



REPUBLIC OF KENYA



**Omar & 3 others v Mohamed & another (Environment & Land Case
12 of 2019) [2025] KEELC 829 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 829 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT GARISSA
ENVIRONMENT & LAND CASE 12 OF 2019
JM MUTUNGI, J
FEBRUARY 26, 2025**

BETWEEN

**AHMED ALI OMAR 1ST PLAINTIFF
IBRAHIM HASSAN MAALIM 2ND PLAINTIFF
HASSAN MAALIM ISSACK 3RD PLAINTIFF
ALI MAALIM ISSACK 4TH PLAINTIFF**

AND

**KHADIJA ABDI MOHAMED 1ST DEFENDANT
HEYNI IBRAHIM KHALIF 2ND DEFENDANT**

JUDGMENT

1. The Plaintiffs instituted the present suit against the Defendants who were described as Chairlady and Secretary of Naima Women Farmers Association registered under certificate No. 3326499 with the Ministry of Gender Children & Social Development vide a Plaint dated 3rd December 2019.
2. By the Plaint the Plaintiffs claimed that the Defendants Women Farmers Association in 2016 started laying claim to the Plaintiffs land measuring approximately 20 Acres situated in Elwak at Bulla Afya Mandera County. The Plaintiffs averred they had been using the land as community land and claimed the Defendants had no right to it. The Plaintiffs thus prayed for Judgment against the Defendants for orders:-
 - a. A permanent injunction restraining the Defendants, by themselves, their agents, servants and/or whomsoever is acting on their behalf or upon their instructions from interfering with the Plaintiffs use of the said land.
 - b. Costs of this suit plus Interest thereon.



- c. Any other relief the Court deems fit to grant.
3. The Defendants filed a Defence and Counterclaim dated 23rd July 2021 where they denied the averments by the Plaintiffs Contained in the Plaint. The Defendants instead contended it was infact the Plaintiffs who had invaded, interfered and/or trespassed onto the Defendants farm No. 2 in Elwak, Bulla Afya without any colour of right. The Defendants contended they were the legal and rightful owners of the land claimed by the Plaintiffs and by their Counterclaim sought orders as follows:-
 - a. A Permanent injunction do issue restraining the Plaintiffs, their servants, employees and/or agents acting on their behalf from interfering, with the Defendants' land to wit; farm No. 2 in Elwak (PDP No. 386/2016/6-ELWAK TOWNSHIP) registered in the name Naima Women Farmers Association.
 - b. A declaration that the suit premises being farm No. 2 in Elwak (PDP No. 386/2016/6-ELWAK TOWNSHIP) is owned by Naima Women Farmers Association.
 - c. Costs of this suit
 - d. Interest on (c) above at Court rates.
 - e. Any other relief this Court deems fit to grant.
4. The suit was part heard before Hon. Justice Cheronu and following his transfer proceed before me from where he had reached. The Plaintiffs presented two witnesses in support of their case and the Defendants presented four witnesses.

Evidence of the Parties.

5. Ali Maalim Issack the 4th Plaintiff testified as PWI. He testified that they had been using a piece of the Community land near Elwak Airstrip to graze their Livestock which they claimed ownership of and that he was one of the owners of the land. He stated they had enjoyed possession and use of the land over a long period without interference from anybody until sometime in 2016 when a group calling itself Naima Women Farmers Association started laying claim of ownership to the land. He stated the group was led by the 1st Defendant who called them from Nairobi claiming to be the Chairperson of the group and warning that they should not undertake any developments on the land.
6. The witness explained that the dispute was referred to the Community elders and the Local Administration to mediate and resolve. The witnesses stated that the elders visited the site and resolved there were two parcels of land on the ground and they placed some demarcation to delineate the two pieces of land. The witness explained that their plot was delineated as plot 'A' and that of Naima Women Group as Plot 'B'. The witness stated they agreed with the elder's resolution but the Defendants (Naima Women Group) did not and they (Defendants) filed a suit in Nairobi which was transferred to Malindi and ultimately to Garissa as ELC No. 5 of 2017 but was finally dismissed by the Court on the basis that Naima as an association lacked the capacity to sue or be sued.
7. The witness testified that the 1st Defendant was using her influence to have the police prevent them from developing their plot. He explained that the land being community land no titles had been issued to anybody though they were recently (2019) issued with certificates of land ownership by the Mandera County Government. The witness stated they wanted the Defendants to be restrained from interfering with their land and/or harassing them.
8. Under Cross-examination by Mr. Ndege Advocate for the Defendants the witness stated there were two parcels of land marked 'A' and 'B' measuring 1.29 Ha and 1.39 Ha respectively and that their land is



- parcel 'B' while that of the Defendants was parcel 'A'. He further explained that the whole land between Elwak and the Airstrip was about 20 Acres and it was community land but the disputed portion was the land they wanted to develop before the Defendants stopped them. He reiterated the dispute was resolved by the area Chief and the elders but the Defendants did not agree with the resolution.
9. Ibrahim Hassan Maalim, 2nd Plaintiff testified as PW2. It was his evidence they had been utilizing the land in dispute since he was born as ancestral land. The land was between Elwak Airstrip and Elgolicha road and measured approximately 3.34 acres. He denied that the land belonged to Naima Women Group and reiterated it was Community land that they had always been using.
 10. Issack Musa Malishe testified as DWI on behalf of the Defendants. He stated he was the Chief of Bulla Afya and affirmed he knew both the Plaintiffs and the Defendants. He adopted his witness statement as his evidence. In Cross examination the witness affirmed that as administration and the elders they made effort to resolve the dispute between the parties but the 1st Defendant (Khadija) insisted the whole land belonged to them and she would not allow any part to be taken away.
 11. Issack Robow Hussein testified as DW2. He stated that he worked as a casual worker as well as a watchman. He stated that he recorded a witness statement on 29th April 2021 which he wished to rely on as his evidence. He explained that the land in dispute was situated behind the Police Station and next to the DC's Office and was being utilized by the 1st Defendant. He stated they had been engaged to place beacons on the boundaries of the land by the 1st Defendant (Khadija) and they placed a total of 43 beacons. He stated that the Plaintiffs entered the land and removed and destroyed the beacons and started constructing on the land and were carrying on construction even at night. The witness stated he had lived in the area since 1997 and it was his evidence that the land did not belong to the Plaintiffs but to the Defendants. He stated the Plaintiffs had no land within the locality.
 12. In cross examination the witness stated he was a neighbor to the disputed land as he lived next to the land. He explained that the Plaintiffs had land not far away from the disputed land where they live. The witness further testified that when the Plaintiffs invaded the land and started constructing, Police were called and they came to the site.
 13. Abdiweli Osma Allow testified as DW3. He adopted his witness statement dated 29th March 2021 as his evidence. He was emphatic that the disputed land was owned by Naima Women Farmers Association where the Defendants are officials with the 1st Defendant as Chairlady. It was his evidence that the Plaintiffs did not own the land which he stated neighbours Elwak Airstrip and was about 10 acres.
 14. Khadija Abdi Mohamed the 1st Defendant testified as DW4. She affirmed she was the Chairperson of Naima Women Farmers Association while the 2nd Defendant was the Secretary. The witness adopted her witness statement made on 30th April 2021 and relied on the filed documents as per list dated 29th April 2021. The documents were admitted in evidence as "D EX 1-15" as listed. The witness explained that Naima Women Farmers Association, was allocated the disputed land measuring 10 Acres in 1992 as per "D EX 2" by the Ministry of Agriculture. She stated they were presently in occupation and asserted that the Plaintiffs had no land adjacent to their land. She denied there was any time they ever threatened the Plaintiffs. The witness urged the dismissal of the Plaintiffs case on account of lack of proof.
 15. The parties following the closure of the trial filed written submissions to urge their respective positions. The Plaintiffs submissions are dated 27th November 2023 and those of the Defendants are dated 18th July 2024.
 16. The Plaintiffs in their submissions reiterated they had always been in possession and occupation of the disputed land and that they held certificates of ownership from the Mandera County Government.



They contended the Defendants unlawfully invaded the land in September 2016 when they started laying claim of ownership to the land. The Plaintiffs contended they had adduced evidence to support their ownership in the form of the certificates of ownership, Chief's letter and a survey report by Pitmatch Surveyors and Consultants which clearly showed the root of the title. In particular the Plaintiffs pointed out, the survey report demonstrated the Plaintiffs and the Defendants plots were separate and distinct designated 'A' and 'B' respectively. The Plaintiff's submitted their exclusive occupation of plot 'B' viewed against the Defendants act of fencing plot 'A' was sufficient proof of their ownership of plot 'B'.

17. The Plaintiffs further submitted the Defendants had not proved how they acquired their land and consequently the root of their title was unchallenged. The Plaintiffs in support of their submissions relied on the Case of Wangui & 2 Others –vs- Wangui & Another (2022) KEELC 3755 (KLR) and Caroline Awinja Ochieng & Another –vs- Jane Anne Mbithe Githu & 2 Others (2015) eKLR to illustrate the factors a Court needs to consider in deducing and/or determining ownership where title is disputed. Inter alia in the Wangui & 2 Others –vs- Wangui & Another Case (Supra) the Court stated thus:-

“The law on unregistered land unlike registered land is slightly unclear. Proof of ownership is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. There is no doubt that the holder of the documents proved is the one entitled to the property ----“.

18. The Plaintiffs maintained the Defendants documents in support of ownership lacked authentication and pointed out the Chief Bulla Afya Location, Issack Musa who testified as a defence witness took office in 1999 yet he was shown as having signed the Defendant's certificate of registration dated 20th August 1992. The Plaintiffs contended the Defendants document could be forged since the document was also stamped by the Deputy County Commissioner Mandera yet such position never existed before 2013. The Plaintiffs thus submitted the Defendants claim of ownership of the disputed land was not proved and their Counterclaim should be dismissed.
19. The Defendants in their submissions rehashed the evidence adduced by the parties. The Defendants submitted that the plots the Plaintiffs claimed to own were individual plots purportedly allocated to them individually between 2017 and 2019 according to the certificates of ownership they exhibited. The sizes of the plots were not specified in the certificates of ownership and could not be Community Land as pleaded by the Plaintiffs. The Defendants submitted they adduced clear evidence that Naima Women Farmers Association was allocated land measuring 10 Acres in 1992 and tendered documentary evidence in form of payment receipts, letters from relevant Government Departments confirming no objection to title processing and copy of PDP and advertisement in the Kenya Gazette of completion of the Part Development Plan.
20. The Defendants in the submissions conceded the land in issue being initially unregistered, comprised Community Land within the meaning of Article 63(2) of *the Constitution* but contend that the land they lay claim to was set apart lawfully in their favour and they were now the lawful owners. Article 63(1) and (2) of *the Constitution* provides as follows:-

63.

- (1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.
- (2) Community land consists of—



- (a) land lawfully registered in the name of group representatives under the provisions of any law;
- (b) land lawfully transferred to a specific community by any process of law;
- (c) any other land declared to be community land by an Act of 44 [Constitution of Kenya, 2010](#) Parliament; and
- (d) land that is—
 - (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
 - (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or
 - (iii) lawfully held as trust land by the county Governments, but not including any public land held in trust by the county government under Article 62 (2).

21. The Defendants submitted the land having been lawfully allocated to them and duly set apart, the Plaintiffs have no justification to interfere with the same and should be restrained by way of injunction. In support of their submissions the Defendants placed reliance on the Case of Mohamed Ibrahim Alio & 6 Others –vs- Mandera County Government & 6 Others (2021) eKLR and Ramadhan Salim –vs- Evans M. Maabi T/a Murhy Auctioneers & Another (2016) eKLR.
22. Having reviewed the pleadings and the evidence adduced by the parties and having considered the submissions made by the parties the issues that arise for determination can be summarised up as follows:-
- i. Whether the disputed land constituted Community land that was allocated to the Plaintiff and/or was land allocated to the Defendants vide PDP No. 368/2016 of 20th October 2016?
 - ii. Whether it is the Plaintiffs and/or the Defendants who are entitled to the disputed land?
 - iii. What reliefs and/or orders should the Court make grant?
23. The Plaintiffs claim to the suit land is predicated on the fact that they claim the land to have been Community Land which according to them they had always occupied and utilized. It was unclear in what manner they were utilizing the land but in 2016 they claimed they wanted to undertake some development on the land and that was when the Defendants emerged and there were some skirmishes that generated intervention of the Police. The Defendants apparently instituted a suit in Nairobi ELC No. 1440 of 2016 seeking to have the Plaintiffs restrained but the suit was ultimately transferred to Garissa as ELC No. 5 of 2017 but was struck out on the basis Nalima Women Farmers Association lacked capacity to sue in its name.
24. The Plaintiffs in support of their claim exhibited individual certificates of land ownership documents which however did not indicate the sizes of the plots nor did they annex part Development Plan (PDP) for identification and to show their location. In contrast the Defendants when they filed their defence and Counterclaim, they in support of their claim of ownership of the disputed land, annexed the exhibits set out in their list of documents dated 24th April 2021 produced as D EX1-15. Exhibit 2 is a Land /Farm Ownership registration form. This form was issued by the Divisional Agricultural Extension Office and was signed by the Agricultural Officer and the District Officer. Although the Chief and Assistant Chief were supposed to sign only the stamp of the Assistant Chief was embossed



meaning they may have been unavailable. I do not consider anything would turn on the fact that the name of Issack Musa who testified he became Chief in 1999 is on the form. The form was signed by the issuer and was witnessed by District Officer Julius O. Otieno who duly signed. The subsequent exhibits Nos. 3,4, 5 and 6 of payment receipts to Mandera County Government and County Council of Mandera in my view gives credence to the Defendants assertion that they were allocated the land. The payments were made by Naima Women Farmers Association for rent for Farm 2 Elwak.

25. Defendants exhibits 7-13 demonstrate that the Defendants parcel of land of 10 acres was set apart and the County Physical Planner sought and obtained approvals from all the appropriate departments before submitting the Part Development Plan(PDP) for advertisement in the Kenya Gazette and the print media. The County Physical Planner vide a letter dated 25th October 2016 (DEX8) addressed to the County Surveyor; the Land Administrator Mandera South; the Director, Public Work; the Sub County Water Office, Mandera South; and County Director of Agriculture Mandera, for comments relating to Farm –PDP No. 368/2016/6 – Naima Women Farmers Association. The content of the letter was as follows:-

Dear Sir/Madam,

RE:- Existing Naima Women Farmers Association Farm –PDP No. 368/2016/-6 Elwak Township.

Attached herewith please find a printed copy of the above Part Development Plan. Your Office is considered important in providing comments to help validate/improve the plan to enable the owner seek title documents.

According to records the farm is registered as Farm No. 2 and belongs to Naima Women Farmers Association.

Please expedite

Signed

Maurice O. Omimo

County Physical Planner

Mandera.

26. All the addressees gave letters of no objection to the PDP and it is noteworthy that the County Executive through the County Secretary vide a letter dated 1st December 2016 wrote to the National Lands Commission confirming that the allocation had been approved by the Cabinet. The content of the County Secretary's letter was as follows:-

RE: PDP NO. 368/2016/6 –Elwak Township

This is to confirm that the County Government of Mandera through its Cabinet meeting discussed the above parcel of land and had no objection for the purpose of PDP. The meeting resolutions were minuted as per the minute No. 04/03/2016 of 23rd March 2016.

Kindly process this request for the Applicant.

Yours

Signed

Okash A. Adan



County Secretary

27. On evaluation of the evidence I am satisfied that indeed the Defendants (Naima Women Farmers Association) were allocated Farm No. 2 Elwak Township in 1992 and that they routinely paid the requisite dues to the County Council of Mandera as evidenced by the payment receipts exhibited. When Mandera County Government was established in 2013, they, as the custodians of Community Land pursuant to Article 63 of *the Constitution* acknowledged the allocation of the disputed land to the Defendants and facilitated the setting apart of the same as envisaged under the Law. The appropriate process of setting apart the land was followed as the Physical Planner caused a PDP to be prepared that was subjected to stakeholder engagement and was advertised in the Kenya Gazette and the Daily Nation Newspaper. Any person who had any interest and/or objection ought to have raised their objection and/or make any representations during this stage. The Plaintiffs never objected to the completion of the PDP in favour of the Defendants who proceeded to have title to the suit land prepared.
28. In the premises applying the guidelines outlined in the cases of Wangui & 2 Others –vs- Wangui & Another and Caroline Awinja Ochieng & Another –vs- Jane Anne Mbithe Gitau & 2 Others (supra) which guidelines I agree with, it is my determination that the Defendants have successfully illustrated how they came to be allocated the land in dispute.
29. In the Caroline Awinja Ochieng Case (supra) Onguto J stated thus:-
 - 24; In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.
 - 25 ----- The Court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership ----“
30. In the present suit the Plaintiffs have certainly fallen short of proving ownership of the disputed land. It will be noted they merely stated they were occupying Community land. The survey report they adduced in evidence, it is to be noted was at the Plaintiffs instance and was not backed by any PDP. Though it made reference to the land owned by the Defendants, it focused on what it described as plot ‘A’ measuring 3.18 Acres which the report indicated was the Defendants land and plot ‘B’ measuring 3.34 acres which the report indicated belonged to the Plaintiffs. The Plaintiffs as per their pleadings indicated their land was 20 acres while as per their allotment form the Defendants land was 10 acres. It is unclear how the Surveyor determined where the Plaintiffs land was and/or the extent of the Defendants land. The survey report was made on 28th September 2021 long after the Defendants had a Part Development Plan (PDP) prepared for their land. Given the circumstances it would be unsafe to place any reliance on the survey report prepared by the Plaintiffs surveyor and I will therefore disregard it.
31. The Plaintiffs further had individual certificates of ownership of land BA 438 to Ahmed Ali Omar, BA 573, 574 and 575 issued to 2nd, 3rd and 4th Plaintiffs in 2017 and 2019 respectively. The certificates do not give any size of the land and it is not clear whether they are comprised in the 20 acres the Plaintiffs



were collectively claiming in the Plaintiff or are located elsewhere. There is nothing to show the location of the plots.

32. As illustrated in the case of Mohamed Ibrahim Alio & 6 Others –vs- Mandera County Government and 6 Others (Supra) there is an elaborate process to be followed before any Community Land can be alienated. There is no demonstration that such process was followed before the Plaintiffs were allocated the land. The land allocated to the Plaintiffs, if at all, cannot be identified in the absence of a PDP. The allotment could not be valid and clearly is unlawful as due process was not followed.
33. On the evidence therefore, it is my determination that the Plaintiffs failed to discharge their burden to prove their case against the Defendants on a balance of probabilities. I accordingly dismiss their suit with costs to the Defendants.
34. As regards, the Defendants Counterclaim I am satisfied that the Defendants proved their case on a balance of probabilities. I allow the Counterclaim and grant orders in terms of prayers (a) and (b) of the Counterclaim. The Defendants will also have the costs of the Counterclaim.

Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 26TH DAY OF FEBRUARY 2025.

J. M. MUTUNGI

ELC - JUDGE

