



**Mulla v Malik & 48 others (Environment & Land Case 31 of 2012)
[2024] KEELC 4354 (KLR) (28 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4354 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 31 OF 2012**

FM NJOROGE, J

MAY 28, 2024

BETWEEN

YAHYA MOHAMED ALI MULLA PLAINTIFF

AND

ABDUL MALIK & 48 OTHERS DEFENDANT

JUDGMENT

1. By a Further Amended Complaint dated 8th June, 2018, the Plaintiff sued the Defendants seeking the following orders;
 - a. Eviction orders coupled with permanent injunction restraining the Defendants or any other person from interfering in any manner whatsoever with Plot No. 10831-Malindi.
 - b. Compensation of the land illegally occupied by the defendants at existing market values and for an order seeking Mesne profits pursuant to loss of user.
 - c. Mandatory injunction compelling the defendants to pull down any illegal structures standing on the suit property in default of which the plaintiff be allowed to pull down such structure at the defendants cost. In alternative orders of demolition do issue directing the OCS assisted by the Court Bailiff and or County Government Askaris to pull down the encroaching illegal structures and restituting the plaintiff to his original position.
 - d. Costs of the suit.
2. In the body of the further amended complaint it was averred that the plaintiff is the proprietor of all that land he describes as Portion number 10831 Malindi and Portion NO 13850 –Malindi after having inherited the same from his deceased father through a succession cause. However, in or about the year 2002 the defendants without any colour of right invaded the plot and carried out unlawful activities including construction and disposal of sections of the property to third parties who also embarked



on unauthorized developments thereon. The plaintiff never consented to their presence. The plaintiff averred that his right to ownership of the property had been violated and that he has suffered loss and damage hence this suit.

Defendant's Further Amended Defence and Counterclaim.

3. The defendants rely on their amended statement of defence and counterclaim filed on 16/11/2020. In the defence it is pleaded that they are members of an organization known as Amani Umoja Self Help Group; that they admit that the original parcel from which the suit land was carved was owned by persons known as Anveralli Mulla, Mohamed Ali Mulla and Abdur Rasul Mulla; that they deny that the plaintiff inherited the suit land from his father as alleged; that they settled on the suit land before the year 2002 at a time when it was vacant and bushy and constructed their homes thereon without demur from any person, and have remained in uninterrupted possession ever since; that the present suit is res judicata Malindi ELC Case No 34 Of 2004; that they need no consent from the plaintiff to remain on the suit premises as they had already acquired title to the land by the time the plaintiff filed the suit; they deny claims that they are disposing of portions of the property and aver that the plaintiff discloses no cause of action against them.
4. In their counterclaim they reiterate the contents of the defence and aver that they have acquired the suit property by virtue of the doctrine of adverse possession and that the plaintiff's title has been extinguished. They seek the following orders:
 - a. A declaration that the plaintiff's title over the portions occupied by the defendant in the suit title has been extinguished by virtue of adverse possession
 - b. That the Registrar Of Titles do effect the registration of the defendants as the owners of the subject portions;
 - c. That the court do issue such orders as it may deem fit or just to grant.

Plaintiff's Defence To Counterclaim.

5. The plaintiff filed a defence and counterclaim on the 23/11/2020, denying the averments thereof and maintaining that the defendants are trespassers on the suit property who can not stake their claim thereto by virtue of the doctrine of adverse possession and that the plaintiff's title has not been extinguished as claimed having regard to the forceful entry of the defendants into the property. He reiterated that the entry of the defendants into the suit land is recent and does not date back to the year 2000 as claimed by the defendants.
6. The plaintiff called one witness and the defendants also called one witness.

EVIDENCE OF THE PARTIES

Evidence for the plaintiff.

7. The plaintiff testified alone in his case and adopted his 2 witness statements filed in the court record and produced documents. He reiterated the matters in the plaint. He averred that the defendants have trespassed on his property. His evidence is that he developed the property in issue in 1985 and he has approved plans for his developments. However, a councillor brought people onto the property in 2002 and he reported to the police. He was thus unable to put up a boundary all due to the invasion. The defendants were on another property and when they were evicted they settled on his property. According to the plaintiff he was not a party to the earlier litigation and he has never appointed any person to deal with his plot. On cross-examination he maintained that he inherited the suit property



from his father, it having been a family plot before that; that he does not have a separate title to the suit land; that the original Plot Number 307 had been subdivided; that he had obtained authority from his brothers to institute the present proceedings; that Plot No 307 was referred to in the confirmation of grant that he and his family members got in respect of his late father's estate.

Evidence for the defendants.

8. Ali Said Tsuma, the 47th defendant testified on behalf of the defendants and adopted his witness statement dated 24/9/12 filed in the court record. His evidence is that he lives on the suit land with his family.
9. Upon cross-examination by Ms Chepkwony the witness DW1 stated as follows: the defendants have no title deed to the property; the Umoja Amani Self-Help Group comprising of about 40 members was registered in the year 2000; the search they carried out for plot number 307R failed to reveal that the plaintiff was the owner thereof. The defendants had not filed for a claim of adverse possession before that plot was subdivided and DW1 does not know when the subdivision occurred. He however has never been evicted from the land, and has never bought the land, but there had been a case, no Malindi 34 of 2004 between DW1 and the previous owner of the property.
10. Upon re-examination he stated that the land was comprised in one title deed under Title Number 307 before subdivision but ghee plaintiff was not living on the suit land but claimed the land later.
11. Dw2 Rajab Mbaruk Auni, testified and adopted his witness statement filed in the court record as his evidence in chief. His evidence is that the defendants found the land bushy and cleared it and brought a surveyor who subdivided it and thereafter DW2 began selling the same. It was his co-defendants who assisted him in clearing the suit land and so he gave them part of the land. As for the plaintiff he had a portion of land on which a hardware business was located by the time the defendants came to the area and he never opposed their entry into the land. DW2 claimed that the family of one Zakiyuddin Ameralli Mullah gave them permission to subdivide the land they are on and that they have not invaded any land owned by the plaintiff.
12. Upon cross-examination by Ms Chepkwony the witness stated that the number of the portion of land that they took is different from the one claimed by the plaintiff but maintained that the plot number he gave is the number in respect of the whole parcel of land involved. He had sold land portions to about 40 buyers; that Zakiyuddin had at one point sued him and other persons in Case No 34 of 2004 when the land was still under the old number 10830 and that is the number that the defendants are claiming even now. He maintained that that is the parcel of land that he is still living on. Mr. Mouko was their lawyer in the Court Case No 34 Of 2004. The defendants had not filed any claim for adverse possession in respect of plot number 307 before the year 2012. He however knew one Yahya. The defendants were moved from one place to another on the land they had occupied while Yahya maintained his position. DW2 admitted that he had been an agent. He admitted that he also knew that in the year 2012 the court had ordered that the suit land goes to the said Yahyah and his sister, and that Yahyah got his subdivision in 2013.

SUBMISSIONS

13. After the evidence of the parties was taken the court orders them to file written submissions which they did the plaintiff on 7/12/2023 and the defendant of 6/3/2024.



ANALYSIS AND DETERMINATION.

14. I have considered the pleadings the evidence and the written submissions of the parties in the preparation of this judgment. The issues arising for determination in this matter are as follows:
- a. Whether the plaintiff is the proprietor of the suit land known as Portion NO 13580 –Malindi;
 - b. Whether the present suit is Res Judicata Malindi ELC Case No 34 of 2004;
 - c. Whether the defendant’s claim for adverse possession has merit;
 - d. Whether the defendants are trespassers on the suit land;
 - e. Whether the defendants should be evicted from the suit property;
 - f. Who ought to bear the costs of the suit.
 - a. Whether the plaintiff is the registered proprietor of the suit land known as Portion NO 13580 –Malindi;
 - a. Whether the plaintiff is the proprietor of the suit land known as Portion NO 13580 –Malindi;
15. The plaintiff produced various documents including an assent that vested in him plot no 307R which is said to have been subdivided to produce plots which included the suit plot no 13580. According to the assent and the deed plan for subdivision numbered 13580, those two documents were registered in the lands office at Mombasa on 17/4/2013. I am persuaded that the plaintiff is the proprietor of Plot Number 13580- Malindi.
- b. Whether the present suit is Res Judicata Malindi ELC Case No 34 of 2004;
16. In respect of the first issue I have examined the plaint in that case. The plaintiffs are one Zakiudin Anverali and another and they claimed that the defendants therein who included DW2 had trespassed on Portion Nos 10831, 10832 and 10833 which were subdivisions of the land formerly known as Plot No 307. An injunction was sought in that suit to restrain the defendants from further trespass. The plaintiff submitted that the defendants were sued by the previous owner of the land in 2004 in Case No 34 Of 2004 for trespass and they vacated the suit property known in 2005 after that matter was settled. Since none of the plot numbers in that case is the same as the plot number in the present dispute, I find that that this suit is not res judicata Case No 34 Of 2004.
- c. Whether the defendant’s claim for adverse possession has merit;
17. I have seen the original KPLC electric power connection documents dating back to 1987 which bear the plaintiff’s name and which corroborate the claim that he was on plot number 307 whereupon a workshop, presumably his own, had been built. The plaintiff’s father died in the years 2000 as per the death certificate whose copy was produced.
18. By an assent dated 30th April 2014 the plaintiff became the owner of among others Plot No 307. Some portions of the assent are handwritten and they point to the devolving of the subdivisions of Plot No 307 R to the plaintiff too. The defendants have admitted that the plaintiff operated a workshop on one side of the plot and that plot can only be the one that he is said to have inherited by virtue of succession in his father’s estate, which is plot number 13580. It is clear therefore that the defendants came into occupation of the said plot after the year 2005 hence the present suit.



19. The defendants never sued the plaintiff for adverse possession in respect of the plot before he instituted the present case against them. The present suit was filed against them in the year 2012 after they had been removed from the lands known as Plot Nos 10831, 10832 and 10833 vide the Case Number 34 of 2004. Though the plaintiff never produced an order to that effect, I have not seen any evidence to controvert the claim that the defendants were removed from those lands by virtue of a settlement in that suit and I am persuaded that they were so removed.
20. If the defendants were removed from those lands in the year 2005 at the instance of one Zakiudin Anverali as asserted by the plaintiff, I am inclined to believe that the defendants invaded the plaintiff's plot after the year 2005 and it is clear that only about 7 years had lapsed by the time the present suit was lodged against them in 2012 and thus their claim under the doctrine of adverse possession can not stand, the doctrine being categorical that a minimum of 12 years must have elapsed to enable a claim and obtain relief under that doctrine. The claim for adverse possession must therefore fail.
 - d. Whether the defendants are trespassers on the suit land;
21. Unlike the plaintiff, the defendants lack any document by which to lay any valid claim to the suit land and their claim to the land under the doctrine of adverse possession had been found to be unsound. The upshot of the foregoing is that the defendants are nothing but trespassers to the land known as Plot Number 13580.
 - e. Whether the defendants should be evicted from the suit property;
22. The defendants having failed to establish any legal claim to ownership of the land and any license from the plaintiff, must be deemed to be on the land at the mercy of the plaintiff who has now sought eviction and demolition orders from this court to enable their removal from the suit land. It is the plaintiff's right to have his land back and in this court's view, the prayers sought by the plaintiff in his further amended plaint are merited.
 - f. Who ought to bear the costs of the present suit.
23. Under Section 27 of the *Civil Procedure Act* costs follow the event. The plaintiff has succeeded in his claim against the defendants and therefore he deserves to be awarded the costs of the present suit.

CONCLUSION.

24. The upshot of the foregoing is that the plaintiff has established his claim against the defendants and this court allows his claim against them jointly and severally and issues the following orders:
 - **a. An order of mandatory injunction is hereby issued compelling the defendants to remove themselves and their property from all that portion of land known as Portion No 13580-Malindi and to give vacant possession to the plaintiff within 90 days from the date of this order in default of which they shall be forcibly evicted at the instance of the plaintiff;**
 - **b. A permanent injunction is hereby issued restraining the defendants or any other person claiming under them from interfering in any manner whatsoever with Plot No. 13580-Malindi;**
 - **c. The defendants shall pull down any illegal structures standing on the suit property in default of which the plaintiff be allowed to pull down such structure at the defendants expense;**
 - **d. The OCS Malindi shall provide security for the peaceful effectuation of these orders;**
 - **e. The Costs of the present suit shall be met by the defendants jointly and severally.**



Judgment dated, signed and delivered at Malindi on this 28th day of May 2024.



MWANGI NJOROGE

JUDGE, ELC, MALINDI

MLD ELC31/12-RLG/DF-16.03.12/FABM-11.10.23/FH-08.04.14/LH-04.03.24/DJ-28.05.24F.

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