



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CIVIL SUIT NO. 583 OF 2000**

**1. AULA ALI AULA**

**2. SUDI KHAMIS TABIBU**

**3. ADAM MOHAMED OMAR (suing as Trustees of the Wakf of**

**MDIGO BIN TABIBU MWANA JUMA & others).....PLAINTIFFS**

**-VERSUS-**

**1. KATANA SHUNGU**

**2. KAZUNGU RUWA**

**3. GEORGE NYANJE.....DEFENDANTS**

**JUDGEMENT**

1. The plaintiffs brought this suit as the trustees of the Wakf of Mdigo Bin Tabibu Mwana Juma & 7 others against the three defendants vide a plaint dated 13<sup>th</sup> November 2000. The plaintiffs prayed for judgement in the following terms: -

**a) A mandatory injunction to issue compelling the defendants to cease trespassing onto and to remove their temporary structures from Sub-Division Plot Number 2349/III/MN.**

**b) In the alternative, an order for eviction of the defendants from the suit land.**

**c) Costs of and incidental to this suit.**

**d) Any other or further relief as to this Honourable Court may deem fit to grant in the circumstances.**

2. The plaintiffs pleaded that the suit parcel sub-division No 2349 was owned by the named persons in paragraph 3 of the plaint who created the Wakf and for which the plaintiffs were appointed as trustees. The plaintiffs also pleaded that the defendants were initially allowed to construct temporary huts on the suit land and in consideration pay monthly rent of Kshs 300 per hut. That the defendants failed to pay the requisite rentals and are now considered as trespassers. They have also failed to vacate the suit land thus necessitating this suit.

3. The suit is defended and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a brief joint statement of defence dated 17<sup>th</sup> January 2001 and filed in Court on 20.2.2001. In the statement of defence, the 2<sup>nd</sup> & 3<sup>rd</sup> defendants denied being trespassers stating that they are living on the land as of right. They also denied the jurisdiction of this Court.

4. The 1<sup>st</sup> defendant filed his statement of defence on 9<sup>th</sup> April 2002 through the firm of Kanyi Thuo & Company advocates where he also denied the plaintiffs' claim. He denied being given a temporary licence for building a house for a monthly rent of Kshs 300. He pleaded that his parents have been on the land since 1959 without any interference and that the plaintiffs' suit is barred by section 7 of the Limitation of Actions Act. He admitted the jurisdiction of this Court but denied that notice of intention to sue had been issued. The 1<sup>st</sup> defendant urged the Court to dismiss the plaintiffs' suit with costs.

5. The plaintiffs also filed a statement of issues dated 10<sup>th</sup> September 2003 listing 5 issues i.e.

**(a) Who are the owners of plot No 2349/III/MN.**

**(b) Are the defendants trespassers on the suit land.**

**(c) Should an order of eviction issue against them.**

**(d) Does the Court have jurisdiction.**

**(e) Who should bear the costs of this suit.**

6. The plaintiffs called two witnesses in support of their case. PW 1 Mohamed Juma Mohamed testified in Court on 22.10.2015 and stated that he is one of the trustees of the Wakf though not a plaintiff. PW 1 told Court that they had no family relationship with any of the defendants. That he was born on the land and was now 64 years old. PW 1 stated that the 1<sup>st</sup> defendant lived on the land with his father until his father died. That the 1<sup>st</sup> defendant moved out but later returned and stayed on permission of Kibwana Khamis. The witness could not tell when they came on the land. The 2<sup>nd</sup> defendant also lived on the suit land with his father on permission of Kahingo. Later Mzee Kahingo left after he was paid for his trees on 22.12.1975 (Pex 2). PW 1 further stated that the 3<sup>rd</sup> defendant lived with their brother Salim as a friend. Salim allowed third the defendant to build. Salim later sold his share to Shomari and he produced the sale agreement as Pex 3. That Salim asked the defendant to leave but he never complied to date. That they also did a demand letter dated 3.10.2000 seeking for vacant possession which has been ignored. That the defendants occupy about 2 acres of the land. He urged the Court to grant them vacant possession the suit land and costs of the suit.

7. In cross – examination, PW 1 said the 1<sup>st</sup> defendant built his house in the 1970s when he came for burial of his father. That the 2<sup>nd</sup> defendant's father also lived, died and was buried on this plot. That the 2<sup>nd</sup> defendant was born on the suit land. PW 1 admitted that the 3<sup>rd</sup> defendant has a home on the land and that all the defendants have lived on this land for a long time.

8. PW 2 is Adam Mohamed Omar who is one of the plaintiffs and a trustee of the Wakf of Mديو Tabibu. PW 2 stated that the defendants have no share on the land. He also agreed with PW 1's evidence on how the defendants came on the land.

9. During cross – examination by Mr Magolo advocate for the defendants, PW 2 said Salim is one of their family members. He could not tell how many people are living on the land but they are many. In re – examination, PW 2 stated that these people living on the land comprises the defendants' families. That marked the close of plaintiffs' case.

10. Each of the defendants testified. The 1<sup>st</sup> defendant said he entered the suit plot in 1959. They lived peacefully with the plaintiffs. The dispute arose when the 1<sup>st</sup> plaintiff cut his coconut trees and sold. He lives on the land with his family. In cross – examination he admitted not calling a neighbour to confirm that he has lived on the suit land for that long. He does not have a title deed for the land.

11. The 2<sup>nd</sup> defendant testified that he has lived on the suit property with his parents since 1966. His father died in 1992. That he was sued after the death of his father but he has nowhere to go. The 2<sup>nd</sup> defendant stated he lives on the suit land with his family. In cross – examination, he showed photographs of stumps of his cut down trees and his house. He said he had no witness to corroborate his evidence. He confirmed the land does not belong to their clan. The photographs were produced as Dex 1 (a) – (d).

12. The 3<sup>rd</sup> defendant on his part told the Court that he was given a place to build and live in by Mwalimu Mohamed in 1970 upon his request. That the said Mohamed has never asked him to leave. That there was no dispute during the lifetime of Mwalimu Mohamed. He urged the Court not to grant orders of his eviction. He produced the proceedings before the Tribunal as Dex 2 and photographs of his home as Dex 3. He disputed the plaintiffs' claim because they have lived there for long. That he entered the land before it had a title.

13. DW 4 was Kenga Kahingi. He said he knew both the 1<sup>st</sup> plaintiff who is a neighbour and 2<sup>nd</sup> & 3<sup>rd</sup> defendants. He was born in the area and knew 1<sup>st</sup> defendant came on the suit land in 1959. That the defendants have lived on the land with their relatives and buried some there. All these time, he has never seen anyone coming to evict them. In cross – examination, DW 4 stated he does not know who has the title to the suit land. He knew the 3<sup>rd</sup> plaintiff because he used to play football but he did not know the 1<sup>st</sup> & 2<sup>nd</sup> plaintiffs well. That if there was a dispute before, he would have been called as a witness. He was not present in the meeting that allowed the defendants to stay on the land. With this evidence, the defendants also closed their case.

14. I have read and considered the submissions filed on behalf of the parties herein. I note from the onset that the plaintiffs' submissions has contradicted their evidence. I will give my reasons why I say so in the subsequent paragraphs. For determination of this suit, I shall adopt the statements of issues filed by the plaintiffs as forming issues for my determination.

15. From the evidence on record, there is no dispute that the suit property is registered in the names of Aula Ali, Sudi Khamis Tabibu, and Mohamed Juma Mohamed & Adam Mohamed Omar as trustees of the Wakf of MDIGO BIN TABIBU MWANA JUMA & OTHERS (Pex 1). The defendants conceded that they do not have title to the land.

16. Are the defendants trespassers on the suit land & therefore they should be evicted from the land. The plaintiffs in their evidence gave a history of how each of the defendants got on to the land. The witnesses did not give specific dates but it was obvious it had taken time. For instance PW 1 admitted the 2<sup>nd</sup> defendant was born on the land. The first defendant lived on the land with his father. The plaintiffs did not deny the occupation of the fathers of the 1<sup>st</sup> and 2<sup>nd</sup> defendants was consented to. The 3<sup>rd</sup> defendant according to PW 1 came to the land at the invitation of Salim who is their family member. Given that the initial occupation of all the defendants was by permission of the plaintiffs and or persons they were claiming through (their predecessors in title), when did such occupation constitute acts of trespass?

17. Trespass is defined by concise oxford dictionary as ***“make unlawful or unwarranted intrusion especially on land or property, a wrongful voluntary wrongful act against the person or property of another especially unlawful entry to a person’s property or land.”***

From the evidence adduced by the plaintiffs on the manner the defendants entered the land and from the above definition of trespass, the entry of the defendants onto the land was definitely not unlawful and therefore did not constitute acts of trespass. PW 2 stated that they allowed the defendants to construct houses and pay a monthly rent of Kshs 300= . Whether there was ever such an agreement, nothing was shown to Court to corroborate the averment but that evidence merely conflicted the position of the plaintiffs that the defendants trespassed onto the suit land.

18. The second defendant told the Court that they lived in peace until one time in 1992 when the 1<sup>st</sup> plaintiff cut down his mango trees. When the 2<sup>nd</sup> defendant questioned this plaintiff, the answer he got was ***“you will leave this land.”*** Other than this statement, the only evidence produced by the plaintiffs is the demand letter dated 3<sup>rd</sup> October 2000 accusing the defendants of being trespassers which I have found above is not the position. The plaintiffs have thus failed to prove to the Court that having allowed the defendants on to their land and that consent not having had any time frames or conditions on when they were to live what changed to make the living now become unlawful? As they have rightly submitted on the provisions of sections 107 of the Evidence Act Cap 80, ***“the burden of proof lies on the persons who wishes the Court to believe the existence of a fact.”*** In this instance, the burden was on the plaintiffs and it did not shift upon the defendants at any given time. Although the plaintiffs are entitled to vacant possession of the land, such right must be exercised by serving due notice. No evidence of service of notice to vacate was shown to the Court other than the demand letter of 3.10.2000 which was premised on trespass.

19. Can the orders of eviction be issued in this case? The 1<sup>st</sup> defendant pleaded in paragraph 6 of his defence that the plaintiffs’ suit was time barred under section 7 of the Limitation of Actions Act Cap 22. This defendant stated he entered the land in 1959. PW 1 stated that DW 1 lived with his father on the land, left a little while and returned again. He has never left. PW 1 in cross – examination said the 1<sup>st</sup> defendant built a house on this land in the 1970s. The suit against the 1<sup>st</sup> defendant has thus been brought after a period of more than 12 years. The 2<sup>nd</sup> defendant’s father also lived, died and was buried on the suit land. PW 1 admitted the 2<sup>nd</sup> defendant was born on the suit land and has continued to live on the land for a long time. Similar case applies for 3<sup>rd</sup> defendant. All this time the plaintiffs were also living on the land and they let the defendants to stay on.

20. The plaintiffs are claiming the land because they are trustees of the Wakf of Mdigu Bin Tabibu. They were appointed trustees in 1995. There is no evidence that the creators of the Wakf ever asked the defendants to move out in their lifetime. Therefore the registered owners cannot use the indefeasibility of their title as a ground to evict the defendants who have been on the land for over twenty years because by their omission/commission, they created a constructive trust in favour of the defendants. Their right to claim back the portions occupied by the defendants goes against the provisions of section 7 of Cap 22 which provides thus;

***“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.” (underline mine for emphasis)***

21. In conclusion, I am not satisfied that the plaintiffs have proved a case against all the defendants. Consequently their suit is dismissed with costs to the defendants.

**Dated, signed & delivered at Mombasa this 23<sup>rd</sup> February 2018.**

**A. OMOLLO**

**JUDGE**