



**Mohamed v Barnabas & 15 others (Environment & Land Case
202 of 2021) [2024] KEELC 6246 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6246 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 202 OF 2021
NA MATHEKA, J
SEPTEMBER 24, 2024**

BETWEEN

ABDI ALI MOHAMED PLAINTIFF

AND

JAMAL BARNABAS 1ST DEFENDANT
NGOWA KEA NGOMBEKO 2ND DEFENDANT
ATHMAN ABOUD 3RD DEFENDANT
HANNINGTON MWAZONGA 4TH DEFENDANT
RAMLA MOHAMED 5TH DEFENDANT
ELISHA KATANA 6TH DEFENDANT
MOHAMED WATO 7TH DEFENDANT
RAMA 8TH DEFENDANT
ROBERT SHIKANGA 9TH DEFENDANT
FRANKLINE MRAMBA 10TH DEFENDANT
FATUMA SUDI 11TH DEFENDANT
STANFORD ACADEMY LIMITED 12TH DEFENDANT
KIBWANA SUDI 13TH DEFENDANT
AWESUDI (KANZE MWADIGO DINGO) 14TH DEFENDANT
HAGIO NDEGE 15TH DEFENDANT
SOFIA ZAME 16TH DEFENDANT



JUDGMENT

1. This is a case of trespass where the Plaintiff through his plaint dated 1st October 2021 pleaded that he is the registered owner of CR. 60865 L.R 2010/V/MN situate in Jomvu Mikanjuni measuring almost half an acre hereafter known as the suit property. That after purchase of the suit property he placed the 2nd Defendant as caretaker of the same who without the knowledge and consent of the Plaintiff sold a portion of the suit property for Kshs. 330,000 vide a sale agreement dated 5th March 2019 to the 1st Defendant. He also averred that the 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th Defendants encroached onto the suit property and erected structures. That despite issuing notice and various demands they have refused and still go on trespassing and erecting structures. The coast regional government surveyor conducted survey on 6th August 2021 and confirmed in his survey report the nature of the encroachment and trespass. Based on the foregoing the Plaintiff sought for the following prayers:
 - a. A declaration that the Plaintiff is the duly registered proprietor of parcel of land Tile Number CR No. 60865, Land Reference Number 2010/V/MN
 - b. A permanent injunction restraining the Defendants whether acting by itself, its agents, employees, servants or otherwise howsoever from claiming, constructing and or trespassing or in any other way interfering with the Plaintiff's piece of land known as Title Number 2010/V/MN on CR No. 60865.
 - c. An order that the Defendants demolish any illegal structures it has put up on the suit property.
 - d. An Order that the Officer Commanding Station and the Officer Commanding Police Division Jomvu Police Station do ensure compliance with the orders of the Honourable Court.
 - e. General damages for trespass and unlawful encroachment onto the Plaintiff's parcel of land.
 - f. Costs of this suit and interest thereon.
 - g. Any other/further relief that the Honourable Court may deem fit to grant.
2. In the 3rd Defendant's statement of defence, he avers that he is the beneficial owner of a parcel of land measuring less than a quarter of an acre and described on survey plan FR 291/45 from the 2nd Defendant having bought it from the 2nd Defendant for Kshs. 400,000. That a survey was conducted by the firm of Pimatech Land Surveyors and Consultants; a private surveyor and the findings of the report dated 11th November 2022 show that the suit property is 49.45 meters away from his property and hence he could not possibly encroach.
3. The 12th Defendant filed its defence on 22nd March 2023 and averred that the Plaintiff's interest in land was extinguished as 12 years had lapsed since the issuance of a lease title on 1st February 1999 and thus this suit is time barred. It avers that it has been operating on the suit property since 2003 when it started as a nursery school and was in open, continuous un-interrupted possession without any interference from the caretaker or the Plaintiff. It avers that it is the owner by virtue of adverse possession and for that reason filed a counterclaim seeking that title to 1¼ of an acre of the suit property be extinguished and the same be registered in the name of the 12th Defendant.
4. The 11th and 13th Defendant averred in their defence that they have occupied 0.2 acres of the suit property for 60 years and are thus entitled to adverse possession. They further pleaded that they have



made developments on the suit property and were never issued with notices to vacate the suit property and on this basis counterclaimed and requested the court to order that they be issued with a title to the suit property and a permanent injunction restraining the Plaintiff from interfering with 0.2 acres of the suit property where they possess. During the hearing PW1 Abdi Ali Mohamed testified that he obtained a letter of allotment dated 9th February 1999 and later a title dated 1st February 1999 and that he paid all the dues before obtaining title. He further stated that the suit property was vacant and that he had seen the same before allotment. He was not aware of when the school was built but that he complained in 2021 about the squatters. That he also wrote to the squatters. He also seemed to not know most of the Defendants and he had produced a survey report which showed the extent of the encroachment. PW 1 testified that the 3rd Defendant bought the suit land from a third party. He was categorical that the squatters moved in sometime in 2014 and that he received his title in 2013 and that the 12th Defendant wanted to buy the suit property.

4. DW Athman Aboud, the 3rd Defendant testified that he is not on the suit property and he produced a survey report. He admitted to buying his property from the 2nd Defendant but currently he does not have title. He was adamant that the 2nd Defendant was a caretaker elsewhere and not on the land he bought and that his house was not among the houses shown in the photos produced by the Plaintiff. DW2 Fatuma Sudi, the 11th Defendant testified that the suit property is family land and that she was born there and that her grandmother also lived there. She further testified that it was crown lands and that there are no titles there but they are in the process of obtaining one. DW3 Kibwana Sudi, the 13th Defendant corroborated DW 2's testimony that the suit property is family land and that he was born there. Further, that he put up his house on it sometime in 1998 and that their family land is more than 10 acres. He concluded by stating he did not see surveyors on the suit property in 2014 and that he has lived on the suit property for 58 years.
5. DW 4, Ezra Otieno one of the proprietors of the 12th Defendant testified that he and his wife put up the school in 2003 and that at the time of his testimony it had 40 students. He claimed that he paid KShs. 30,000 as consideration and registered the school in 2012 although it started operating in 2010. He admitted that part of the school was in the suit property and that he claims 1¼ acres of the suit land from the suit property. He later clarified that he expanded the school and encroached onto the suit property and built a toilet, kitchen and some classrooms and he obtained the necessary approvals. DW4 testified that he never received notices from the Plaintiff and that the school was in the open and that he has fenced the portion occupied by the 12th Defendant.
6. Counsel for the Plaintiff filed their submissions and the court has found the following issues for determination:
 1. Who is the owner of the suit property?
 2. Whether the Defendants have trespassed onto the suit property?
 3. Whether the 11th, 12th and 13th Defendants have satisfied the requirements for adverse possession?
7. Section 26 of the *Land Registration Act* states that a certificate of title is prima facie evidence of ownership. The Plaintiff produced a title issued on 26th June 2013 but for period commencing 1st February 1999. None of the Defendants have disputed this and thus this evidence stands uncontroverted. On the issue of trespass, the 3rd Defendant testified that his property is 49.45 meters away and produced a report dated 11th November 2022 and in their submissions counsel for the Plaintiff simply stated that the 3rd Defendant was very hostile when the Plaintiff tried to access his



property and so he deemed it fit to sue him under order 1 rule 7 of the Civil Procedures. I find that there is no evidence against the 3rd Defendant and the suit is dismissed as against him.

8. The 11th, 12th and 13th Defendants all admitted to living on the land and gave a defence of adverse possession as prayed in both their counterclaims. Therefore, trespass will only succeed once the court finds that they have not met the requirements of adverse possession. Asike-Makhandia, JA described adverse possession in *Mtana Lewa vs Kahindi Ngala Mwangandi* (2015)eKLR as follows;

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, which is in these terms:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

9. With regard to the 11th and 13th Defendant, they claimed to occupy the suit property as family land since the days of their grandmother. It is trite that the 11th and the 13th Defendant are siblings and they testified to that they have lived on the suit land since they were born. The Plaintiff claimed that the squatters started invading the suit property sometime in 2014. When the Plaintiff was able to prove ownership, the burden of proof shifted to the 11th and 13th Defendants to show that they had adverse possession. The only evidence on record is their testimonial evidence and had no corroborating evidence. It therefore remains that the adverse possession has to be decided on a preponderance of evidence and it is the courts humble opinion that a party claiming adverse possession has to bring witnesses who can qualify their possession of the properties. Indeed the 11th and 13th Defendant did not call further witnesses to support their claim and did not even produce pictures of the developments they had made. The court finds it difficult to accept the narrative of adverse possession by the 11th and 13th Defendant. Perhaps, a chief or even a village elder would have greatly assisted their case. I find that the 11th and 13th Defendants have trespassed on the suit property.
10. With respect to the 12th Defendant, just as the Defendants above, the burden of proof shifted to them to prove that their occupation was open and notorious without interference from the Plaintiff. According to a valuation report produced by Wyco Valuers dated 7th October 2014, the suit property was vacant and underdeveloped and the only school mentioned was a public school named Mikanjuni Primary School. From the testimony of DW4 he states that he encroached the suit property sometime in 2004 and he started classes by that time. Since the Defendants have not disputed the valuation reports and have not produced sufficient evidence to show that they were in occupation from 2004 or even 2014, I find that they have not met the requirements of adverse possession as the time limit for maturity of adverse possession had not lapsed by the time of filing this suit. In this regard I find that they have trespassed.



11. A permanent injunction was described in Kenya Power & Lighting Co. Limited vs Sheriff Molana Habib (2018) eKLR where it was held inter alia as follows:

“...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. 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...”.

12. The Plaintiff having proved trespass against the Defendants and the court grants a permanent injunction.

13. General damages for trespass were discussed in Philip Ayaya Aluchio vs Crispinus Ngayo (2014) eKLR where it was 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. The Plaintiff’s aforementioned valuation report was for the year 2014 but no other valuation report was filed after the said trespass and I find the same has not been proved and it will not be awarded. I find that the Plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A Declaration that the Plaintiff is the duly registered proprietor of parcel of land Title Number CR No. 60865, Land Reference Number 2010/V/MN.
2. A Permanent Injunction restraining the Defendants whether acting by itself, its agents, employees, servants or otherwise howsoever from claiming, constructing and or trespassing or in any other way interfering with the Plaintiff’s Piece of land known as Title Number 2010/V/MN on C.R. Number 60865
3. An Order that the Defendants demolish any illegal structures it has put up on the suit property within the next 90 days upon service of this order.
4. Costs to the Plaintiff.

It is so ordered.

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

N.A. MATHEKA

JUDGE

