



**Al-Jahadhmy v Adi (Environment & Land Case 143 of 2017)  
[2024] KEELC 1504 (KLR) (19 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1504 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 143 OF 2017  
EK MAKORI, J  
MARCH 19, 2024**

**BETWEEN**

**FEISWAL ALI AHMED AL-JAHADHMY ..... PLAINTIFF**

**AND**

**FUAD ALI ADI ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff in the year 2015 travelled abroad. He came to learn that the land he had left behind Lamu/Block/V/4 measuring approximately 8.41 ha. Situated at Wiyoni within Lamu County had been invaded by the defendant who occupied in his favour and without permission 0.09 ha.
2. He filed this suit on 19<sup>th</sup> June 2017 through his Legal Representative and Attorney Mohammed Ali Nassry seeking the following reliefs:
  - a. A permanent injunction restraining the defendant by himself or any person claiming under his name from trespassing, or encroaching into, fencing, putting up temporary or permanent structures, carrying out any development activities, wasting and from continuing to occupy or from adversely dealing with the plaintiff's parcel of land aforesaid.
  - b. Vacant possession. Demolition and removal of all illegal structures temporary and permanent erected by the defendant on the encroached portion of the land.
  - c. Costs of this suit.
  - d. Any other or further relief this Court may deem fit to grant.
3. The defendant was duly served with all the necessary suit papers on 7<sup>th</sup> July 2017 as can be witnessed by the return of service by one Awadh Salim Hiyesa. He instructed the firm of Kaluki Muriu Ndiritu & co Advocates to file a Memorandum of Appearance (which was filed on 12<sup>th</sup> July 2017) and a defence



(which was never filed on time but I can see one filed and sneaked into these proceedings filed on 23<sup>rd</sup> June 2023).

4. This matter came up severally in the open Court significantly on 11<sup>th</sup> October 2021 for pretrial, the said firm of advocates did not appear in Court to represent the defendant in this cause. On 30<sup>th</sup> August 2021, the defendant was served personally when it was realized he did not wish to proceed with his former lawyer. There is an affidavit of service deposed and filed in Court on 13<sup>th</sup> September 2021 by one Awadh Salim Hiyesa. The Court however did not sit on the appointed date. Another service was done for a hearing on 28<sup>th</sup> April 2022, the firm of Aboubakar Mwanakitina filed a notice of change of advocate, when the matter came up that day, Ms. Bujra holding their brief sought adjournment for lack of the defendant's file, and the entire pleadings from the former advocate. The matter was adjourned to 12<sup>th</sup> June 2023 but the defendant was condemned to pay costs of ksh 15,000/- to the plaintiff. It is said that the amount remains unpaid to date.
5. The matter, therefore, proceeded on the appointed date as undefended, despite the defence belatedly filed, well after the matter had been heard and closed. The plaintiff adopted the witness statements filed dated 20<sup>th</sup> February 2021 and through his Attorney said that he is the registered owner of the land in question measuring 8.3 ha. A title document was produced in evidence to show the plaintiff as the absolute registered owner. Also produced are proceedings against the defendant in a criminal case against the defendant for forcible detainer which matter is alleged to be pending before the Lamu Magistrates Court.
6. The plaintiff asserts that the defendant encroached, and trespassed on his parcel of land measuring 0.009 ha. – That the alleged allocation of the portion he occupies is without legal basis or sanction of the law and allocation of land as an entity known as Wiyoni – Milimani Squatter Upgrading Scheme Lamu has no such mandate hence the current cause of action seeking the prayers as sought in the plaint.
7. The plaintiff submits that the prayers sought in this suit stand undefended and uncontroverted as the defendant failed or neglected to attend Court to defend. That absolute ownership of the suit property rests with the plaintiff in accordance with Section 24 as read with Section 25 of the [Land Registration Act](#) no 3 of 2012 since he is the one who has the title document.
8. That under Section 26 of the same Act, *prima facie* he is the absolute owner of the land unless it is shown he acquired the same fraudulently, through misrepresentation, illegally, unprocedurally, or through a corrupt scheme. The plaintiff cites the decisions in *Serah Mweru v Commissioner of Lands & 2 Others* [2014] eKLR, and [Margret Njeri Wachira v Eliud Waweru Njenga](#) [2018] eKLR as supporting his averments and evidence adduced to merit the prayers required from this Court.
9. The plaintiff further claims that the orders sought have been proved and should be issued with costs since largely this matter went unanswered and undefended.
10. This Court is called to determine whether the plaintiff has demonstrated his case against the defendant on a balance of probabilities, whether the reliefs pursued can be granted, and who should be condemned to pay costs.
11. As alluded to earlier the defendant was duly served but for strange reasons did not file defence and witness statements within the stipulated time. As I was perusing the record, I came across a defence and witness statement filed on 23<sup>rd</sup> June 2023 well after the matter had been heard and closed on 12<sup>th</sup> June 2023! How the same gained entry to the Court record is strange because the record shows since 2017, the defendant has never been keen to file defence even after being condemned to pay costs for delaying the disposal of this matter.



12. The plaintiff narrated how he acquired the suit property by way of allotment leading to the acquisition of title to it. To support the encroachment, there is attached a survey report which is dated 20<sup>th</sup> April 2017, which shows the encroachment as 0.009 ha. With photographs annexed to the report showing the structures built by the defendant.
13. When one is issued and has a title document issued by the Registrar as held in: *In re Estate of Raphael Ngugi (Deceased)* [2022] eKLR:

“It is evident that the right to own and acquire property in Kenya is premised under Article 40 of the *Constitution* of Kenya, 2010. The said Article provides as follows;

- “(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
- (a) of any description; and
  - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person--
- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
  - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-
- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
  - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that
    - (i) requires prompt payment in full, of just compensation to the person; and
    - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- ...”

Further, a certificate of title is prima facie held to be evidence of ownership of the stated land. This is provided for in Section 26(1) of the *Land Registration Act* which provides; -

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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.”

However, the said ownership can be challenged as provided by 1(a) & (b) above.”

- 14. The defendant did not approach this Court to refute the manner the plaintiff alleged he acquired the title to the disputed land. The defendant did not join too to explain to this Court whether he holds a title contra to that held by the plaintiff nor appeared in this Court to state whether an entity called Wiyoni – Milimani Squatter Upgrading Scheme Lamu, had the legal capacity to allocate land as it did to him from the suit paper he (sic) filed.
- 15. In the end the plaintiff’s claim succeeds in this manner:
  - i. A permanent injunction does and is hereby issued restraining the defendant by himself or any person claiming under his name from trespassing, or encroaching into. Fencing, putting up temporary or permanent structures, carrying out any development activities, wasting and from continuing to occupy or from adversely dealing with the plaintiff’s parcel of land aforesaid.
  - ii. An order for Vacant possession does and is hereby issued directed at the defendant or those claiming under him to forthwith demolish and remove all illegal structures temporarily and permanently erected by the defendant on the encroached portion of the land in any event within 90 days from this judgment, Failure the plaintiff to do so at the expense of the defendant.
  - iii. Costs of this suit be borne by the defendant.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 19<sup>TH</sup> DAY OF MARCH 2024, IN THE ABSENCE OF PARTIES WHO WERE AWARE OF THE DAY.**

**E. K. MAKORI**

**JUDGE**

