



**Mahfudhi v Kadenge & 9 others (Environment & Land Case
36 of 2019) [2024] KEELC 1800 (KLR) (27 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1800 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 36 OF 2019**

**MAO ODENY, J
MARCH 27, 2024**

BETWEEN

AHMED SUHEIL MOHAMED MAHFUDHI PLAINTIFF

AND

KAHINDI CHENGO KADENGE 1ST DEFENDANT

CHARO KADHENGI 2ND DEFENDANT

CHRISTOPHER KENGA MUTOI 3RD DEFENDANT

SAMSON KAINGU KADHENGI 4TH DEFENDANT

DAVID KAINGU KADENGE 5TH DEFENDANT

KAINGU KADHENGI 6TH DEFENDANT

SHUKRAN CHENGO KADENGE 7TH DEFENDANT

KAHINDI KADHENGI KAINGU 8TH DEFENDANT

KAHINDI KENGA MUTOI 9TH DEFENDANT

CHENGO KADENGE KAINGU 10TH DEFENDANT

JUDGMENT

1. By a Plaint dated 31st May, 2019, the Plaintiff herein sued the Defendants seeking the following orders:
 - a. A declaration that the parcels of land being subdivisions Nos. 5061(Org. No. 1587/2)111/MN, 11802(Org. No. 5062/1) 111/MN, 11803 (Org, No. 5062/2)111/MN, 5063 (Org. No.1587/4)111/MN, 5064 (Org. No. 1587/5)111/MN and 5065 (Org No. 1587/6)111/MN are wholly and solely owned by the Estate of the late Suheil Bin Abeid and Muhfudh Bin



Awadh and that the defendant's occupation of the same is unlawful, illegal and an affront to sanctity of title.

- b. A mandatory order compelling the defendants, their families, servants and/or any person (s) claiming right under them through them or through them to vacate and deliver up to the plaintiffs, in vacant possession, all that parcel of land being subdivision Nos. 11803(Org. No. 5062/2)11 MN which they are presently occupying and/or any of the subdivisions herein, namely Nos. 5061(Org. No. 1587/2)111/MN, 11802(Org. No. 5062/1) 111/MN, 11803 (Org, No. 5062/2)111/MN, 5063 (Org. No.1587/4)111/MN, 5064 (Org. No. 1587/5)111/ MN and 5065 (Org No. 1587/6)111/MN which they or any of them may move into and occupy at the time of filing of this suit or during its pendency.
 - c. A permanent injunction restraining the defendants by themselves , their families, servants and/ or any person(s) claiming right under them or through them from going into or in any way whatsoever entering and/or interfering with, or any part of, all those parcels of land being subdivision Nos. 5061(Org. No. 1587/2)111/MN, 11802(Org. No. 5062/1) 111/MN, 11803 (Org, No. 5062/2)111/MN, 5063 (Org. No.1587/4)111/MN, 5064 (Org. No. 1587/5)111/ MN and 5065 (Org No. 1587/6)111/MN
 - d. Damages
 - e. Costs of this suit
 - f. Interest at court rates from the date of judgment until payment in full.
 - g. Such other or further order as the Honourable court may deem fit and just to grant.
2. The Defendants filed a defence and counterclaim where they denied the plaintiffs' claim, and sought an order that they had acquired the suit parcels by way of adverse possession.

Plaintiff's Case

3. PW1 Mohammed Mahfudh adopted his Witness Statement date 31st May 2019 and produced a list of documents as Pex No. 1 to 14. PW1 stated that he together with the 1st Plaintiff are the legal representatives of the Estate of the late Mahfudh Awadh and Suheil Bin Abeid respectively.
4. It was PW1's evidence that Suheil Bin Abeid and Mahfudh Bin Awadh bought the suit properties from the Estates of Mohamed Bin Auf and Ms Aisha Binti Salim which properties were subdivided and registered in common names of the deceased persons. PW1 stated that the purchase was in respect of half of the suit property measuring 94.5 acres
5. PW1 further stated that Mwanafela Ali Shariff later bought the remaining half from the estates of Mohamed Bin Auf and Ms Aisha Binti Salim. That by a consent in Mombasa HCC No. 134 of 1988 a boundary dispute between Mahfudh Bin Awadh and Mwanafela Ali Shariff, the land was subdivided into two creating Plot Nos 1587 and 1588 Section 111 Mainland North.
6. It was PW1's testimony that parcel No. 1588 was registered in the name of Mwanafela Ali while 1587 was registered in the names of Suheil Bin Abeid and Mahfudh Bin Awadh which were subsequently subdivided.
7. It was PW1's evidence that the Defendants during the pendency of the suit, moved into the suit parcel of land and that it was agreed by consent that the parties to the suit equally share the expenses of removing the squatters who were compensated.



8. PW1 stated that all the families were compensated and moved out apart from Defendants who instituted case No Mombasa HCC No 275 of 1993 which they never prosecuted. PW1 therefore stated that the action of the Defendants amounts to trespass and urged the court to grant the orders as prayed in the Plaintiff.
9. On cross-examination by Ms Onyango, PW1 stated that they have a mother title to the suit land but they do not have a transfer. He further stated that they carried out a survey but the documents remained at the lands office. PW1 also stated that the squatters were compensated whereby some moved out but the Defendants refused to vacate.

DEFENDANTS' CASE

10. DW1 Kahindi Kadenge adopted his Witness Statement dated 28th August 2019 and stated that they have been in occupation of the suit property since 1900 when their ancestors settled on the property
11. DW1 stated that by the time of the alleged acquisition of the suit property their family had already acquired the same vide adverse possession hence the Plaintiffs' acquisition of the suit land was unlawful.
12. PW1 urged the court to dismiss the Plaintiffs' case and allow their counterclaim as prayed.
13. On cross examination by Mr. Odongo, DW1 stated that they have had disputes over the suit land and have not been in peaceful occupation. He further stated that he does not know the history of the suit parcel of land. It was his evidence that the land belongs to the government and that the Plaintiffs are not the owners of the suit land.
14. DW1 also testified that the Plaintiffs must have forged the title to the suit land. That Kitsao filed a suit No. 275 of 1993, which was dismissed. He stated that the squatters were compensated and vacated the suit land but some refused to leave.

Plaintiffs' submissions

15. Counsel gave a brief background of the case and identified two issues for determination namely; whether the Plaintiffs are entitled to the orders sought and whether the Defendants are entitled to the counterclaim.
16. On the first issue, counsel submitted that the suit parcels are registered in the names of the deceased Suheil Bin Abeid and Mahfudh Bin Awadh whose ownership has never been challenged.
17. Counsel further submitted that the deceased had a good title which was acquired legally and relied on Sections 24 and 25 of the [Land Registration Act](#). Mr. Odongo also cited that case of Witu Nyongoro Ranch (DA) Co Ltd Vs Nagea Damon Dofoe & 32 others Malindi ELC No 100 of 2016 where Olola J. held that the invasion of land is a violation of rights conferred by Section 24 of the [Land Registration Act](#).
18. Mr. Odongo submitted that a valuation was done and the squatters were compensated. Further that the Defendants' averment that they have been living on the suit land since time immemorial is not true as it is on record that they came from Kadzonzo in Mariakani, Ganze and Mwenza Ng'gombe in Kilifi.
19. On the second issue whether the Defendants are entitled to the counterclaim, counsel submitted that the Defendants are not clear on the property they purport to lay claim on. That the parcels of land are subdivisions of plot No. 1587 /111/MN and that the estate of the deceased herein which the Plaintiff are legal representatives have never owned parcel No. 1588/111/MN.



20. Mr. Odongo also submitted that the Defendants cannot circumvent the provisions of Order 37 Rule 7 (2) of the Civil Procedure Rules which makes it mandatory to annex a certified copy of an extract of the title which was not done by the Defendants. That title Nos 1587 & 1588 no longer exist following subdivisions and surrender of the original titles.
21. Counsel urged the court to allow the Plaintiffs' claim and dismiss the Defendants' counterclaim with costs.

Defendants' Submissions

22. Counsel identified the following issues for determination. Whether the Plaintiff lawfully acquired the subject property plot No. 1588 (originally Plot No. 265/111/MN before subdivision, whether the Defendants have acquired rights over the suit property, whether the Plaintiffs' rights jointly and severally have been extinguished, whether the Defendants have any other remedy available to them or not.
23. On the first issue, counsel submitted that the Defendants' ancestors were already in occupation by the time of the purchase by the Plaintiffs and that the crop valuation for compensation was done in 1982, which confirms that, the Defendants were in occupation.
24. Ms Onyango further submitted that the Plaintiffs' purchase was unlawful as the Defendants were already in occupation. Further that the Plaintiff did not tender any evidence that they fairly compensated the Defendants.
25. Counsel submitted that the Defendants have met the threshold to be declared as owners vide adverse possession and cited the case of Tabitha Waitherero Kimani Vs Joshua N'gan'ga (2017) eKLR.
26. On the Plaintiffs' rights to the suit land have been extinguished, counsel submitted that the Plaintiffs did not acquire the suit land lawfully hence do not have a claim over the suit land. That the property was registered unlawfully in the Plaintiffs' names and urged the court to dismiss the Plaintiffs' case and allow the counterclaim as prayed.

Analysis and Determination

27. The issues for determination are:
 - a. Whether the Plaintiffs are the owners of the suit parcels of land, whether the defendants are trespassers.
 - b. Whether a mandatory and permanent injunctions should issue against the defendants from interfering with the suit parcels of land
 - c. Whether the plaintiffs are entitled to damages
 - d. Whether the defendants have acquired the suit parcels of land by way of adverse possession.
 - e. Who pays the costs of the suit together with the counterclaim?
28. The Plaintiff gave evidence of the genesis and acquisition of the suit land by the deceased. They produced copies of certificate of title and official Searches of the suit parcels of land.
29. The certificate of Postal search dated 16th August 2018 in respect of Plot No. 16587/111/MN Title No. CR 71906 indicated that the title was closed for subdivision. Plot Nos. 5061/111/MN, 5062/111/MN, 5063/111/MN, 5064/111/MN, 5065/111/MN all indicate that they are registered in the names of Suheil Bin Abeid and Mahfudh Bin Awadh the Plaintiffs herein.



30. It is also on record that there have been disputes in respect of the suit parcels of land. This is demonstrated by a consent that was recorded in Mombasa HCC No. 134 of 1988, a boundary dispute between Mahfudh Bin Awadh and Mwanafela Ali Shariff, which led to the land being subdivided into two creating Plot Nos. 1587 and 1588 Section 111 Mainland North.
31. It is further on record that parcel No. 1588 was registered in the name of Mwanafela Ali while 1587 was registered in the names of Suheil Bin Abeid and Mahfudh Bin Awadh which were subsequently subdivided.
32. The Plaintiffs gave evidence which has not been challenged that the Defendants during the pendency of the suit, moved into the suit parcel of land and that it was agreed by consent that the parties to the suit equally share the expenses of removing the squatters who were duly compensated.
33. DW1 confirmed that the families of the squatters were compensated and moved out apart from Defendants who instituted case No. Mombasa HCC No 275 of 1993 which was dismissed.
34. Counsel for the Defendants submitted that the Plaintiff did not tender any evidence that they fairly compensated the Defendants. From the evidence it is apparent that the Plaintiffs are the registered owners of the suit land and that the Defendants have tried severally to claim the suit parcels of land to no avail.
35. The latest attempt is through an amended defence and counterclaim for an order that the Plaintiffs' rights to the suit land have been extinguished vide the doctrine of adverse possession.
36. Section 24(a) of the [Land Registration Act](#) provides as follows:
 - (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.
37. Under Section 26 of the [Land Registration Act](#), a Certificate of title to land is conclusive evidence of ownership of the land. The section provides as follows:
 - (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.”
38. Even though the Defendants averred that the Plaintiffs unlawfully acquired the suit land on the ground that they purchased the land without consulting the Defendants, there was no evidence of such illegality or unlawful dealing. DW1 alluded to fraud in the acquisition of the suit land by the Plaintiffs but neither pleaded nor particularized the nature of the fraud.
39. A party cannot spring up a surprise during evidence in chief and cross-examination serious issues of fraud, which border on criminality. The reason for a requirement that fraud must be pleaded and particularized is to give the adversary an opportunity to prepare a response.



40. In the Court of Appeal case of *Vijay Morjaria vs Nansingh, Madhusingh Darbar & another* [2000] eKLR the court held that;

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

41. The Defendants neither pleaded nor particularized the nature of fraud against the Plaintiffs in their counterclaim. The Defendants did not tender any evidence to specifically prove the alleged fraud.

42. On the issue of whether the defendants have acquired the suit parcels by way of adverse possession, the ingredients of adverse possession are well settled. In the case of *Mtana Lewa vs Kahindi Ngala Mwangandi* [2015] eKLR the Court of Appeal held that:

“Adverse possession is essentially a situation where a person takes possession of land and 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, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, which is in these terms:-

“An action may not be brought by any person to recover land after the end of twelve 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.”

43. A claimant must prove that he/she has been in peaceful/uninterrupted occupation of the suit land adversely to the true owner of the land. The claimant must also specifically identify or describe with precision the portion that he or she is in occupation of.

44. In the case of *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018] eKLR the Court of Appeal held as follows:

“We cannot help but note that the evidence tendered in support of the respondents’ case was by five respondents. These respondents only gave evidence with relation to the dates they each entered into possession of the suit property. There was no evidence to show that such possession was without the consent of the former registered owner. The photographs of the structures erected on the suit property could equally not establish the absence of consent from the previous registered owner. In addition, we, unlike the learned Judge, find that no further evidence was given with respect to when the other respondents took possession.

Without such evidence, there was nothing to support the respondents’ contention that they had been in adverse possession of the suit property prior to the appellant’s title.

Even if we were to accept that, the five respondents who testified had established that they had been in an open and uninterrupted occupation of the suit property in excess of 12 years after the appellant acquired title still their claim fell short. There is a further problem because none of them tendered any evidence with regard to identifiable portion(s) of the



suit property, which they each occupied which was essential to their claim. More so, taking into account that there were allegations that apart from the respondents over 200 people were also in occupation of the suit property.”

44. The court further relied on the case of *Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Bakshwein & Another* [2015] eKLR and stated that:-

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Githu vs. Ndele* [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them.”

45. The Defendants in this case did not discharge the burden of proving and specifically identifying or describing the portions that they occupied.

46. In a claim of adverse possession a party must acknowledge the ownership by the person of which he/she claims to have acquired the land through adverse possession. You cannot be heard to assert that the land was acquired illegally or fraudulently and in the same breath as the court to grant you orders that you have acquired the same by way of adverse possession. The root of the title would be tainted therefore you cannot benefit from a tainted title.

47. In the case of *Haro Yonda Juaje v Sadaka Dzenzo Mbauro & Kenya Commercial Bank* (2014) eKLR, the Court held that:

“One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff’s averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered *Land Act* and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.”

48. The Defendants did not acknowledge the Plaintiffs title as they claimed that it was unlawfully acquired. It means that their claim for adverse possession cannot stand. Even if they recognized the title, they still would have an uphill task to prove the ingredients of adverse possession.

49. It is on record, which is admitted by the parties that there has been numerous cases by the Defendants in respect of the suit parcels, which cases were dismissed. This shows that there was no peaceful occupation of the suit parcels. It is also admitted that the occupation was interrupted as some point when some of the Defendants vacated after compensation but came back to the suit parcels.

50. The Defendants claimed that the land was ancestral land. If you are claiming land as being ancestral then your rights do not accrue as adverse to the title holder as was held in the case of *Sammy Mwangangi & 10 others v Commissioner of Lands & 3 others* [2018] eKLR.

51. I conclude that the Plaintiffs have proved their case against the Defendants and is therefore allowed with costs. The Defendants have failed to prove their counterclaim against the Plaintiffs and is therefore



dismissed with costs. I make no order as to damages taking into account the nature of the case. I therefore make the following specific orders:

- a. A declaration is hereby issued that the parcels of land being subdivisions Nos. 5061(Org. No. 1587/2)111/MN, 11802(Org. No. 5062/1) 111/MN, 11803 (Org, No. 5062/2)111/MN, 5063 (Org. No.1587/4)111/MN, 5064 (Org. No. 1587/5)111/MN and 5065 (Org No. 1587/6)111/MN are wholly and solely owned by the Estate of the late Suheil Bin Abeid and Muhfudh Bin Awadh and that the defendant's occupation of the same is unlawful, illegal and an affront to sanctity of title.
- b. A mandatory order is hereby issued compelling the defendants, their families, servants and/ or any person (s) claiming right under them through them or through them to vacate and deliver up to the plaintiffs, in vacant possession, all that parcel of land being subdivision Nos. 11803(Org. No. 5062/2)11 MN which they are presently occupying and/or any of the subdivisions herein, namely Nos. 5061(Org. No. 1587/2)111/MN, 11802(Org. No. 5062/1) 111/MN, 11803 (Org, No. 5062/2)111/MN, 5063 (Org. No.1587/4)111/MN, 5064 (Org. No. 1587/5)111/MN and 5065 (Org No. 1587/6)111/MN which they or any of them may move into and occupy at the time of filing of this suit or during its pendency.
- c. A permanent injunction is hereby restraining the defendants by themselves , their families, servants and/or any person(s) claiming right under them or through them from going into or in any way whatsoever entering and/or interfering with, or any part of, all those parcels of land being subdivision Nos. 5061(Org. No. 1587/2)111/MN, 11802(Org. No. 5062/1) 111/MN, 11803 (Org, No. 5062/2)111/MN, 5063 (Org. No.1587/4)111/MN, 5064 (Org. No. 1587/5)111/MN and 5065 (Org No. 1587/6)111/MN
- d. Defendants to vacate the suit land within 45 days failure to which eviction order to issue.
- e. Defendants' counterclaim is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF MARCH 2024.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

