



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chombo & 4 others v Nyuni (Land Case 162 of 2021)  
[2024] KEELC 4197 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 4197 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
LAND CASE 162 OF 2021  
AE DENA, J  
MARCH 7, 2024**

**BETWEEN**

**BAKARI NASORO CHOMBO ..... 1<sup>ST</sup> PLAINTIFF  
MOHAMED JUMA ALI ..... 2<sup>ND</sup> PLAINTIFF  
MOHAMED BAKARI NYUNI ..... 3<sup>RD</sup> PLAINTIFF  
IDRIS JUMA KHALE ..... 4<sup>TH</sup> PLAINTIFF  
BAWA AMADI SEID ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**KASSIM HAMISI NYUNI ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiffs refer to themselves as the lawful heirs of the late Nyuni Kunyapapursuant to Succession Case No 337 of 2013 at the Kadhis Court in Kwale. That despite the Defendant seeking a declaration through the Kadhi's Court that he was the rightful heir to the estate of the deceased, the court made a finding that the Defendant was not in any way related to the deceased and was not entitled to inherit any of the deceased's estate property. That it was therefore imperative of the Defendant to vacate Kwale/Msambweni 'A'/2164 (herein the suit property) and to date he has failed to do so. This is despite the Defendant being served with orders issued by the Kadhis Court on 29/10/1986.
2. The Defendant's occupation of the suit property is termed as wrongful and has denied the Plaintiffs the use and occupation of the suit property. These brief facts inform the genesis of this suit.
3. The Plaintiffs pray for judgement against the Defendant for;
  - a. A declaration that the Plaintiffs are the rightful owners of all that parcel of land known as Kwale/Msambweni 'A'/2164.



- b. A permanent injunction requiring the Defendant to remove all structures erected from the suit property.
  - c. Alternatively, the Defendant be evicted from the suit property.
  - d. Costs of this suit.
4. In cementing their claim against the Defendant, the Plaintiffs have annexed a copy of the following documents filed under the list of documents dated 1/9/2021;
1. Copy of title deed for Kwale/Msambweni 'A'/2164.
  2. Copy of Ruling dated 4th march 2020.
  3. Copy of letter from the Ministry of Lands and Physical Planning dated 9<sup>th</sup> June 2021.
  4. Copy of letter from the Ministry of Lands and Physical Planning dated 22<sup>nd</sup> July 2021.
  5. Letter from Assistant County Commissioner Msambweni Division.
  6. Copy of court order dated 23rd April 2018.
  7. Copy of certificate of official search.
5. Initially the matter had proceeded exparte and was scheduled for Judgment. The firm of Khatib & Co Advocates vide a Notice of Motion application dated 23/9/2022 applied to set aside the proceedings. The application was allowed and they filed defence on behalf of the Defendant on 9/1/2023. The Defendant avers that the court in Chief Kadhi Succession Case No 337 of 2013 erred in finding that he was not an heir to the estate of Nyuni Kunyapa.
6. According to the Defendant, the suit property was also the subject matter in Judicial Review No. 18 of 2014 at the High Court in Mombasa and by consent of all the parties herein, vesting orders were issued over the ownership of the suit property. The Defendant states that he reserves the right to the suit property and he lastly denies the jurisdiction of this court stating that the issues raised are similar to the ones in the judicial review proceedings. The Defendant prays that the Plaintiffs suit be dismissed with costs.
7. The Defendant annexed the following documents in buttressing his case and which documents were later produced before court during his testimony;
- 1.. Order in JR No 18 of 2014
  2. ELC No 5 of 2021
  3. Search

### **Evidence**

8. The suit proceeded for hearing on 16/5/2023.

### **Plaintiffs' Case**

9. PW 1 Bakari Nassoro Chombo ID No. XXXX adopted his witness statement filed on 1/9/2021 as his evidence in chief. The witness further produced the list of documents dated 1/9/2021 as part of his evidence in court (PEX "1-7".) It is the Plaintiffs' testimony that the Defendant filed a succession suit being Kwale Kadhis Court Succession Case No 337 of 2013 seeking recognition as the heir/dependent of the estate of the late Nyuni Kunyapa. That vide a Judgment dated 29/10/1986 the Chief Kadhi



- in Mombasa, held that the Defendant was not an heir of the deceased. The Defendant however went ahead and built a structure on the suit property and has denied the Plaintiffs occupation of the same.
10. The Plaintiffs state that the Defendant is in contempt of the orders issued by the court dated 29/10/1986 and should therefore be evicted and permanently restrained from entering the suit property by orders of this court.
  11. On cross examination the witness testified that the Defendant was known to him. That his father and the Defendant's father are brothers. Upon being referred to paragraph 3 of his witness statement he indicated that Nyuni Kunyapa is his grandfather. Kunyapa and the Defendant are also related. The witness states that he lives on the suit property which measured about 6 ½ -7 Acres [Msambweni Mwerenze Kwale A/2164]. That many people live on the shamba including the Plaintiff and the Defendants. He testified that they are the only heirs to the suit property because there is a search. That the Defendant has a portion in plot 1870 and 1872 where his father lived and should therefore move there.
  12. The witness further indicated that he saw the orders in JR No. 18 of 2014 by Justice Ogolla in the Defendants list of documents. They however did not appeal against the order.
  13. PW 1 urged the court to order the Defendant to vacate the suit property. That according to the Muslim faith/sharia, grand children are not allowed to be heirs only the children are allowed. That he had inherited his father's share of the suit property and whose name is in the title. The Defendants' father's name isn't in the title. That the proceedings JR 18 of 2014 were not about the suit property.
  14. With the above evidence the Plaintiffs' case was closed.

#### **Defence Case**

15. DW1 Kassim Hamisi Juma– ID No. XXXX adopted his witness statement dated 17/9/2022 as his evidence in chief. The Defendant testified that the Plaintiffs are his siblings as they share the same grandfather who had two wives. That all the parties in the suit reside on the suit property. The Defendant adopted his List of Documents dated 17/11/2022 (DEX 1-3).
16. With reference to the Plaintiffs list of documents, he testified his name was not among the names in the title dated 23/12/2013 because he was not present nor was he involved during its survey. That the Kadhis case was in 1986. He filed a review against the Kadhi's judgment in Mombasa. The Judge ordered that the land should be subdivided to 12 people as listed in the order dated 30/10/2017. The witness further testified he thereafter filed a case in Kwale ELC Miscellaneous 5 of 2021 which issued orders on 3/2/2022 to subdivide to the 12 named in the previous order. That the order has not been implemented as the Plaintiffs have frustrated the process. The witness stated that he still wished that the land be sub divided.
17. On cross-examination the witness indicated that there was no other land other than the suit property. That the suit property belonged to their grandfather and they were all entitled.
18. Upon re-examination the witness testified that his house was built in 1964. That Nyuni Kunyapa's land is the same land as the suit property. That he had lived on the suit property for over 35 years. Bakari's father that is the 1<sup>st</sup> Plaintiff father is the one who allowed him to construct thereon. At this juncture the defence case was marked as closed.
19. The court in a bid to get a clearer understanding of the Defendant's testimony inquired on why he had asked for permission from the 1<sup>st</sup> Plaintiffs father.



20. The court further inquired on the state of occupation and DW1 stated that the same was open, there was no demarcation.

### **Submissions**

21. Parties filed and exchanged their final submissions.

### **Plaintiffs' Submissions**

22. The Plaintiffs' submissions were filed before court on 15/8/2023 and identified the following issues for determination; -
- a. Whether the Applicant has established a prima facie case with probability of success;
  - b. If the injunction is not granted they will suffer irreparable injury that cannot be compensated by an award of damages; and
  - c. If in doubt the court will decide the application on the balance of convenience.
23. On the first issue for determination, the Plaintiffs submit that the Defendant has failed to call for any evidence in ownership of the suit property. The they on the other hand have been able to produce land documents showing previous ownership of the suit property to have been inherited by three of the late Ngophas sons that is Nassoro Juma Nyuni, Ali Juma Nyuni and Mohamed Juma Nyuni. That the suit property was inherited by the Plaintiffs from their fathers.
24. On the second issue for determination the Plaintiffs submit that they have been deprived of the use and quiet enjoyment of the suit property. That their rights to ownership of land as envisaged under Article 40 of *the Constitution* and Section 26 of the *Land Registration Act* 2012 have been violated. That for that reason the court should make a finding that they have proved suffering irreparable harm that cannot be compensated by way of damages. The Plaintiffs lastly submit that they have proved their case on a balance of probabilities without a doubt. The court is urged to allow the suit as prayed.

### **Defendant's Submissions**

25. The Defendant's submissions were filed on 27/7/2023. It is submitted that a prima facie case has not been established by the Plaintiffs. That the two major questions that arise from the suit are; -
1. Do the Plaintiffs have exclusive legal rights over the suit property capable of being protected by an injunction to stop the Defendant from infringing it.
  2. Do the Plaintiffs have genuine arguable case against the Defendant
26. The Defendant submits that it was evident during the hearing of the suit that the suit property originally belonged to Nyuni Kunyopa who is the grandfather to both parties herein. That vide JR No 18 of 2014 the suit property was vested upon 12 persons inclusive of the Defendant. The Defendant states that he had produced evidence to back up this assertion. That the 1<sup>st</sup> Plaintiff did not produce any evidence to back up his authority to act on behalf of the rest of the Plaintiffs. That despite him being aware of the Judicial Review orders he had not appealed against the same. That in the absence of an appeal or review of the orders issued on 47/12/2017 the said orders are still lawful and grant the Defendant his legal right to be on the suit property. That for these reasons the Plaintiffs have not proved to this court of any exclusive equitable rights of ownership of the suit property and the court should find so. The Defendant seeks that the suit is dismissed with costs.



## Determination

27. Before I delve into the main issues for determination in this suit, I will first address the preliminaries raised by the Defendant. Firstly, whether PW 1 had the requisite authority to testify on behalf of the rest of the Plaintiffs. From the proceedings, at the time of hearing of the Plaintiffs case, it was established that no consent had been filed by the Plaintiffs authorising PW 1 to testify on their behalf. The court raised this issue, and inquired whether Counsel for the Defendant was opposed to the testimony but it was intimated that the issue will be raised in the submissions which counsel did. The rest of the Plaintiffs who were present before court however stated that they were not opposed to the Plaintiff testifying on their behalf.
28. It is clear that no written authority or affidavit was filed authorising the Plaintiff to testify on behalf of the rest of the Plaintiffs. However, this consent was granted orally before court and in the presence of the defendant and his Counsel. Having not opposed the same, I find that despite the consent having been issued outside the scope of the laid principles of law, it was nevertheless issued and was in no way prejudicial to the Defendant. In the interest of justice and the principles outlined under Article 159 of *the Constitution*, I find and hold that the evidence on record is proper as the same was consented to by the rest of the Plaintiffs.
29. The second preliminary issue was on the suit herein being *res judicata*. The Defendant did not use this term while submitting on it but simply stated that the issues raised herein had been raised and dealt with in the Judicial Review proceedings before the High Court. Though discussed later in this Judgement, I note that the pleadings in the Judicial Review application were never filed. It was only the order emanating from the said proceedings that was attached as evidence before this court. A quick perusal of the order however informed the court that the judicial review proceedings were an appeal of the orders issued at the Kadhis Court. It is trite that Judicial Review proceedings concern the process of how a decision was arrived at and not the substance See. *Kenya Medical Practitioners and Dentists Board & 2 Others* (2013) eKLR. Perhaps the manner in which the proceedings at the Kadhis Court were conducted is what was contested in the Judicial Review. The issues are absolutely different from the gist of this suit. The doctrine of *res judicata* does not suffice therefore.
30. Whosoever asserts the existence of a legal right over any property is vested with the burden to prove the same save for when the law exempts them. Section 107 of the *Evidence Act* Chapter 80 Laws of Kenya 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, 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.”
- Further, 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.”
31. The Plaintiffs allege that they are the owners of the suit property herein. It was incumbent upon them to prove this fact by way of evidence to the satisfaction of the court. It is the Plaintiffs case that the suit property lawfully belongs to them by virtue of its registration in their names through a copy of the title



- deed which has been produced as evidence before this court. The court has perused a copy of the said title which bears the names of all the Plaintiffs and was issued on 23/12/2013. The Plaintiffs further allege that the Defendant vide an application to the Kadhis Court in Kwale Succession Case No 337 of 2013 applied for execution of a decree dated 23/4/2018 seeking to have the suit property sub divided.
32. The Defendant did not however annexe copies of the order from which the decree emanated from, as such the Kadhis Court in the above cited succession suit did not render itself on the application for subdivision for lack of the documents alluded to by the Defendant. This court has perused the copy of the Ruling by Hon. Wendo Shabaan Kadhi and confirms this position. It is noted that the court in Kwale Succession Case No 337 of 2013 vested ownership and possession of the suit property in the names of the Plaintiffs herein. The order bearing this information is dated 23/4/2018 and has been produced as evidence before court.
33. The Defendants case is that the suit before the Kadhi that was filed in Kwale Succession Case No 337 of 2013 and which vested the suit property upon the Plaintiffs was appealed vide Mombasa Judicial Review No 18 of 2014. An order emanating from these proceedings indicates that the suit property be vested among 12 individuals and who include the Plaintiffs and the Defendant herein. Interestingly, the said order is by consent of parties.
34. In an effort to perfect the orders granted in the Judicial Review, I notice that the matter was filed before me vide ELC Misc 5 of 2021 and I issued orders to the Kwale County Surveyor to perfect the order that subdivided the parcel of land known as Kwale/Msambweni 1/2164 To Ruzukuye Hussein, Idris Kitale, Kinana Ali, Bakari Nassoro, Ali Juma Nyuni, Binti Hamadi Salim Nyuni, Kassim Khamis, Juma Suleiman, Bakari Salim, Juma Pashua & Mkungu Mohamed. No appeal or review has been preferred against this order emanating from both the High Court and the ELC Court.
35. It is evident that the suit property is registered in the Plaintiffs names, in discharging the burden of proof of ownership of the same, the Plaintiffs have placed reliance on the title deed issued to them vide Kwale Succession Case No 337 of 2013 and which is claimed to have been pursuant to the orders of the Chief Kadhi issued on 29/10/1986. I do not seem to find the proceedings of the Chief Kadhi in respect of the orders issued in 1986, the proceedings before the Kadhis Court in Kwale have also not been annexed. The Judicial Review proceedings have not been annexed, the court has been left to grope in the dark and is only guided by orders emanating from this respective courts.
36. It is noteworthy that under section 26 of the *Land Registration Act* a Certificate of title will be held as conclusive evidence of proprietorship, 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.”



37. Section 24(a) of the *Land Registration Act* on the other hand 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;
38. The above position was reiterated in *Dr Joseph Arap Ngok v Justice Moiwo Ole Keiwa & 5 Others* Civil Appeal No. CA 60 of 1997 where the Court of Appeal stated as follows: -
- “Section 23 (1) of the Act gives 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 take 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”.
39. It is perceptible from the above provisions of law and case law that the law protects title to land, but the same can be challenged under certain circumstances and which include, where the title is obtained by fraud or misrepresentation. Secondly where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. The Court of Appeal in the case of *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR, held as follows:
- “We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”
40. Now back to the task before court, I find that the Judicial Review orders by Justice Ogolla reviewed the Judgement and Decree of the court in Kwale Kadhis Court Civil Case No 337 of 2013. Notably it was by consent of the parties herein. The said consent order has not been set aside or challenged. Consequently, it is clear that the suit property is to be divided among the 12 individuals listed in the consent order of the Judicial Review proceedings. The same having not been set aside ties the hands of this court in making any orders with regards to the suit property other than upholding the orders earlier issued in ELC Misc 5 of 2021. The orders granting the Plaintiffs the suit property and which informed registration and issuance of the titles was successfully challenged by the Defendant. The orders sought in the instant suit are therefore not attainable in law.
41. Additionally the Defendant and even the Plaintiffs have in their evidence testified that they reside on the suit property. The Defendant states that his occupation and use has been for 35 years, which is not a short period of time. Having him evicted without basis simply because a title has been presented before court and whose origin is disputed will amount to an injustice. The ownership of the land by registration of the 12 persons listed will amount to a lesser hardship and injustice as compared to having only the Plaintiffs hold ownership and occupation of the suit property. See *Kamau Muchuba v Ripples*



*Ltd.* [1993] eKLR and *Charles Mwangi Kamau v Mohamed Hassan Sheikh Noor* (RIR) HCCC No. 2 of 2005 where Justice D. Maraga had this to say: -

“Sad will be the day when any court of law will, with equanimity allow, may, assist a party to retain a position of advantage that he obtains through a planned act of contemptuous disregard to the law of the land”

42. Further, the evidence as to the root of the title is questionable and the court is not convinced that the Defendant is not entitled to a share of the suit property. The allegation that the Defendant is not entitled to ownership of the suit property and possession of the same has in my view not been sufficiently proved. I am guided by the holding in *Benja Properties Limited v Syedna Mohammed Burbannudin Sabed & 4 others* [2015] eKLR, where the court held that:

“It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seized prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in Ghana of *Wuta-Ofei v Danquah* [1961] All ER 596 at 600, the slightest amount of possession would be sufficient.”<sup>30</sup> In addition, section 116 of the *Evidence Act* states that: -

“When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”

43. In conclusion, I accordingly find that the suit is not merited and is therefore dismissed. The parties herein are family members, in a bid to foster cohesion and peace among them I will issue no orders as to costs.

44. The orders granted in ELC Misc 5 of 2021 are to be perfected, for avoidance of doubt the same are;

1. The parcel of land known as Kwale/Msambweni A/2164 be subdivided to Ruzukuye Hussein, Idris Kitale, Kinana Ali, Bakari Nassoro, Ali Juma Nyuni, Binti Hamadi Salim Nyuni, Kassim Khamis, Juma Suleiman, Bakari Salim, Juma Pashua & Mkungu Mohamed in accordance with their Islamic shares.
2. The Kwale County Surveyor to execute the prayer [1] above
3. The Kwale County Registrar of land to register the mutation form in [2] above and issue titles to heirs.
4. The OCS Msambweni Police Station provide security during the execution of this order.

It is so ordered.

**JUDGEMENT DATED SIGNED AND DELIVERED THIS 7TH DAY OF MARCH 2024.**

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**A.E DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of: -

1<sup>st</sup> – 5<sup>th</sup> Plaintiff/Respondent present in person



Ms. Mohamed holding brief for Mr. Khatib for the Defendant

Mr. Disii - Court Assistant.

