



Bakushwen & 2 others (Suing as Administrator of the Estate of Salim Mbarak Bakshwen) v Mida Creek Ecocamp & 4 others (Environment & Land Case 16 of 2021) [2024] KEELC 1513 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1513 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 16 OF 2021
FM NJOROGE, J
MARCH 20, 2024**

BETWEEN

**MOHAMED SALIM MBARAK BAKUSHWEN 1ST PLAINTIFF
NURU SALIM MBARAK 2ND PLAINTIFF
SALMA SALIM MBARAK 3RD PLAINTIFF
SUING AS ADMINISTRATOR OF THE ESTATE OF SALIM MBARAK
BAKSHWEN**

AND

MIDA CREEK ECOCAMP & 4 OTHERS DEFENDANT

JUDGMENT

1. A declaration that the Plaintiffs are the lawful beneficial owners of that piece of land known as Portion Number 79 of Mida (Suit Property).
2. A declaration that the Plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of all that property known as Portion Number 79 Mida.
3. A declaration that the Defendants whether by themselves or their servants or agents and/or otherwise howsoever are wrongfully and unlawfully in occupation of the suit property and are accordingly, trespassers on the same.
4. An order of that the Defendants and all other trespassers do forthwith vacate and deliver vacant possession of the suit property to the plaintiffs.
5. An order of eviction against the Defendants, their agents, servants as well as any other parties whom the Defendants have permitted to occupy any part of the suit property.



6. A permanent injunction restraining the Defendants whether by themselves or their servants or agents and/or otherwise howsoever from remaining on or continuing in occupation of the suit property.
7. General damages for trespass.
8. Mesne profits for the wrongful occupation of the suit property as trespassers.
9. An order directed to the OCS Mida Police Station to execute the Orders of this Honourable court and evict all trespassers and unauthorized occupants of the suit property including the Defendants and their servants and agents.
10. Costs of this suit together with interest thereon at such rate and for such period of this as this honourable court may deem fit to grant.

The Plaintiffs' case is that they have been the lawful beneficial owners of the suit property allocated to them through a Certificate of Confirmation of Amended Grant of Letters of Administration Intestate dated 27th January 1995. The plaintiff averred that on diverse dates the Defendants without legal right, authority and connivance on the part of the Plaintiffs illegally entered the suit property and thereafter wrongfully remained possession thereof and have thereby trespassed and continue to trespass thereon. It was further averred that efforts have been made to make the Defendants vacate have been futile and the Defendants have neglected and/or refused to desist from the said trespass. The plaintiffs particularized the Defendants unlawfulness as follows:

- a. The 1st defendant has unlawfully erected a permanent wall and a gate and has continually operated their business on a portion of the suit property without any consent or authority from the plaintiff.
- b. The 2nd Defendant has displaced a beacon, grabbed and erected a fence on the suit property without any consent or authority from the plaintiff.
- c. The 3rd and 4th defendants have in particular erected semi-permanent dwelling houses on a portion of the suit property without any consent or authority from the plaintiff.
- d. The 5th defendant has without any color of right unlawfully and illegally trespassed on the premises of the plaintiffs and planted trees on the suit property without obtaining consent.
- e. Utilized the resources of the suit property including flora, fauna and water resources.
- f. Failed to deliver vacant possession despite not being the registered owners of the property.
- g. Continually extended the boundaries of the area under their occupation, cultivation and/or utilization without any consent or authority from the plaintiff, full particulars thereof are within the Defendants knowledge.

The plaintiffs' further set out the particulars of loss and damage as follows:

- a. The plaintiff has been deprived of the use, possession, occupation and quiet enjoyment of the suit property;
- b. The plaintiff's property has had sizeable portions of its valuable portion wasted with no compensation.
- c. The defendants' actions have infringed on the Plaintiff's constitutional right to property.
- d. The Defendants' misuse of the flora, fauna and water resources on the suit property.



- e. The 3rd and 4th defendants' construction of a semi-permanent dwelling house without any consent or authority from the plaintiff create an eyesore and have thus defaced the beauty of, and devalued the suit property and impeded the plaintiff's development plans.

11. The 1st, 3rd, 4th and 5th Defendants Defence
12. The 1st, 3rd, 4th and 5th Defendants filed a statement of defence dated 23rd March 2023 which statement contains denials of the averments of the plaint save for stating that the defendants are occupying their own separate parcels of land that they inherited from their parents over 25 years ago.

2nd Defendant's Defence.

13. The 2nd defendant despite filing a memorandum of appearance did not file a defence.
14. The matter proceeded for hearing with one witness testifying for the plaintiffs.

Evidence Of Parties

Plaintiff's Evidence.

15. PW1 Salima Salim Mbarak, the 3rd plaintiff relied on his witness statement dated 18/3/2021 and adopted it as his evidence-in-chief. He produced a P. Exh 1 the death certificate of his father. Produced as P. Exh 2 was a copy of title showing the plaintiff's late father as the owner of the suit property. He also produced P. Exh 3 a certificate of confirmation of grant showing that he is one of the administrators having beneficial interest in the land. He prayed that the defendants be evicted.

The plaintiffs' case was then closed.

Defendant's Evidence.

16. The defendants did not testify and the defence case was closed

Analysis And Determination.

17. The court directed that the plaintiffs file submissions within three days from the date of hearing. The said orders were not complied with. That notwithstanding I find the following issues for determination;
 1. Whether the plaintiffs have proved ownership of the suit property
 2. Whether the plaintiffs are entitled to the reliefs sought.

Section 24(a) of the *Land Registration Act* provides as follows:

“Subject to this Act, 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.”

Section 26 (1) of the *Land Registration Act* states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”

18. It is trite that, the certificate of title issued by the Registrar upon registration 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 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.

19. It is the burden of the plaintiff to prove that is owner of the suit property.

Section 107(i) 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.”

20. In the instant case, the plaintiffs produced as P. Exh 2 a Certificate of ownership in the name of Salim Mbarak Mbakushwen (deceased) who was the plaintiffs’ father. The Plaintiffs also produced as P. Exh 3 a Certificate of confirmation of grant that demonstrates their interest in the suit property. This evidence has not been challenged by the defendants through any documentary or oral evidence.

21. Consequently, this court is satisfied that the plaintiffs have proved on a balance of probabilities that they are the lawful beneficiaries of the suit property. Having made that finding, it is axiomatic that the orders for injunction and eviction against the defendants are merited. As regards general damages and mesne profit, the same were not addressed by the plaintiffs save for being pleaded in the plaint and the same are hereby disallowed.

22. In the end, judgement is entered in favour of the plaintiffs against the defendants jointly and severally in the following terms:

1. A declaration is hereby made declaring that the plaintiffs are the lawful owners of the suit property known as Portion No. 79 Mida;
2. A declaration is hereby made declaring that the plaintiffs are entitled to exclusive and quiet possession of the suit property comprised in Portion No. 79 Mida;
3. The defendants shall remove themselves from Portion No. 79 Mida and deliver vacant possession of the suit premises to the plaintiffs within 30 days of this order;
4. An order of permanent injunction is hereby issued restraining the defendants whether by themselves or their servants or agents from continuing with occupation of the suit property;

23. The Costs of the suit shall be borne by the defendants.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 20TH DAY OF MARCH 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

