



**Abdi & another v Adan (Environment & Land Case 002 of 2022)  
[2024] KEELC 4868 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4868 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT GARISSA  
ENVIRONMENT & LAND CASE 002 OF 2022**

**JM MUTUNGI, J**

**JUNE 20, 2024**

**BETWEEN**

**KAMIL DAGANE ABDI ..... 1<sup>ST</sup> PLAINTIFF**

**NAFISA MOHAMED MOHAMUD ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SUGOW ABDI ADAN ..... DEFENDANT**

**JUDGMENT**

1. This suit was commenced by the Plaintiffs at Garissa Senior Principal Magistrates Court as Civil Case No. 9 of 2009 vide a Plaint dated 30<sup>th</sup> January 2009. An *ex parte* Judgment was entered against the Defendant on 2<sup>nd</sup> October 2009. The Defendant applied to set aside the Judgment but his application was dismissed by the Court vide a Ruling dated 22/2/2010.
2. The Defendant filed an Appeal against the Judgment and Ruling Nairobi ELC Milimani vide ELC Appeal No. 8 of 2014. The appeal was allowed by Obaga, J in a Judgment dated 31<sup>st</sup> July, 2017. The *ex parte* Judgment was set aside and the Defendant was granted leave to file a defence.
3. The Plaintiffs by their Plaint in the suit land prayed for Judgment against the Defendant for:-
  1. An injunction to issue restraining the defendants jointly and severally from interfering, occupying, trespassing, cultivating and or carrying on any activity on Tana farm No. 31.
  2. A declaratory order that the Plaintiffs are the legal owners of Tana farm No. 31 as against the defendants who are illegal trespassers thereon.
  3. Cost of the suit.
4. The plaint was predicated on the grounds that the Plaintiffs were the Administrator and Administratrix of the late Sheikh Dagane (Deceased) who was the legal owner of Tana Farm No. 31 at Garissa. It was



the Plaintiffs position that Sheikh Dagane (Deceased) had been in occupation and possession of the suit land and that the Defendants were trespassers on the land. They averred that before his death, he had filed PM Civil Case No. 15 of 1994 seeking to have the Defendant evicted from the suit land as the Defendant had trespassed into the suit land, but unfortunately the case could not proceed as Sheikh Dagane (Deceased) passed away immediately after filing the suit. They claimed that the Defendant has been occupying and possessing the suit land illegally and has sold part of it to third parties.

5. The Defendant filed its Statement of Defence and Counterclaim dated 11<sup>th</sup> October 2018 where averred that he was the rightful owner of the suit land and that he had been in lawful possession thereon and that he had not sold any portion thereof. He claimed that Garissa PM Civil Case No. 15 of 1994 was dismissed for want of prosecution and as such this suit was res judicata. The Defendant raised a counterclaim and claimed that he has been in possession of the suit land since the year 1994 and has enjoyed continuous, uninterrupted and quiet possession of the suit land until 2009 when this suit was instituted and has thus, acquired prescriptive rights over the suit land. He prayed for orders that:
  1. A declaration that the Defendant is the lawful owner of the suit property known as Tana Farm 31 Garissa as against the Plaintiffs.
  2. An injunction restraining the Plaintiffs jointly and severally from meddling with the suit property known as Tana Farm 31 Garissa by any means whatsoever.
  3. A declaration that the Plaintiffs claim is time barred by the provisions of Cap 22 Laws of Kenya.
  4. Costs of the suit.

#### **Evidence of the Parties**

6. The suit was heard on 25/4/2023 and 27/6/2023 when both parties called their witnesses to testify and closed their respective cases. PW1, Nafisa Mohamed Muhamud, testified that she was the wife to Sheikh Dagane (deceased) who owned the suit land which was near ADC and which measured about 150 acres. She testified that her deceased husband entered the suit land when it was vacant, settled in it and started cultivating it. It was her position that the Defendant trespassed into the land and started cultivating it. She claimed that her husband took the Defendant to Court but he unfortunately died during the pendency of the case and that her son took over the case. She stated that her deceased husband had ownership documents over the suit land. On Cross Examination, she stated that she was the third wife of the deceased and that she used to live in the suit land and was cultivating it, before she was chased out by the Defendant. She stated that she was not sure whether her deceased husband's plot was No. 31 and was not aware that the Defendant's plot land was No 88. She stated that her husband had showed her the ownership documents to the land and further stated that the Defendant was at present in occupation of the suit land. She testified that the Defendant had sold portions of the land to third parties who had built houses on the land.
7. PW2, Sudi Dakane Adan, a son to sheikh Dakane (deceased) testified that his deceased father had filed a suit in 1994, which his mother and elder brother took up upon the death of his father. He testified that the suit land sits next to Maalim farm which is owned by three brothers. He testified that there was sufficient evidence to show that his deceased father was the registered owner of the suit land and prayed that the Court do find in favour of the Plaintiffs. On cross examination, PW2 stated that he did not have an allotment letter and that he did not have proof to show that the Defendant had sold any portion of the suit land to third parties.
8. The Defendant called Haji Shariff who testified as DW1. He adopted his witness statement as his evidence. He affirmed that his mother was a member of the Benane farm and that his mother, Isha



- Sharif Noor, had been a witness in the case that was heard in 1994 before the Chief and the District Officer, where they confirmed that the land belonged to the Benane farmers. He stated that Benane Farm was along Sankuri road in Mandera though he did not know whether the name of the road has changed. He stated that his mother was staying outside the farm but indicated that there were people who were staying in the farm and had constructed houses thereon.
9. The Defendant, Sugow Abdi Aden testified as DW2 and stated that the County Council allocated them as a group the land to do farming. He stated that the suit land had always belonged to Benane Farmers Group. Under Cross examination, DW2 explained that the differences in the list of Benane farm Members was occasioned by the fact that members were allowed to be represented by members of their family and that the members were allowed to sell their shares in the farm. DW3, Hussein Adan Isaack testified that he was a resident of Benane farm and had resided therein from when he was young. He stated he carried out farm work and indicated that all the members of the group had their portions in the suit land. Under Cross examination, the witness denied that the people who had built on the suit land were mere buyers and/or that the members were selling the land to non-members.
  10. The Court owing to the fact that the evidence by the parties had disclosed the existence of two plots being Nos. 31 and 88 Garissa which the Plaintiffs and the Defendant were claiming ownership of respectively and there was the question whether the two plots were one and the same, the Court on its own motion opted to summon the Land Registrar Philip Munyoki to clarify the position. The witness however stated as the plots were not registered he had no documents relating to them and indicated it was the Physical Planner who would have custody of the Part Development Plan (PDP) for the plots and would be able to assist the Court.
  11. The Court directed that the County Physical Planner Garissa and the County Surveyor be summoned to testify in regard to the two plots numbers 31 and 88 Garissa. Peter Mwangi Waititu a Surveyor attached to the National Government testified that plot No. 31 and 88 were not registered and that no survey maps existed depicting their location. He stated that he could not tell where the plots emanated from. He affirmed that every plot allocation needed to be supported by a Part Development Plan (PDP) for identification purposes.
  12. Mary Wangui Mwangi, the Garissa County Director of Physical Planning testified that they did not have any records of plot No. 31 and 88 in their records at the County. She stated they however had references of Tana Farm though they did not have any records on Benane Farm or Tana Farm, Taksoi Farm and Maalim Farm. Upon Cross Examination by Mr. Ondieki Advocate for the Defendant, the witness admitted the letter dated 22<sup>nd</sup> February 1982 from the Garissa County Council exhibited at page 156 of the trial bundle addressed to the Chairman, Benane Farmers Group affirmed that the group had been allocated plot No. 88 Garissa. The witness however stated that the allocation was not accompanied with a PDP as is the norm.
  13. Moses Barnabas Nyongesa, Land Officer/Administrator Garissa County testified that he was the custodian of all land records and that plot No. 31 and 88 did not have any Letters of Allotment, were not surveyed and had no Part Development Plans (PDP). He stated if the allotment was by the National Government there would be a Letter of Allotment and if the allotment was by the County Council there would be a minute passing the resolution allocating the Plot. In Cross Examination by the Plaintiff the witness stated that a Letter of Allotment contains terms and conditions of allotment and usually survey would follow once the allottee accepts and satisfies the conditions of the allotment.
  14. Following conclusion of the trial the parties filed written submissions. The Plaintiffs filed their submissions on 14<sup>th</sup> December 2023 while the Defendant filed his submissions on 22<sup>nd</sup> December 2023.



The parties in their submissions rehashed the facts and the evidence as presented before the Court during the hearing.

### **Analysis and Determination.**

15. I have considered the pleadings, the evidence adduced both orally and by way of documents and I have considered the submissions made on behalf of the parties. The issues that arise for determination are as follows:-
  - i. Whether the Plaintiffs were validly allocated Plot No. 31 also referred to as Tana Farm Garissa.
  - ii. Whether the Defendant/Benane Farm was allocated plot No. 88 Garissa and if so whether Plot No. 31 and 88 Garissa refer to the same land?
  - iii. What reliefs, if any should the Court grant?
16. On the evidence adduced by the parties, it is evident that the Plaintiffs claim to have been allocated Tana Farm Plot No. 31 Garissa. The Defendants on their part claim to have been allocated Benane Farm Plot No. 88. The Origination documents relating to the allocation are far from being clear. For instance none of the parties produced a formal letter of offer/allotment spelling out the terms and conditions of the allotment. Usually a Letter of offer/allotment ought to spell out the terms and conditions of the allotment and should require the allottee to accept the terms and conditions in writing. The Letter of Offer/allotment should also ordinarily attach a Part Development Plan (PDP) and should indicate acreage and user of the land.
17. The PDP gives the specifications of the land and assists in the identification of the land for survey purposes. In the instant matter though both the Plaintiffs and the Defendant produced what they stated were Letters of Allotment, none had a PDP attached to aid in identification of the plots. It is not disputed that the Defendant(s) are in occupation and possession of the land and/or parts of the land they claim to be plot No. 88 Benane Farm. The question that arises is whether the portions the Defendants occupy comprise plot No. 31 (Tana Farm) belonging to the Plaintiffs. In the absence of a survey Map and/or PDP and a Surveyor's report it is difficult to ascertain whether both plots 31 and 88 exist and if they do, their extent and dimensions on the ground.
18. In the case of the Plaintiffs they rely on various correspondences to assert ownership to plot No. 31 Garissa. The Plaintiff exhibited a letter from the District Agricultural Office dated 6.1.1988 addressed to the Clerk to the Council captioned "Division Farm Ownership" which on the face of it was recommending Sheikh Dagane Aden Abdi to be allocated "Dagane Farm" (no plot No shown) estimated to be 150 acres. Sheikh Dagane vide a letter dated 2<sup>nd</sup> January, 1988 addressed to the Commissioner of Lands had applied for a letter of allocation of Existing Farm No. 31 PART A. Apparently the Commissioner of Lands responding to the request, on 6<sup>th</sup> September 1991 wrote to the District Commissioner Garissa and District Land Office seeking their comments and/or recommendations concerning the farm to enable him take further actions. The Land Officer vide a letter dated 16<sup>th</sup> November 1992 responded to the Commissioner of Lands confirming he had no objection to Sheikh Dagane being issued ownership documents but requested that the Part Development Plan No.326/98/13 be amended since it only indicated a portion of the land. As at this point a letter of offer/allotment should have been issued by the Commissioner of Lands but none was produced and/or exhibited by the Plaintiffs.



19. The Defendant on his part in support of his claim of ownership of plot No. 88 Garissa (Benane Farm) relied on the letter dated 22<sup>nd</sup> February 1982 exhibited at Page 156 of the trial bundle addressed to the Chairman Benane Farmers Group. The content of the letter was as follows:-

RE:- ALLOCATION OF FARM.

You are allocated a farm along Sankuri road, your farm is No.88 in our records.

You have to pay the registration and annual rent of the year immediately.

C. S. DAHIR

AG/CLERK/TREASURER

GARISSA COUNTY COUNCIL.

20. The District Agricultural Officer like in the case of the Plaintiffs had on 10.2.1982 written to the Clerk of the County Council recommending that Benane Group be allocated Benane Farm (138 Acres) and on the same day the treasurer to the Council wrote confirming that the Benane Farm belonged to Ibrahim Abdi, Issack Dahir, Sharif Isha, Hassan Noor and Ali Mohamed.
21. It is evident from the foregoing analogy that the County Council of Garissa at different times purported to allocate the Plaintiff and the Defendants some land. It is not clear whether plot 31 and plot 88 supposedly allocated to the Plaintiff and the Defendant respectively related to the same land. The problem was compounded by the fact that no formal allotment letter setting out the terms and conditions was issued and no PDP was issued to any of the parties to identify the land allocated. It was only the County Council and now the County Government of Garissa that could pinpoint the land allegedly allocated to the parties. The Plaintiff during the hearing referred to a google generated map but unfortunately that cannot supplant the necessity of a Part Development Plan (PDP) where land is allocated as such land needs to be delineated and identified with reference to the PDP.
22. The Court during the hearing having appreciated the difficult there was in determining whether the two plot Nos. 31 and 88 were identifiable on the ground opted to have the Land Registrar, the Land Officer, the Surveyor and the Director, County Planning summoned to give evidence respecting the two plots. The Officers unfortunately did not provide any credible evidence in regard to the allocation of the two parcels of land. The Land Registrar maintained that as the two parcels of land were not registered there was no assistance he would be able to give. The Surveyor like the Land Registrar stated that they had no Survey maps for Plot No. 31 and 88 and he could not say from where the plots emanated. He was however emphatic that any allocation of land requires to have a Part Development Plan (PDP) to denote and define the plot for identification purposes.
23. The County Director of Physical Planning stated they had no records of plot No 31 and 88 (Tana Farm and Benane Farm respectively). Moses Barasa Nyongesa the Records Keeper of the County Government equally stated they had no records of the two plots.
24. After a careful evaluation, consideration and analysis of the evidence in this matter, I am not satisfied that the Plaintiffs have proved they were allocated plot No. 31 (Tana Farm) or that the said plot was identifiable on the ground. There was no formal letter of allotment that incorporated the terms and conditions of allotment produced in evidence. The correspondences referred to by the Plaintiffs as evidencing ownership in my view were not sufficient to show that the Plaintiffs were indeed allocated plot No. 31 Garissa. There was no Part Development Plan (PDP) or Survey Map to define the plot for identification purposes and it is my holding and determination that plot No. 31 was not identifiable. Where a party claims an interest in land, such land must be defined and identifiable and that explains



why allotment in regard to unregistered land must be supported by a duly approved and authenticated Part Development Plan (PDP) for purposes of definition and identification of the land.

25. Both the Plaintiffs and the Defendant claim to be allottees of the defunct County Council of Garissa of plot Nos. 31 and 88 respectively. The Officers from the County Government who would have been expected to have records of the allotments have emphatically denied they hold any records relating to the alleged allotments. If there are no records respecting the existence and/or allotment of the plots how then can they be authenticated? It is not possible to do so. The parties may perhaps need to engage with the County Government to verify the existence of the plots they lay claim to. The Court cannot validate plots whose source documents have not been authenticated and/or have been denied by the allocating authority.
26. Whatever I have stated in regard to the allocation of Plot No. 31 as concerns the Plaintiffs applies equally to the Defendant's claim of allocation of plot No. 88 (Benane Farm). The claim by the Defendant is not supported by a formal letter of allotment which was duly accepted by the Defendant. The Defendant's plot No. 88 has no records at the County Governments Offices as testified by the Officers from the County Government. The Defendant has not in my view proved the Counterclaim to the requisite standard and cannot be entitled to the orders he seeks.
27. In the final analysis it is my holding and determination that the Plaintiffs have failed to prove their case on a balance of probabilities and are therefore not entitled to the orders sought in the Plaint. The Defendant likewise has not proved his Counterclaim on a balance of probabilities. I accordingly dismiss the Plaintiffs suit as well as the Defendants Counterclaim. As no party has been successful in their claims, I make no order for costs and consequently each party shall bear their own costs of the suit and of the Counterclaim.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 20<sup>TH</sup> DAY OF JUNE 2024.**

**J. M. MUTUNGI**

**ELC - JUDGE**

