



**Noor (Suing as the Legal Representative of Mohamed Jama Noor) v Muhambi & 49 others
(Environment & Land Case 43 of 2017) [2024] KEELC 3290 (KLR) (23 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3290 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 43 OF 2017
FM NJOROGE, J
APRIL 23, 2024**

BETWEEN

JIBRIEL MOHAMED JAMA NOOR (SUING AS THE LEGAL REPRESENTATIVE OF MOHAMED JAMA NOOR) PLAINTIFF

AND

JOSEPH DANIEL MUHAMBI & 49 OTHERS DEFENDANT

JUDGMENT

1. This suit was initially instituted on 2nd March 2017 by Mohamed Jama Noor (now deceased) whom was later substituted by his son and legal representative, Jibriel Mohamed Jama Noor, who filed an amended plaint dated 6th October 2020.

PLEADINGS

Plaint

2. In the said Plaint, the Plaintiff averred that the deceased was at all material times the registered owner of all that parcel of land known as Portion 509 Malindi Title Number LT 33 Folio 310 File 3778 situated within the Malindi District and containing by measurement 227.3 acres or thereabouts (hereinafter ‘the suit property’). The Plaintiff averred that sometime in the year 2012, he discovered that the Defendants had unlawfully and without any authority or permission invaded the suit property thus deterring him from utilizing and developing the same; that despite several demands to vacate the suit property, the Defendants have failed, refused and or neglected to vacate, and have continued to trespass on the suit property. For the stated reasons, the Plaintiff sought judgment against the Defendants for: -
 - i. A declaration that the deceased Plaintiff Mohamed Jama Noor is the absolute registered owner of the suit property.



- ii. A mandatory injunction to compel the Defendants, their relatives, agents, servants and/or any other person under instructions of the Defendants to give vacant possession of the suit property and to demolish the structures constructed thereon and to remove all the materials failing and/or in the alternative the structures be demolished and removed at their costs.
- iii. An order of permanent injunction restraining the persons mentioned in ii above from trespassing and encroaching upon and/or interfering in any way with the suit property.
- iv. Upon issuance of prayer i, ii, and iii the honourable court be pleased to issue an eviction order against the defendants.
- v. Eviction of the defendants from the suit property be done with the assistance of the OCS Malindi Police Station.
- vi. Costs of this suit and interests at court rates.

Defence

3. On their part, the Defendants filed a joint statement of defence and counterclaim dated 16th March 2017. They averred that they acquired beneficial interests over the suit property from their forefathers who occupied the suit property peacefully for so many years since the 1960s and that they only became aware of the existence of the Plaintiff's title and thus his claim to the land when this suit was filed.

Counterclaim

4. The Defendants counterclaim against the plaintiff is for: -
 - a. That the Defendants are entitled to be declared as proprietors of the suit property by virtue of adverse possession.
 - b. That the Defendants are entitled to be registered and issued with ownership documents over the suit property in place of the Plaintiff.
 - c. A permanent injunction order be issued restraining the Plaintiff, his agents, servants, employees, assigns and or any other person acting on his behalf from encroaching, claiming or interfering in any manner with the Defendants' use, possession and enjoyment of the suit property.

Evidence

Plaintiff's evidence

5. The Plaintiff was the sole witness to testify in this matter. He adopted his written statement dated 9th November 2023 as part of his evidence-in-chief. He produced as PEXH 1-3 documents annexed to the list of documents dated 6th October 2020; and PEXH4-13 documents annexed to the list of documents filed on 2nd March 2017. The Plaintiff reiterated that the deceased, his father, is the registered owner of the suit property and that the Defendants have always denied him entry thereon. He told the court that when the deceased purchased the suit property in the year 1978, the same was vacant and therefore the Defendants' allegation that they have occupied the suit property for over 52 years was false.
6. There being no other witness for both the Plaintiff and the Defendants, the parties' cases were both marked as closed. The court also directed that parties file closing submissions.



Submissions

Plaintiff's Submissions

7. Counsel for the Plaintiff outlined four issues for determination- firstly, whether the defendants trespassed on the suit property and should hence be evicted; secondly, whether the defendants are entitled to the orders sought in the counterclaim; thirdly, whether the Plaintiff is entitled to the orders sought in the plaint; and lastly, costs of the suit.
8. In relation to the first issue, counsel for the plaintiff quoted the definition of trespass charted in the Black's Law Dictionary 10th Edition, Winfield & Jolowicz on Tort, Sweet & Maxwell 19th Ed (Page 428), Section 3 (1) of the [Trespass Act](#), Cap 294 and in the cases of Municipal Council of Eldoret v Titus Gatitu Njau [2020] eKLR. He submitted that the Plaintiff has first as a requirement established absolute ownership of the suit property as envisaged under Sections 24, 25 and 26 of the [Land Registration Act](#) by producing a copy of indenture and survey report dated 17th January 2017.
9. He added that the Plaintiff has equally demonstrated interference with the defendants' possession of the suit property as was posited in the cases of Simpson v Bannerman [1932] 47 CLR 378 and Barker V The Queen [1983] 153 CLR 338,343-377. Further, it was submitted that the interference was without the Plaintiff's authority as pleaded. As such, counsel argued that the Plaintiff had established the tort of trespass against the defendants.
10. In regard to the second issue, counsel submitted that having failed to adduce any evidence in support of their case, the Defendants' counterclaim should be dismissed. He added that a registered owner should be able to rightfully enjoy his rights to land without any interference as was the position established in Alice Chemutai Too v Nickson Kipkirui Korir & 2 others [2015] eKLR.
11. On the issue as to whether the Plaintiff is entitled to the injunction sought in the Plaint, counsel relied on the cases of Giella v Cassman Brown [1973] EA 358, Nguruman Limited v John Bonde Nielsen & 2 others [2014] eKLR; Mrao Ltd v First American Bank of Kenya Ltd [2003] eKLR; Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR; Robert Mugo wa Karanja v Ecobank (K) Limited & another [2019] eKLR; Malier Unissa Karim v Edward Oluoch Odumbe [2015] eKLR; Jay Super Power Cash and Carry Ltd v Nairobi City Council & 20 others CA 111/2002; Locabail International Finance Limited v Agro Export & Others [1986] ALL ER 906 and Shepherd Homes v Sandham [1970] 3 WLR.
12. Counsel argued that having established all the conditions stated in the mentioned cases as to granting an order of permanent injunction, the Plaintiff's rights under Article 40 of [the Constitution](#) ought to be protected by stopping the Defendants' illegal actions within the suit property; that the Defendants, having failed to justify their entry and occupation of the suit property therefore must be evicted. To buttress this argument, counsel relied on the case of Gitwany Investments Limited v Tajmal Limited & 3 others [2006] eKLR.
13. On the issue of costs of this suit, counsel urged the court to grant costs in favour of the Plaintiff. He relied on Section 27 (1) of the [Civil Procedure Act](#) and the case of Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR.
14. Having considered that pleadings, evidence and submissions presented, I find that the following issues arise for determination: -
 1. Whether the plaintiff has proved his case for trespass and a claim for injunction against the defendants.



2. Whether the defendants have proved their claim for adverse possession as per the counterclaim.

Analysis and Determination

15. From the evidence tendered and the documents produced, it is not in dispute that the plaintiff is the registered owner of the suit property. It is also not disputed that the Plaintiff together with one Mohamed Perwaiz Joo first purchased the suit property from some three individuals identified as Njenga Kinuthia, Albert Kabui and Peter Njenga Mbugua. The Plaintiff presented a copy of indenture dated 6th March 1978 to that effect. Thereafter, and as established in another indenture dated 14th December 1980, the Plaintiff bought Mohamed's share thus becoming the sole registered owner of the suit property. This evidence was not controverted. It is also evident that the Plaintiff's title has not been impeached on the ground of fraudulent acquisition. It is therefore safe to state that as between the parties in the current suit, the Plaintiff has satisfactorily demonstrated that he is the rightful and registered owner of the suit property.

16. Section of 108 and 109 *Evidence Act* provides that the onus of proof lies upon a party who relies on a set of facts or who makes an allegation even if the other party were to offer no response to those allegations. It is also settled that for one to succeed in a claim of adverse possession he must satisfy the criteria stated in the case of *Kimani Ruchine & Another v Swift, Rutherford Co. Ltd. & another* (1977) KLR 10 where Kneller J. stated as follows:

The Plaintiffs have to prove that they have used this land which they claim as of right, nec vi, nec clam, nec precario (no force, no secrecy, no evasion)The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

17. These principles were restated by the Court of Appeal in the case of *Samuel Kihamba –v- Mary Mbaisi*, KSM CA No. 27 of 2013 as follows: -

Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land.”

18. Further, the Court of Appeal in the case of *Ruth Wangari Kanyagia –v- Josephine Muthoni Kinyanjui* [2017] eKLR while acknowledging adverse possession is a common law doctrine restated the same principles by citing the India Supreme Court decision in the case of *Kamataka Board of Wakf –v- Government of India & Others* [2004] 10 SCC 779 where the court stated thus: -

In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”



19 Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya provides as follows:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

20. Section 17 of the same Act further provides:

Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

21. The burden was therefore on the Defendants to demonstrate to this court that their occupation within the suit property met the above stated conditions; that it was open, without force, without secrecy, without permission of the Plaintiff, and for a period exceeding 12 years. The Plaintiff claimed that when he purchased the suit property in the year 1978, the suit property was unoccupied until sometime in the year 2017 when he discovered that the Defendants had invaded the suit property. On their part, the Defendants alleged that they acquired the suit property from their forefathers who occupied the same from the early 1960s. I have already stated that the *Evidence Act* requires that he who alleges must prove. This is the cardinal principle of the law of evidence. In this case, after filing their defence and counterclaim, the Defendants failed to present any evidence before this court, as such their allegations remain unsubstantiated. In the absence of such evidence, it is difficult to ascertain when and how the Defendants entered the suit property. The outcome of this is that the claim for adverse possession pleaded in the counterclaim fails.

22. The photographs exhibited by the Plaintiff show that there are some structures put up by the Defendants and their agents without the plaintiff’s authorization. This assertion is indeed admitted by the Defendants themselves in their pleadings. This amounts to trespass on the Plaintiff’s suit property.

Conclusion

23. The upshot is I find that the Plaintiff has proved his case against the Defendants and that the claim for adverse possession by the Defendants must fail. The Defendants are trespassers. The plaintiff’s right to enjoy the suit property is protected by the law in sections 25(1) and 26 of the *Land Registration Act* and Article 40 of *the Constitution*. I therefore enter judgment in favour of the Plaintiff as prayed in the Plaintiff. For the avoidance of doubt, I decline to award general damages for trespass as submitted by counsel for the Plaintiff for the reason that the same was not pleaded.

- a. A declaration is hereby issued declaring that the deceased Plaintiff Mohamed Jama Noor is the absolute registered owner of the suit property;
- b. A mandatory injunction is hereby issued compelling the Defendants, and/or any other person claiming under them to demolish the structures constructed on Portion 509 Malindi Title Number LT 33 Folio 310 File 3778 - Malindi District and to remove all the materials therefrom within 90 days of this judgment and in default the structures be demolished and removed at their cost and the defendants be evicted therefrom;
- c. An order of permanent injunction is hereby issued restraining the Defendants, and/or any other person claiming under them from further trespassing or encroaching and/or interfering in any way with the property known as Portion 509 Malindi Title Number LT 33 Folio 310 File 3778 - Malindi District;



- d. In the event of eviction of the defendants from Portion 509 Malindi Title Number LT 33 Folio 310 File 3778 - Malindi District the OCS Malindi Police Station shall provide security for the exercise;
- e. The defendants shall bear the costs of this suit.

JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 23RD APRIL, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

