



Dubai Business Park Limited v County Government of Kilifi & 2 others (Environment & Land Case E057 of 2021) [2025] KEELC 596 (KLR) (12 February 2025) (Judgment)

Neutral citation: [2025] KEELC 596 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E057 OF 2021
EK MAKORI, J
FEBRUARY 12, 2025**

BETWEEN

DUBAI BUSINESS PARK LIMITED PLAINTIFF

AND

THE COUNTY GOVERNMENT OF KILIFI 1ST DEFENDANT

KENYA NATIONAL HIGHWAY AUTHORITY 2ND DEFENDANT

NATIONAL LAND COMMISSION 3RD DEFENDANT

JUDGMENT

1. The suit was commenced through an Amended Plaint dated 9th February 2024, supported by a Witness Statement dated the same date and a List of Documents and a Further List of Documents dated 14th June 2021 and 23rd March 2023, respectively. The key legal issues in this case revolve around the ownership of the suit property and the alleged encroachment by the Defendants.
2. The Plaintiff claims that it is the legal and lawfully registered proprietor of the property known as L.R. No. MN/III/8746, Grant No. C.R. 58326, measuring approximately 1.571 acres, located along Mombasa-Kilifi Road, within Shariani Trading Centre, Kilifi South Sub-County in Kilifi Town (‘the suit property’).
3. The Plaintiff alleges to have purchased the suit property in 2018 from Francis Karisa Mwambogo and George Kaiza Kautela for valuable consideration, and a transfer was registered to that effect on 21st May 2018. Since then, the Plaintiff avers it has consistently paid the applicable property rent and rates.
4. Before the acquisition of the suit property, the Plaintiff’s directors undertook a comprehensive due diligence process to verify the validity and legality of the root of the title to the suit property. This meticulous process, which included confirming the authenticity of the Letter of Allotment and the subsequent survey and registration, forms a crucial part of the Plaintiff’s claim of ownership:



- i. The suit property was acquired by the said Francis Karisa Mwambogo and George Kaiza Kautela by way of allotment through a Letter of Allotment dated 27th June 2000;
 - ii. At the time, the suit property was known as Unsurveyed Commercial Plot “A” Kijipwa, Kilifi, under PDP No. 845.KLF.23.91.
 - iii. Subsequently, the Director of Surveyors confirmed the Letter of Allotment to be authentic, and the suit property was surveyed accordingly. Plan No. F/R 534/161 was approved, and Deed Plan No. 344/98 was registered, leading to the registration of Grant No. CR 58326 on 5th December 2012 and the issuance of a title in the names of Francis Karisa Mwambogo and George Kaiza Kautela.
 - iv. The actions of the 1st and 2nd Defendants deeply aggrieve the Plaintiff – that despite being the rightful and legal owner of the suit property, the Defendants proceeded to encroach and trespass on it, erecting the Kilifi South Sub-County offices without permission. The Plaintiff’s allegations of encroachment and trespass form a significant part of this dispute.
5. Given the circumstances, the Plaintiff seeks the following reliefs:
- a. Compensation in the amount of Kshs. 70,000,000/- being the market value of the suit property;
 - b. A declaration that the Company is the lawfully registered proprietor of the suit property;
 - c. A mandatory injunction compelling the Defendants, their agents, proxies, and anyone acting under them to remove the structures and/or buildings erected on the suit property;
 - d. General and exemplary damages for trespass and conversion of property and nuisance;
 - e. Mesne profits from January 2020 until the date of taking back vacant possession and/or abatement of nuisance.
 - f. Costs of the suit and interest thereon; and,
 - g. Any other relief that the Court deems fit to grant.
6. The 1st Defendant filed a Statement of Defense dated 9th March 2023, a Witness Statement dated 16th May 2023, and a List of Documents of a similar date. In summary, the 1st Defendant alleges that the Sub-County offices are within Shariani Camp, where the 2nd Defendant initially accommodated them, and that the land is public and separate from the Plaintiff’s property.
7. Further, the 1st Defendant alleges that the land occupied by the Sub-County offices is public land which was un-surveyed until September 2018, when vide a Public Notice dated 26th September 2018, a Part Development Plan No. 845/KLF/2018/1 was prepared in respect to the said land. It is alleged that no objections were raised by any person against the Part Development Plan, and the Kilifi County Assembly subsequently approved the same. As such, the 1st Defendant alleges that the Sub-County offices are located on public land, which has yet to be surveyed and is entirely separate from Plaintiff’s property - the suit property.
8. The 2nd Defendant, on the other hand, filed a Defense dated 20th February 2022, along with a List of Documents and a Witness Statement of the same date. Similarly, the 2nd Defendant alleges that its offices are within Shariani Camp, at Shariani Centre, and that it has been in occupation of the Shariani Camp, along with other road sector departments, since earlier than 1994. Further, the 2nd Defendant



similarly alleges that the land occupied by the Sub-County offices is public land un-surveyed until 2018, when PDP No. 845/KLF/2018/1 was prepared and that the same is pending approval.

9. After the close of the Plaintiff and the Defendants' respective cases, the Court directed parties to file written submissions. They complied. From the materials placed before me, the issues that fall for the determination of this Court are:
 - i. Whether the Plaintiff is the lawfully registered owner of the suit property;
 - ii. Whether the 1st and 2nd Defendants have illegally encroached and trespassed on the suit property;
 - iii. Whether the Plaintiff is entitled to the reliefs sought;
 - iv. Who should bear the costs of the suit?
10. On the first issue, both sides contend that the allocation of the suit property was regularly done, with the Plaintiff tracing the root of its title to the original allottees - Francis Karisa Mwambogo and George Kaiza Kautela - being Unsurveyed Commercial Plot "A" Kijipwa, Kilifi, under PDP No. 845.KLF.23.91. It claims to have purchased the suit property from those initial allottees. On the other hand, the land occupied by the Sub-County offices and those of KeNHA was unsurveyed public land until 2018, when PDP No. 845/KLF/2018/1 was prepared, and the same is pending approval. A physical look at the site will reveal no encroachment at all. It will seem both sides have different approvals and PDPs.
11. The main contention is whether the Defendants have encroached and trespassed on the suit property. The Plaintiff submits that they have. The Plaintiff alleges that the sub-county offices on the suit property were discovered sometime in 2019. In this regard, the Plaintiff produced photographic evidence indicating the presence of the Sub-County offices allegedly on the suit property. Additionally, Plaintiff filed a Valuation Report dated 11th June 2021 to confirm that the suit property was the one upon which the valuation exercise was conducted. More importantly, the Plaintiff alleges the report confirms that the sub-county offices are situated on the suit property and include photographic evidence.
12. Plaintiff submits further that the Valuation Report confirms that the Survey Map relevant to the suit property was examined. A historical search revealed that the suit property was never set aside for public use.
13. Plaintiff concludes that it is clear that the 1st and 2nd Defendants have trespassed on the suit property and put up permanent structures on it, amounting to a continuing act of trespass. In this situation, the Defendants have denied that they are on the suit property and produced a Google Map supporting that assertion, which Map allegedly indicates that the suit property is on a separate location from the land occupied by the 1st and 2nd Defendants. Plaintiff asserts that a Google Map is not proof of the actual location of the land allegedly occupied by the 1st and 2nd Defendants. As Section 107 (1) of the [Evidence Act](#) provides that:

“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...”.
14. The Plaintiff believes that the 1st and 2nd Defendants have not proved that the Plaintiff's property is in a separate location as alleged or at all, and the Court is urged to find so.



15. 1st Defendant contends, given the contention by Plaintiff on encroachment and trespass, that the only way in which the 1st and, by extension, the 2nd Defendant could encroach and/or trespass onto the suit property was if it was shown they went beyond the boundary. There was, therefore, a need to determine the position of the Kilifi South Sub-County Offices relative to the boundary of the suit property. This could only be proved through detailed survey evidence, including a Survey Report, to assist this Court in establishing the true identity of the suit property, its boundaries, and the location of the Kilifi South Sub-County Offices. Since the Plaintiff Witness did not produce a copy of the Register, it is impossible to ascertain if there was any indication in the Registry that the boundary had been fixed to conclude concerning the approximate boundaries and the approximate situation of the suit property on the ground leading to a finding that the 1st Defendant or the 2nd Defendant had encroached and/or trespassed onto the suit property. I will tend to agree with the submissions by the 1st Defendant as buttressed by the authorities cited - *Doset Wanjala t/a Blessed International Ministries Church v Wandera* [2024] KEELC 4789(KLR) where Ohungo J. faced with similar circumstances held:

“ 18. The burden of proving that the boundary had been fixed was upon the Respondent, since he is the one that moved the Subordinate Court. It cannot simply be assumed, as the Respondent would like us to do, that the boundary was fixed simply because he has a Title Deed. That kind of reasoning flies in the face of Section 18 (1) of the *Land Registration Act*. I am satisfied that the boundary of the Suit Property was not fixed and that in the circumstances, this Court cannot simply cure the defect by ordering the preparation and filing of a Survey Report, as is suggested by the Respondent.”

16. The Learned Judge went ahead to state:

“ Even if I had found that the Subordinate Court had jurisdiction, the Respondent would have had one more obstacle to surmount. He must prove that there was encroachment. Encroachment on registered land is a technical issue which requires expert evidence. Detailed survey evidence including a survey plan must be produced to help the court in establishing the true identity of the parcels, their boundaries and location of developments. The significant role played by surveyors and survey plans was discussed by the Court of Appeal in *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] eKLR. Even though the standard of proof in a civil case is proof on a balance of probabilities, a litigant alleging encroachment through construction of part of a building into his parcel cannot simply rely on his own layman’s assertions to prove his case. In the circumstances of this case, the Respondent did not prove any encroachment.”

17. This position was adopted in *Peter Njuguna Gitau v Board of Management Uhuru Primary School* [2023] KEELC 20185 (KLR), where Omollo J. held:

“ 88. No evidence has been tendered on the extent of the Defendant’s parcel, and as things remain, it is not possible for this Court to determine encroachment or trespass. The Plaintiff and Defendant ought to have sought the services of a Surveyor to demarcate the boundaries of their respective parcels of land as allocated to them.”

18. Eric Randu DW1 who is the 1st Defendant’s Acting Director of Urban Development under the Department of Lands, Housing, Physical Planning, and Urban Development, was categorical that the Kilifi Sub-County Offices occupy an unsurveyed Public Land which is set apart for its use



vide a Physical Development Plan for existing sites for (a) KeNHA Camp (b) Sub-County Offices under Reference Number 845/KLF/2018-1. Shariani and Kilifi South Sub-County were prepared and advertised. Gazzeted in the Kenya Gazette vide a Public Notice dated 26th September 2018, duly approved by the County Assembly of Kilifi. The 2nd Defendant's witness, Michael Obop, adopted this position and testified that the suit property is separate and distinct from the Shariani Camp, which had been a road camp before 1994. It is partly occupied by the Kilifi Sub-County Offices and all the road sector institutions. Michael Obop, in his testimony, further clarified that the 2nd Defendant's offices are located at Shariani Centre along the Sabasaba-Malindi (A7) Road. The former Ministry of Roads and Public Works (MoR&PW) occupied the camp and utilized it to maintain the roads within Kilifi North Sub-County. In the year 2007, the Kenya National Highways Authority (KeNHA), Kenya Urban Roads Authority (KURA), and the Kenya Rural Roads Authority (KeRRA) were established pursuant to the enactment of the Kenya Roads Act, 2007 to carry out the functions previously undertaken by the Ministry of Roads and Public Works. Upon their establishment, various movable and immovable properties under the Ministry in charge of roads were transferred and vested to the established Authorities. However, since most of the camps occupied by the Ministry of Roads had not been surveyed and did not have Land Reference numbers, none were vested, including the Shariani camp. KeNHA, on 15th October 2015, requested the County Physical Planning Officer vide a letter Ref: KeNHA/P&E/Camps/Vol.1/10 to prepare Part Development Plans (PDPs) for Road Camps within Kilifi County, Shariani included, the Kilifi County Physical Planning office subsequently prepared a PDP Ref. No 845. KLF.2018.1 for Shariani Camp in 2018, which PDP is pending approval.

19. Thus, the Kilifi Sub-County Offices are located on Public Land that has yet to be surveyed and is completely separate from the suit property. Plaintiff did not controvert this through evidence and fell short of the glory of Section 107 (1) and (2) of the Evidence Act (Cap 80) – he who asserts must prove - the burden never shifted to the Defendants.
20. Having found so – the reliefs sought by the Plaintiff cannot be awarded. The Plaintiff should go to the drawing board and ascertain the location of his land.
21. The upshot is that the Plaintiff's suit is hereby dismissed with costs to the Defendants.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 12TH DAY OF FEBRUARY 2025.

E. K. MAKORI

Judge

In the Presence of:

Ms. Odhiambo, for the Plaintiff

Ms. Mulonji, for the 1st Defendant

Ms. Bodo, for the 2nd Defendant

Happy: Court Assistant

