



**Backshuwein (Suing in his Capacity as the Administrator of the Estate of Abdalla Salim Backshuwein - Deceased) v Said & another (Environment & Land Case 105 of 2015) [2024] KEELC 6181 (KLR) (27 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6181 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 105 OF 2015  
MAO ODENY, J  
SEPTEMBER 27, 2024**

**BETWEEN**

**SALIM ABDALLA BACKSHUWEIN (SUING IN HIS CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF ABDALLA SALIM BACKSHUWEIN - DECEASED) ..... PLAINTIFF**

**AND**

**AHMED SALIM SAID ..... 1<sup>ST</sup> DEFENDANT  
FAIZ SALIM SAID ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By Plaintiff dated 1<sup>st</sup> July, 2015, the Plaintiff herein sued the Defendants seeking the following orders:
  - a. An order of permanent injunction against the Defendants either by themselves, servants, agents, employees, legal representatives or any other person claiming interest through them from trespassing, entering, remaining, selling, alienating or dealing with the suit property in any manner whatsoever and to cease undertaking any further constructions, and digging of pits in the suit premises.
  - b. Any other relief the court deems fit to grant.

**Plaintiff's Case**

2. PW1 Salim Abdalla Backshuwein adopted his witness statement dated 25<sup>th</sup> November 2021 and a list of documents dated 24<sup>th</sup> November 2020 which he produced as PEX No 1 to 9 and PEX No 11 to 18 respectively. PW1 also filed a further list of documents dated 11<sup>th</sup> July, 2022 which he produced as PEX No 19 to 24.



3. It was PW1's testimony that the defendants have trespassed on the suit land, prayed for the orders sought in the plaint with costs. PW1 was not subjected to cross-examination.
4. PW2 Josephat Kazungu Mwatelah a Licensed Surveyor testified that he was given instructions by the Plaintiff's lawyers to confirm whether there was encroachment on parcel No 10483, visited the site and prepared a report dated 17<sup>th</sup> April, 2021 which he produced as PEX No 25 and 26 respectively.
5. PW2 testified that his findings were that beacon AB 7 and AB 8 whose data is on FR No 195/81 were in good condition. PW2 further testified that he also identified beacons TB3 and BN2 whose data are on FR No 257/54 were also in good condition. PW2 therefore stated that from his findings, the small shopping structure (herein after referred to as "Kiosk") had encroached on the suit plot.

### **Plaintiff's Submissions**

6. Mr. Obaga, counsel for the Plaintiff submitted that the Plaintiff has been the executor in respect of the suit property known as portion number 6108 (ORG 780/3) Malindi which was formerly 94/2 which emanated from a subdivision of the mother title being plot 94. Counsel submitted that the late Abdalla Salim Bakhshuwein sold the suit property but later repurchased the same hence the succession proceedings.
7. Counsel submitted that the Defendants have no claim over the suit property however they have been erecting structures therein without the Plaintiff's approval or consent. Counsel submitted that the Plaintiff has been denied peaceful occupation of the premises.
8. Mr. Obaga also submitted that the Plaintiff has no issue with the permanent building however the adjacent Kiosk on portion 10488 is not registered with the land registry in Mombasa.
9. Counsel relied on the cases of Autar Singh Bahra and Another vs Raji Govidji HCCC 548 of 1998 and *Edward Muriga (through Stanely Muriga) vs Nathaniel D. Schulter Civil Appeal 23 of 1997* and submitted that the Plaintiff has proved his case on a balance of probabilities and urged the court to enter judgment as prayed in the plaint.

### **Analysis and Determination**

10. The issue for determination is whether the Plaintiff is entitled to a permanent injunction order as sought in the Plaint dated 1<sup>st</sup> July, 2015.
11. The Defendants neither gave evidence nor filed any submissions in respect of their defence. Even though the defendants filed a defence and witness statements, the same remain as mere allegations as was held in the case of *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997* as follows:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence”.



12. The plaintiff's evidence therefore remains uncontroverted by the defendants. It does not follow that if a Plaintiff's claim is uncontroverted, his/her claim must be allowed as prayed as was held in the case of Daniel Kenga Katana & 4 others v Dzitu Toto Bokole & 3 others [2022] eKLR

“It does not follow that if the plaintiff's evidence is uncontroverted his/her claim has to be allowed as prayed. This does not shift the burden of proof of a case to the Defendant. The Plaintiff still has that burden on a balance of probabilities. This is as per Section 107 and 108 of the Evidence Act which provides: -

107. Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

13. In the case of Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR the Court explained as follows regarding permanent injunctions:

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.

9. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties.
  10. Generally, an injunction is sought in addition to other remedies. It is often difficult to seek an injunctive relief as a stand-alone remedy. In most cases it accompanies declaratory orders.”
14. PW2 produced a survey report dated 17<sup>th</sup> April, 2021 on portion No 10483 (Original No 6108) Malindi Township and the finding in the report was as follows:

“the building housing the kiosk which is hatched with red color on the attached plan, partly encroaches the road and partly encroaches portion 10483. Area encroaching road-0.0024 Ha or 24 sq M and Area encroaching portion 10483 is 0.0048 or 48 Sqm.”

15. This report was not controverted either by a contrary report or evidence by the defendant. The Plaintiff produced a Certificate of Postal Search as on 7<sup>th</sup> May, 2014 showing that he is the registered owner as the executor of Plot number 94-Malindi, title number L.T 23 Folio 350 File 3357. The Plaintiff also produced various photographs showing encroachment in respect of the suit property.



16. This court thus finds that the Plaintiff has proved his case on a balance of probabilities and consequently issues the following orders:
- a. A permanent injunction is hereby issued against the Defendants either by themselves, servants, agents, employees, legal representatives or any other person claiming interest through them from trespassing, entering, remaining, selling, alienating or dealing with the suit property in any manner whatsoever and to cease undertaking any further constructions, and digging of pits in the suit premises.
  - b. Costs to the Plaintiff.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**M. A. ODENY**

**JUDGE**

