



REPUBLIC OF KENYA



Mwamadzeno & another v Mwalimu & 10 others (Environment & Land Case E010 of 2022) [2024] KEELC 6110 (KLR) (19 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6110 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E010 OF 2022
AE DENA, J
SEPTEMBER 19, 2024**

BETWEEN

RAMA HAMISI MWAMADZENGO 1ST PLAINTIFF

NAMALI MOHAMED MWAVYOMBO 2ND PLAINTIFF

AND

HAMISI MWALIMU 1ST DEFENDANT

REHEMA KAZI 2ND DEFENDANT

ALI MWALIMU 3RD DEFENDANT

MBARAKA MWASAMULI 4TH DEFENDANT

MWANAKOMBO HAMISI 5TH DEFENDANT

HAMISI MWAKURIA 6TH DEFENDANT

ASHA HAMADI 7TH DEFENDANT

NICOLUS NDULU 8TH DEFENDANT

AKIBA MWAUMBEA 9TH DEFENDANT

SAIDI TERENI 10TH DEFENDANT

FATUMA MWADZONDO 11TH DEFENDANT

JUDGMENT

Introduction

1. The plaint instituting this suit was filed before court on 7/3/2022 and is dated 23/2/2022. It is the Plaintiffs case that they are the registered owners of parcel No Kwale/Ukunda/5368 measuring



approximately 0.28Ha having acquired the same and issued with a valid title by the Ministry of Lands. That sometime in the year 2022 the Defendants trespassed into the suit parcel and commenced construction work thereon without the consent of the Plaintiffs.

2. The Plaintiffs pray for judgement against the Defendants for; -
 1. A declaration that the Plaintiffs are the registered owners of the suit property herein known as parcel number Kwale/Ukunda/5368 measuring approximately 0.28Ha
 2. A permanent injunction restraining the Defendants, their agents, servants, employees or any other person claiming under the defendants from occupying, constructing, using, leasing, selling, developing and or doing any other thing on the suit property known as parcel number Kwale/Ukunda/5368
 3. An order that the Defendants together with his agents, servants, employees and or any other person claiming under the defendant, or any person in occupation on the suit property known as parcel number Kwale/Ukunda/5368 do give vacant possession of the suit property.
 4. An order that the Defendant together with his agents, servants, employees and or any other person claiming under the defendant, or any person in occupation on the suit property known as parcel number Kwale/Ukunda/5368 be evicted from the suit property in the event of failure to give vacant possession of the suit property.
 5. An order that Officer Commanding Station [OCS] Diani Police Station do offer/provide security and ensure compliance with prayer 4 above
 6. Costs and interest at court rates
3. On 30/1/2024 Mr. Nyange counsel for the Plaintiff sought that the Defendants confirm if they had filed Defence in the matter. Ms. Barayan informed the court that the same was filed on 23/3/2022 together with the Memorandum of Appearance which she undertook to supply. The court directed that a copy of Statement of Defence be supplied to both the court and Mr. Nyange by close of business same day. Ms. Barayan however only furnished it on 25/07/24 at the point of writing this judgement after I sought the assistance of the Court Administrator to confirm if the Defence had been filed. I noted the Statement of Defence is dated 21/3/2022 and while it bears no court stamp the same bears the stamp for Kituo Cha Sheria as having been received on 21/2/2024. However, from the record, a Memorandum of Appearance by the firm of Barayan & Associates was filed on 21/3/2022. An amount of Kshs.500 was paid as court fees for the Defence on 6/4/23. The contents of the defence are that the property was fraudulently transferred to the Plaintiffs as the same should be in the name of the Defendant's grandfather who is deceased. The Defendants pray for the Plaintiffs suit to be dismissed with costs.

Evidence

4. The suit was heard virtually on 30/01/24.
5. PW1 Nimali Mohamed Mwavoyombo the 2nd Plaintiff adopted her witness statement dated 4/12/2023 and filed on 7/12/2023. The witness further adopted the documents in the list of documents dated 23/2/2022 which included Copy of title deed, Copy of green card and Copy of Certificate of postal search and Bundle of photos of the suit property (PEX 1-4). The witness statement reiterates what is stated in the Plaint.
6. On cross-examination the witness testified that the suit property is her land by dint of registration. That the land initially belonged to her grandmother/father, Mwanamisi Dzingani and Mwinjikai



- Mwachimera who were both deceased. PW1 conceded she did not present the death certificates in court. That after their death a succession was undertaken at Kwale Kadhis court which she conceded was not among the documents produced. The witness stated that the title was obtained through succession. That she didn't file any documents to show her relationships with the grandmother and grandfather. That a report of the Defendant's invasion had been made to the chief but she did not report to police station.
7. On re-examination the witness referred to the Kadhis case as being 162 of 2014 which finalised in her favor. The Plaintiff's case was marked as closed at this juncture.
 8. DW1 was Kennedy Mulewa Kalama from Mwaroni Ukunda Diani, a pastor. He adopted his statement filed on 6/4/2023 as his evidence in chief. According to the statement the witness relocated to Kwale/Ukunda/135 in 1981, rented a house for 4 months from the legal owner Hamisi Said Mwachangu to whom he duly paid rents and whom he knew until his demise. That the said 'landlord' used to live with his children Saidi Hamisi Mwachangu, Mwanakombo Hamisi and Binti Hamisi Mwachangu. That he thereafter constructed his own house on Kwale/Ukunda/136. That he had never seen Nimali Mohamed Mwavombo for the period he has lived there. The witness proceeded to list 5 the surviving children of Hamisi Said Mwachangu deceased.
 9. On cross-examination the witness testified that he was not a Defendant in the suit. He reiterated the owner is Hamisi Saidi Mwachangu. That he had no proof of the tenancy agreement nor rent he used to pay. The witness further stated that he had put up a church on the suit property and a house. DW1 conceded he had not presented any title over the suit property or any document confirming the individuals listed in his witness statement were heirs of the said Hamisi Saidi Mwachangu.
 10. On re-examination he testified that he had entered the land in 1981 as a tenant of Hamisi Said Mwachangu who is the father of the Defendants. That he had lived there and known them as his children. That title deeds are usually kept by the owners. He clarified that the suit property was not his.
 11. DW2 was Omari Punde Mwakundi a fisherman and village chairman (Mzee wa Mtaa). He adopted his witness statement filed on 6/04/2023 as evidence in chief. DW2 testified that his father was a brother to Hamisi Saidi Mwachangu and the latter was like a father to him. Like DW1 the witness listed 5 children of Hamisi Said Mwachangu deceased and their survivors. He reiterated that Hamisi Saidi Mwachangu is the legal owner of Kwale/Ukunda/135 which is now registered as plot number Msa/Block1/1590 and who lived on the property with his wife and children without interference. That he never met the said Nimali Mwavombo during the period the entire period of the deceased life and was not known to him. That the only heirs entitled to the land were those he had listed.
 12. On cross examination DW2 testified that his name is not among the defendants because he is a witness and not the owner of the land. He conceded that though he had supplied names of the heirs he had not evidence that they are heirs.
 13. On re-examination DW2 clarified that the Defendants are known to him as they are his neighbours and their father Said Mwachangu who was also a neighbour.
 14. With the above evidence the defence case was marked as closed.

Submissions

15. Both parties through their counsels filed and exchanged submissions.



Plaintiffs Submissions

16. The Plaintiffs submissions were filed before court on 6/2/2024 and addressed two issues 1) Whether the suit was contested and 2) Whether the final prayers sought should issue. It is submitted that no defence had been filed in opposition to the suit. That despite given the opportunity to serve the same upon counsel for the Plaintiff they did not comply as at the time of preparation of the Plaintiffs submissions. That the Defendants or their witnesses did not produce any document. That the said witnesses had not been sued. That the Defendants never participated in the hearing. The suit was thus undefended
17. On whether the prayers sought should be granted, the court is referred to the provisions of sections 24,25 and 26 of the [Land Registration Act](#), on the rights of a registered proprietor of land together with the privileges and appurtenances accorded to them. That the Plaintiffs being registered proprietors of the land as evidenced by the documents produced before court and should be protected by the law. It is further submitted that the Defendants have unlawfully occupied the suit property and hence trespassed on the same. The Plaintiff has referred to Ahmed Mohamed Abdullahi Vs. Mwarome Jumable & Others Malindi ELC No. 198 of 2017, Obiye Thomas Vs. Yunuke Sakagwa Nyoiza ELC Case No.277 of 2018 and Grandscope Ventures Ltd Vs. Patani Mwalimu & Others several authorities listed in the submissions in cementing their claim on the suit property.

Defendants Submissions

18. The Defendants submitted on Who is/are the true and registered owners[s] of the suit property, Whether the suit was contested, whether this honourable court should grant the orders sought by parties and Which party should bear costs of this suit.
19. The defendants cited sections 24,25 and 26 of the [Land Registration Act](#) in buttressing that even though the Plaintiffs held title the same can be defeated. That the Plaintiffs title was not validly acquired. It is submitted that to the best of the Defendants knowledge, the suit property is registered under the name of Hamisi Saidi Mwachangu the grandfather to the Defendants and therefore the defendants are the rightful heirs to the suit property.
20. The Defendants submit that the Plaintiffs have failed to adequately prove how they came into ownership of the suit property and how the title deed was obtained. That the same was obtained by fraud, illegal and unprocedural means and should be declared void abinitio.
21. The court is referred to the holding in Dina Management Limited [V County Government of Mombasa & 5 Others E010 of 2021](#) where the issue of a title being sufficient proof of ownership was discussed. Reference was further made to the case of [Munyu Maina V Hiram Gathitha Maina Civil Appeal No 239 Of 2009](#) where the court held that a registered proprietor must go beyond the instrument and prove legality of a title by showing its acquisition was legal. Further that the issue of the rightful owners of the suit property can only be determined by the succession court. The court is urged to find that the acquisition of the suit property by the plaintiffs was illegal.
22. On whether the suit was contested it is submitted that even if the suit was undefended, the claiming party in a civil claim ought to provide sufficient evidence on a balance of probabilities for the court to grant whatever orders that have been prayed for. It is submitted that the Plaintiffs claim over the land is based on assertions that have not been backed up by evidence.
23. On whether the court should grant the orders sought by the parties, it is submitted that undefended suit is not a ground upon which the orders should be granted. It was still incumbent upon the Plaintiffs



to discharge the burden of proof. The court is referred to the case of Mwaja & Five Others Vs. National Land Commission & Another (Environment & Land case 100 of 2021) (2023) KEELC 16458 (KLR). That the Plaintiffs having failed to prove ownership and possession the claim that the Defendants are trespassers should not be entertained. Moreover, the property belonged to a 3rd party Hamisi Saidi Mwachangu and should remain in his names until proper transmission is done.

24. On costs it is submitted that it is the Plaintiffs who have dragged the Defendants to court by the unprocedural manner under which they obtained the title and should be denied costs. The court is urged to deny the Plaintiffs the reliefs sought and grant the Defendants costs.

Analysis and Determination

25. There are some preliminaries issues that have emerged from the submissions of the parties. It is submitted that the suit is undefended for two reasons. Firstly, no Defence was filed. Secondly by dint of Defendants failure to participate in the suit at the hearing and instead calling on DW1 and DW2 who are not Defendants, to testify on their behalf. That there was no authority given to the said witnesses to proceed with the case on the Defendants behalf.
26. I have already pointed out elsewhere in this judgement the circumstances surrounding the Statement of Defence dated 21/3/22. Though paid for it was submitted for the record way later and served way later. Clearly there were gaps which are attributable to Counsel for the Defendants. Counsel for the Defendant did not place much weight on the implication of this point except stating that the balance of proof still lay on the Plaintiff to prove their claim to the required standard. I respectfully agree that the burden of proof still lay upon the Plaintiff to prove the case and this is by dint of section 107 of the Evidence Act. I'm guided by the holding in Kirugi and Another Vs Kabiya & 3 others (1987) KLR 347 where the Court of Appeal stated;

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”

27. I will proceed on the above premise and also not visit the mistake of the advocate on his client and in the interest of justice. Having stated this, I must add that a Memorandum of appearance was indeed duly filed thus entitling the Defendants to participate in the suit through cross examination. With regard to the Plaintiffs contestation that the DW1 and DW2 required letters of authority to represent the Defendants I respectfully disagree. For me it is not a must for a party to testify. He can call witnesses and leave it at that and this is exactly what happened in the instant case. Both DW1 and DW2 admitted in cross examination that they were not among the defendants sued in the proceedings herein. To me they simply testified in support of the fact that the Defendants were the heirs of the original owner of the suit property and they DW1 & 2 were not claiming as Defendants. I will therefore not belabor this point.
28. This then brings me to the issues for determination which in my view are
1. Whether the Plaintiffs are the lawful registered owners of the suit property
 2. If the answer to 1) above is yes, whether the reliefs sought should issue
 3. Who should bear the costs of this suit.



Whether the Plaintiffs are the lawfully registered owners of the suit property

29. It is the Plaintiffs case that they are the registered proprietors of the suit property having been registered as such. The Plaintiffs produced in evidence Title Deed dated 18th May 2017 registered in the names of Rama Hamisi Mwamadzenge and Nimali Mohamed Mwavyoambo. The register was also produced confirming the registration. It is certified true copy. A certificate of Official search is also part of the record produced as RHN 2 in the supporting affidavit sworn jointly by the Plaintiffs on 23rd February 2022 in support of the Notice of motion application of even date. The title in itself is prima facie evidence of ownership. PW1 testified the transfer of the suit property to their names was effected by transmission from their late grandparents Mwanamisi Dzingani and Mwinyikai Mwachimera vide Kwale Kadhis Court Succession Cause No 162 of 2014. The Defendants did not produce any evidence contesting the authenticity of the said proceedings or their vacation by the court. Indeed, on re-examination PW1 clarified giving the citation of the Kadhis case as Number 162 of 2014 which she stated was finalised in her favor. On perusal of the court record, the court came across the orders of the Kadhis court dated 24th February 2015 attached to the Supporting Affidavit of Nimali Mohamed Mwavyoambo sworn on 28th June 2022 (NM1). Order No. 4 vests the estate of Mwanarusi Zinyau and Mwinyikai Mwachiwero to the Plaintiff herein.
30. The *Land Registration Act* speaks to a title deed being conclusive evidence of ownership of land unless the same has been procured through fraud or misrepresentation. Section 26 (i) provides: -
- “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.”
31. The Defendants allege that the Plaintiffs title deed to the suit property was procured by fraud. A claim of fraud must be specifically pleaded with particulars of how the fraud was perpetrated. In addition, the allegations of fraud must be strictly proved. The Court of Appeal in *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR where the Court of Appeal stated thus:
- “It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo _vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “... We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases.”..In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
32. The Defendants did not provide any evidence before court to support the allegations that the succession proceedings in the Kadhis court case number 162 of 2014 was by misrepresentation of any



facts and fraud. Most importantly, no evidence has been tabled in proof that the transfer of the property to the Plaintiffs and registration thereof was procured by fraud. As it is, the same was spearheaded through the Kadhis court.

33. Moreover the Defendants did not prove their interest in the suit property to entitle them to impeach the title held by the Plaintiffs.
34. Based on the evidence led and placed before me I found no justification to impeach the title held by the Plaintiffs. It is the finding of this court that the Plaintiffs are the lawfully registered owners of the suit property.

Whether the reliefs sought should issue

35. In view of the above finding I will proceed to determine whether the reliefs sought by the Plaintiff should be granted. The Plaintiffs have sought for a declaration that they are the lawful owners of the suit property which I have already considered.
36. Should the permanent injunctive orders issue? The court in *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR pronounced itself as follows with regard to what constitutes a permanent injunction; -

“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”.

37. Guided by the principles for granting orders of Injunction established in the celebrated case of *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358, The Plaintiff produced a title document and having established they are the lawful registered owners of the suit property. The Plaintiffs further state that the Defendants have unlawfully taken occupation of the suit property without the Plaintiffs permission and consent. The Plaintiffs case is that the continued occupation and developments on the suit property are bound to cause them irreparable loss and harm. I have perused the photographs annexed by the Plaintiffs herein, indeed the occupation by the Defendants is evident. The evidence of DW1 and DW2 further confirms that indeed they are in occupation of the suit property and have set up their homes thereon. According to both witnesses, this occupation is through the permission of the Defendants named in the pleadings. The said defendants did not give evidence. It is my view that the Plaintiffs have proved the aspect of irreparable loss and damage being bound to be suffered in the event that the orders of permanent injunction are not granted.
38. The Plaintiffs having proved their case on a balance of probabilities and persuaded by the dictum in *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* (supra) and noting the occupation as above, are entitled to the grant of the orders sought including vacant possession herein.
39. The Plaintiffs have further sought for costs of the suit. It is true that the costs follow the events as provided by Section 27 of the *Civil Procedure Act*. The same states that;

“(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.”

40. Arising from the above provisions the power is however discretionary and given the nature of the dispute herein which appears to have some family connotation, I will direct that parties bear their own costs.
41. The upshot of the foregoing is that this court finds that the Plaintiffs have proved their case on a balance of probabilities against the Defendants. Consequently, Judgement is hereby entered for the Plaintiffs against the in the following terms; -
 1. A declaration hereby issues that the Plaintiffs are the registered owners of the suit property herein known as parcel no Kwale/Ukunda/5368 measuring approximately 0.28Ha
 2. A permanent injunction is hereby issued restraining the Defendants, their agents, servants, employees or any other person claiming under the defendants from occupying, constructing, using, leasing, selling, developing and or doing any other thing on the suit property known as parcel no Kwale/Ukunda/5368
 3. The Defendants together with his agents, servants, employees and or any other person claiming under the Defendant, or any person in occupation on the suit property known as parcel Number Kwale/Ukunda/5368 do give vacant possession of the suit property in the next 180 days of this judgement.
 4. That in the event of failure to 3 above there be an order of peaceful eviction of the Defendants at the Defendants costs upon expiry of the 180 days herein.
 5. An order hereby issues that Officer Commanding Station [OCS] Diani Police Station do offer/ provide security and ensure compliance with prayer 4.
 6. Parties to bear their own costs.

Orders accordingly.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 19TH DAY OF SEPTEMBER 2024

AE DENA

JUDGE

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

Mr. Nyange for Plaintiffs

Ms. Nyawera H/B for Barayan for Defendants

MS Asmaa Maftah Court Assistant.

