



**Museni & another v Salim & 5 others (Environment & Land Case
287 of 2016) [2024] KEELC 290 (KLR) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 290 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 287 OF 2016
NA MATHEKA, J
JANUARY 30, 2024**

BETWEEN

HANIF SHAJI MUSENI 1ST PLAINTIFF

SHEELA HASSAN MUSENI 2ND PLAINTIFF

AND

MIRAJ MGANYI SALIM 1ST DEFENDANT

SAUM MOHAMED 2ND DEFENDANT

JUMA OMARI HASSAN 3RD DEFENDANT

MARIAM MOHAMED 4TH DEFENDANT

SAID CANDY 5TH DEFENDANT

PUNGU FUEL DEVELOPMENT ASSOCIATION 6TH DEFENDANT

JUDGMENT

1. The Plaintiffs aver that after due verification of the titles, the Plaintiffs purchased Properties Title Numbers Kwale/Pungu Fuel Area/ 164, Kwale/Pungu Fuel Area/ 165 sand Kwale/Pungu Fuel Area/ 544, the Suit Properties herein. The Plaintiffs further aver that since the date of purchase the Plaintiffs have been in peaceful possession and enjoyment of the suit properties without any let or hindrance from anybody by exercising all rights of ownership. The Plaintiffs aver that, they purchased the Suit Properties from Abdulsamad Mwangi Mucheru and Amina Hassan Museni, the original allottees of the Suit Properties. In this way valid legal title to the Suit Properties transferred to the Plaintiffs from the vendors. Later after the Plaintiffs purchase the Suit Properties were transferred into the names of the Plaintiffs and ownership is currently with the Plaintiffs as evidenced in the title deeds registered in the names of the Plaintiffs. The Plaintiffs further aver the Defendants are illegally attempting to dispossess and interfere with the Plaintiffs peaceful possession and enjoyment of the schedule property



and are currently building a permanent house with a parameter wall on the suit properties. In this connection, the Plaintiffs made a complaint to Likoni Police Station but the Defendants are using their influence and police are not entertaining the Plaintiffs' complaints either to provide protection or to control the Defendants illegal action. Hence the Plaintiffs are approaching this Honourable Court seeking permanent injunction and other reliefs. The Plaintiffs avers that the Defendants are bent upon to dispossessing the Plaintiffs of the suit properties and forcibly occupying them. The Plaintiffs pray for this Honourable Court for judgment and decree against the Defendants for the following reliefs;

- a. For a Permanent Injunction, restraining the Defendants, their agents, representatives, assignees or anybody claiming through or under them from trespassing, constructing, selling, transferring, leasing, sub-dividing, charging and/or in any way interfering with the Properties Title Numbers Kwale/Pungu Fuel Area/ 164, Kwale/Pungu Fuel Area/ 165 and Kwale/Pungu Fuel Area/544, the Suit Properties herein.
 - b. Order demolishing of structures belonging the Defendants on Properties Title Numbers Kwale/Pungu Fuel Area/ 164, Kwale/Pungu Fuel Area/ 165 and Kwale/Pungu Fuel Area/544, the Suit herein.
 - c. Costs for and incidental to this Suit; and
 - d. Any such other relief or reliefs as this Honourable Court deems fit to grant in the facts and circumstances of the case, in the interest of justice and equity.
2. This court has considered the evidence and the submissions therein. PWI testified she had a power of attorney from the Plaintiffs who are her children (PEx1) and that they are the lawful registered owner of the suit properties namely, Title Numbers Kwale/Pungu Fuel Area/ 164, Kwale/Pungu Fuel Area/ 165 and Kwale/Pungu Fuel Area/ 544. That the Defendants are dispossessing the Plaintiffs from the suit properties and forcibly occupying it. She produced the certificate of title as an exhibit. Section 24 (a) of the [Land Registration Act](#) stipulates as follows;
- “subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....”
3. In the case of [Willy Kipsongok Morogo v Albert K. Morogo](#) (2017) eKLR the Court held as follows;
- “the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under Sections 24, 25 and 26 of the [Land Registration Act](#).”
4. While in the case of [Joseph N.K. Arap Ng'ok v Moiyo Ole Keiwua & 4 Others](#) (1997) eKLR, where the Court of Appeal held that;
- “Once one is registered as an owner of land, he has absolute and indefeasible title which can only be challenged on grounds of fraud or misrepresentation and such is the sanctity of the title bestowed upon the title holder.”
5. Further, in Civil Appeal No. 246 of 2013 [Arthi Highway Developers Limited v West End Butchery Limited and Others](#), the Court of Appeal expressly stated thus:
- “Section 23(1) of the then [Registration of Titles Act](#) (now reproduced substantially as Sections 25 and 26 of the [Land Registration Act](#) set out below) gives an absolute and indefeasible title



to the owner of the property. The title of such an 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 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 would be placed in jeopardy.”

6. Be that as it may, Section 26 of the [Land Registration Act](#), No.3 of 2012 provides that;

“26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

7. In the case of [Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & Another](#) (2013) eKLR the court held that;

“the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme.”

8. Hon. Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the [Land Registration Act](#) rendered himself as follows: -

“...the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.

For the first limb, it appears to me that the title of the 1st defendant was obtained by fraud or misrepresentation. However, there is no evidence that the 1st defendant was a party to the fraud or misrepresentation. Indeed, to me the 1st defendant was an innocent purchaser for value. He was probably conned of his money by the 2nd Defendant and that is why he is the complainant in the first count of the criminal charges facing the 2nd Defendant. I am not of the view that he was a party to the fraud or misrepresentation that conveyed the land to him. He was a victim of the scheme employed by the 2nd defendant. I cannot therefore impeach the title by virtue of the provisions of section 26 (1) (a).

Is the title impeachable by virtue of section 26(1) (b)? First, it needs to be appreciated that for section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the



vitiating factors noted therein which are the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26(1) (b) is to remove protection from an innocent purchaser of innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26(1)(b) in my view is to protect the real title holders from being deprived of the titles by subsequent transactions”.

9. The Defendants were served severally but failed to attend court during the hearing. I have perused the court file and find that on the 8th November 2016 the 1st Defendant filed a list of documents and among them was a surveyors report by Edward Kiguru Land Surveyors dated 28th October 2016 which state that the purpose of the survey was to verify the location and acreage of parcel No. Mombasa/MS/Block V/544. The results were that the house falls under Plot No. Mombasa/Pungu Fuel Area/109. I find in the court record also that on the 30th November 2016 and the 14th February 2017 the court ordered that the District Land Registrar and the District Surveyor Kwale do visit plot number 164 and 165 for purposes of identifying if the 2nd Respondents house is on either of the two plots and thereafter file a report. On the 29th March 2017 a report was indeed filed in court which found that all the buildings are within the cadastral boundary of parcel No. 164. The report was signed by the District Surveyor one Herbert Ndolo and dated 13th March 2017. I rely on the latter report by the District surveyor and find that indeed the Defendants have encroached on the Plaintiff’s properties.
10. Although the 2nd Defendants alleges that there is a dispute over the plots and that the National Land Commission is investigating no evidence of the same has been tendered or the report of the same. Section 109 of the [Evidence Act](#) Cap 80 is clear that;

“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.”

11. The well-known mantra “he who asserts must prove.” Was well pointed out by the Court of Appeal in [Jennifer Nyambura Kamau v Humphrey Mbaka Nandi](#) (2013) eKLR as follows;

“We have considered the rival submissions on this point and state that Section 107 and 109 of the [Evidence Act](#) places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the [Evidence Act](#) provides that

“whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the [Evidence Act](#) provides, the burden lies on that person who would fail if no evidence at all were given on either side.”



12. In *James Muigai Thungu v County Government of Trans-Nzoia & 2 others* (2022) eKLR it was held that;

“It is now settled law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may expressly exempt him or her. Section 107 of the *Evidence Act* Chapter 80 Laws of Kenya succinctly states:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

Also, further, Section 108 of the *Act* states thus:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Again Section 109 of *Act* refers to the burden of proof of a particular fact. It states that:

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.”

13. It was upon the Defendants therein to prove their case that they were not encroaching and no point did the evidential burden shift from the Defendants to the Plaintiffs in terms of proving ownership of the suit premises.

14. It is the view of this court that it can only make a determination on the ownership of the suit property based on the title documents and the supporting report of the surveyor. In associating myself with the cited decisions, the legal provisions cited above as well as the evidence before me, I find that the Plaintiffs have proved their case on a balance of probabilities and I grant the following orders;

1. A Permanent Injunction, restraining the Defendants, their agents, representatives, assignees or anybody claiming through or under them from trespassing, constructing, selling, transferring, leasing, sub-dividing, charging and/or in any way interfering with the Properties Title Numbers Kwale/Pungu Fuel Area/ 164, Kwale/Pungu Fuel Area/ 165 and Kwale/Pungu Fuel Area/544, the Suit Properties herein.
2. The Defendants are to vacate the Plaintiff's Properties Title Numbers Kwale/Pungu Fuel Area/ 164, Kwale/Pungu Fuel Area/ 165 and Kwale/Pungu Fuel Area/544, within the next 90 days from the date of the service of this judgement and in default eviction orders to issue.
3. Costs of this suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 30TH DAY OF JANUARY 2024.

N.A. MATHEKA

JUDGE

