

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

**ELC CASE NO. 45 OF 2017**

**SALIM MWANA JAMILA**

**ALI ISSA CHEMNI**

**MBWANA MWINYIRI BRAMU**

**SHABAN OMAR**

**AMINI SALIM CHAMIRA ..... PLAINTIFFS**

**VERSUS**

**BETTY WANJIKU KIURA ..... DEFENDANT**

**JUDGMENT**

**Background**

1. By a Plaint dated 20<sup>th</sup> February 2021, Salim Mwana Jamila, Ali Issa Chemni, Mbwana Mwinyiri Bramu, Shaban Omar and Amini Salim Chamira (hereinafter “the Plaintiffs”) pray for the following:

- i) A permanent injunction restraining the Defendant, his agents, servants or employees from entering upon and erecting and constructing a perimeter stone wall, developing, occupying, trespassing or any way dealing and or interfering**

**with the Plaintiff's right of ownership and interest in the Plaintiff's property known as Title Number CR 67802 Land Reference Number 29878;**

**ii) General damages for trespass upon the Plaintiff's property being Title Number CR 67802 Land Reference Number 29878; and**

**iii) Costs of this suit.**

2. Those prayers arise from the Plaintiff's contention that at all material times relevant to this suit, they were the registered proprietors in common of all that piece of land known as Title No. CR 67802 LR No. 29878 situated in Shimoni Township in Kwale County.
3. The Plaintiffs accused the Defendant of trespassing upon the parcel of land on 14<sup>th</sup> February 2017 and proceeding to erect and construct a perimeter stone wall therein with a view to alienating the same to herself.
4. Betty Wanjiku Kiura (the Defendant) is opposed to the Plaintiff's claim. In her Statement of Defence and Counterclaim dated 21<sup>st</sup> March 2017, the Defendant avers that the Plaintiffs have all

along been aware of her interest in the property. the Defendant denies that she has trespassed onto the property and asserts that she has since 5<sup>th</sup> October 1998 been the owner thereof having purchased the same from one Joel Mwangi and made several developments thereon.

5. The Defendant avers that she constructed a perimeter wall back in the year 2003 and that she has drilled a borehole, built a shelter and rears cows and goats on the land. It is her case that the Plaintiffs have approached the court with unclean hands by claiming that they have been in occupation of the suit property.
6. By way of her counterclaim, the Defendant prays for the following:

**a) A declaration that the Defendant is the legal and registered owner of the property known as Title Number CR 31876 Land Reference Number 13003;**

**b) A declaration that the property known as Title Number CR 31876 Land Reference Number 13003 is distinct and separate from the property described as Title No. CR 67802 LR No. 29878;**

**c) A permanent injunction restraining the plaintiffs, their agents, servants or employees from evicting, harassing entering upon and occupying, trespassing or any way dealing and or interfering with the Defendant's right of ownership and interest in the Defendant's property known as Title No. CR 31876 LR No. 13003;**

**d) Costs of the Counterclaim;**

**e) Interest on (c) above at Court rates from the date of Judgment until payment in full; and**

**f) Any other or further relief that this Honourable Court may deem fit to grant.**

### **Analysis and Determination**

7. At the trial herein both the Plaintiffs and the Defendant called 2 witnesses in support of their respective cases.
8. I have carefully perused and considered the pleadings filed, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before the court by the Learned Advocates representing the parties.

9. By their suit herein, the 5 Plaintiffs have sought for an order of a permanent injunction restraining the Defendant, her servants and agents from entering, occupying, trespassing upon or in any manner whatsoever dealing with a parcel of land which they describe as Title No. CR 67802, LR No. 29878 situated at Shimoni in Kwale County. In addition, the Plaintiffs pray for general damages for trespass. It is the Plaintiff's case that at all times material, they were the registered proprietors of the parcel of land said to be measuring 0.6925 Ha.
10. On her part, the Defendant denies that she has trespassed upon the property described by the Plaintiffs. On the contrary, the Defendant asserts that she is the registered proprietor of a parcel of land which she describes as Title No. CR 31857, LR. No. 13003 measuring 0.6245 Ha and situated within Shimoni Township in Kwale County. It is the Defendant's case that she did purchase the said property from one Joel Mwangi on 5<sup>th</sup> October 1998 and that she had since carried out developments thereon.
11. By her Counterclaim, the Defendant has urged the court to declare that she is the legally registered proprietor of the said

Title No. CR. 31857, LR. No. 13003. In addition, she has asked the court to declare that her said title is separate and distinct from the property described by the Plaintiffs and to issue an order of permanent injunction restraining the Plaintiffs from evicting her from her parcel or in any way entering or trespassing thereon.

12. According to the Plaintiffs, they were registered as leasehold proprietors of their property on 1<sup>st</sup> February 2013 after which they were jointly issued with a Certificate of Lease on 16<sup>th</sup> June 2016. They accuse the Defendant of trespassing onto their property on or about 14<sup>th</sup> February 2017 and thereafter erecting a perimeter stone wall fence around the same. They told the court that the Defendant had since ignored their request to cease the trespass.
13. The Plaintiffs told the court that the parcel of land they claim was previously trust land which was held by the County Council of Kwale for the benefit and on behalf of the local occupants of the area. It was further their case that the said parcel of land had been their ancestral land since time immemorial and that they held native customary rights over the same.

14. On the other hand, the Defendant told the court that she was registered as the proprietor of the said Title No. 31857, LR No. 13003 in the year 1998 after she purchased the same from one Joel Mwangi who had been allotted the land by the Commissioner of Lands. She told the court that she took possession of the land immediately after the purchase on 5<sup>th</sup> October 1998 and that she started developing the same and rearing cows and goats thereon as early as the year 2003.
15. As was stated by the court in the case of ***Hubert L. Martin & 2 Others -vs- Margaret J. Kamar & 5 Others (2016) eKLR:***

**“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for**

granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder”.

16. That position was reiterated by the Supreme Court in the case of ***Dina Management Ltd -vs- County Government of Mombasa & 5 Others [2023] KESC 30 (KLR)*** where the apex court citing the decision in the case of ***Munyu Maina -vs- Hiram Gathitha Maina (2013) KECA*** held as follows:

**“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances**

**including any and all interests which need not be noted on the register.”**

17. In support of her Certificate of Title for the said LR No. 13003 Shimoni in her name, the Defendant has produced a Letter of Allotment dated 24<sup>th</sup> December 1993 issued to one Joel Mwangi. In addition, she has produced a copy of a Sale Agreement between herself and the said Joel Mwangi dated 5<sup>th</sup> October 1998 as well as a letter dated 7<sup>th</sup> October 1998 from the Commissioner of Lands giving consent to transfer the allotment. She has also produced stamp duty valuation requisition as well as receipts for stamp duty, consent and land rent.
18. In support of the fact that she has been on the suitland for some time, the Defendant also produced photos showing the perimeter fence, a borehole and livestock on her said parcel of land.
19. At the trial herein, the Plaintiffs conceded that they were not in occupation of the land. Salim Mwana Jamila (PW1) who testified on their behalf told the court that the other Plaintiffs were his brothers and cousins and that they had settled “elsewhere”.

PW1 told the court that land adjudication was done in the area in the year 2012 and that they were thereafter allocated the land in February 2012.

20. From the material placed before the court, I had no doubt that as at the year 2012, the Defendant was already in occupation of the parcel of land described as Title No. CR. 31857, LR No. 13003, Shimoni and that the title described by the Plaintiffs as CR. No. 67802, LR No. 29878 came out of a politically driven process that tried to assume the previous allocation of land in the area.
21. In support of their case, the Plaintiffs have produced an internal Memo dated 27<sup>th</sup> April 2012 from the then Minister for Lands James Orengo to the Director Administration in his office directing as follows:

**“IRREGULARITIES IN SHIMONI KWALE**

**I have held discussions with the Heads of Department regarding grave problems in Shimoni, Kwale. The particulars are well known to them. I direct that a special team comprising of Officers from lands, Survey, Physical Planning and Land Adjudication and Settlement be sent to Kwale**

**without fail on Wednesday 2<sup>nd</sup> May, 2012. The team should ensure that the land along this area be secured for the ordinary residents or beneficiaries who have derived interest from them.”**

22. In addition, the Plaintiffs have produced a letter dated 2<sup>nd</sup> August 2013 from the Director of Surveys in the same Ministry of Lands addressed to the Chairman, National Land Commission. The letter states in the relevant part as follows:

**“RE: REGULARIZATION OF LAND OWNERSHIP  
SHIMONI - KWALE**

**Please refer to an Internal Memo Ref No. ... dated 27<sup>th</sup> April 2012 from the Hon Minister for Lands on this issue.**

**The survey has been finalized and is as shown on the Survey F/R Nos. 385/16 and 381/17.**

**However, the survey has been approved for data only, pending availability of letter of allotment from the Commission.**

**Upon receipt of these letters of allotments, deed plans will be prepared on indent and payment of survey fees.**

....”

23. It was evident to me that the title held by the Plaintiffs was a product of this process which did not take into account the fact that the area had long been surveyed. In the course of this trial, the court ordered a joint survey site visit which visit was conducted under the superintendence of the Deputy Registrar of this court on 8<sup>th</sup> April 2022. The Report dated 12<sup>th</sup> May 2022 prepared by the Coast Regional Surveyor Sammy W. Juma (PW2) reads in the relevant part as follows:

**“Analysis of the Survey**

**1. LR. No. 13003 is contained in survey plan (F/R) 117/23 and measures 0.6245ha. This parcel was surveyed in the year 1970.**

**2. LR. No. 29878 is contained in survey plan (F/R) 385/16 and measures 0.6925ha approximately. This parcel was surveyed in the year 2012.**

**3. Analysis of the coordinates defining the two parcels shows that the two parcels overlap. The area of overlap measures 0.55ha approximately.**

**The extent of the overlap is illustrated in the attached drawings ...”**

24. Arising from the foregoing, it was evident that the area had been previously surveyed in 1970 when the Defendant’s parcel of land was created. There was no evidence that the Defendant who already held title for her property was involved in this second survey that was meant to secure land for the local residents.
25. Asked in cross-examination about the legality of the second survey done in the year 2012, PW2 responded as follows:

**“FR 117/23 was registered on 9/12/1970. I am not aware whether the survey plan was cancelled.**

**From the Fr 385/16 which depicts parcel No. 29878 there is an overlap but I don’t have any evidence on the cancellation of the survey plan.**

**I don’t know whether the Defendant was informed and/or involved in the cancellation of the Survey Plan. I was coming to inform the court there was an overlap of the Plan.**

**There can be more than one survey plans but where there are a genuine title deed and a re-survey is done that is an illegality. In the case of an illegality the second survey plan is cancelled as it was done on land that was not available.”**

26. The suit property having been surveyed in 1970 and registered in the Defendant’s name in 1998, it was clear to me that the Defendant remained the lawful proprietor thereof. Her title was governed by Section 23 of the Registration of Titles Act (now repealed) which provided as follows:

**“The Certificate of Title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”**

27. In that respect, the title that was issued to the Defendant in the year 1999 for LR. No. 13003 gave her absolute and indefeasible title to the land and the same could not be defeated in the guise of taking care of the interest of the so-called “Locals” of Shimoni area. The presumption of indefeasibility and conclusiveness of title is rebuttable only by proof of fraud or misrepresentation which has not been alluded to in the Plaintiffs’ pleadings or at all.
28. In any event, the Defendant’s title was the first in time, and therefore, takes precedence over any title that may have subsequently been issued to the Plaintiffs or any other person in respect of the same parcel of land. That was the position taken by Lenaola J. (as he then was) in ***Gitwany Investment Limited -vs- Tajmal Limited and 3 Others (2006) eKLR*** where the Learned Judge held as follows:

**“....Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them, issued**

**regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity.”**

29. In the matter herein, despite asserting a claim rooted in ancestral rights under Trust Land, the Plaintiffs have failed to establish any nexus to the suit property. Other than their claim that they were “locals” and that the Defendant was not, they have neither demonstrated any ancestral relationship they have with the property to show how the so-called trust land was allocated to themselves.
30. In the premises I find and hold that the Plaintiffs have failed to establish that their title was lawfully and procedurally acquired. Their claim is based on a flawed process that disregarded established procedures for allocation and registration and their resultant title overlaps the suit property that was already registered in the Defendant’s name. The Defendant on the other hand has demonstrated the root of her title which has not been revoked and was first in time.

31. Accordingly, judgment is hereby entered for the Defendant with orders as follows:

- a) **The Plaintiffs' suit is hereby dismissed.**
- b) **A declaration is hereby made that the Defendant is the registered owner of the suit property known as Title No. CR 31857, LR No. 13003.**
- c) **A declaration is hereby made that the property known as Title No. CR 31857, Land Reference No. 13003 is distinct and separate from the property described as Title No. CR 7802, Land Reference No. 29878.**
- d) **A permanent order of injunction is hereby issued restraining the Plaintiffs, their agents, servants or employees from evicting, harassing, entering upon and occupying, trespassing or in any way dealing and or interfering with the Defendant's right of ownership and interest in the Defendant's property known as Title No. CR 31857 Land Reference No. 13003.**
- e) **The Plaintiffs shall jointly and severally bear the costs of the suit and of the Counterclaim**

32. It is so ordered.

**Judgment dated, signed and delivered in open court and virtually at Mombasa this 11<sup>th</sup> day of December, 2025**

.....  
**J.O. OLOLA**  
**JUDGE**

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Mr. J. Asige Advocate for the Plaintiffs
- c) Ms. Nyambura Kamau Advocate the Defendant