



**Shariff v Kadenge & 10 others (Environment & Land Case
35 of 2019) [2024] KEELC 1252 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1252 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 35 OF 2019**

MAO ODENY, J

MARCH 8, 2024

BETWEEN

MWANAFELA ALI SHARIFF PLAINTIFF

AND

DICKSON KITSAO KADENGE 1ST DEFENDANT

SHIDA KAINGU 2ND DEFENDANT

HAMISI TUYE KAINGU 3RD DEFENDANT

CHENGO KADENGE KAINGU 4TH DEFENDANT

JOHNSON KAINGU CHARO 5TH DEFENDANT

REUBEN KADHENGI KAINGU 6TH DEFENDANT

WILSON CHARO MTOI 7TH DEFENDANT

MOSES KAINGU CHEA 8TH DEFENDANT

RAJAB TUYE KAINGU 9TH DEFENDANT

SHIDA KAINGU CHEA 10TH DEFENDANT

JOSEPH TUYE KAINGU 11TH 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 7121 (Org. No 7119/3) III/MN, 7122 (Org. No 7119/4) III/MN, 7123 (Org. NO 7119/5) III/MN, 7124 (Org No 7119/6 III/MN, 7125 (Org No 7119/7) III/MN 7126 (Org. No 7119/8) III/MN, 7127 (Org. No



7119/9) III/MN, 7118 (Org No 7119/10) III/MN, and 7120 (Org No 7119/2) III/MN are wholly and solely owned by the plaintiff, and that the Defendants' 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 or through them to vacate and deliver up to the Plaintiff, in vacant possession, ALL THAT parcel of land being Subdivision 7120 (Org No 7119/2) III/MN which they are presently occupying, and/or any of the subdivisions herein, namely Nos 7121 (Org No 7119/3) III/MN, 7122 (Org No 7119/4) III/MN, 7123 (Org NO 7119/5) III/MN, 7124 (Org. No 7119/6) III/MN, 7125 (Org No 7119/7) III/MN 7126 (Org No 7119/8) III/MN, 7127 (Org No 7119/9) III/MN, 7128 (Org No 7119/10) III/MN, and which they or any of them may move into and occupy at the time of filling 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. 7121 (Org, No 7119/3) III/MN, 7122 (Org No 7119/4) III/MN, 7123 (Org NO 7119/5) III/MN, 7124 (Org No 7119/6 III/MN, 7125 (Org No 7119/7) III/MN 7126 (Org No 7119/8) III/MN, 7127 (Org No 7119/9) III/MN, 7128 (Org No 7119/10) III/MN, and 7120 (Org No 7119/2) III/MN
 - d. Damages
 - e. Costs of this suit
 - f. Interest on (d) and (e) above at Court rates from the date of judgment until payment in full.
 - g. Such other or further order as the Honorable Court may deem fit and just to grant.
2. The Defendants filed an amended statement of defense and counter claim dated 21st April, 2022 where they sought the following orders:
- a. That the Plaintiff's suit be dismissed.
 - b. That the Plaintiff's interest in the parcel of land parcel No 1587 and 1588 Section III Mainland North measuring approximately 95.5 Acres be extinguished.
 - c. That the Defendants herein be registered forthwith as the owners of the suit parcel of land in place of the Plaintiffs by reason of the fact that the Defendants have become entitled to the said parcel of land by adverse possession.
 - d. That the Registrar of Titles, do issue Certificate of Titles for the Parcel of land No 1587 and 1588 Section III Mainland North measuring approximately 94.5 Acres registered in the names of the Defendants without gazettelement.
 - e. That the Registrar of Titles be ordered to reconstruct file/records and certificate of title for the parcel No 1587 and 1588 Section III Mainland North measuring approximately 95.5 Acres without gazettelement and cause an entry and register the Defendants as the registered owners.
 - f. That the orders referred above be registered against the title to the property known as land parcel No 1587 and 1588 Section III Mainland North measuring approximately 95.5 Acres in terms of Section 38 (2) of the limitation of Action Act, Chapter 22, Laws of Kenya.
 - g. That the Court has jurisdiction to hear and determine this matter. The cause of action arose in Kilifi County where the property comprising the subject matter of this Suit is situate.



- h. That the Defendants acknowledge that there has never been and there is no Suit pending between the same parties herein in relation to the same subject matter in Suit.
- i. A mandatory injunction directing the Plaintiff's by themselves, through their servants or agents or through any one claiming them from dealing, wasting, damaging, intruding, trespassing, developing and/or interfering with the Defendants/Applicants quiet occupation and possession of parcel subdivision Nos 1587 and 1588 (original No 265 Section III M.N).
- j. Costs and interest of this Suit.
- k. Such other further orders as the Honourable Court may deem fit and just to grant.

Plaintiff's Case

- 3. PW1 Ali Sharrif Sagaaf adopted his statement dated 31st May, 2019 and stated that he has his wife's power of attorney donated in 1988. He also produced documents in the list of documents dated 31st May 2019 as PEX No 1. to 9.
- 4. PW1 stated that he bought the suit land in 1988, has been in occupation, developed it and subdivided the same for his children. It was further his evidence that Defendants are squatting on the land and that they had been given portions to cultivate but instead settled claiming ancestral land. PW1 also testified that it is not true that the Defendants are occupying the whole parcel of land as a report by a surveyor confirmed the true position on the ground in 2019.
- 5. On cross- examination by Miss Onyango, PW1 told the court that they have developed and subdivided the land but could not remember the surveyor who did the subdivision and when the same was done. It was further his testimony that he has evidence of compensation of the trees and the letters from the Chief where the Defendants had promised to vacate upon the compensation.
- 6. PW1 stated that the Defendants requested for a survey where the report indicated that finding No. 3 that the boundary lined in red is the area claimed by the Defendants which is a total of 20 acres within plot No Mainland North Section 111/7120, 5065, 11802 and 11803. He stated that Plot No. 4 plot is a big portion of land and is not developed.
- 7. Upon re-examination by Mr. Mugambi, it was PW1's testimony that finding No. 2 states that the area is within M/N/7/20/1/803 the boundary marked in purple. He testified that the report shows where the Respondents were residing and not ownership.

Defendants' Case

- 8. DW1 Reuben Kadhengi Kaingu adopted his Witness Statement filed on 28th August, 2019 and stated that he was born in 1969 on the suit land and has never been a squatter. He testified that a dispute arose in 1980 when the Plaintiff wanted to evict them.
- 9. It was DW1's testimony that after the ruling which directed that status quo be maintained, the Plaintiff's built a wall but they did not file a case for contempt of court. That they have stayed on the suit land for more than twelve years so they should be issued with a title.
- 10. Upon cross examination by Mr. Mugambi, DW1 told the court that the land belonged to Kibalawashe and he is claiming adverse possession and ancestral land. He stated that the Plaintiff has a title deed and that he has known the Plaintiff since 1980. DW1 elaborated that they have never agreed to be given alternative land and the letter stating that they had agreed to be given alternative land was a lie.



11. Upon re-examination by Mrs. Onyango, DW1 testified that there was a case No 275 of 1993 where an order was issued but they never obeyed. He further stated that the Plaintiff came to buy trees but they did not sell to him.

Plaintiff's Submissions

12. Counsel relied on Section 107 (1) of the *Evidence Act* and Section 26 (1) of the *Land Registration Act, 2012* and submitted that the Plaintiff has adduced evidence to prove that he is the rightful owner of the suit land.
13. It was counsel's submission that the Plaintiff gave a detailed historical background of how she came to acquire parcel No 265/2 later known as plot No 1588 Section III Mainland North and which was later subdivided into nine parcels and transferred the subdivisions to her children.
14. Counsel submitted that entries 11, 14 and 18 in the Certificate of Ownership issued to Mohamed bin Aafi (deceased) on 6th October, 1923 under the repealed Land Titles Ordinance, 1908 capture the details of the transfer of the land to the Plaintiff.
15. Mr. Mugambi submitted that on 5th October, 1990 the High Court at Mombasa issued an order in Mombasa High Court Civil Suit No 134 of 1998 recognizing the Plaintiff's title to parcel No 265/2 and that the Plaintiff has been in possession of the suit property which he has developed.
16. Counsel further submitted that the Plaintiff has been paying land rent and property rates for the nine (9) subdivisions to the County government of Kilifi and produced the rates clearance certificate, invoices, receipts, property rate statements from the Kilifi County Government.
17. Mr. Mugambi submitted that the Defendants did not adduce evidence to dislodge the Plaintiff's claim of ownership, instead they claimed that their grandfathers have lived and buried them on plot 1588 for the last 100 years. Further, that the land is their ancestral land and that they have acquired it by way of adverse possession.
18. It was counsel further submission that the Plaintiff has no interests in plot No 1587 Section III Mainland North and that plot No 1588 which the Defendants are claiming no longer exists as it was subdivided in 2018 into 9 plots.
19. Counsel relied on the case of Stephen Mwadoro & 56 others v Alhad Mohamed Hatimy [2020] eKLR and submitted that one cannot claim to have acquired land by adverse possession if he claims that the land he is occupying is his ancestral land. Counsel also cited the cases of Haro Yonda Juaje v Sadaka Dzenge Mbauro & another [2014] eKLR and Sammy Mwangangi & 10 others v Commissioner of Lands & 3 others [2018] eKLR.
20. Mr. Mugambi submitted that in Malindi Environment and Land Case No 94 of 2014, one Johnson Kaingu Charo (alias Johnson Kaingu Cheya) wrote a statement in which he described himself to be a grandson of Kaingu Cheya Kibakwashe and the statement is a confirmation by Mr. Johnson that he was aware that the land on which his grandfather had settled belonged to the Plaintiff and was not their ancestral land. He relied on the case of Omar Hassan Haji & another v Safari Kazungu & 49 others [2021] eKLR.
21. Counsel further relied on the cases of Mtana Lewa vs Kahindi Ngala Mwangandi [2015] eKLR, Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR and Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another [2015] eKLR.



22. Finally counsel stated that the Defendants claimed a total 95.5 acres without indicating what size each one of them was occupying individually as the acreage claimed is even in excess of the Plaintiff's land and the Defendants in this case 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.
23. Counsel relied on the cases of Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others [2018] eKLR and Michael Githinji Kimotho v Nicholas Muratha Mugo [1997] eKLR and submitted that the Plaintiff has proved her case against the Defendants to the required standard and is entitled to the prayers sought in her plaint dated 31st May, 2019.

Defendants' Submissions

24. Counsel identified the following issues for determination:
 - a. Whether the Plaintiff lawfully acquired the subject property Plot No 1587 and 1588 (Originally Plot No 265/III/MN before subdivision)?
 - b. Whether the Defendants have acquired rights over the suit property?
 - c. Whether the Plaintiff's rights jointly and severally over the suit property have been extinguished?
 - d. Whether the Defendants have any other remedies available to them or not?
25. On the first issue, counsel submitted that at the time of the alleged purchase of the subject suit property by the Plaintiff, their family had already acquired rights over the property vide adverse possession and therefore the Plaintiff unlawfully purchased their property without their involvement.
26. Counsel submitted that the Plaintiff has failed to bring forth any evidence proving that he has fairly compensated the Defendants prior to seeking eviction orders in this suit; the Defendants being squatters as described by the Plaintiff.
27. On the second issue, counsel submitted that they have since acquired rights over the subject property vide adverse possession and relied on the case of Tabitha Waitherero Kimani v Joshua Ng'ang'a (2017) eKLR.
28. On the third issue, counsel submitted that the Plaintiff did not acquire the subject property lawfully and they do not have any right and/or claim over the subject suit property. Counsel relied on Article 40 (1) and 2 (a) of *the Constitution* of Kenya and Article 60 (1) of *the Constitution*. Counsel relied on the case of Titus Kigoro Munyi vs Peter Mburu Kimani Civil Appeal No 28 of 2014.
29. Ms Onyango stated that it is the Defendants' case that the subject suit property is registered unlawfully in the name of the Plaintiff and therefore cannot legally deal with the suit property and even risks eviction unless the suit property is registered in their names jointly.

Analysis And Determination

30. The issues that arise for determination are
 - a. Whether the suit parcels are wholly owned by the Plaintiff and if the Defendants occupation of the same is unlawful?



- b. Whether the Defendants are entitled to the orders sought in their counter claim dated 21st April, 2022?
- c. Who should bear the costs of the suit?
31. On the first issue, the Plaintiff in his list of documents dated 31st May, 2019 has attached Certificates of Title of the nine subdivisions numbers: 7121 (Org. No 7119/3) III/MN, 7122 (Org. No 7119/4) III/MN, 7123 (Org. NO 7119/5) III/MN, 7124 (Org No 7119/6 III/MN, 7125 (Org No 7119/7) III/MN 7126 (Org. No 7119/8) III/MN, 7127 (Org. No 7119/9) III/MN, 7118 (Org No 7119/10) III/MN, and 7120 (Org No 7119/2) III/MN.
32. The titles show that the suit parcels are registered in the names the Plaintiff and her children being: Sheikha Shariff Sagaaf, Naila Shariff Sagaaf, Sharif Aidarus Ali Sagaaf, Zaina Shariff Ali Sagaaf, Nusaybah Sheriff Ali Sagaaf, Abdunnassir Sharif Ali Aidarus Sagaaf and Rumana Abdulrahman Abduswamad.
33. It is the Plaintiff's case that she is the registered proprietor having bought the parcel of land from the estate of one Mohamed Bin Auf and that of Aisha Binti Salim in 1987. The Plaintiff has also produced a sale agreement dated 4th June, 1991 whereby the vendor is one Dorothy N. Chome and the Plaintiff together with one Ahmed Suhel as purchasers of land Plot No 178 Tezo Roka Settlement Scheme No 484 which was intended to settle the Defendants but they refused to relocate to the suit parcel.
34. Section 24 (a) of the *Land Registration Act* provides that:
- “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”
35. Section 26 of the *Land Registration Act* on the other hand provides that:
- “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.”
36. The Defendants are claiming adverse possession in their counterclaim to have acquired the suit land by way of adverse possession. In the same breath they are also claiming that the suit land is their ancestral land. It is further on record that they are claiming that the Plaintiff acquired the title illegally.
37. The issue of the Plaintiff having acquired the suit land illegally should have been particularized to show the illegality or the irregularity of the acquisition. This was not done. The evidence adduced by the Plaintiff shows the chronology of acquisition of the suit land. The root of the Plaintiff's title has not been challenged.



38. Coming to the issue of adverse possession by the Defendants, it is trite that for a party to claim adverse possession, such party must acknowledge such title. You cannot attack the root of a title to have been acquired illegally and hope to benefit from an irregularly obtained title.

39. In the case *Haro Yonda Juaje v Sadaka Dzenge Mbauro & Kenya Commercial Bank (2014)* eKLR, where 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.”

40. It follows that the defendants’ claim for adverse possession cannot succeed.

41. The other issue is whether a claimant can succeed in a case of adverse possession when such claimant pegs the claim on the land being ancestral land. The answer is in the negative, if you are claiming land as being ancestral then you 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.

42. I have considered the pleadings, the evidence by the parties, the submissions and relevant judicial authorities and find that the Plaintiff has proved her case against the Defendants hence the same is allowed with costs. The Defendants have failed to prove their counterclaim against the Plaintiff and the same is dismissed with costs. I therefore make the following specific orders:

- a. A declaration is hereby issued that the parcels of land being subdivisions Nos 7121 (Org. No 7119/3) III/MN, 7122 (Org. No 7119/4) III/MN, 7123 (Org. NO 7119/5) III/MN, 7124 (Org No 7119/6 III/MN, 7125 (Org No 7119/7) III/MN 7126 (Org. No 7119/8) III/MN, 7127 (Org. No 7119/9) III/MN, 7118 (Org No 7119/10) III/MN, and 7120 (Org No 7119/2) III/MN are wholly and solely owned by the plaintiff, and that the Defendants’ occupation of the same is unlawful, illegal and an affront to sanctity of title.
- b. A permanent injunction is hereby issued 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. 7121 (Org, No 7119/3) III/MN, 7122 (Org No 7119/4) III/MN, 7123 (Org NO 7119/5) III/MN, 7124 (Org No 7119/6 III/MN, 7125 (Org No 7119/7) III/MN 7126 (Org No 7119/8) III/MN, 7127 (Org No 7119/9) III/MN, 7128 (Org No 7119/10) III/MN, and 7120 (Org No 7119/2) III/MN
- c. The counterclaim dated 21st April 2022 is hereby dismissed with no orders as to costs.
- d. Defendants to vacate the suit land within 45 days failure to which eviction order to issue.
- e. The costs of the suit are awarded to the Plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 8TH 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.

