



REPUBLIC OF KENYA



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Tsutsu aka Mwadena Tsutsu Chirenje v Charo & another (Environment & Land Case E106 of 2022) [2025] KEELC 837 (KLR) (26 February 2025) (Judgment)

Neutral citation: [2025] KEELC 837 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E106 OF 2022
SM KIBUNJA, J
FEBRUARY 26, 2025

BETWEEN

**EDWARD MWADENA TSUTSU AKA MWADENA TSUTSU
CHIRENJE PLAINTIFF**

AND

HATIME ALI CHARO 1ST DEFENDANT

RAZAKI ALI JOHO 2ND DEFENDANT

JUDGMENT

1. This suit was commenced through the plaint dated 6th October 2022, by the plaintiff claiming to be the beneficial and registered owner of Plot Mikahani/Mawemabomu/Chonyi/386, suit property, which was ancestral land. That he has been on the suit property for over 50 years and that after adjudication process, it was registered in his name. He averred that sometime in September 2022, the defendants trespassed onto the suit land and started cultivating it without his authority or giving him any notice. That the defendants' land is not near the suit property, and unless they are stopped from their acts, he would suffer irreparable loss and prejudice. The plaintiff therefore seeks the following prayers:
 - a. "A permanent injunction restraining the Defendants either acting by themselves, their employees, agents and, and/or through any other means whatsoever from trespassing, alienating, encroaching, wasting, damaging, dealing and/or interfering with Plot Mikahani/Mawemabomu/Chonyi/386 and/or do issue direction compelling the 1st and 2nd defendants their servants, agents and/or employee to stop cultivating said land and/or pull down their construction and/or structures, development lying on the plaintiff's piece of land if any.
 - b. A declaration that the plaintiff is the registered legal and/or beneficial owners of all that piece of land known as Plot MIKAHANI/MAWEMABOMU/CHONYI/386 in mazeras rabai



contained in Land's Adjudication Section of Mikahani/Mawemabomu/Chonyi Adjudication Scheme Section which said piece of land is comprised in the survey /demarcation records as per the Title Deed issued on the 11th day of October Two Thousand and Nineteen.

- c. An order directing the County Commissioner and/or administration assisted by the officer Commanding Rabai Station to supervise and provide security during the from of defendants' items that may be found lying on the land.
 - d. Costs and interests.
 - e. Any other relief the court may deem fit.”
2. The defendants opposed the plaintiff's claim through their amended statement of defence and counterclaim filed on the 18th December 2023, averring inter alia that they are legal administrators and beneficiaries of the estate of the late Ali Joha Charo; that the recent official search does not show that the plaintiff is the registered owner of the suit land; that they came to the said land in 1998; that the plaintiff had sold a portion of the suit property in 1998 to the late Ali Joho Charo, who is their husband and daughter respectively, but had the whole land adjudicated in his name in their absence; that they have acquired title over the portion of the suit property measuring one acre under adverse possession as they have been using the land since 1998 without disturbance for over 24 years and planted avocados, pineapples, mivide, and mango trees among others; that their ownership of the one acre portion of the suit land was discussed and agreed during the meeting of 29th September 2022; that the plaintiff started disturbing them and interfering with their use of the property after the death of Ali Joha Charo so as to deprive them of their land; they therefore seeks for the following orders in their counterclaim:
- a. “An order of permanent and mandatory injunction restraining the plaintiff either by himself, his servants and/or agents from trespassing, claiming and/or dealing in any way with the Defendant's portion of land measuring one acre or thereabout situated at Mawemabomu and known as Plot No. Mikahani/Mawemabomu/Chonyi/386 and a declaration that the Defendants are the lawful owners of the suit property measuring one acre or thereabout.
 - b. Damages against the Plaintiff for wrongful entry into, occupation of and/or trespass onto the suit premises of the Defendants.
 - c. Costs of the suit and counterclaim.
 - d. Interest at court rates”
3. The plaintiff filed a reply and defence to the defendants' defence and counterclaim dated 22nd May 2024 inter alia averring that he holds a genuine title deed to the suit property that he obtained after due process through adjudication; that he never signed any sale agreement and the defendants; have not given particulars of the same; that he is the owner of the suit property that is approximately 1.1 hectares by virtue of title issued to him dated 11th October 2019; that as the registered owner of the said land, he could not be accused of being a trespasser and his cultivation and or occupation of the same is lawful, and the counterclaim should be dismissed with costs.
4. During plaintiff hearing, the plaintiff testified as PW1, and relied adopted the contents of his statement dated 6th October 2022 and two lists of documents, one of even date and the other dated 20th May 2024. He testified that the sale agreement document the defendants have annexed is over a portion of land he sold to one Esther, who was not a party to this suit, and is over a different parcel of land; that the defendants had not paid him any money as purchase price and as they have not been in peaceful use of the land, they should be evicted. In cross examination, PW1 reiterated that one of the agreements produced by the defendants was between him and Esther Dzame that he signed while at the police



station, and was over a different parcel of land; that the defendants came onto the suit property and started constructing a house and he reported them to the police and District Officer, who visited the land and asked defendants to stop the construction. He denied selling any land to Ali Charo, the deceased. He also denied knowing Mwambaji Mlaji and that the said person was the initial owner of the land.

5. In their defence, the 1st and 2nd defendants testified as DW1 and DW2 respectively. Defendants called two witnesses who are the 1st and 2nd defendant respectively. DW1 relied on her statement dated 17th October 2022 and list of documents of even date and another further one filed on 23rd November 2023 which the court has noted was a further list of witness, which was wrongly cited as further list of documents. It is her testimony that the plaintiff sold one acre of land to her late husband, Eric Ngala, now deceased, was a witness. She stated that she could not remember which year it was, but confirmed seeing her husband paying the plaintiff. That they had planted mango and coconuts trees on the land. That after the death of her husband, the plaintiff started disrupting their possession. In cross-examination, DW1 told the court her husband had shown her the sale agreement, but could not tell whether it had the number of the suit property as she does not know how to read and write. That though she could not tell whether the land her husband bought from the plaintiff had a reference number or not when he bought it, she was sure they have lived on it for about thirty years. DW 2 adopted his statement dated 17th October 2022, and restated that his father had bought one-acre portion of the suit property in 1988 and that they have lived on it for over 20 years. He denied having been summoned by the land adjudication committee. He told the court that he is 34 years old and was a young man when his father bought the land from the plaintiff in 1998. In cross-examination, DW2 admitted that the sale agreement they rely on does not have a signature of the parties, or the parcel number of the land being sold. That his father died in 2020 but he could not tell how far he had gone in obtaining title to their portion of the suit property. He also admitted that he was the one building the house in 2021 but was stopped by the district officer. In cross-examination, DW2 told the court that the house he was constructing is incomplete, and there was nobody settled on the suit property. He added the sale agreement has identity cards numbers but no signatures are affixed.
6. At the close of the parties' cases, directions on filing and exchanging submissions were given. Ms. Marende Ncheza & Company Advocates, the learned counsel for the plaintiff, filed their submissions dated the 30th October 2024, which the court has considered. The CTS confirms that Ms. J. K. Mwarandu & Company Advocates, learned counsel for the defendant, filed some documents on 15th November 2024, which are only showing the left half of the documents and it is therefore impossible to get their contents. The Court Assistant and the Researcher have informed me that they tried to reach out to the advocate to send a properly scanned filed copy of the document without success. As I prepare this judgement, I have noted that yesterday, the 17th February 2025, the said advocate uploaded a copy of the same document that is still showing the left half of the documents.
7. The issues for determination by the court are as follows:
 - a. Who the registered owner of the suit property is.
 - b. Whether the plaintiff has established the defendants are trespassers on the suit property, and if so whether the orders sought should issue in his favour.
 - c. Whether defendants have proved that the plaintiff had sold one-acre portion of the suit property to the late Ali Joho Charo, and whether their defence and counterclaim on adverse possession has merit.
 - d. Who is entitled to costs?



8. The court has carefully considered the parties' pleadings, oral and documentary evidence, submissions by the plaintiff's learned counsel, superior courts decisions cited thereon, and come to the following findings:

- a. Under section 26 of the *Land Registration Act* No. 3 of 2012, a certificate of title issued by the Registrar shall be taken as prima facie evidence of ownership of the land by the person(s) thereon. Such a title can only be challenged on the ground of fraud, or misrepresentation involving that person or illegality or unprocedurality or corrupt scheme. The plaintiff has produced a copy of the title deed for Mawemabomu/Chonyi/386 measuring 1.1 hectares, the suit property, issued to him on 11th October 2019, and a letter from one Peter Njeru, Land Adjudication and Settlement Officer, dated 18th January 2019 confirming that plot number 386 is recorded in the plaintiff's name and it has no pending dispute. That as rightly submitted by counsel under sections 24 and 26 of the *Land Registration Act*, the registration of the plaintiff as the proprietor of the suit property vested in him absolute ownership of the land. The plaintiff's registration as proprietor of the said land is further confirmed by the certificate of search dated 2nd May 2019 that shows the plaintiff was registered on 8th January 2019, as the absolute owner of the suit property.
- b. The defendants' main contention is that they have beneficial interests over one acre of the suit property that was bought by their husband/father, the late Ali Joho Charo. The defendants presented a sale agreement dated 21st March 1998 that is in Swahili. The relevant portions of the said agreement are reproduced here below:

“TAREHE 21/3/1998.

NI MIMI EDWARD MWADENA TSUTSU NAMBA YA KITAMBULISHO
9xxxx74 NIMEMUUZIA BW. ALI JONA CHARO SHAMBA KWA SHILINGI
12,500/= NI MIMI EDWARD MWADENA TSUTSU NIMEMUUZIA PLOTI
NYINGINE KWA 25,000/= SHAHINDI NI ERIK NGALA CHARO”

The rest of that document is about payment of Kshs.8,000/= and 4,800/= on 7th August 1999 and 6th April 1999 respectively. there is no signature or thumbprints of the vendor, purchaser and witness against all the entries on the document. Section 3(3) of the *Law of Contract Act* provides:

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

- (a) the contract upon which the suit is founded-
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party”

The plaintiff has denied selling any portion of the suit property to the late Ali Joho Charo and both Ali Joho Charo and Erick Ngala Charo have passed away and neither of the defendants witnesses the agreement, then their claim over the existence of a valid sale agreement is



unverified or uncorroborated. In the case of Nelson Kivuvani versus Yuda Komora & Another, Nairobi HCCC No 956 of 1991, the court held that:

“..the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.

- c. The defendants produced two other documents that acknowledges receipts of various amounts on 14th November 2016, 16th April 2018 & 16th July 2018. Though the document has three signatures, it is not possible to tell the identity of the person(s) who affixed them as no names are noted next to them and the defendants did not offer any evidence on the matter. There follows a payment of 22nd December 2018 indicated to be from Ester Dzame of Kshs.4000/=, and below it are other figures without attached details. The next document is acknowledgement of 6th January 2020, for Kshs.10,000/= with Edward Mwadena Tsutsu, John Tsutsu Mwadena, Esther Dzame Ali and Hatime Ali listed as witnesses. Against the names of Edward and Esther are identity card numbers. There are no signatures or thumbprints on that part of the writing. Below that are amounts of Kshs.1000/=, 500/=, 1000/=, 1000/= and 1000/= against the dates of 21st January 2020, 11th March 2020, 2nd April 2020, 31st May 2020 and 1st September 2020 respectively and a signature next to the amounts. Again, no name or purpose is indicated against the entries and as the defendants did not avail evidence to shed more light, the court cannot tell whose signatures appear on the document or the purpose of the amounts indicated thereof. Indeed, the court is unable to attach any connection between the agreement of 21st March 1998, and the payments detailed on the rest of the three documents, because none mentions the suit property at all. There is also no basis for the court to take the amounts listed on the documents and payments by Esther Dzame to be taken as payments of the purchase price for the one acre allegedly bought by Ali Joho Charo from the plaintiff. The plaintiff testified that the land Esther was paying for was different from the suit land, subject matter in this case, and in the absence of evidence from the defendants to show the connections of those payments to the alleged sale agreement they relied upon, the court cannot find for them.
- d. Despite the court finding that the defendants’ have failed to establish the existence of a valid sale agreement, between the plaintiff and the late Ali Joho Charo, it is a fact that is conceded by the plaintiff they had taken possession of the suit land. It is on that basis that they raised a defence of having been in adverse possession. The defendants claimed that they had been in possession of the suit property from 1998 and used it without interruptions until after the death of Ali Joha Charo on 7th September 2020. They have filed their counterclaim based on adverse possession. The plaintiff disputed the defendants’ counterclaim and stated that their occupation has not been peaceful as he had reported to the police and district officer when the 2nd defendant started constructing a house. He admitted during cross-examination that Esther had paid him some money but for a different parcel of land. He also admitted the he has never evicted the defendants from the land. The court has noted that the defendants’ averred at paragraph 7 of their reply to the plaintiff’s defence to the counterclaim dated 30th May 2024 that Esther was a sister to the 2nd defendant. That averment has not been disputed or challenged by the plaintiff, and in the absence of the plaintiff showing the court what other land other than the portion claimed by the defendants she was making payments for, then I would proceed to make a finding that the payments were in respect of suit property, as claimed by the defendants.



- e. In civil cases, the standard of proof is on a balance of probabilities and it appears to the court that it is true that the defendants have been on the suit land since 1998, contrary to the plaintiff's claim. Despite the absence of a valid sale agreement, it is also probable that the late Ali Joha Charo bought the suit land from the plaintiff in 1998. The entry onto the suit property by the defendants was therefore as purchasers and therefore with the plaintiff's as the vendor's consent. There is no evidence of Land Control Board consent having been obtained within six months after the agreement, which means the sale agreement became void. The defendants however continued in occupation planting coconuts trees on the one acre portion of the suit land. Their continued occupation or possession of the suit property after the expiry of six months, that is from 1999, was therefore without the plaintiff's consent and hence adverse to his title. By the time this suit was filed in 2022, a period of about 22 years from 1999 had lapsed. The defendants had been in possession of the one acre of the suit property all through that period. The plaintiff confirmed through his oral testimony in court that he had not evicted them.
 - f. That while the plaintiff has failed to prove on a balance of probabilities that the defendants were trespassers on the one acre suit property, the defendants have successfully establish their defence of being in adverse possession of one acre of the said land. They have also established their adverse claim over the one acre of the suit property to the standard required by the law.
 - g. Costs under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya follow the event unless where for good reason the court directs otherwise. In this instance, I find no good cause to depart that common edict on costs, and will award the defendants the costs.
9. From the foregoing determinations, the court finds the plaintiff has failed to prove his claim against the defendants, and his suit is dismissed with costs. On the counterclaim, the court finds the defendants have established their claim and judgement is entered in their favour against the plaintiff and the following orders are issued:
- a. A declaration is hereby issued that the Defendants are the lawful owners of a portion of the suit property measuring one acre or thereabout.
 - b. That the plaintiff is ordered to transfer the portion of the suit property occupied by the defendants measuring one acre within the next ninety days, and in default the Deputy Registrar do execute all necessary documents to give effect to this order.
 - c. An order of permanent and mandatory injunction restraining the plaintiff either, by himself, his servants and/or agents from trespassing, claiming and/or dealing in any way with the Defendants' portion of land measuring one acre or thereabout in Plot No. Mikahani/Mawemabomu/Chonyi/386, suit property.
 - d. Plaintiff will pay the defendants the costs in the counterclaim.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 26TH DAY OF FEBRUARY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiff : M/s Kyalo



Defendants : Mr Kahindi For Mwarandu

Shitemi – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

