



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mwaleso v Mwangao & another (Cause 106 of 2021)
[2022] KEELC 4895 (KLR) (6 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 4895 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE**

CAUSE 106 OF 2021

AE DENA, J

JUNE 6, 2022

BETWEEN

SAID ALI MWALESO PLAINTIFF

AND

ABDALLA ALI MWANGAO 1ST DEFENDANT

ABDALLA ALI MWAKUTUNZA 2ND DEFENDANT

JUDGMENT

1. This suit was commenced by way of a plaint filed on 7th September 2018. The subject of the suit is land parcel Kwale/Maweche/89 (herein rereferred to as the suit property). The plaintiff claims that he is the registered owner of the suit property and that the defendants have trespassed into and constructed on the suit property. The plaintiff wants vacant possession, demolition of the structures constructed by the defendants and an order of permanent injunction against the defendants from inter alia trespassing or in any manner dealing with the suit property.
2. The 1st Defendant filed a statement of defence on 22nd October 2020 and denied that the claims that the plaintiff is the registered owner of the suit property. It is the 1st defendants' case that the plaintiff obtained the registration fraudulently. He further alleges that he rightfully and lawfully occupies part of the suit property which belonged to his uncle. He also averred that the suit was res judicata various previous cases filed in court on the suit property between the same parties.
3. That the plaintiff in response reiterated inter alia that the claim herein is for vacant possession and not ownership. That the plaintiff was illiterate and lacked any capacity to manipulate records at the land's office. It is also averred the allegations of fraud are speculative and a counterclaim ought to have been filed long time ago.
4. The suit was heard on 3rd February 2022, the plaintiff was represented by Mr. Kahindi advocate and the 1st defendant by Mr. Mutubia Advocate.



The Plaintiffs Case

5. PW1 was Said Ali Mwaleso the plaintiff a resident of Matuga and the only plaintiff witness at the trial. He told the court he was unemployed. He adopted the witness statement dated 27th August 2018 as his evidence in chief and produced a total of six documents as listed in the plaintiffs list of documents dated 4th September 2018. These were title for the suit property, Judgement in Miscellaneous Application (JR) No. 58 of 2011, Court Order dated 2nd October 2017, Affidavit of Service of Festus Kombe Mwarandu, Photos and Demand letter dated 16th August 2018. The witness statement basically reiterated the orders issued in the judicial review application which I will refer to later in this judgement.
6. PW1 testified that he served the defendants with the above order with expectation that the defendants would move out of the suit property, which they did not. Instead, they continued living, cultivating and planting permanent trees thereon causing him mental anguish an irreparable damage. He wanted the defendants out of the suit property, demolish their structures, uproot their trees and give vacant possession.

6 Upon cross examination denied that took the other family members land and registered it under his name. Others issues emerging from the cross examination will become apparent later in this judgement.

The Defence Case

7. DW1 was Abdalla Ali Mwangao the 1st defendant a farmer born in 1962 residing at mwawache Kinondo Kwale. He adopted his witness statement dated 17th November 2020 as part of his evidence in chief. According to the said statement it was his evidence that he was invited to the suit property (plot No. 88) by his uncle Ali Saidi Mwakutunza who purchased the same in 1974 before adjudication. That his uncle allocated him 12 acres therefrom where he planted trees, crops and constructed his dwelling house. That during adjudication his uncle Ali Saidi Mwakutunza occupied plot 88 while Said Ali Mwaleso who was Ali Said Mwakutunza's uncle encroached into plot no.88 by about 12 acres which he fraudulently registered as plot no. 89. Further that this is the 12 acres that he had lived on the suit property for over 30 years and since the year 2004. That he occupies 15 acres of the suit property of which the plaintiff had no right to claim and that though the plaintiff did not live on the land the balance of 55 acres belonged to the plaintiff.

Submissions

Plaintiff Submissions

8. It was submitted that Ali Said Mwakutunza the 1st defendant's uncle was not the registered owner of the suit property or any part thereof at the time he was invited by the 1st defendant to occupy the same. That the plaintiff had produced a copy of title deed for the suit property showing he was the registered owner. Citing section 26(1) of the *Land Registration Act* 2012 and Sections 107 and 108 of the *Evidence Act*, it was submitted that since the 1st defendant had challenged the plaintiffs title on the grounds of fraud the onus was on him to strictly prove the particulars of fraud pleaded and that the plaintiff was party to the alleged fraud.
9. That the 1st defendant had failed to discharge this burden of proof as he did not adduce any evidence of previous boundaries and acreage as well as their alteration by the plaintiff. Further that no evidence was produced to show any objection against the allocation of the suit property to the plaintiff during the adjudication process as provided under the *Land Adjudication Act*. Instead, the defendants filed a claim before the Land Disputes Tribunal whose decision was adopted by the Magistrates Court as its judgement and later quashed. That the defendants did not appeal these orders. Reliance was also placed



upon Kajiado ELC. No.95 of 2019 *PF Dave Flowers Ltd Vs Paul Kuya Kisoso & Others* In addition, it was contended that there was no proof of ownership of the 12 acres of land or any document from Ali Said Mwakutunza granting the same to the 1st defendant. Further that no evidence was placed before court showing that Ali Said Mwakutunza had been allocated the said 12 acres or any part of the land. Counsel further submitted that the 1st defendant had failed to implead or enjoin in this suit the land adjudication & Settlement Officer who he alleged to have connived with the plaintiff to amend the boundaries and acreage. It was pointed that plot No. 88/Maweche and plot No. 89/Maweche were distinct from each other and were not a portion of each other.

Defendants Submissions

10. The 1st defendant filed their submissions on 25th March 2022. Counsel submitted that the suit was res judicata since the plaintiff had filed many previous cases on the suit property against the defendant. That the defendant had occupied 15 acres of the suit property for 30 years and the plaintiffs claim over the said portion has been extinguished by way of adverse possession and that the order for eviction cannot issue. It was pointed that the land occupied by the defendant has never been owned, occupied or used by the plaintiff, as such the plaintiff had no right over it. That the plaintiff had failed to demonstrate how he acquired the title to the suit property when the defendants were in occupation of a portion thereof for over 30 years. That it was not possible in law for the plaintiff who had no house and did not occupy the suit property which was then government land during adjudication to be allocated the land. This court was urged not to shut its eyes on glaring irregularities in the registration of the suit property. It was further submitted that the defendants claim over the land was reinforced by the decision of the Land Disputes Tribunal which found that the portion belonged to the defendants.
11. It was contended that the authority of Kajiado ELC. No.95 of 2019 *PF Dave Flowers Ltd Vs Paul Kuya Kisoso & Others* was not applicable as it concerned the filing of a preliminary objection and the substantive issues of adverse possession and irregular registration were not in issue. Counsel urged that the plaintiffs claim had failed the test for grant of eviction orders. This court was urged to make a finding in favor of the defendant for the 15 acres he was in occupation of and rectification of the register and the defendant's registration in this regard.

Analysis And Determination.

12. I have carefully perused and considered the pleadings filed in this case, the oral testimonies of the witnesses and the evidence adduced at the trial. I have also considered the written submissions by counsels.

The plaintiff craves the following orders; -

- a. Vacant possession of the suit properties being all that registered parcel of land situated at Kwale/Maweche Shimba Hills within Kwale county in the Republic of Kenya and known as Title no. Kwale/Maweche/89 measuring 30 HA or thereabouts and an order of eviction of the defendants from the suit premises and demolition of any buildings or any plants erected by the defendants, its servants and or agents or any person claiming through the defendants.
- b. An order of permanent Injunction be issued against the defendants, restraining the defendants either by themselves, their servants and or agents or any person claiming through them from trespassing, encroaching, occupying, cultivating, erecting boundaries upon or constructing and structures transferring, alienating, disposing and or having any or dealing with all that registration portion of land known as Plot No.Kwale/Maweche/89 measuring approximately 30 Hectares or thereabout.



- c. Costs of this suit
 - d. Interest thereon at Court rates
13. The following issues are for determination in this claim; -
- a. Whether the plaintiffs claim is res judicata.
 - b. Whether the plaintiff is entitled to the reliefs sought in the plaint.
 - c. Whether the 1st defendant is entitled to the portion of the suit property he alleges to be in occupation.
 - d. Costs
14. The 1st defendant has contended that the plaintiffs claim is res judicata. From the proceedings in this file the issue of res judicata was the subject of a ruling delivered by Justice Sila Munyao on 12th November 2019. The three suits cited by the defendant were Kwale SRMCC Land Case No. 4 of 2003 and Kwale SRMCC No. 363 of 2010 and High Court Miscellaneous Application No. 58 of 2011 (Judicial Review). The court made a finding that the past decisions that the defendant was claiming were previous suits were all declared a nullity. That it is as if they were never filed and decided *ab initio* and did not qualify as previous suits for res judicata to apply. The defendant did not appeal this decision and cannot now be heard to raise the point again. I decline to entertain this objection. Even if I were to determine the same I would make the same finding as will become apparent shortly.
15. The plaintiff's case is that he is the registered owner of the suit property measuring about 30 Ha. That despite orders issued by the High Court on 4th September 2012 the defendants trespassed into and constructed on the suit property. A copy of the judgement of Miscellaneous Application (Judicial Review) No. 58 of 2011 and the court order dated 2nd October 2017 emanating therefrom were produced as evidence. In response to the defense of res judicata the plaintiff reiterated that ownership of the suit property was determined by a competent court which found the land Dispute tribunal as well as the subordinate court had no jurisdiction to determine land ownership. I will first put the matters into context from my reading of the judgement in (Judicial Review) No. 58 of 2011. In the JR proceedings the plaintiff sought review of the decision of the Coast Provincial Land Appeals Committee that was rendered of 29th October 2008. The appeal arose from a determination of the Msambweni District Land Disputes Tribunal pronounced in July 2002 and adopted by the Kwale Resident Magistrates Court in March 2003. The decision of the Msambweni District Land Disputes Tribunal was to subdivide the suit property between the plaintiff and his uncle's estate. From the judgement the main ground for review was that the Provincial Appeals Committee and the District Land Disputes Tribunal lacked jurisdiction under the Land Disputes Act to determine the issue of ownership of the suit property and to revoke title. The 3rd Respondent in the Judicial review proceedings was Abdalla Ali Mwangi and Abdalla Ali Mwakutunza who were sued in their capacities as legal representatives of Ali Said Mwakutunza. They were duly represented. Justice Edward Muriithi allowed the application and made the following orders; -
- a. That an order of certiorari is hereby issued as prayed to quash the order of Kwale Resident Magistrates Court in Land Case No. 4 of 2003 made on 27th April 2011 to subdivide the suit property.
 - b. That an order of declaration is issued declaring that the Land disputes Tribunal and the Provincial Land Appeals Committee have no jurisdiction to determine disputes relating to ownership of land and that therefore the respective decisions of 23rd July 2002 and 29th October



2008 adopted by the Kwale Resident Magistrates Court in Land Case No. 4 of 2003 on 12th February 2003 and on 27th April 2011 respectively, are illegal null and void.

- c. That an order of prohibition against the District Land Registrar Kwale from acting upon the orders of Kwale Resident Magistrates Court of 12th February 2003 and 27th April 2011.
16. The plaintiff pleads that despite serving the above High Court orders upon the defendants they continued to trespass, constructing therein basically using the suit property as they pleased. My understanding of the above orders is that the judicial review proceedings did not in my view resolve the contest between the parties as to the ownership of the suit property as the plaintiff would want this court to believe. The orders merely put back the applicant to the position he was in before the decision of the Land Disputes Tribunal, that is, the registered absolute proprietor of the suit property. In this regard the question that begs to be answered is whether the orders for vacant possession should issue on the basis of the said court order and the certificate of title? As regards the High court order the answer is in the negative for the reasons that the said orders only quashed the impugned award for want of jurisdiction. I will therefore proceed to address the issue of ownership.

Ownership of the suit property

17. The plaintiff testified that the suit property belonged to him and presented a copy of the certificate of title herein (see Land Certificate issued on 9th February 1987 to Said Ali Mwaleso). I have already put into perspective the issues surrounding ownership of the suit property and how this claim ended up in this court. Indeed, by dint of section 26(1) of the [Land Registration Act](#) 2012 registration is not absolute proof that a person is the legal owner of land especially when the title is under challenge. The title can be challenged on grounds of fraud or misrepresentation to which the said registered owner is proved to be a party as well if the said title has been acquired illegally, unprocedurally or through a corrupt scheme. But how did the plaintiff come to be involved in the suit property noting that he testified that he lives in Matuga and confirmed during cross examination that he was born in Matuga Chigato where he lives with his family and that, that is where his inheritance was. From my understanding of this entire claim it is by virtue of family or family relations. I say so because the plaintiff admitted during cross examination that all the parties or disputants are from one family. *The plaintiff also confirmed on re-examination that he treated the suit property as his from a family perspective and that he had informed the adjudication team as such.* Though on re-examination the plaintiff stated that he purchased the suit property for sugar cane farming and had to leave when the Ramisi sugar company collapsed. The plaintiff did not tender any evidence to show from whom he bought the land which takes me back to the family connection. He however has a certificate of title and this takes me to the defendant's contention that the title was obtained fraudulently. The plaintiff must also prove his title has been issued/procured in accordance with the law and laid down procedures. It is now trite that it is not enough that one dangles an instrument of title see [Daunchi Kiptugen Vs. Commissioner of Lands & 4 Others](#) (2015) eKLR.
18. The 1st defendant has pleaded in his statement of defence that the plaintiff connived with the Land adjudication & Settlement Officers in Kwale during the adjudication exercise in Maweche by unlawfully altering the land adjudication records, inserting the plaintiff's name into the register after the adjudication process had closed, removing the name of the late Ali Said Mwakutunza from the adjudication register without following the laid down procedure and interfering with public records. The burden of proof was therefore upon the defendants to prove these allegations. DW1 testified that he was invited to a portion of the suit property he refers to as plot No. 88, by his uncle Ali Saidi Mwakutunza who had bought the land before adjudication. That the said Ali Saidi Mwakutunza allocated him 15 acres, (it is noteworthy that 12 and 15 acres have featured in the pleadings and



submissions which I will not address for now) where he has lived for over 30 years. Further that the plaintiff had no right to claim the said portion after his uncle died. He confirmed on cross examination that he was on the suit property during adjudication and had a house thereon. He clarified that he had lived on the suit property for over 30 years and not since 2004 as stated in his witness statement. It is noteworthy that this clarification is further buttressed by the plaintiff during re-examination when he stated that the 1st defendant came into the suit property in 1995. On cross examination PW1 confirmed that Ali Saidi Mwakutunza was his uncle and who is the father of the 2nd defendant lived on the suit property before adjudication and after adjudication. That the adjudication officials found the said Ali Saidi Mwakutunza on the suit property. Also, that the 2nd defendant is like his brother, that the 1st defendant was a family member and the houses seen in the photos (see plaintiffs bundle of documents) actually belonged to the 1st defendant. The plaintiff admitted that the 1st defendant came to the suit property before Ali Saidi Mwakutunza died. He however denied that he took the other family members land and registered it under his name. It was submitted for the plaintiff that no evidence was adduced by the 1st defendant showing that the late Ali Said Mwakutunza had been allocated part of the suit property or the 12 or so acres of land during the registration exercise and his name removed. In my view this cannot hold since the plaintiff confirmed on reexamination that the 1st defendant has been on the suit property since 1995 (this is 32 years.) In response Counsel for the defendant invited this court to ponder how it is possible that one would be left out during the adjudication exercise under these circumstances. From my reading of the pleadings and oral evidence it is clear the suit property was a family land owned by the relatives of the parties herein. The deceased it is confirmed by both the plaintiff and the 1st defendant had lived on the suit property and was there during the time of adjudication. During his oral testimony DW1 informed this court that he occupies 15 acres of the suit property and that though the plaintiff did not live on the land the balance of 55 acres belonged to the plaintiff. Therefore, as family land it must have encompassed all the family members herein. I agree with counsel that the deceased including the defendants cannot possibly have been left out especially considering that they were the ones actually on the ground. It cannot suffice as a defence that the Land Adjudication Officer was not enjoined as submitted by Counsel for the plaintiff considering that under the provisions of Order 1, rule 9 of the *Civil Procedure Rules* the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. I find that this was family land encompassing all the parties and the defendants were also properly on the land.

19. I will at this juncture also deal with the defence of adverse possession as raised by the 1st defendant in his witness statement and submissions by counsel for the plaintiff. I have already analyzed the issue of occupation in the foregoing discussion and I will not belabor this point. The plaintiff has lived on the portion he claims for over 30 years and there has been no actual eviction by the plaintiff. Even at the time of the plaintiff filing this claim for eviction in September 2018 the statutory limitation period of 12 years in respect of this portion had crystalized. This has been litigated in numerous cases such as the Court of Appeal in *Chevron (K) Ltd Vs. Harrison Charo Wa Shutu* (2016)eKLR and *Gulam Mariam Vs Charo Karisa and Kuria Kiarie & 2 Others Vs Sammy Magera* (2018) eKLR to mention just but a few. I thus make a finding that the plaintiff has no claim over the portion claimed by the 1st defendant.
20. Having found the above I will now consider the allegations of fraud as particularized at the opening of paragraph 18 of this judgement. I will reiterate my analysis therein which also speaks to this point. From the foregoing and in the circumstances of this case I do not see how the plaintiff may have been registered as the owner to the entire suit property unless his knowledge and participation in the fraud. In any case there is no evidence on how the plaintiff obtained the title.
21. I must now deal with the issue of the acreage of the portion occupied by the defendant having found in his favor in this regard. In the pleadings and proceedings, the portion seems to oscillate around 12



acres and 15 acres. I will be guided by the pleadings since it is now trite that a party is bound by their pleadings. The 1st defendant at paragraph 5 of the statement of defence dated 17th November 2018 pleads to 12 acres or thereabouts and has consistently alluded to this portion. Therefore, I make a finding that it is 12 acres as against the 30HA appearing in Land certificate herein.

22. This suit was filed against two defendants. The firm of Sherman Nyongesa & Mutubia entered appearance for both the defendants on 12th November 2018. On 22nd October 2020 the said firm filed a written statement of defence dated 21st October 2020. At first, I thought it was a simple error but upon perusal of the same was satisfied that the defence was only in respect of the 1st defendant. I have perused the file and have not come across any defence filed on behalf of the 2nd defendant. I also perused the proceedings where the matter was before court and there has been no mention of what may have happened to the 2nd defendant. I noted that in JR 58 of 2011 (see SAM 3 the defendants herein Abdalla Ali Mwangao and Abdalla Ali Mwakutunza were sued as 3rd Respondents in their capacities a Legal Representatives of Ali Said Mwakutunza (deceased). I will therefore proceed on this basis and that the 1st defendant is claiming the 12 acres being his own portion where he lives as given to him by the deceased.
23. Having found that the suit property is family land I hereby decline to issue an order of eviction and issue the following orders as the judgement in this suit which in my view will serve justice; -
1. A declaration that the plaintiff is the lawful owner of 18HA share of the land at Kwale/Maweche Shimba Hills within Kwale county in the Republic of Kenya and known as Title No. Kwale/Maweche/89 measuring 30 HA.
 2. A declaration that the 1st defendant is the lawful owner of 12 acres share of the land at Kwale/Maweche Shimba Hills within Kwale county in the Republic of Kenya and known as Title No. Kwale/Maweche/89 measuring 30 HA.
 3. An order that the plaintiff do sign all the requisite and/or transfer forms transferring 12 acres of Title No. Kwale/Maweche/89 measuring 30 HA. to the 1st defendant and in default the Deputy Registrar shall sign all the requisite and/or transfer documents transferring the said 12 acres.
 4. An order that the plaintiff shall deliver to the Land Registrar the Certificate of Title dated 9th February 1987 for Kwale/Maweche/89 measuring 30 HA. for cancellation.
 5. Each party to bear their own costs.

DELIVERED AND DATED AT KWALE THIS 6TH DAY OF JUNE 2022

A.E. DENA

JUDGE

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

Mr. Kahindi holding brief for Mr. Mwarandu for the Plaintiff

Ms. Thaka Holding brief for Mr. Mutubia the Defendant.

Mr. Denis Mwakina- Court Assistant.

