



REPUBLIC OF KENYA



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**Technical University of Mombasa v Jamad & 16 others (Environment & Land
Case 198 of 2009) [2024] KEELC 13257 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13257 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 198 OF 2009
SM KIBUNJA, J
NOVEMBER 20, 2024

BETWEEN

TECHNICAL UNIVERSITY OF MOMBASA PLAINTIFF

AND

ALI SAID JAMAD 1ST DEFENDANT
SAID SALIM 2ND DEFENDANT
MBARAKA SAID OMAR 3RD DEFENDANT
MOHAMED SAID OMAR 4TH DEFENDANT
YAHYA OMAR BIN MUNIF 5TH DEFENDANT
ABDULAZIZ MBARAK SALIM 6TH DEFENDANT
MOHAMED SAID OMAR 7TH DEFENDANT
HASSAN ISLAM 8TH DEFENDANT
AWADH KHAMIS ABOUD JAMAD 9TH DEFENDANT
JULIUS JOHN NDECHIO 10TH DEFENDANT
SALIM MBARAK OMAR 11TH DEFENDANT
BIJUMA KIBWANA 12TH DEFENDANT
HAFSWA JAGINA KHAMIS 13TH DEFENDANT
RAMADHAN SHEE 14TH DEFENDANT
ABDULRAHMAN AMIR 15TH DEFENDANT
NADINAH LM RASHID 16TH DEFENDANT
ALI SAID OMAR 17TH DEFENDANT



JUDGMENT

1. The Plaintiff instituted this suit through the plaint dated 18th June 2009 as amended on 19th February 2024. It is the plaintiff's case that it is the registered owner of Plot No. Mombasa/Block XI/386, suit property, measuring 4.26 acres acquired in the name of its precursor, Mombasa Institute of Muslim Education, on 3rd February 1953. That the plaintiff changed name and status variously from Mombasa Institute of Muslim Education to Mombasa Polytechnic University College and later Technical University of Mombasa. Under the University Act 2012, the plaintiff acquired a charter on 30th January 2013 to operate as a fully-fledged public university and all rights, liabilities and assets held by Mombasa Polytechnic University College were automatically transferred to the Technical University of Mombasa. It is the plaintiff's case, that the defendants have encroached on the suit property, hived off a portion thereof, and commenced construction of a building. The plaintiff prayed for judgment against the defendants jointly and severally for:
 1. "A declaration that the plaintiff is the registered proprietor of the suit property has an absolute and indefeasible title to the suit property and therefore the defendants are illegally in occupation of the same devoid of any rights of interest, legal, beneficial, or equitable in the suit premises Plot No. Mombasa/Block XI/386.
 2. A declaration that the defendants ought to vacate Plot No. Mombasa/Block XI/386 and give vacant possession of the plaintiffs forthwith and in default an order of eviction to be granted as a matter of right.
 3. An order of eviction against the defendants specifically to demolish and remove all the illegal structures and or building erected on Mombasa/Block XI/386 at the defendant's cost be issued and that the District Commissioner Mombasa District or any other officer he may delegate for that purpose be ordered to effect the said eviction and demolition of all the said illegal structures with the help, protection and assistance of the officer commanding police division (OCPD) Makupa Police Station Mombasa and any other officer he may delegate for that purpose.
 4. That a permanent injunction do issue restraining the defendant herein by themselves, their agents, employees, relatives or family members or any other person whomsoever and whatsoever from constructing or erecting any building or structures or Mombasa/Block XI/386 of whatsoever nature of from occupying residing, utilizing or in any other manner whatsoever from further committing acts of trespass or adversely interfering with the plaintiff's rights and interest and quiet possession and enjoyment of Mombasa/Block XI/386 or continuing so to do at all.
 5. Any other order the honourable court may deem fit and just in the circumstances.
 6. Costs."
2. The defendants filed a statement of defence and counterclaim dated 3rd September 2009 and denied the plaintiff's ownership to the suit property. The defendants denied any sale of the suit property between



the plaintiff and Mombasa Institute of Muslim Education and stated that they were not privy to that contract. The defendants maintained that they were not trespassers, but had built houses on the suit property years ago. In their counterclaim, the defendants contended that they had acquired title to the suit property through adverse possession having settled on the suit property for an uninterrupted period of 40 years. They averred that the plaintiff cannot seek to demolish their houses without compensation and prayed for judgment to be entered against the plaintiff for:

- a. “A declaration that the defendants are entitled to orders of the counterclaim as sought in the counterclaim.
 - b. A declaration that the purported sale and subsequent transfers are illegal perse
 - c. Costs.”
3. The plaintiff responded to the defence and counterclaim with a reply to defence and defence to counterclaim dated 17th May 2024 inter alia averring that they are the registered owner of the suit property having acquired it in 1953. That the plaintiff has been the registered owner for over 56 years and that the defendants have no legal rights over the suit property. The plaintiff reiterated that the defendants are trespassers and their continued occupation of the suit property is illegal and an infringement to the plaintiff’s right to its proprietorship, possession and usage. In defence to the counterclaim, the plaintiff maintained that it was a fully-fledged public University, and the suit property is therefore public land that cannot be acquired by way of adverse possession. The plaintiff prayed for the counterclaim to be dismissed with costs and for judgment to be entered against the defendants as prayed for in the plaint.
 4. During the hearing, the plaintiff called John Chege, who testified as PW1 and the defendants called Ali Said Omar who testified as DW1.
 5. PW1 testified inter alia that Mombasa Institute of Muslim Education bought the suit property measuring 4.26 acres in 1953, and the certificate of title was issued on 15th June 2009. He contended that the plaintiff had developed hospitality facilities and lecture halls as well as hostels on the suit property, but a portion of it was occupied by the defendants, as shown in the survey report dated 27th October 2021. During cross-examination PW1 admitted that though they had sued 17 people only, there were approximately 81 people in occupation on the land. That the 17 defendants were part of the 81 people that were occupying the suit property. He clarified that title documents show the original property was 5.26 acres and 4.26 acres was subdivided as the suit property. PW1 insisted that the defendants settled on the suit land after it was bought by the plaintiff in 1953 as it was vacant at the time. That the letter of 4th November 2004 does not state that the original squatters have any rights over the suit land, but it simply identified the squatters and stated they should vacate from the suit property.
 6. DW1 testified that he was born on the suit property in 1954 as the last born of his family. That their first born was born in 1938 on the land, died in 2022 and was buried on that land. He claimed that the Mombasa Muslim Institute of Education was established while they were already in occupation of the land. He contended that he was among the first 25 people to occupy the suit land. That the land owned by Mombasa Muslim Institute of Education was separate from the one they occupied, that was part of the Muslim Institute’s land and not on their land. DW1 insisted that the plaintiff took the suit land from the squatters and developed it, while they have been in occupation for over 100 years and cannot be evicted by the school as it found them there. In cross-examination DW1 claimed that their houses were over 100 years old. That he inherited his house from his parents, but indicated he had not brought photographs of the same. That the original owners of the land had given a portion thereof to a Muslim institute and the other portion to the defendants. That it is true the defendants occupied



the land in dispute with the permission from the original owner and not the plaintiff. He stated that it is true the receipts filed in court showed that the land belonged to the plaintiff and that they were paying rent of Kshs 7. He agreed that they had received a letter asking for their eviction but insisted it was only addressing illegal squatters. He confirmed that the plaintiff is a public institution established with public funds, but claimed that the original Muslim institute was established by and for Muslim community only. He confirmed that they were paying rent to the Muslim institute, but stopped paying in 1961 after the government took it over, and that nobody had demanded that they pay rent ever since.

7. The learned counsel for the plaintiff and defendants filed their submissions dated the 3rd September 2024 and 11th October 2024 respectively, which the court has considered.

8. The following are the issues for the determinations by the court:

- a. Who between the plaintiff and defendants is the legal owner of the suit property.
- b. Whether the suit property is public or private property.
- c. Whether defendants have acquired title to the suit land under adverse possession.
- d. Who pays the costs?

9. The court has carefully considered the parties' pleadings, oral and documentary evidence by PW1 and DW1, submissions by the learned counsel, superior courts decisions thereon, and come to the following determinations:

- a. The plaintiff's case is that the original parcel where the suit property arose from, was LR. 106/10, Section 11, Mombasa, which was 5.6 acres, under the title acquired on 25th June 1928 under the Town Planning Amendment Ordinance, 1927. The original land was then subdivided, and portions thereof sold out. The plaintiff, then known as Mombasa Institute of Muslim Education [MIOME], bought the suit property measuring 4.26 acres for Kshs.160,000 by the indenture dated 20th April 1953 from Estate Syndicate Limited which had bought the original parcel, Plot No. Subdivision No. 106 Section 11 (XI) measuring 5.06 acres on 14th October 1948, from Adulrehman Bin Miran. The plaintiff was registered as the proprietor of the land, Mombasa/Block XI/386, measuring 4.26 acres on 15th June 2009.
- b. The title held by the plaintiff is indefeasible evidence of the plaintiff's ownership of land. Therefore, the plaintiff is conferred with all the rights and privileges accruing as provided for in sections 24 and 25 of the [Land Registration Act](#), including the right to possession, to a quiet and peaceful occupation and right to use of their property. Section 24 (a) of the [Land Registration Act](#), states that:

“Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

Section 25 (1) of the [Land Registration Act](#),

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances



belonging thereto, free from all other interests and claims whatsoever, but subject—

- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.”
- c. On the issue of whether the defendants have trespassed onto the plaintiff’s suit property or have acquired title to the suit property by way of adverse possession, the plaintiff insisted that the defendants are trespassers on the suit property, having moved onto it because it was then vacant. The defendants in their counterclaim claimed to have acquired title to the suit property by way of adverse possession. The survey report that was prepared by Sammy Wambua, the Regional Surveyor dated 27th October 2021 and filed in court on 10th March 2022, that was admitted as an exhibit by consent, established that the defendants are occupying 1.0206ha of Plot No. MI/XI/386, the suit property, that belongs to the plaintiff. The report further shows that out of the 4.26 acres of the suit land, the plaintiff occupies 1.742 acres, while the defendants and others occupy 2.522 acres. The defendants’ claim that the land they occupy was different from that owned by the plaintiff cannot therefore be based on facts, because the surveys report clearly show the portion is part of the plaintiff’s land.
- d. The defendants claimed that they had occupied that portion of the suit property before the plaintiff came to being, and that their houses are away from that of the university. However, as established by the surveyor’s report, the defendants have occupied or encroached on part of the suit property owned by the plaintiff. That encroachment by the defendants and others has been a thorn in the flesh of the plaintiff for many decades. On 15th June 1961, the plaintiff while known as Mombasa Institute of Muslim Education wrote to one Omar Saleh Munif informing him that as the owners of Plot No. 106/R Section XI, they will charge a ground rent of Kshs 7/= for occupation of the portion of the suit property starting 1st June 1961. The defendants has attached receipts of between October 1961 and December 1962 showing that they were paying ground rent to Mombasa Institute of Muslim Education, the



precursor of the plaintiff. DW1 indeed admitted that they paid rent Mombasa Institute of Muslim Education, but they stopped making these payments once it was taken over by the Government of Kenya. The fact that the defendants were paying ground rent can only be an indication that they were occupying the land with permission or consent of the owner, and cannot turn around now in this suit, and claim their occupation was adverse to the title of the registered proprietor, as they appear to do through their counterclaim.

- e. The defendants have submitted through their learned counsel, that whereas the suit property was public land, they have a right to their housing on the land, having occupied and developed it. The counsel cited the case of LSK versus Kinyua, Head of Public Service and 5 Others (2022) eKLR where it was held that;

“...where the landless occupied public land and established homes, they acquire a protectable right to housing over the same. The right to housing over public land crystalized by virtue of long period of occupation by people who have established homes and raised families on land....”

However, as pointed out above, the defendants did not enter onto the suit property as squatters but as ground paying individuals, whose licence or permission has since been withdrawn or revoked.

- f. The plaintiff is a public university under the Technical University of Mombasa Charter 2013. Land held and occupied by a public institution is public land within the meaning of Article 62 (1) of *the Constitution* of Kenya. There is no doubt therefore, that the suit property that is registered in the plaintiff's name is public land. Public land cannot be subjected to a claim of adverse possession as provided for by section 41 (a)(i) of the *Limitation of Actions Act*, which provides as follows:

“ This Act does not—

- (a) enable a person to acquire any title to, or any easement over—
- (i) Government land or land otherwise enjoyed by the Government.”



- g. While upholding a notice of preliminary objection against an originating summons seeking title by way of adverse possession against title held by the County Government of Kisumu, in the case of Alex Opiyo Mwandu versus City Manager County Government of Kisumu & Another [2017] eKLR, the court held that;

“That Section 41 of the Limitation of Actions Act excludes “Government land or land otherwise enjoyed by the Government” from the provisions of the Act. That the land held by the 2nd Respondent falls in the definition of public land as it is held in trust for the public use in the County until and unless it is allocated to a private entity. The Applicant’s claim is not against a private entity or for private land. The claim is against the 2nd Respondent, which is a County Government, and over a public land in contravention of the provisions of Section 41 of the Limitation of Actions Act. That accordingly the suit is for striking out as a non-starter.”

And, in the case of James Maosa Okeno versus County Government of Kisii [2019] eKLR the court held that;

“The subject property is not community land as averred by the Plaintiff. It is public land within the definition of public land under the Constitution. The land is registered under Gusii County Council and was reserved for the specific purpose of Bonyancha Market. The Applicant’s occupation of any portion of land cannot entitle him to claim title by adverse possession. His occupation, if at all, could only have been at the pleasure of the Respondent and the Respondent was entitled to give him notice to vacate at any time. His possession however long could not operate to extinguish the title to the respondent.”

- h. The law as codified under section 41 of the said Act and confirmed through judicial pronouncements in previous cases, including the above listed, is clear and the defendants cannot seek to adversely own and be registered as proprietors of the suit property as it is public land. Their argument that they have acquired protectable rights to housing over it does not hold water. The plaintiff has demonstrated vide the notices



issued by its predecessor, Mombasa Polytechnic, on 1st November 2005 and 4th November 2004 that the defendants' occupation and possession of the suit property was adverse to the rights and interest of the plaintiff as a registered owner. That adverse occupation by the defendants of the suit property, which is public property already alienated to the plaintiff, is incapable to extinguish the plaintiff's rights and interest over the land, in view of section 41 of The *Limitation of Actions Act*. Put differently, the doctrine of adverse possession is inapplicable where the land is public or trust land or land owned by the Government. The defendants having occupied the land with permission or consent of the owner as evinced through payment of receipted ground rent at some time, remained on the land under the same terms, until they were asked to vacate, but they declined prompting the commencement of this proceeding. They should vacate from the suit property to enable the plaintiff put the land to the intended use as detailed by PW1 in his evidence.

- i. The court finds the defendants are therefore trespassers on the suit property. Trespass as defined in section 3 (1) of the *Trespass Act*, Chapter 294 of Laws of Kenya which provides that:

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

The defendants have denied the plaintiff the use, occupation, possession and enjoyment of the suit property.

- j. In the amended plaint the plaintiff has sought for the eviction of the defendants and a permanent injunction restraining them from remaining on the land. It is trite law that trespass to land is actionable per se. The plaintiff need not prove that it suffered any specific loss or damage. In the case of *Duncan Nderitu Ndegwa versus Kenya Pipeline Company Limited & Another* [2013] eKLR, the court held that:

“On the issue and quantum of general damages, once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary to for the court to award



general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendant's trespass."

The measure of damages is usually the value of the suit land before the trespass and immediately after the acts of trespass. The plaintiff ought to present before the court a valuation report that would paint a picture to the court as to the situation on the suit property, and the costs of restoring the suit land to its former value, so as to guide the court in settling on a fair amount of monetary value of the damage caused. The court has noted the plaintiff herein has not sought for damages.

- k. The actions of the defendants of trespassing on the suit property ought to be permanently stopped. The plaintiff is therefore entitled to an order of eviction, as well as a permanent injunction restraining the defendants from remaining on the suit property.
- l. Under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, costs follow the event unless where for good cause otherwise ordered by the court. In this instance, I find no reasonable cause to go against that general direction. The plaintiff will have the costs of the suit.

10. Flowing from the determinations set out above, the court finds and orders as follows:

- a. The defendants are directed to vacate from and remove all their structures on Mombasa/ Block XI/386 within the next 60 days from the date of this judgment failure to which the plaintiff is at liberty to evict the defendants and demolish all their structures thereon at the defendants' expense, under the supervision of the OCS Makupa Police Station, Mombasa.
- b. A permanent injunction is hereby issued restraining the defendants, by themselves, representatives, agents, employees, servants or whatsoever acting on their behalf from selling, alienating, letting, subdividing, transferring, charging or in any other manner whatsoever interfering with the plaintiff's ownership, use, possession and occupation of the property known as Mombasa/ Block XI/386, after they vacate or are evicted.
- c. The defendants are to pay the costs of the suit and the counterclaim to the plaintiff.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 20TH DAY OF NOVEMBER 2024.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF:



Plaintiff : Mr. Opolu.

Defendants : No Appearance

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

