



**Khamis & 2 others v Ainushamsi Multiple Agencies Limited (Environment & Land Case 241 of 2020) [2024] KEELC 3722 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3722 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 241 OF 2020**

**NA MATHEKA, J**

**APRIL 24, 2024**

**BETWEEN**

**JAMAL ABEID KHAMIS ..... 1<sup>ST</sup> PLAINTIFF**

**MOHAMED ABEID KHAMIS ..... 2<sup>ND</sup> PLAINTIFF**

**ABDULHAKIM ABEID KHAMIS ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**AINUSHAMSI MULTIPLE AGENCIES LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The claim is that at all material times herein the plaintiffs are the registered Proprietors of all that parcel of land known as Plot NO. Kilifi/Kawala W Kadzonzo/32 located near Mariakani township along the Mombasa-Nairobi Road. The defendant previously had a Title known as No. CR 60948 for CR. NO. 28815 which is the same parcel of land known as Plot No. Kilifi/Kawala 'A' Kadzonzo/32 but the defendant's Title had been issued under the then Registration of Title Act (Cap 281). By a letter dated 29<sup>th</sup> September 2015 from the National Land Commission, the Commission held that the Title owned by the defendant was suspicious as it had been obtained through the Setting Apart process yet the area had been declared an Adjudication Area under the Land Adjudication Act. (Cap 284). On 13<sup>th</sup> October 2015, the Defendant herein filed Msa ELC No. 263 of 2015 against Hakika Transport seeking a Declaration that their title NO. CR 60948 for Plot No. 28815 is a legal title amongst other orders. On 28<sup>th</sup> March 2019, the MSA ELC No. 263 of 2015 was dismissed by the High Court in Mombasa. That however there are other pending suit at the Malindi Environment and Land Court being ELC NO. 93 of 2014 and NO. 139 of 2014, over the same parcel of land.
2. On 18<sup>th</sup> December 2020 the defendant brought building materials at the site and intended to start constructing of a boundary wall and occupy the property. The plaintiffs' claim against the defendant is for an order of injunction restraining the defendant his employees, servants and or agents from



occupying, constructing or in any other way interfering with property known as Plot No. Kilifi/Kawala 'A' Kadzonzo/32. The plaintiffs pray for judgment against the defendant for;

- i. An Injunction restraining the defendant, his servants, employees and/or agents from entering, remaining, occupying, constructing and/or in other way occupying Plot No. Kilifi/Kawala A Kadzonzo/32.
- ii. General damages.
- iii. Costs of the suit.
- iv. Any other and further relief this Honourable Court deems fit to grant.

3. The defendant states that Plot No. Kilifi/Kawala "A" Kadzonzo/32 is also known as Title CR 60948 IR NO. 28815 (suit property) and the defendant is the registered owner of the suit property. The defendant states that the suit ELC 263 of 2015 was between the defendant and another party not a party to this suit. The defendant states that it obtained approvals from the County for the construction of the boundary wall.

4. This court has considered the evidence and the submissions therein. It is the plaintiffs' case that they are the registered proprietors of LR. Title No. Kilifi/Kawala 'A' Kadzonzo/32 measuring 4.05ha having purchased it from Hamisi Mrinzi Kokoi. The plaintiffs averred that the suit property is part of the Kawala Adjudication Section, they produced a letter dated 29<sup>th</sup> September 2015 from the then Vice Chairperson, National Land Commission who was informing Hamisi Mrinzi Kokoi, 1<sup>st</sup> plaintiff and the defendant, that the suit property was subject to adjudication. It was stated that the suit property was demarcated to Hamisi Mrinzi Kokoi and the title was issued to him on 19<sup>th</sup> March 2014, which is followed by him selling and transferring the same to the plaintiffs. The said letter questioned how the defendant acquired title to the suit property, situated in an adjudication section, where interest and rights are ascertained to persons owning land customarily through the land adjudication process. It was further stated that there was no evidence of setting apart as claimed by the defendant and called for the investigation of Title No. 28815 Cr 60948 held by the defendant.

5. The defendant on the other hand maintained that he is the registered owner of Kilifi/Kawala 'A' Kadzonzo/32 also known as LR Title No. CR 60948 Plot No. 28815 measuring 3.495. The defendant produced a letter dated 10<sup>th</sup> November 2020 from the National Land Commission addressed to the Land Registrar, Mombasa. In the said letter, sought to confirm that the suit property was processed by setting apart by the then Mariakani County Council and title issued to Makwangara Kazungu Gunga for a lease term of 99 years. Makwangara then sold and transferred the suit property to the defendant who became the registered owner on 10<sup>th</sup> October 2015. The defendant also produced a certificate of official search dated 20<sup>th</sup> January 2021 which indicated that he is the registered owner of Plot No. 28815 CR 60948 measuring 3.495 for a term of 99 years.

6. On one hand, the plaintiffs claim the suit property was part of Kilifi Kawala 'A' Kadzonzo adjudication section and was demarcated to Hamisi Mrinzi Kokoi, who later sold the suit property to them. The defendants claim the suit property was set apart by the then Mariakani County Council and a grant was issued to Makwangara Kazungu Gunga who later sold the suit property to him. There are two title documents before the court and the issue for determination is which of the two will be upheld by the court and which will be cancelled by the court within the meaning of Section 26 of the [Land Registration Act](#).



7. The suit property is situated in the Kawala 'A' Adjudication section of the Mariakani area, Kilifi District, this was confirmed by a letter dated 29<sup>th</sup> September 2015 from the Vice Chairperson National Land Commission. During the land adjudication process, it was confirmed the suit property belonged to Dzuha Dzombo Chirondo, whose family endorsed Hamisi Mrinzi Kokoi, who lived on the suit property as the owner. PW2, County Land Registrar, Kilifi together with PW3, County Surveyor Kilifi both confirmed in their testimony that the suit property was situated in an adjudication area and was allocated to Hamisi Kokoi who later sold to the plaintiffs. The testimony of the two concedes with the letter by the County Surveyor from Kilifi County Government, Department of Lands, Energy, Housing and Physical Planning written to the Deputy Registrar of this court on 6<sup>th</sup> January 2017. The County Surveyor confirmed to the court that the suit property is situated in an adjudication section registered in the names of the plaintiffs. He maintained that the defendant's title to LR 28815 could not be determined since the survey plan to the same could not be traced. This was also the position of the Director of Surveys, Arthi House who wrote to the Land Registrar Kilifi on 28<sup>th</sup> February 2018 that the survey records for LR No. 28815 do not exist in their records. DW2 the Land Registrar Mombasa testified that LR 28815 exists in the Mombasa lands registry records which originated from approved Deed plans dated 7<sup>th</sup> September 2011. DW2 admitted that she did not have any evidence to confirm that the suit property was set apart but indicated that titles under the Registration of Title (as held by the defendant) were only registered in the Mombasa Lands registry catering for the whole of the coastal region.
8. Before the enactment of *the Constitution* of Kenya, 2010 the Commissioner of Lands granted land belonging to the government under the authority of the president. These powers that the Commissioner of Lands yielded of alienating government land were only to be exercised in specific cases such as for the establishment of schools, hospitals, and religious centres that would benefit the community as a whole and not for individual use as subject to the Government Lands Act. In the instant case, the defendant has produced a Certificate of Grant No. CR 60948 of LR 28815 measuring 3.495 was issued to Makwangara Kazungu Gunga on 6<sup>th</sup> September 2011. The grant was registered at the Mombasa land registry on 4<sup>th</sup> January 2012 and later transferred to the defendant on 10<sup>th</sup> October 2015, as seen from the certificate of search dated 20<sup>th</sup> January 2021. Further, the repealed Constitution of Kenya allowed local authorities to set apart trust land within their area of jurisdiction to be used and occupied by a public body for the benefit of the community in instance setting up of schools, hospitals, national parks, stadiums, bus parks, public spaces, agricultural research centres etc. In *Bahola Mkalindi vs Michael Seth Kaseme & 2 others* (2013) eKLR it was held that;

“Indeed, Section 115(2) of the repealed Constitution provided that Trust land could only be dealt with in accordance with the African Customary Law vested in any tribe, group, family or individual. *The Constitution* also provided that the only way Trust land could be legally removed from the purview of communal ownership of the people was through adjudication and registration or setting apart. Adjudication and registration of Trust land removed the particular land from the purview of community ownership and placed it under individual ownership while setting apart removed the Trust land from the dominion of community ownership and placed it under the dominion of public ownership. Trust land could only be allocated legally pursuant to the provisions of *the Constitution*, the Trust *Land Act* and the *Land Adjudication Act*.”



9. While in *Leah Magoma Ongai vs Attorney General* (2015) eKLR, it was held that;

“Section 117 of the repealed Constitution of Kenya empowered the County Councils to set apart an area of Trust land within their jurisdiction for use and occupation by any person for a purpose which in the opinion of the County Council is likely to benefit the residents of the area. Section 13 of the Trust [Land Act](#) Cap. 288 Laws of Kenya provides for the setting apart of Trust land by County Councils for private use pursuant to the provisions of section 117 of the repealed Constitution of Kenya aforesaid. Section 53 of the Trust [Land Act](#) gave the Commissioner of Lands power to administer Trust land as an agent of the County Councils and in that regard, the Commissioner of Lands had power among others to execute on behalf of the County Councils, grants, leases, licences and other documents relating to Trust land. Section 13 (2) of the Trust [Land Act](#) provides that the setting apart of land by a county council must be approved by a resolution passed by a majority of the members of the council. Although the Commissioner of Lands had power to administer Trust land on behalf of the County Councils, section 53 (a) of the Trust [Land Act](#) denied it power to approve the setting apart of Trust land on behalf of the County Councils. In discharge of its duties under the Trust [Land Act](#), the Commissioner of Lands was enjoined to act in accordance with the directions of the County Councils.”

11. The defendant held a title in the form of a grant created over government land alienated by the Commissioner of lands while maintaining that the suit property was set apart by the Mariakani County Council. It is evident that the defendant has contradicting evidence, on one hand, he claims the suit property is a creation of a process of setting apart carried out by the Mariakani County Council, while holding a Certificate Grant that was supposedly issued by the Commissioner of Lands and registered in Land Registry of Mombasa. Government land cannot be trust land held in trust by a county council on behalf of a local community. A grant could only be made in respect of unalienated government land by the Commissioner of Lands on behalf of the president. If indeed the suit property was alienated through the Commissioner of Lands, the Makiakani County Council had no role to play in setting part of unalienated government land. The defendant therefore cannot maintain a grant of title issued by the Commissioner of Lands while claiming the same was set apart by Makiakani County Council. The Court in *Leah Magoma Ongai vs Attorney General* (supra) held that;

“Whereas the Commissioner of Lands had power to execute a lease on behalf of the County Council of Gusii under section 53 of the Trust [Land Act](#), Cap 288 Laws of Kenya, it could only do so after the land had been set a part by the County Council of Gusii for alienation to the plaintiff through a resolution by the said council. The Commissioner of Lands had no power to set apart Trust land and to purport to alienate the same on behalf of a County Council. I have no evidence before me that County Council of Gusii passed a resolution to set apart the suit property and to alienate the same to the plaintiff. I also have no evidence before me that all the procedures relating to such setting apart and alienation were followed.”

12. From the evidence before me, I am not satisfied that the setting part of the suit property was lawful. The court cannot connect the grant issued by the Commissioner of lands and the setting apart by the County Council of Mariakani. It has not been established by the defendant whether the lease he holds is under government land or trust land, the defendant has failed to prove the basis in which the Land Registrar Mombasa proceeded to process title in his name. It led the court to conclude that the defendant’s certificate of title CR. 60948 LR No. 28815 was acquired illegally and ought to be cancelled.



13. It is also clear to this court that the plaintiffs' title is authentic and the suit property belongs to them. In his testimony, the 3<sup>rd</sup> plaintiff claimed the defendant had occupied the suit property and pulled down the boundary wall that they had constructed. DW1, the defendant's director did not deny he was in occupation of the suit property. The plaintiffs are entitled to the suit property and the defendant's occupation amounts to trespass and an infringement of their rights as registered proprietors, as the defendant's occupation of the suit property denied the plaintiffs from using, occupying, possessing and enjoying it. It is trite law that trespass to land is actionable per se, the plaintiff need not prove that he suffered any specific loss or damage. The court will however assess the damages to award depending on the facts and circumstances of each case. In *Duncan Nderitu Ndegwa v Kenya Pipeline Company Limited & another* (2013) eKLR, it was held that;

“On the issue and quantum of general damages, once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary to for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendant's trespass.”

14. Consequently, this court finds that the plaintiffs have proved their case on a balance of probabilities and the defendant's counterclaim is unmerited. The court proceeds to make these final orders:
- a. An order is hereby issued compelling the Land Registrar, Mombasa to cancel the Certificate of Title No. CR 60948 LR 28815 issued in the name of Ainushamsi Multiple Agencies Limited.
  - b. A permanent injunction against the defendant, either by himself, his servants, agents, employees or anyone authorized by him from continuing to occupy LR. Title No. Kilifi/Kawala 'A' Kadzonzo/32.
  - c. The defendant is hereby ordered to vacate LR. Title No. Kilifi/Kawala 'A' Kadzonzo/32 and remove all the buildings structures within 90 days from the date of this judgement.
  - d. In the event of default (b) above the plaintiffs be at liberty to so evict or cause to be evicted from the suit land in strict adherence to the law and to remove all the 1<sup>st</sup> defendant's buildings and structures at the cost of the Defendant.
  - e. General damages for trespass are provided in the sum of Kshs 100,000/- annually from 2020 and a similar amount annually or a part thereof until vacant possession is delivered to the plaintiffs.
  - f. Costs of the suit and the defendant's counterclaim are awarded to the plaintiffs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24<sup>TH</sup> DAY OF APRIL 2024.

**N.A. MATHEKA**

**JUDGE**

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