  - g. That having come to the above conclusions, the court finds there is no need to make a determination on whether or not the plaintiffs' claim on adverse possession has merit, as the person they sued as the defendant had died long before the suit was filed. There is therefore no defendant capable of being sued in this suit.
10. Flowing from the foregoing conclusions, the court finds and orders as follows:
- a. That as it is apparent Haiderali Popat Teju, the defendant, had died in 2002, about eleven (11) years before the filing of this suit, ELC No. 109 of 2013, the same is hereby struck out for being a nullity.
  - b. That the court on its own motion reviews and sets aside the order made on the 7<sup>th</sup> February 2023 dismissing ELC No. 62 of 2013 for non-attendance and in its place orders that the said suit be struck out for being a nullity.
  - c. That the ELC Deputy Registrar to urgently ensure a certified copy of this judgement together with certified copies of the pleadings and affidavits filed for and signed by the said Haiderali Popat Teju, and any other necessary documents in ELC No. 62 of 2013 and 109 of 2013, are forwarded to the Directorate of Criminal Investigations [DCI] Mombasa County for necessary investigations and action as ordered in 9 (e) and (f) above.

It is so ordered.

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

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

**ELC MOMBASA.**

In The Presence Of:



Plaintiffs/counterclaimants: Mr. Oyass for Obonyo

Defendant : No appearance.

Wilson – Court Assistant.

S. M. Kibunja, J.

Elc Mombasa.

