



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 7 OF 2013

IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOM, IN ARTICLES 19, 20, 21, 22, 27, 28, 31 AND 40 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE CONSTITUTION IN ARTICLE 2, 3, 60 AND 64

AND

IN THE MATTER OF: THE REGISTRATION OF TITLES ACT (REPEALED) AND THE LAND REGISTRATION ACT (2012)

BETWEEN

MOHAMED SADEEQUE KHAN.....PETITIONER

VERSUS

- 1. ALI DIDI ABOUD.....1ST RESPONDENT**
- 2. PASTOR NGANGA T/A/ WATAMU WORSHIP CENTER (G.O.C)....2ND RESPONDENT**
- 3. ATHMAN SHAIBU SHOSHI.....3RD RESPONDENT**
- 4. A.O ATHMAN.....4TH RESPONDENT**
- 5. MULKI HASSAN.....5TH RESPONDENT**
- 6. MOHAMED HERI.....6TH RESPONDENT**
- 7. MWANAISHA MOHAMED.....7TH RESPONDENT**
- 8. OMAR FUNDI.....8TH RESPONDENT**
- 9. HASSAN ABDULLAH.....9TH RESPONDENT**
- 10. JACKLINE MWANIA.....10TH RESPONDENT**
- 11. ANNASTACIA KAHAMA.....11TH RESPONDENT**
- 12. HILDAGAD GASHAMBA.....12TH RESPONDENT**

13. JOIYCE NYOKAB.....	13 TH RESPONDENT
14. BWANA FAE USTAHIDI.....	14 TH RESPONDENT
15. EMMANUEL CHARO TINGA.....	15 TH RESPONDENT
16. HELLEN MURUNGI.....	16 TH RESPONDENT
17. HELLEN MAKEBA.....	17 TH RESPONDENT
18. SAID BWANA.....	18 TH RESPONDENT
19. BARAKA KABERIA.....	19 TH RESPONDENT

JUDGMENT

Background

1. By his Petition dated 3rd May 2013 as amended on 16th July 2013, Mohammed Sadeeqe Khan prays for the following reliefs against the 19 Respondents listed herein:

1. It be declared that the Respondents have contravened the Petitioner’s right to property under Article 40(1) and (3) of the Constitution;

2. An injunction order restraining (all) the Respondents whether by themselves or through their employees, servants and/or agents from erecting any buildings, structures, fencing, or in any other manner interfering with Plot No. 807 situate in Watamu;

3. A mandatory order directed at (all) the Respondents directing them to demolish all existing structures on Plot No. 807 situate in Watamu.

4. A declaration that the Petitioner is the lawful and legal owner of the land comprising of Plot No. 807 and that the Respondents have illegally encroached upon the same thereby violating the Petitioner’s Constitutional rights over the suit property;

5. An injunction restraining (all) the Respondents whether by themselves or through their servants, employees and/or agents from in any way obstructing and/or interfering with the survey of the suit property and re-establishment of beacons;

6. It be declared that the Respondents have committed trespass to land;

7. General damages

8. Costs of this suit.

2. Those prayers arise from the Petitioner’s contention that he has been the registered proprietor of the suit property measuring 1.009 Ha since 1st July 1993. At the time he purchased the property, there was one illegal structure thereon belonging to the 1st Respondent who was then a powerful KANU Councillor. The other Respondents have since erected structures and other developments on the land at the invitation and upon assurance by the 1st Respondent.

3. The Petitioner avers that he has had immense problems in obtaining vacant possession of the suit property as the 1st Respondent used his political clout at the time to stage violent demonstrations using local youths to lock him out of the land and the Petitioner had a real apprehension for his security and safety. By an agreement with the Petitioner dated 26th September 1996, the 1st Respondent agreed to accept Kshs 400,000/- from the Petitioner as full and final settlement of his claim in respect to the developments on the land. Instead, he invited the 2nd to 19th Respondents to the property under the pretext that he has a legitimate interest therein.

4. The Petitioner further avers that on 5th January 2009, he reported the illegal occupation and encroachment to the Watamu Chief’s Office but no action was taken on the Respondents. It is his case that by virtue of the illegal encroachments on his land, the Respondents have violated his rights under Articles 27, 28, 31 and 40 of the Constitution and hence the reliefs sought herein.

5. In their Answer and Response to the Petition dated and filed herein on 5th August 2013, the original five Respondents-Ali Didi Aboud, Pastor Ng’ang’a T/A Watamu Worship Centre (G.O.C) and Mulki Hassan deny that the Petitioner is the lawfully registered proprietor of Plot No. 807 Watamu CR No. 27676.

6. In particular, 1st to 5th Respondents aver that:

- a. **The Petitioner's said registration is unlawful, null and void and at best unconstitutional;**
- b. **The alleged Grant was unlawfully obtained and lawful methods to acquire the same were not followed;**
- c. **At the registration of the Petitioner, the Respondents were lawfully in occupation and use of the said Plot with permanent buildings erected thereon for more than 30 years;**
- d. **The Petitioner has never had physical occupation of the land; and**
- e. **The alleged grant in favour of the Petitioner relates to an area that has been planned for squatter settlement by the Government.**

7. Accordingly and while they admit having permanent development on the land, the Respondents deny that the same are illegal and or that they were done on the invitation of the 1st Respondent. They further assert that the said developments were duly permitted by relevant Government departments contrary to the Plaintiff's contention that the same are wrongfully and illegally erected.

8. The Respondents further aver and maintain that if the Court finds the Petitioner's grant lawful, then they have become owners of the land by way of adverse possession and are entitled collectively to be registered as proprietors thereto having been on the land for more than 30 years. Accordingly, the Respondents urge the Court to determine and declare that:

- a. **The grant of Plot No. 807 Watamu CR No. 27676 to the Petitioner was irregular, wrongful and illegal;**
- b. **The Respondents and other residents of Watamu in occupation of the land are thereat lawfully and regularly;**
- c. **An order that Plot No. 807 Watamu CR No. 27676 is a nullity and void ab initio and that the same be ordered cancelled and/or annulled by this Court;**
- d. **In the alternative a declaration that the Respondents and other residents are entitled to possessory and occupational rights to the land by way of adverse possession;**
- e. **In the alternative an order that the Respondents and other occupiers of the land be registered as proprietors of Plot No. 807 Watamu CR 27676 by way of adverse possession and an order be issued cancelling and/or annulling the title in favour of the Petitioner; and**
- f. **An order that the Petition be dismissed with costs to the Respondents.**

9. While the 6th to 19th Respondents were enjoined in these proceedings following the Amendment of the Petition on 16th July 2013, I was unable to find any response on their part to the Petition.

The Petitioner's Case

10. The Petitioner (PW1) testified as the sole witness in his case. Relying on his Affidavit sworn and filed in support of the Petition herein, the 81year old resident of England testified that he purchased the suit property in October 1995 and is presently the registered proprietor thereof.

11. PW1 testified that when he purchased the property there was one illegal structure thereon belonging to the 1st Defendant- Ali Didi who was a powerful KANU Councillor in Watamu at the time. He told the Court he had a difficult time obtaining vacant possession as the 1st Defendant used his political clout at the time and rallied youths to stage violent demonstrations to lock PW1 out and prevent him from taking possession of the land.

12. PW1 told the Court that he then entered into a written agreement with the 1st Defendant dated 26th September 1996 wherein the 1st Defendant agreed to accept the sum of Kshs 400,000/- in full and final settlement of his claim in respect of the developments he had done on the suit property and thereafter vacate the same. The 1st Defendant however failed to honour the agreement and instead continued to build structures on the land. He then invited the other Defendants who equally built structures on the land on the pretext that he had a stake on the land.

13. PW1 told the Court that as at the time he filed the suit, there were 12 illegal structures thereon erected without the prior permission or approval of himself or the Municipal Council of Malindi. On 5th January 2009, PW1 reported the illegal occupation to the Chief's Office Malindi. The Chief confirmed that the land had been invaded by squatters. Due to the resistance of the Respondents, PW1 told the Court he has been unable to survey the property and re-establish beacons thereon.

14. On cross-examination, the Petitioner told the Court he bought the land from one Shedrack Kiptugen. He went to the Commissioner of Lands with Mr. Kiptugen and was issued with the Grant. PW1 conceded that he did not have a copy of the allotment or the application for allotment and that he only had the title and deed plan as some of his documents were stolen.

15. PW1 further testified that he was shocked to find someone on the land after buying it. When he went to the land in 1995/1996, he was chased away by some people on the land. While he was aware the land was initially a re-creation park for children, he was unaware that it

had been set aside as a settlement scheme. There were now many people there and he got the names of the 19 Respondents herein from the Surveyor.

The Respondents Case

16. The Respondents equally called one witness in support of their case.

17. DW1-Athumani Shahibu Shossi is the 4th Respondent and a resident of Watamu. Relying on his statement filed herein on 14th October 2015, DW1 testified that his father Shaibu Shossi was a beneficial owner of part of the suit property having acquired the same from 1970. His father built a house on the land and their whole family lived thereon. That house is now occupied by DW1's brother Yusuf. DW1 was also allocated a plot on the land where he has now built his house.

18. DW1 denied that the Petitioner is the lawfully registered proprietor of the land. He told the Court there were several permanent buildings on the land built by other people some of whom had not been sued herein. Many of them including DW1 had since been recognized by the Government as genuine settlers thereon to the extent that the Government prepared a Part Development Plan for squatter settlement thereon.

19. DW1 testified that the Petitioner's grant was unlawfully obtained as at the time of registration, the Respondents were already lawfully occupying and using the property. He told the Court the Petitioner has never had physical occupation of the land or carried out any development thereon and he was therefore not entitled thereto.

20. On cross- examination, DW1 testified that the 1st Respondent is their former Councilor. He however denied that the 1st Respondent resides on the suitland. He told the Court he could not remember when the land was turned into a settlement scheme but thought it started around the year 2000. DW1 further told the Court that they were selling the land because it belonged to them having occupied it for more than 30 years. He conceded that he had nothing to show their houses had been built with the approval of the Municipal Council of Malindi.

Analysis and Determination

21. I have perused and considered the pleadings herein, the oral testimonies of the witnesses and the evidence adduced at the trial. I have equally benefitted from the written submissions as placed before me by Mr. Khan, Learned Counsel for the Petitioner and Mr. Kilonzo, Learned Counsel for the Respondent.

22. The Petitioner herein prays for a number of declarations and injunctive orders in respect of all that parcel of land measuring 1.009 Ha situated in Watamu Township within Kilifi County and more particularly known as Plot No. 807 (Grant No. CR 27676). The Petitioner told this Court that he bought the said parcel of land from the original allottee-one Shedrack Kiptugen and was registered as the proprietor thereof on 3rd October 1995.

23. The Petitioner told the Court that shortly after purchasing the property, he was shocked to learn that a section thereon was already occupied by Ali Didi Aboud, (the 1st Respondent herein) who was then a powerful Councillor and a member of the then ruling party KANU. He told the Court that his efforts to obtain vacant possession were frustrated from time to time by the 1st Respondent who used his political clout to stage violent demonstrations using the local youths to lock him out of the land.

24. In an effort to win over the 1st Respondent, the Petitioner told the Court that he was compelled to enter into a written agreement with him on 26th September 1996 wherein the 1st Respondent agreed to be compensated with a sum of Kshs 400,000/- for the developments he had made on the land upon which the 1st Respondent would relinquish his interest therein. Contrary to the terms of the said agreement, the Petitioner told the Court that the 1st Respondent instead started inviting his co-respondents onto the suit property on the purport that he had a stake thereon.

25. The 2nd to 19th Respondents thereafter invaded the suit property and put up structures and unauthorized houses thereon and have refused to vacate the land. By reason of the foregoing, the Petitioner accused the Respondents of infringing upon his Constitutional right to equal protection and equal benefit of the law, his right not to have his property and possession seized and the right not to be arbitrarily deprived of his property as prescribed under Articles 27, 31 and 40 of the Constitution.

26. But the Respondents dispute the Petitioner's claim to the suit property. According to them, they have used and occupied the suit property for more than 30 years. Contrary to the Petitioner's averments, the Respondents told the Court that they were in lawful occupation of the suit property and had indeed erected permanent buildings thereon by the time the suit property was getting registered in the Petitioner's name.

27. The Respondents therefore maintain that the Petitioner's registration as the owner of the suit property is unlawful, null and void and to say the very least, unconstitutional. They told the Court that the suit property was previously known as public utility area Plot No. 7 which Plot the Government later on set aside for Squatter Settlement and upgrading. It was therefore their case that the Petitioner had not followed the lawful steps in acquiring such a property and as a result the resultant grant had been unlawfully obtained.

28. On the other hand, the Respondents contended that even if the said grant was to be deemed lawful, they had occupied the suit property an uninterrupted for period in excess of 30 years and that as a result, the Petitioner having not occupied the property for all that time, his title had been extinguished by operation of the law and the Respondents had acquired title thereto under the doctrine of adverse possession.

29. From the material placed before me, it was not in dispute that the Petitioner had on 3rd October 1995 been issued with Grant No. CR 27676 for the said Plot No. 807, Watamu under the Registration of Titles Act, Cap 281 of the Laws of Kenya (now repealed). The Respondents have attacked the Petitioner's registration terming it unconstitutional, unlawful, null and void on the basis that the Petitioner did

not follow lawful procedure to acquire the same.

30. Testifying before this Court, the Respondents' sole witness Athuman Shaibu Shossi (DW1) told the Court that prior to its allocation, the suit property was a public utility land, a picnic playground for children and that thereafter the same was set aside as a Squatter Settlement Scheme. As it were however, the Respondents did not produce any evidence to demonstrate either that the land was previously a public utility playground and/or that it was subsequently so set aside by the Government for purposes of Settlement of Squatters.

31. As provided under Section 109 of the Evidence Act, *the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

32. I have looked at all the correspondences and documents produced by the Respondents herein but was unable to find any that makes reference to the parcel of land as being either a public playground or having been set aside for the Settlement of the Respondents as squatters. All that is revealed by the correspondence is that at some point in time in the year 2000, the Respondents or some of them made efforts to have the suit property allocated to themselves on the basis that they had already developed the same.

33. The Respondents scheme appears to have had the tacit backing of some officials from the Ministry of Lands Headquarters in Nairobi. In this respect and by a letter dated 9th February 2000, one S.P.N Gathongo for the Commissioner of Lands addressed the District Lands Officer, Kilifi as follows:

“Re: Application For Residential Plots already Permanently Developed by the Applicants-Watamu Township-Malindi

Please refer to your copy of my letter Ref. 35336/XIII/50 dated 18th January, 2000 and should be grateful if you would visit the area and let me have your ground report to enable me take further action.”

34. By another follow up letter written by the same S.P.N. Gathongo less than a week later on 15th February 2000 to the District Lands Officer, Kilifi, he writes as follows:

“Re: Application for Residential Plots Already Permanently Developed-Watamu Township-Malindi Plot No. 807-Mohammed Sadia Khan

I enclose herewith a copy of the plan showing the above plot and should be grateful if you would inspect the site and let me have the ground report to enable me take further action.”

35. In response to those two letters, the then Kilifi District Land Officer Njamwea Mercy wrote to the Commissioner of Lands on 24th March 2000 as follows:

“Re: Watamu Township (Malindi) Plot No. 807-Mohamed Sadia Khan

Your letter Ref No. 35336/XIII of 15th February 2000 refers.

Plot No. 807 has entirely been “re-subdivided” into smaller plots and there is a permanent development in that: -

As shown on the attached Sketch Plan, Plot IX is a permanent Church of the Kenya Assemblies of God.

Plots I-V, VIII to XI are having each three bedroomed permanent residential houses which are all occupied and well maintained with clean tree/flower planted compounds.

Plot VI and VII are under construction and its (sic) only roofing which is remaining.”

36. From a perusal of the above correspondence, all of which were not copied to the Petitioner, it was evident that both those who had applied for the so-called “residential Plots” and the officials from the Ministry of Lands were indeed aware not only that the land in question was not public land as claimed but that it was private and was registered in the name of the Petitioner herein.

37. That being the case the only way the Government could have initiated a process of a Squatter Settlement Scheme as purported by the Respondents would be through the revocation and cancellation of the Petitioner's title to the land. That is a process that would have required the Government with appropriate notice to the Petitioner to move the Court to revoke, cancel or rectify the title and the Petitioner would then be entitled to compensation. It was otherwise not open for the officials at the Ministry of Lands to just wake up and revoke or cancel or even refuse to uphold the Petitioner's title to the land on account that other individuals had built thereon and or were in the process of constructing houses thereon.

38. As it were, the Petitioner's case is grounded on the fact that he has an absolute and indefeasible title that is capable of protection under Article 40 of the Constitution and the Laws of this Country. Article 64 of the Constitution defines private land as “registered land or land held by any person under freehold or leasehold tenure or any other land declared private land under an Act of Parliament.

39. While the Respondents alleged that the Petitioner's title was unlawfully obtained, they did not place anything before me to demonstrate that the same had been obtained in a manner that was unlawful. Having known of the existence of the title as far as back as the year 2000

when they engaged in the above correspondence, they took no steps to try and impeach the same on account of the alleged grounds of irregularity and only raised the issue some 13 years later after the Petitioner brought them to Court.

40. As the Court of Appeal observed in *Dr. Joseph N.K. Arap Ngok –vs- Justice Moiwo Ole Keiwua & 5 Others Nairobi CA No. 60 of 1997(unreported)*:

“Section 23(1) of the (Registration of Titles) Act gives an absolute and indefeasible title to the owner of the property. The title of such owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya will be placed in jeopardy.”

41. Having found that the Petitioner holds a valid title to the suit property, I must now turn my attention to the Respondents’ prayer in the alternative that they have since acquired title to the suit property under the doctrine of adverse possession. That doctrine is embodied under Section 7 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya as follows:

“An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

42. Explaining the doctrine in *Mtana Lewa –vs- Kahindi Ngala Mwamgandi (2005) eKLR*, the Court of Appeal stated that:

“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years.”

43. The Learned Judges of Appeal went further and stated that:

“Before one can claim title to land by adverse possession and apart from proving 12 years of uninterrupted, open and peaceful possession, certain strictures must be satisfied. Those strictures are summarized in the Latin maxim, nec vi, nec clam, nec precario, that, one’s possession has not been through use of force, not in secrecy and without the authority or permission of the true owner. In terms of Section 38 of the Limitation of Actions Act, where a person claims to have become entitled by adverse possession to land he must apply to the High Court for an Order that he be registered as the new proprietor of the land in place of the registered owner. It is therefore not automatic that once all the elements of adverse possession have been met, the possessor, without more becomes the new owner.”

44. In the instant matter before me, the Respondents averred that they have been on the suit property for a period exceeding 30 years. While it was admitted that as at the time of filing this Petition they all had some permanent buildings or other structures on the land, no evidence was placed before this Court as to when each and everyone of them put up the said structures and the exact measurements thereof.

45. In his testimony before this Court, the Petitioner asserted that upon acquiring title to the suit property, he found one shack owned by the 1st Respondent who was then a Councillor of the area. He told the Court that he later on entered into an agreement with the 1st Respondent on 26th September 1996 upon which the 1st Respondent agreed to relinquish his interests on the land upon payment of the sum of Kshs 400,000/-. According to the Petitioner, the 1st Respondent later on reneged on the agreement and instead invited the other Respondents to invade the property.

46. The 1st Respondent did not testify herein. While it was clear that as at 1995/1996, the 1st Respondent was on the suit property, it remained unclear when the other Respondents entered the land. Incidentally in his testimony before this Court, the Respondents sole witness denied that the 1st Respondent resides on the suit property. But while they denied being on the land at the invitation of the 1st Respondent, none of them offered any evidence as to when exactly and how they came to be on the land.

47. That notwithstanding, it was evident that as at the year 2000, the Respondents were not only on the land but some of them had built permanent houses thereon. That was around the time the Respondents sought to be allocated the suitland. Arising from the correspondence between the parties, it was therefore not in doubt that the Respondents had been on the land for about (13) years by the time the Petitioner filed this suit.

48. As to whether that occupation extinguished the Petitioner’s rights and interest on the suit property, one need not go far but to look at the dictum of the Court of Appeal in the *Mtana Lewa Case (Supra)*. From the material placed before me, there was again no doubt that over this period of time, the Petitioner had made efforts to take back his land in vain. While the Petitioner did not present any evidence of the violent protests that he claimed were instigated against himself by the 1st Respondent, there was sufficient evidence to demonstrate that the Respondents had held onto the land by sheer force and the concomitant threat of violence.

49. From the Respondents’ documents filed herein on 10th August 2016, the Petitioner’s then Advocate Swaleh & Company had written to some nine (9) of the Respondents herein on 27th January 2007 as follows: -

“Re: Plot No. 807 Mohamed Sadiq Khan Watamu

We have been appointed by our above named client with instructions to write to you as follows:

That you have illegally trespassed onto our client's plot and put up your structures without any authority or permission from our client.

Please be warned that your action is illegal and has no basis in law or at all. Our instructions are that unless you demolish your structures and clear the area within the next 30 days, we shall proceed to Court at your own risks as to costs and consequences arising therefrom."

50. In their response to that letter three days later Messrs Malonza & Company, Advocates for the Respondents wrote on 31st January 2000 to the Petitioner's Advocate as follows:

"Re: Yusuf Mwalimu & Others-Our Clients and Mohamed Sadique Khan- Plot No. 807

Your letter dated 27/1/2000 addressed to our above named Clients refers.

We are instructed that our Clients are rightful owners and occupiers of the subject property for over thirty (30) years. Our Clients have permanent houses and have carried out extensive developments on the said property. Our Clients maintain that they are not trespassers and shall not vacate their property. Any action taken shall be resisted."

51. On the same day and by a separate copy, the same Respondents Advocate wrote a letter to the Town Clerk, Malindi Municipality and the District Land Officer Kilifi on the same issue as follows:

Re" Plot No. 807 New Watamu

We act for numerous persons of the family of Shaibu Shosi Fahman who have occupied the above stated piece of land for over thirty (30) years now and have put up permanent houses and extensive developments thereon.

We are instructed that there has been unlawful attempt to allocate this particular piece of land to persons other than the developers/occupants. The matter has been taken up with the Commissioner of Lands and other relevant bodies.

Please confirm that our Clients interests are protected to avoid confrontation."

52. While this Court may have dismissed such threats as the usual banter that parties may engage in, it was not lost on this Court that the Respondents have themselves confirmed their resolve to forcefully and violently keep the Petitioner away from the suit property even in their pleadings before this Court. At Paragraphs 10 and 12 of the Respondents' Answer and Responses to the Petition filed herein on 5th August 2013, the Respondents aver as follows:

"10. The Respondents deny the averments in paragraphs 18, 19, 20, 21 and 22 of the Petition and puts the Petitioner to very strict proof thereof. The Respondents aver that for having been in occupation of the land for over 30 years, there was no basis in law or fact why the Petitioner was allocated the said land which hitherto was a public utility area reserved for picnic and parking according to the Part Development Plan of Watamu and thereafter planned by the Government for Squatter Settlement for the Respondents and others who have now completely and extensively developed the land. The Respondents therefore aver that they will not let a stranger like the Petitioner claim and take away from them their developments using unlawful grant and would fight to their death by their blood to ensure that their Constitutional rights of occupation of the land is recognized and protected and to this end will never allow the Petitioner (to) set foot within the confines of their development which are ideally their houses and birth rights entitlement.

12. In response and answer to the averments in paragraphs 25, 26, 27 and 28 of the Petition, the Respondents repeat the previous averments of this Answer and Response to the Petition and aver that the Petitioner and his Surveyor have no right to enter upon their land which the Petitioner has never had occupation and has never developed and which the Respondents and other residents of Watamu have developed and built their houses upon after being re-planned for squatter upgrading settlement by the Government and to this extent admit that the Petitioner and his servants forever shall never be allowed to set foot thereat whether with Police or otherwise as the Respondents and residents of Watamu have a Constitutional right to defend their lawful houses and residences against Land grabbers like the Petitioner and any such attempt shall be defended by the Respondents and residents of Watamu with their blood, lives and spirits until the Petitioner and his partners in illegality get the light of the reality."

53. Arising from the foregoing, I have no hesitation in finding that the Respondents have since the year 2000 forcefully held onto the suit property and that their claim for adverse possession thereof must fail. Their occupation of that property is illegal, unlawful and without any foundation in law or otherwise. They have clearly by their admission used unlawful means to deprive the Petitioner of the use and occupation of his property. This Court will not allow them to continue to benefit from the illegality of their actions.

54. As the Honourable Justice Edward Muriithi asserted in a similar scenario after analyzing some three Court of Appeal of decisions in *Abdilrazak Khalifa Salim –vs- Harun Rashid Khator & 2 Others (2015) eKLR:*

"The above trilogy of authoritative Court of Appeal decisions is crystal-clear as to the status of claims by a registered land-owner running against claims by the physical occupant of a suit land. Unless-

i. The physical occupant meets the conditions of an adverse possession claim, and he has moved the Court through

the prescribed procedure for having his claim upheld, and his claim has been upheld; or

ii. The physical Claimant proves to the satisfaction of the Court that the registered title-holder attained his proprietorship status by fraud or he was party to a misrepresentation which brought him thither, then the registered land-owner wins the arguments hands down; and the physical occupant must yield, quit or be evicted. It seems to me that this is the current state of the law; and so it forms the doctrinal substratum whereupon any lesser equitable pleas, may, in a proper case, be made before the Court.”

55. When he testified before this Court, the Petitioner was an 81 years old man. Given his evidence that he bought the suit property and was issued with title in the year 1995, he was 57 years when he acquired the land. For some 24 years, he has been fighting to get his land, taken away from him on the threat of physical violence by the Respondents who trespassed thereon. He has asked for Kshs 5 Million compensation as general damages. This Court accepts that he deserved some compensation for those lost years. I shall award him Kshs 3.5 Million as general damages.

56. Otherwise and for the avoidance of doubt, I did not find any basis for the Respondents claims herein and the same stand dismissed. I was however satisfied that the Petitioner has proved his case to the required standard. Judgment is accordingly hereby entered for the Petitioner as prayed in the Petition.

57. The Petitioner shall also have the general damages assessed at Kshs 3.5 Million as well as the costs of this Petition.

Dated, signed and delivered at Malindi this 18th day of September, 2020.

J.O. OLOLA

JUDGE