



Chakera & another v County Government of Mombasa (Environment & Land Case 38 of 2015) [2024] KEELC 5295 (KLR) (17 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5295 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 38 OF 2015**

SM KIBUNJA, J

JULY 17, 2024

BETWEEN

ALIAKBER AMIRUDDIN CHAKERA 1ST PLAINTIFF

FAKHURUDDIN AHMEDALI CHAKERA 2ND PLAINTIFF

AND

COUNTY GOVERNMENT OF MOMBASA DEFENDANT

JUDGMENT

1. Plaintiffs sued the defendant through their amended plaint dated the 8th March 2020, seeking for *inter alia*:
 - a. Declaration that the defendant's intended actions on the plaintiffs' property, subdivision No. 140, section X1, Mombasa Island, title No. Mombasa Block/X1/1066, the suit property, is unlawful, illegal, *ultra-vires*, void and amounts to trespass and unlawful interference with private property.
 - b. An award of Kshs.12,600,000 being lost income from the illegal intrusion plus interest from 5th March 2015, being the date of filing this suit.
 - c. General damages for trespass.
 - d. Permanent injunction restraining the defendant from entering, evicting, demolishing, or in any other way interfering with the plaintiffs' land, structures, quiet possession and enjoyment of the suit property.
 - e. A mandatory order compelling the defendant to within 30 days of the judgement to at its own costs, issue a notice of closure of un-surveyed access road traversing on the suit property in either the Daily Nation or Standard Newspaper.



- f. Costs.
 - g. Any other relief that the court may deem appropriate to grant.
2. The plaintiffs inter alia avers that:
- a. They are the registered proprietors of land parcel Subdivision No. 140 of Section X1, Mombasa Island, title No. Mombasa /Block X1/1066, the suit property; that they have through their grandfathers been in possession of the suit property since 1960, and have erected commercial buildings thereon that are leased to tenants who conducts various businesses therefrom; that the plaintiffs have also developed a block of three storey residential building, church and three timber yards thereon; that on 29th January 2015, the defendant's employees from the lands department entered onto the suit property without the plaintiffs' consent and threatened to evict the tenants and demolish the business structures thereon, and unlawfully constructed an un-surveyed access road traversing the property; that the defendant's unlawful action of constructing the illegal access road deformed part of the suit property, and rendered the areas leased to the tenants to be of less or no use.
 - b. That the defendant has maliciously misled some of the tenants not to pay rent, and the members of the public to use the said access road, claiming the suit property belongs the defendant; that the defendant has refused to deliver vacant possession of the suit property to the plaintiffs despite knowing they are the registered proprietors.
 - c. At paragraphs 6B and 6C of the amended plaint, the plaintiffs tabulated the rent lost due to the defendant's actions on the suit property totalling Kshs. 12,600,000 as at 22nd February 2021.
3. The defendant opposed the plaintiffs' claim through their defence and counterclaim dated the 6th February 2017, inter alia denying any illegal entry onto the suit property, demolition thereon or eviction therefrom; that permanent injunction cannot issue as any likely injury suffered can be compensated by an award of damages, and prayed for the plaintiffs' suit to be dismissed with costs.
4. In its counterclaim, the defendant averred that it was at all material times the rightful owner of all the parcel of land known as Mombasa/Block X1/140, and any title document held by the plaintiffs in respect of the said land is not authentic but fake and fraudulently obtained. The defendant therefore sought for orders that:
- a. A declaration be issued that the defendant is the legitimate and lawful owner of Mombasa/Block X1/140.
 - b. That the plaintiffs be ordered to deliver vacant possession of Mombasa/Block X1/140 to the defendant.
 - c. Costs.
5. The plaintiffs opposed the defendant's counterclaim through their reply to amended defence and counterclaim dated the 16th February 2017, inter alia averring that the counterclaim was incompetent and incurably defective; that land known as "Subdivision No. 140 of Section X1 Mombasa Island and title No. L.R. Mombasa/Block X1/10" has been in their possession since 1960s; that the counterclaim was in bad faith and should be dismissed with costs.
6. During the hearing, the Aliakber Amiruddin Chakera, Mathew Hipoliti Lyamuya, Ephantus Waweru Rugethe, who are the 1st plaintiff, tenant and valuer testified as PW1 to PW3 respectively. The testimony of PW1 is among others the defendant came with a tractor in February 2015 and made a road



through their land, directly affecting structures of two tenants, namely Eric Mwadime t/a Mwadime Enterprises and Mathew Laimula t/a Glomali Enterprises. That the Mwadime used to pay Kshs.45,000 per month, but after the damage the rent came down to Kshs.40,000 per month. That the structure for Laimula, who was paying Kshs.25,000 to 30,000 per month was completely destroyed, resulting to a total loss of rent. That Maximum Celebration Centre, a church, refused to pay rent claiming the defendant had told them it was the owner of the property. PW2 testified that he has been conducting a business on a yard belonging to the plaintiffs from 1999, and in 2015, a fire broke out burning the yard down plus that of Mwadime. That three days later, as they were clearing the area, the defendant's officers came with surveyors, and informed them that the land belonged to the defendant. Then on another date the defendant came with a grader and ploughed a road through the land which is still there. That he still continues to operate his business there and pays Kshs. 40,000 rent to the plaintiffs. PW3 testified that he was asked by the plaintiffs to do a valuation report to determine the loss of rental income occasioned by the creation of the road through the plot. He informed the court that upon checking the survey map of that area, he found the road that was done through the subject plot was not in the map. He assessed the lost rental income as Kshs.12,510,000 and prepared his report dated the 16th February 2021 that he produced as exhibit.

7. The defendant had not filed any witness statements and closed its case on 18th September 2023.
8. The court then directed the learned counsel to file and exchange submissions. The learned counsel for the plaintiffs and defendant filed their submissions dated the 13th December 2023 and 2nd April 2024 respectively, which the court has considered.
9. The issues for the court's determinations are as follows:
 - a. Who between the plaintiffs and the defendant is the lawful owner of the suit property.
 - b. Whether the defendant entered onto the suit property and opened a road of access, as alleged by the plaintiffs, and if so, whether the defendant's actions were lawful or amounted to trespass.
 - c. What orders to issue in the circumstances of this suit.
 - d. Who pays the costs in the suit and counterclaim?
10. The court has carefully considered the pleadings filed by the parties, evidence tendered by the plaintiffs through PW1 to PW3, submissions by the learned counsel, superior courts decisions cited thereon and come to the following conclusions:
 - a. That the plaintiffs have produced a copy of the indenture of conveyance dated the 18th April 1960, confirming acquisition of Subdivision No. 140, Section X1, Mombasa Island, Title No. Mombasa/Block/X1/1066 from R. A. Trading Company Limited, and copy of title deed for Mombasa/Block X1/1066 issued on 7th November 2008, in the names of the plaintiffs & 2 others, confirming their registration with that parcel. Though, the defendant alleged being the legitimate and lawful owner of Mombasa/Block X1/140, no evidence in support of the said averment was presented to the court.
 - b. It is trite, and various superior courts have held that the prima facie evidence of ownership of land is a certificate of title. This fact is buttressed by section 26 of the [Land Registration Act](#) No. 3 of 2012 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.”
- c. In this proceeding, the plaintiffs and defendant are claiming ownership of the suit property. The plaintiffs herein have, as pointed out above, presented their evidence through PW1 to PW3. The defendant did not tender any evidence in support of their claim of entitlement to the ownership of the suit land. The defendant’s pleadings, being statements of what it alleges, without evidence, cannot be taken to be proof of what is contained therein. Pleadings are mere allegations and a party wishing for the court to find in their favour, must tender evidence in support of their averments thereof. Though the defendant had inter alia alleged that the plaintiffs’ title to the suit property had been obtained fraudulently, it tendered no proof thereof, despite being given the opportunity to file documents, witness statements and to tender evidence during the hearing. Its allegations against the plaintiffs’ acquisition of ownership of the suit property, and the title thereof remains unverified, and therefore, incapable of being a challenge to the plaintiffs’ claim of title. The defendant’s counterclaim not having been established, through evidence must therefore fail.
- d. Under section 107 (1) of the *Evidence Act*, Chapter 80 of Laws of Kenya, the person who alleges the existence of a fact or state of affairs bears the burden of proof. In the case of *Francis Otile v. Uganda Motors Kampala* HCCC No. 210 of 1989 the court held that pleadings are not evidence nor can they be a substitute thereof. Also, in the case of *Edward Muriga Through Stanley Muriga v. Nathaniel D. Schulter* Civil Appeal No. 23 of 1997, the court held that where a defendant does not adduce evidence, the plaintiff’s evidence is to be believed as allegations by the defence is not evidence. In *CMC Aviation Ltd. v. Cruisair Ltd.* (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835, Madan, J (as he then was) expressed himself as hereunder:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

The only party who claims ownership of the suit property in this proceeding, and has tendered prima facie evidence in support thereof, are the plaintiffs. The certificate of title to the suit property that the plaintiffs have produced as exhibit has not been successfully impugned.



In the case of *Motex Knitwear Limited v. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002*, the court, citing the case of *Autar Singh Babra and Another v. Raju Govindji*, HCCC No. 548 of 1998 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 defence 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”. Having found that the plaintiff has title, it is amazing that the only witness produced by the squatter defendants has questionable testimony. Hence the counterclaim by the county government fails.”

- e. The evidence tendered by the plaintiffs through PW1 and PW2 confirms that the defendant indeed entered onto the suit property as alleged without the plaintiffs’ authority or any colour of right of ownership. The defendant ploughed a road through the suit property thereby interfering with the rental values and income as confirmed by PW2, one of the tenants. That the plaintiffs had erected structures for rental on the suit property as confirmed by PW2 and PW3. The Plaintiffs have annexed some of the lease agreements with their documents and PW3 has analysed the losses that accrued due to the defendant’s entry and actions, including making a road of access through the plot. PW3 assessed the lost rental income as Kshs.12,510,000 as at 16th February 2021, when he prepared the report that he produced as exhibit. That has not been controverted through any other evidence.
 - f. Among the prayers sought is general damages. The learned counsel has cited the case of *Philip Ayaya Aluchio versus Cripinus Ngayo* [2014] eKLR, where Kshs.100,000 was awarded, as general damages. I find there being no challenge that the defendant ploughed a road through the suit property without authority and consent, a similar amount is reasonable as general damages in this suit. I therefore find the plaintiffs have on a balance of probabilities established their claim against the defendant as required by the law and are entitled to the prayers sought as detailed herein under.
 - g. The plaintiffs having been successful in their claim are under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya entitled to costs.
11. Flowing from the above conclusions on both the plaintiffs’ suit and defendant’s counterclaim, the court finds and orders as follows:
- a. That judgement is hereby entered for the plaintiffs against the defendant as prayed in the amended plaint dated the 8th March 2020.
 - b. That the defendant has failed to prove its counterclaim against the plaintiffs and is hereby dismissed.
 - c. The defendant will pay the plaintiffs’ costs in the main suit and counterclaim.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 17TH DAY OF JULY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.



In the presence of:

Plaintiffs : Mr. Karina

Defendant: Mr Lumatete

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

