



Kaleli v Headlan (Sued as the Administrator of the Estate of Headlam S Mnen (Deceased) and on his own Behalf) & 5 others (Environment & Land Case 1 of 2023) [2024] KEELC 7534 (KLR) (Environment and Land) (15 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7534 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE 1 OF 2023
EK WABWOTO, J
NOVEMBER 15, 2024**

BETWEEN

BENJAMIN KALELI PLAINTIFF

AND

BOMU HEADLAN (SUED AS THE ADMINISTRATOR OF THE ESTATE OF HEADLAM S MNEN (DECEASED) AND ON HIS OWN BEHALF) 1ST DEFENDANT
ISAAC RENY S MRUTU 2ND DEFENDANT
REMES MRUTU 3RD DEFENDANT
NAOMI MRUTU 4TH DEFENDANT
SHABAN KITENGE MATIAKI 5TH DEFENDANT
THE ATTORNEY GENERAL 6TH DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit through a plaint dated 6th December 2004 initially as Mombasa High Court Civil Suit No. 233 of 2004 before the same was transferred to this Court. The Plaintiff sought for the following reliefs:-
 - a. A declaration that the Plaintiff is the proprietor of the suit premises and that the 1st to 5th Defendants have trespassed on the same.



- b. A mandatory injunction compelling the Defendants by themselves, their agents or servant and or employee to vacate the said premises and hand over vacant possession of the same to the Plaintiff and remove any fence placed on the property.
 - c. That the Defendants do pay the Plaintiff the value of the harvested crops on a monthly basis and or in the alternative the court do order proper assessment to be effected by the relevant Agricultural Department and the value be paid by the Defendants.
 - d. That the Director Land Adjudication Officer and Agricultural Officer do go to Plot 501 and indicate how much is occupied by each Defendant and its crop and usage valuation.
 - e. Costs of the suit.
 - f. Any other relief that this Honourable Court deem fit and just to grant.
2. The suit was contested by the Defendants. The 1st to 5th Defendants filed their Statement of Defence dated 9th November 2004 seeking for dismissal of the suit while the 6th Defendant filed a Statement of Defence dated 22nd October 2004 equally seeking for dismissal of the Plaintiff's suit.

The Plaintiff's case

- 3. It was averred that the Plaintiff was the proprietor of Plot No. 501 situated at Kamala Mata Adjudication Section at Miereni Taveta which had been acquired sometimes back. The 1st to 5th Defendants trespassed onto the said property and owing to the said property and owing to the said action the Plaintiff has been unable to harvest his crops as the same were harvested by the Plaintiff.
- 4. It was further averred that the trespass was done with the knowledge of the District Land Adjudication Officer, Taita Taveta and the said officer has ignored and or refused to prevent the Plaintiff from such trespass. It was also averred that the District Agricultural Officer has also ignored and or refused to properly assess the damage the 1st to 5th Defendants are causing in the land and the loss the Plaintiff is incurring and the Plaintiff would want them ordered not to do so. It was also averred that the demand notice that had been issued had been ignored and hence necessitating the filing of this instant suit.
- 5. During trial, Benjamin Mutuku Kaleli, the Plaintiff herein testified as PW1 and the sole Plaintiff's witness in the matter. He adopted and relied on his witness statement dated 10th February 2021 and list of documents dated 20th March 2006 and a further list of documents dated 11th December 2017 in his evidence in chief. He added that he started cultivating on the land upon purchase in 1982. At that time the land was not measured in size but he was shown the boundaries on the ground. He also stated that Plot 501 borders Plot 503 and Plot 505. Plot 503 is for Headlam and Plot 505 is for Mruttu. He also stated that Plot No. 504 belonged to Musangi Mwakilegwa (deceased) the brother to Raphael Ngima Mwangechi.
- 6. It was his testimony that there were previous disputes relating to the property and he had produced evidence demonstrating the same. He also stated that he has sued the defendants for entering his land, Plot No. 501. Bomu Headlam took one half and Isaac Mruttu took another half and they are still on the land to date.
- 7. On cross-examination by Counsel for the 1st to 5th Defendants he stated that he bought the land in 1982 and has a sale agreement for the same though it was destroyed when his house was burnt down. He also stated that he bought the land from brothers Nginda Meoloi and Machaku Kiunguru and at the time of purchase, no title deed had been issued and the land was yet to be adjudicated as at that time.



8. On further cross-examination, he also stated that the land was demarcated in 1985. There was no dispute until 2001. He has no survey report and the trees were cut in 2018. He stated that the land could not be surveyed because the same had been fenced.
9. When re-examined, he stated that the first agreement was burnt in his house and then another agreement was done on 18th June 2002. He also stated that he had no issue with Headlam until he died. The problem started in 2001 when the lands officers came to the land over Case No. 12 of 1997 seeking to implement the decision of elders of 1983. He stated that a mistake was made at that time and he filed a case at the Magistrate Court upon which a fresh assessment was ordered. Despite that, Headlam never vacated the land and he had produced evidence confirming that his crops were destroyed.

The case of the 1st to 5th Defendants

10. The 1st to 5th Defendants filed a Statement of Defence dated 22nd October 2004. The 1st to 5th Defendants denied the contents of the plaint. They also averred that the Plaintiff is not entitled to the reliefs sought.
11. During trial, the 1st Defendant testified as DW1. He stated that Isaac Reny Mruttu and Remes Mruttu are children of Naomi Mrutu and they border his land. He also stated that Shaban Litengi Metiaki and Lawrence Litengi are brothers. He further stated that their father was known as Headlam Sailem Mnene. He stated that he owns Plot No. 504, Mruttu owns Plot No. 505 and did not know which property is owned by the Plaintiff. He also adopted and relied on his statement dated 19th July 2022 and bundle of documents dated 5th July 2006 in his evidence in chief.
12. When cross-examined, he stated that he was aware that the 3rd Defendant passed away sometimes in 2021. He also stated that the decision of the Panel of Elders referred at paragraph 10 of his statement is a case where his father Headlam sued Laurent Kitonyi and Nginda so that they could show the land that had been sold since his father had bought the land from them. He also stated that the Case No. 12 of 1997 was withdrawn. The Land Officer came to show the three brothers Nginda Mealoi, Lazarus Kitengi and Shaban Kitengi their land. They were to be shown their portions so that Headlam can claim and be compensated from the brother he bought from. He also stated that he did not know if the Plaintiff had title to Plot No. 501.
13. When he was showed the title, he stated that he had not lodged any complaints regarding the same. He denied harvesting anyone's crops. He was not aware of any complaint over Plot No. 501. He withdrew the suit No. 12 of 1997 since there was a decision of elders saying each brother be shown their portions and each buyer to follow from the brother who sold the land. He stated that his father died in 1997. The elders came when his father had already died and he was the one on the ground to demarcate the land to the 3 brothers. He also stated that he was given land from Laurent's portion. He got 8 acres. The 3 brothers had over 30 acres and he uses the portion of Laurent. He further stated that the Plaintiff should get his land from Nginda. The letter of 2.12.2003 show the Plaintiff's name against Plot No. 501. His father's name is against Plot 503. He knows Msangi of Plot No. 504 and Reny Plot 505 and he was not present when the panel sat in 1983.
14. When re-examined, he stated that he has no title to his land because the same had a dispute.



Court's directions

15. Upon hearing the Plaintiff and 1st to 5th Defendants cases, this court differently constituted through Justice Munyao Sila issued the following orders on 27th July 2022:-

“The Taita Taveta District Land Registrar and District Surveyor to proceed to the ground and do the following:-

1. Establish and/or re-establish the boundary marks of the Plots Taita Taveta/ Kimala Mata/501, 503, 505.
2. The two officers to provide particulars of the person/s using these parcels of land and whether one proprietor has entered into the other's land and if so, the extent thereof.
3. The two officers to do a report accompanied by a sketch map showing the above.
4. The parties herein to liaise with the two officers on the date and time of this exercise.
5. Any costs be borne by the Plaintiff at the moment.
6. This order be extracted and be served by Counsel for the Plaintiff.
7. Mention to confirm the report on 26th September 2022.”

16. As per the record of the Court, the report was not ready on 26th September 2022 when the matter came up for mention and this prompted the court to adjourn the same to 8th November 2022. After several mentions the report was ultimately availed on 23rd January 2023 upon which the court directed the maker of the report to be cross-examined.

The testimony of John Mwambingu Mwanga, Sub County Agribusiness Officer, Taveta

17. He attended court on 12th July 2023 pursuant to court summons which had been earlier issued. He stated that he only saw only nine bananas stems valued at Kshs. 1,800/= and that the report was incomplete because they needed security to finalize.
18. He also stated that in view of that reason he was unable to complete the report.
19. When cross-examined by Counsel for the 1st to 5th Defendants, he stated that when preparing the letter dated 21st February 2023 he knew that it was for presentation to the court. He also stated that the letter dated 21st February 2023 does not mention the previous report of bananas valued at Kshs. 1,800/=. He also stated that it was not possible to ascertain damages on the suit land due to the time that had lapsed.
20. When cross-examined by Counsel for the 6th Defendant, he stated that he had not known Mr. Maoto who was the Agricultural Officer that had sworn the affidavit dated 13th July 2015 but currently had retired. He further stated that the report indicated that the assessment could not be done as parties could not agree for the same to be extended on the land.

The testimony of Kembaso Wycliffe – County Surveyor, Taita Taveta County

21. He relied on his report dated 17th January 2023. He stated that parcel No. 503 was 3.55Ha, 3.5acres being more on the ground than on the record. Parcel 505 was valued at 2.27Ha, 0.89acres was more



on the ground than what is registered by 4.71 acres. Parcel 501 is 3.86Ha. He also stated that what was shown on the ground is more than the registered size.

22. When cross-examined by Counsel for the 1st to 5th Defendants he stated that he was aware that the land was subject to adjudication process which was concluded. The RIM is accurate on the adjudicated parcel. Parcel 483 appears twice on the RIM which must have been in error. He was not aware of any dispute over the issuance of the titles. He used GPS Coordinates but did not attach them. He took measurements over the parcel of dispute but did not file it in court. Parcels 501, 503 and 505 have general boundaries and not fixed boundaries. He could not tell if the RIM had been published. Owner of Parcel 501 had included Parcels 3862 and 3863 to be part of his land.
23. On re-examination, he stated that the adjudication of those parcels had been completed. The relevant RIM of the area in dispute is the one that he had attached and after adjudication, the RIM is published to enable members of the public get access.

Testimony of Siena Mwanguri Land Registrar, Wundanyi, Taita Taveta County.

24. She stated that she was in court pursuant to court summons issued earlier, she had a green card and adjudication report of 501. The title deed was issued on 9th March 2018. The adjudication record confirms that Benjamin Kaleli was the allottee. In respect to 504 – the Green Card was opened on 8th March 2017. Title deed issued on 9th March 2017 to Alphonse Nyambu Mesanji and adjudication record confirmed that he was the first allottee.
25. When cross-examined by Counsel for the 1st to 5th Defendants, she stated that she did not bring the records for 505 because the same was not listed in the summons.

The Plaintiff's submissions

26. The Plaintiff filed written submissions dated 28th August 2024. Counsel for the Plaintiff submitted on the following issues:-
 - a. Whether a declaration should issue that the Plaintiff is the absolute proprietor of TAITA TAVETA/KIMALA MATA/NO. 501.
 - b. Whether a mandatory injunction should issued compelling the Defendants to vacate the suit premises.
 - c. Whether the Defendants should compensate the Plaintiff.
 - d. Who bears costs of the suit.
27. It was submitted that the Plaintiff has a valid title that is not disputed. The Land Registrar confirmed to court that the Plaintiff was the first allottee of the said land. The 1st Defendant who is the main player in this matter, was also allotted Plot No. 503 and has his title. The evidence by the Surveyor and the findings in the Surveyor's report indicate that if encroachment by Plot No. 503 and 505 are removed, then the registered acreages for the three parcels, 501, 503, 505 fits on the ground with minimal or no discrepancy. Further, the Surveyor noted that the position shown by the Defendants who are owners of 503 and 505 does not support the ground acreage by registered documents. There has never been change of boundaries for plot no. 501 and 503 for a period of 19 years from 1982 to 2001. The deceased and the Plaintiff respected their boundaries but the deceased son, who is the administrator, sought to illegally change boundaries.
28. It was further submitted that the decision of the adjudication committee is a decision made as a matter of public administration in exercise of the powers conferred under the [Land Adjudication Act](#) which



decision has never been questioned via judicial review application. The decision of the Panel of Elders has never been discharged. An attempt so to do in 2001 failed and the original land boundaries were re-established. There has never been any Objection to the Adjudication process as envisaged under the Land Adjudication Act and it follows that no appeal has ever been preferred by any party disputing that the Plaintiff was the first Allottee of the Plot No. 501. Throughout the entire proceedings, the Defendants have never alleged that the Plaintiff acquired Plot No. 501 fraudulently, unprocedurally and illegally and the proprietors of Plot No. 505 and 503 have never sued the Plaintiff to dispute ownership of Land. The disputes were mainly on boundaries between the deceased and those who sold him Plot No. 503.

29. It was contended that the Plaintiff have discharged the burden of proof on a balance of probabilities under the Evidence Act, that the Plaintiff is the absolute proprietor of the suit property.
30. Citing the case of Wanyonyi =Versus= Kamunya & 3 Others (Environment and Land Appeal No. 1 of 2023) [2024] KEELC 5127 (KLR) (Environment and Land) (11 July 2024), it was submitted that the Defendants never raised any objection to the adjudication process and the title in Plot No. 501 was issued to the Plaintiff. The 1st to 5th Defendants unlawfully and illegally encroached onto the Plaintiff's land.
31. In respect to the mandatory injunction sought, it was argued that the Plaintiff is entitled to the same since the Defendants are illegally tilling the land. Reliance was also placed on the Surveyors report and testimony of the Land Registrar. The Plaintiff also urged the court to grant costs of the suit and an award of Kshs. 3,000,000/= in view of the fact that the land is prime land for banana plantation measuring 10 acres and the Defendant have been in occupation of the land for more than 20 years cultivating the land and harvesting crops. The case of Wibeso Investments Limited & Another =Versus= Tamarind Meadows Limited & 5 Others [2020] eKLR was cited in support.

The Defendant's submissions

32. None of the Defendants filed any written submissions despite being granted an opportunity to do so. However the court is still expected to consider the pleadings and evidence on record.

Analysis and Determination

33. The court has considered the pleadings, oral and documentary evidence adduced together with the written submissions filed by the parties and has outlined the following issues for determination herein:-
 - i. Whether the Plaintiff has proved his case to the required standard.
 - ii. Whether the Plaintiff is entitled to the reliefs sought.
34. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the Evidence Act, which provides as follows:
 - “(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.”



Sections 109 and 112 of the same Act states;

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

35. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea vs David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

36. The court will be guided by the foregoing. During trial, the Plaintiff was able to demonstrate to this court that he has a valid title to the suit property. The court was also furnished with a Surveyor’s report dated 17th January 2023 which confirmed as that Parcel 501 belonged to the Plaintiff and is completely encroached to the ground. All the three parcels 501, 503 and 505 are well documented on the Registry Index Map and that the Defendants who are owners of parcel 503 and 504 giving a ground acreage not supported by registered documents. The testimony of the Surveyor during trial together with the Land Registrar equally confirmed the same.

37. Article 40 of *the Constitution* of Kenya, 2010, elaborates on the right to own property in Kenya. It provides as follows;

“(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

38. Section 24 of the *Land Registration Act*,

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; and



- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease. Rights of a proprietor.

Section 25.

- (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.
 - (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
39. In view of the foregoing, the Plaintiff has proved his case to the required standard.
40. On whether the Plaintiff is entitled to the reliefs sought, this court has found and held that the Plaintiff is the legitimate owner of the suit property. To the extent that the Plaintiff is the lawful owner of the suit property, and is therefore entitled to the reliefs sought, as owner and proprietor of the suit property. [See *Mohanson Kenya Ltd v Registrar of Titles* [2017]eKLR.
41. The Plaintiff is vested and bestowed with the rights and interests over the suit property. Consequently, and in this regard, the Plaintiff herein is entitled to vacant possession.
42. As concerns the extent and scope of the rights of a land owner, the Plaintiff not excepted, it suffices to take cognizance of the holding in the case of *Mohansons (Kenya) Limited v Registrar of Titles, Mary Murtazza Ondatto & Attorney General (Petition 103 of 2012)* [2017] KEELC 2730 (KLR).
43. Secondly, the Plaintiff has sought for an order of mandatory injunction. To this end, it suffices to state that the owner of the property is conferred with designated rights and exclusive rights. In this regard, the owner of land is thus entitled to exercise his rights of occupation, possession and use without interference from any third party. [see Section 24 and 25 of the *Land Registration Act*].
44. By virtue of being the lawful and legitimate proprietor of the suit property it is therefore imperative to state that the Plaintiff herein is entitled to the order of mandatory injunction sought.
45. In respect to the compensation for value of the harvested crops, the Plaintiff submitted for an award of Ksh 3,000,000 however he was not able to quantify the same and equally the District Agricultural officer testified and stated that he was unable to ascertain the value of the damaged crops owing to the passage of time and also access to the entire place and as such no proper basis has been laid to this court for the grant of this prayer. The Plaintiff also did not plead for any specific prayer seeking for a grant of general damages for trespass and as such the court is equally unable to grant any damages for trespass.
46. In respect to costs of the suit, the Plaintiff's position was that the actions of the Defendants necessitated the filing of the instant case. Pursuant to Section 27 of the *Civil Procedure Act*, the same is at the discretion of the court and in any event to the successfully party, unless otherwise stated. Upon



considering the circumstances of this case this court directs the 1st to 5th Defendants to bear costs of the suit which shall be awarded to the Plaintiff.

Final Orders

47. In the end, judgment is hereby entered in favour of the Plaintiff against the Defendants as follows:-
- i. A declaration be and is hereby issued that the Plaintiff is the proprietor of Plot No. 501 situated at Kamala Mata Adjudication Section at Miereni within Taveta and the 1st to 5th Defendants have trespassed on the same.
 - ii. An order of mandatory injunction is hereby issued compelling the Defendants by themselves, their agents and or servant and or employee to vacate the said premises and hand over vacant possession of the same to the Plaintiff within 30 days failure of which eviction to issue.
 - iii. Costs of the suit shall be borne by the 1st to 5th Defendants.
 - iv. Any other relief not expressly granted is declined.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 15TH DAY OF NOVEMBER 2024.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Nyongesa for the Plaintiff.

N/A for the Defendants.

Court Assistant: Mary Ngoira .

