



Kavu & 8 others v Mwarogo (aka Chibwanda) (Environment & Land Case 67 of 2022) [2024] KEELC 940 (KLR) (28 February 2024) (Judgment)

Neutral citation: [2024] KEELC 940 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 67 OF 2022
NA MATHEKA, J
FEBRUARY 28, 2024**

BETWEEN

**JABALI CHONDO KAVU 1ST PLAINTIFF
DAVID YAMO ADEMBA 2ND PLAINTIFF
DAVID GUDAHI 3RD PLAINTIFF
EVANSON SIMON KINYANJUI 4TH PLAINTIFF
SADA OMAR RAJAB 5TH PLAINTIFF
PAUL NZAU KIVUVA 6TH PLAINTIFF
ESHE SALIM AWADH 7TH PLAINTIFF
STEPHEN MUANGE MUTUA 8TH PLAINTIFF
YONAS KARIUKI MOGES 9TH PLAINTIFF**

AND

SULEIMAN OMAR MWAROGO (AKA CHIBWANDA) DEFENDANT

JUDGMENT

1. At all material times to this suit, the plaintiffs were the registered proprietor of all those subdivisions hived from property known as plot No. 356/11/ MN registered in the Mombasa Lands District Registry situate in Utange Mombasa County. The plaintiffs aver that the property was initially purchase by the 1st Plaintiff who purchased the aforesaid property in 2014, paid the relevant taxes and the same was duly registered in his name. The plaintiffs state that after the 1st Plaintiff purchased the property, he caused the Property to be subdivided and has transferred the subdivided portions to co-plaintiffs. That on or about May 2019, the plaintiffs came to learn that the defendant had dug holes on their plot and was digging trenches on this parcel, deposited construction materials on property



known as Plot No. 356/11/ MN registered in the Mombasa Lands District Registry situate in Utange Mombasa County claiming that it belonged to him. The despite attempts to report the matter at Bamburi Police through OB No. 16/ 17/2019, the defendant has been adamant and has continued with his illegal actions. The plaintiff prays for the following orders;

- a. A permanent injunction restraining the defendant, whether by himself, his servant, agent, assigns or whomsoever from encroaching, trespassing, claiming right over all that property known as Plot No. 356/11/ MN registered in the Mombasa Lands District Registry situate in Utange Mombasa County
 - b. An order of mandatory injunction compelling the defendant, his servants, agents, employees and/or assigns to forthwith move out and remove all the construction material deposited on Plot No. 356/11/ MN registered in the Mombasa Lands District Registry situate in Utange Mombasa County
 - c. Costs of the suit.
2. This court has considered the evidence and the submissions therein. The 1st plaintiff was registered as the proprietor of LR No. 356/II/MN on 5th December 2014 and on 13th November 2015 acquired approvals from the County Government of Mombasa to subdivide LR No. 356/II/MN into several subdivisions Nos. 14777 to 14801. There were transfers to the other plaintiffs as follows; to the 2nd plaintiff was transferred to Subdivision No. 14788, the 3rd plaintiff was transferred to Subdivision No. 14780 on 4th February 2016, the 4th plaintiff was transferred to Subdivision No. 14781 on 30th March 2016, the 5th plaintiff was transferred to Subdivision No. 14785 on 21st June 2016, the 6th plaintiff was transferred to Subdivision No. 14787 on 6th July 2016, the 7th plaintiff was transferred to Subdivision No. 14791 on 2nd August 2016, the 8th plaintiff was transferred to Subdivision No. 14789 on 5th September 2017 and the 9th plaintiff was transferred to Subdivisions No. 14795, 14796, 14797, 14798, 14799, 14780 and 147801 on 1st March 2018.
 3. It is the plaintiffs' case that the defendant has trespassed into their suit premises and has dug up trenches, and deposited construction materials. The same was reported at Bamburi Police Station through OB No. 16/17/2019 but the defendant has continued with his illegal actions. The plaintiffs has averred that the actions of the defendant are detrimental to their right to the suit premises and has urged court to find him in trespass and restrain him from the suit premises.
 4. The plaintiffs filed a return of service of the summons to enter appearance as well as other pleadings such as the plaint, list of documents to the defendant on 29th June 2022. On 16th November 2022 the firm of Obinju Rondo & Co. LLP advocates filed a notice of appointment on behalf of the defendant. Later on 8th March 2023, the said firm filed an application seeking leave to cease acting for the defendant on the ground that they cannot reach the defendant for instructions in the case. The court granted the application as prayed on 2nd May 2023 and proceeded to direct the matter to proceed for hearing. The matter proceeded on hearing on 14th November 2023, in the absence of the plaintiff. This is after the court confirmed that the plaintiffs served the defendant of the hearing notice of the say and filed in court a return of service. The affidavit of service was sworn on 29th September 2023 by one Dennis Karenga Jumba confirming that the defendant was served with the hearing notice of that day.
 5. The 1st plaintiff was the registered proprietor of LR No. 356/II/MN as at 5th December 2014, which he later subdivided among the 2nd to 9th plaintiffs, who were registered as the proprietors under Subdivisions No. 14777 to 14801 (Original No. 356/II/MN) on diverse dates between 2014 to 2018. The defendant has not challenged these titles issued to the plaintiffs and this leads the court to find that the plaintiffs as the registered owners of all the subdivisions falling under LR No. 356/II/MN.



Section 26 of the *Land Registration Act*, provides that a certificate of title is conclusive evidence of proprietorship and shall be taken by all courts as prima facie evidence that the person named is proprietor of the land and is the absolute and indefeasible owner. The Section states:-

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— on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

6. The court is satisfied that the 2nd to 9th plaintiffs have indefeasible ownership of the suit premises subdivisions. As the absolute and indefeasible owner of the suit premises they are conferred with all the rights and privileges stated in Sections 24 and 25 of the *Land Registration Act* including the right to possession, to a quiet and peaceful occupation and right to use of their property.
7. The plaintiffs in the plaint pleaded that the defendant had invaded the suit property dug trenches and dumped construction materials thereon. Trespass occurs when one makes an unlawful entrance onto the land of another person and interferes with the registered owner's lawful possession of their land. A registered proprietor has sufficient legal possession of his land, which is enough to support an action for trespass. The plaintiffs must be in actual possession or entitled to its possession at the time of bringing an action for trespass. The plaintiff averred that in May 2019 the defendant had dug trenches on the suit premises as well as deposited construction materials, this evidence was not challenged.
8. The valuation report, which was conducted on 5th March 2021 after the suit premises was subdivided stated that the suit premises was developed with residential buildings. I find that there are occupants on the suit premises, however the same was subdivided and is now owned by different registered owners. It is the plaintiffs' evidence that indeed the defendant was in physical occupation of the said plots, dug trenches and deposited construction materials. The plaintiffs averred that they reported the defendant's encroachment to the police and obtained an OB No. 16/17/2019. The defendant despite having been served offered no evidence to the contrary. Consequently, the court finds that the plaintiffs have proved that the defendant have trespassed on the Subdivisions No. 14777 to 14801 (Original No. 356/II/MN). 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 defendant, whether by himself, his servant, agent, assigns or whomsoever from encroaching, trespassing, claiming right over all that property known as Plot No. 356/11/ MN registered in the Mombasa Lands District Registry situate in Utange Mombasa County
 2. An order of mandatory injunction compelling the defendant, his servants, agents, employees and/or assigns to forthwith move out and remove all the construction material deposited on Plot No. 356/11/ MN registered in the Mombasa Lands District Registry situate in Utange Mombasa County within 90 days from the date of this judgement.
 3. No orders as to Costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF FEBRUARY 2024.



N.A. MATHEKA
JUDGE

