



REPUBLIC OF KENYA



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**Awadh & another (Administrators of the Estate of Omar Awadh
Madhesh, Deceased) v Ramadhan & 9 others (Environment & Land Case
256 of 2014) [2024] KEELC 5435 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5435 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 256 OF 2014
NA MATHEKA, J
JULY 24, 2024

BETWEEN

AWADH OMAR AWADH 1ST PLAINTIFF
BARKA OMAR AWADH 2ND PLAINTIFF
ADMINISTRATORS OF THE ESTATE OF OMAR AWADH MADHESH,
DECEASED

AND

HAWA RAMADHAN 1ST DEFENDANT
SAFARI CHARO 2ND DEFENDANT
SAMOE SAID 3RD DEFENDANT
LALASHE NDEIPAI 4TH DEFENDANT
MUSYOKA-KIVANDA 5TH DEFENDANT
CHARLES NZAU 6TH DEFENDANT
ESTHER KEMUTO 7TH DEFENDANT
FATMA MOHAMMED 8TH DEFENDANT
SALLM BARISA 9TH DEFENDANT
ELIZABETH NYANGALA 10TH DEFENDANT



JUDGMENT

1. The Plaintiffs aver that they are the legal administrators of the Estate of Omar Awadh Madhesh (Deceased) one of the registered proprietors of all that parcel of land known as PLOT NO. 11651/1/MN/ situate at Kisauni Mombasa. The Plaintiffs state that the Defendants have trespassed unto the property and erected several structures thereon and have also committed acts of wanton waste and destruction of the said property. The Plaintiffs state that the Defendants actions of invading and trespassing into the property have impeded, hindered, frustrated and greatly inconvenienced the Plaintiffs from accessing, administering and to make usage of the property. The Plaintiffs states that the Defendants actions of invading and trespass, invasion, erection of structures and continued occupation of the property thereof are unwarranted, oppressive, unlawful illegal and should be stopped by this Honourable Court. The Plaintiffs claim against the Defendants is for eviction from the property, removal of all structures erected thereon and General Damages for trespass unto the property. The Plaintiffs pray for Judgement against the Defendants jointly and severally for.
 - a. An eviction order against the defendants and or their agents or any other person from Plot No. 11651/1/MN
 - b. General damages for trespassSUBPARA c.
Costs of the suit and interest thereon.
 - d. Any other or further order as this Honourable Court may deem fit and just to grant.
2. The Defendants state that they have since acquired the premises they occupy having resided there for a period exceeding twelve years and shall plead that the court finds that plot no. 11651/1/MN situated at Kisauni be declared as owned by the Defendants. The Defendants pray for;
 - a. The suit against the Defendants be dismissed with costs.
 - b. Judgment be entered for the Defendants for a declaration that the defendants have jointly and severally acquired the parcel of land by virtue of a long and uninterrupted period of stay.
 - c. The costs of the suit be provided for.
 - d. Interest on costs.
 - e. Any other relief that the court may deem fit to grant.
3. PW1, Mbarak Hamed Mbarak testified that he is a grandson of the deceased Omar Awadh and that his mother is one of the administrators of the deceased's estate. Further that the registered owners of the suit property are the administrators of the suit property and previously it was in the name of the deceased together with Ajore Bin Hussein and Yuben Binti Shehe. He narrated the history of the suit property from the original registered owner Salima Binti Mohammed who sold 1.2 Ha to one Yuben who sold 0.4 Ha to the deceased Omar Awadh through a transfer dated 29th May 1956. He further testified that Yuben has never transferred the remaining share to his family members. The above mentioned Ajore acquired interest in the suit property through 'succession case 4480 of 2003' through the administrator Rosta Khan.
4. That through partition dated 17th December 2004 the aforementioned Yuben, Ajore & deceased Omar Awadh, the partition was done on plot 11650. He testified that plot 11650 was subdivided into



2922 and 2923. However, plot 2922 was subdivided into plot 11650 and 11651 sometime in 2000 by Mr. Kiduru under the instructions of Rosta Nassir Khan. The suit property was vacant and the only person on the land at the time was the late Charo Baya who resided there under the authority of the late Omar Awadh and cultivated mangoes until 2006 when he died. He testified that he knows the defendants as they (plaintiffs) use to visit the suit property and that the occupants later increased. The matter was previously handled by National Land Commission who issued eviction notices to the defendants which never happened. That they conducted a survey and a Mr. Abubakar surveyor prepared a report dated 14th June 2011 showing that the suit property was vacant. He informed the court that the defendants invaded the suit property in September 2013 starting with the 1st defendant who he interrogated and she claimed she was a tenant of the 10th defendant

5. Further in 2008 when he became of majority age, he did not raise any concern because the suit property was vacant and that the 2nd defendant was their caretaker whom they appointed verbally. PW1 also stated that as at 2012, only the 2nd defendant was on the suit land as he was born there. They issued eviction letters through their advocates dated 18th October 2013.
6. PW2, Barka Omar Awadh relied on her statement and the documents in the list of documents filed on 17th October 2011 and 10th November 2016. She stated that PW1 is her son and that there was a caretaker on the suit property named Charo. That the suit property is on Malindi road near Matopeni and that the defendants have been there for about 10 years (as at the date of her testimony on 4th April 2024). The suit property belonged to three unnamed people before and thereafter they did a succession cause and it was registered in the administrator's names. That she is a beneficiary of 10 acres although she does not know the full acreage. That the defendants have put up houses made up of mabati.
7. Although the defendants entered appearance and filed a defence, there was no testimony despite several adjournments. The plaintiff filed his submissions dated 19th June 2024 After careful consideration of the pleadings, the testimonial evidence of PW1 and PW 2 and the issue for consideration are as follows;
 - i. Who is the legal owner of the Plot No. 11651/I/Mainland North?
 - ii. Whether the prayers in the counterclaim can be granted?
 - iii. Who bears the costs?
8. The best evidence or proof of ownership is a certificate of title under section 26 of the [Land Registration Act](#), Cap 300 which states as follows;
 - “(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
9. The courts are therefore mandated by statute to consider a title document as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land that can only be challenged on



grounds stipulated as above. The testimony by PW 1 shows that the suit property is a subdivision of plot 2922 and is evidenced by Certificate of Title No. CR. 35913 and it shows that it was registered to three individuals namely; Yumbe Binti Sheikh, Hajeri Hussein Dorry And Omar Awadh Madhesh. PW1 and 2 are the son and wife of the 3rd individual while the plaintiffs are administrators of the same. The history of the suit property as narrated by PW1 is supported by the documents produced by PW2. It is clear that the mother title was L.R 166 Section I Mainland North and it was registered in the name of Mohamed Bin Azam and was later transferred to Salima Binti Kibwana. It was later transferred to Yumbe Binti Sheikh on 2nd January 1952. The deceased Omar Awadh Madhesh received a 138/358 share of the estate of the late Salima Binti Kibwana on 9th June 1956 and finally Hejeri Hussein Dorry who received 220/358 share of the estate of the late Salima above mentioned.

10. The property was then divided in plot 2923 on 24th September 1991 and 2922 on 31st January 2001. On 18th September 2002, plot 2922 was subdivided into plots 11651 as evidenced by the above-mentioned title no. CR 35913. The deed of partition dated 17th December 2004 relied on by PW 1 is for CR .35912 and not the suit property herein. From the title of CR35912 it is apparent that the late Omar Awadh Madhesh was also a beneficiary but surrendered it to Hujery Hussein Dorry through the said deed of partition. However, plot 11651 measures approximately 0.3482 Ha is 0.860 acres and the title was transferred to the plaintiffs herein on 2nd June 2015.

11. From the above it seems that Omar Awadh Madhesh is one and the same as Omar Awadh Mohamed and it has not been challenged by the defendants. The Court of Appeal in the case of Edward Mariga Through Stanley Mobisa Mariga Vs. Nathaniel David Shulter & Another (1979) eKLR said;

“The respondents filed a defence in which they denied the appellant's claim and averred that the accident was caused by the appellant's own negligence in that he suddenly ran across the road and in the process was hit by the motor vehicle. The respondents did not give evidence and so the only explanation as to how the accident happened was the version put forward by the appellant and his brother.”

12. The absence of the defendant's testimony leaves the court with no choice but to depend on the testimony of facts averred by the plaintiff's witnesses. In CMC Aviation Ltd Vs. Crusair Ltd (No.1) (1987) KLR 103 as follows;

“The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”

13. It is therefore the court's opinion that the plaintiffs are the registered owners of plot no. 11651. However, in cross examination of PW1, counsel for the defendants tried to introduce an allegation that the property is public land but no documentary or testimonial evidence was adduced by the defendants. Therefore, the court's finds that the plaintiffs are the registered owners of the suit property. When it comes to general damages for trespass the E. Obaga J. in the case of Philip Ayaya Aluchio vs Crispinus Ngayo (2014) eKLR where he held as follows;

“The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately after the trespass or the



costs of restoration, whichever is less See Hostler – VS – Green Park Development Co. 986 S. W 2d 500 (No. App. 1999).”

14. In *Nakuru Industries Limited vs S S Mehta & Sons* (2016) eKLR where the court faced such a similar situation it was held as follows;

“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the defendants did trespass onto the plaintiff’s land and conduct some excavation. For this reason I award the defendant damages in the amount of Ksh 500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.”

15. In the case of *Willesden Investments Limited vs. Kenya Hotel properties limited NBI H.C.C. NO. 367 of 2000* (a case cited by the plaintiff), the court stated that;

“There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that K.Sh. 10 000 000 is a reasonable award for general damages”.

16. From the above precedents, the plaintiff did not produce any report showing the damages on the suit property. It is the evidence of PW2 that the structures on the suit property are made of iron sheets where some of the tenants conduct their businesses and reside upon. All these structures can be demolished to vacate the land. I find that damages for trespass have not been proved and will not be awarded.

17. On the counter claim, I find that there was lack of testimonial evidence by the defendants. In the case of *Motex Knitwear Limited Vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) Hccc No.834 Of 2002*, Lesiit J. citing the case of *Autar Singh Bahra And Another Vs. Raju Govindji, Hccc No.548 Of 1998* the court appreciated that;

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

18. The counterclaim must fail in this case and it is dismissed with no orders as to costs.

19. Section 27 of the *Civil Procedure Act*, Cap 21 states as follows:

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”



20. The plaintiffs being successful and the defendants having failed to testify I order that each party shall bear their own costs. In the upshot I find that the plaintiffs have proved their case on a balance of probabilities and I grant the following orders;
1. The defendants or their agents are to vacate the suit property Plot No. 11651/1/MN within 90 (ninety) days upon service of this order and in default eviction orders to issue.
 2. Each party to bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF JULY 2024.

N.A. MATHEKA

JUDGE

