



**Kamia & another v Ziro & 4 others; Mguta (Interested Party)
 (Environment & Land Case 280 of 2015 & 70A of 2022 (Consolidated))
 [2024] KEELC 7488 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7488 (KLR)

**REPUBLIC OF KENYA
 IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
 ENVIRONMENT & LAND CASE 280 OF 2015 & 70A OF 2022 (CONSOLIDATED)
 SM KIBUNJA, J
 NOVEMBER 13, 2024**

BETWEEN

JOHN MUTHINI KAMIA PLAINTIFF

AND

MWARIDZO JUMA ZIRO DEFENDANT

AND

NASSORO OMAR MGUTA INTERESTED PARTY

**AS CONSOLIDATED WITH
 ENVIRONMENT & LAND CASE 70A OF 2022**

BETWEEN

NASSORO OMAR MGUTA PLAINTIFF

AND

JOHN MUTHINI KAMIA 1ST DEFENDANT

ALI SALIM MWAKUFWAIRWA 2ND DEFENDANT

RUKIA SALIM MWAKUFWAIRWA 3RD DEFENDANT

KWALE LAND REGISTRAR 4TH DEFENDANT



JUDGMENT

1. John Muthini Kamia, the plaintiff in ELC NO. 280 of 2015, first suit, and 1st defendant in ELC NO. E070 of 2022, second suit, filed the first suit against Mwaridzo Juma Ziro, defendant in ELC No. 280 of 2015, through the plaint dated 2nd November 2015, seeking for:
 - a. “A permanent injunction restraining the defendant by himself/servants/agents from encroaching upon/trespassing/occupying the suit property and/or in any other manner interfering with the indefeasible rights of ownership of the plaintiff over the suit property No. Kwale/Diani Beach Block 1576.
 - b. An order of eviction of the defendant from the suit property No. Kwale/Diani Beach Block 1576.
 - c. An order for demolition of the illegal structures put up by the defendant in the suit property No. Kwale/Diani Beach Block 1576 at his cost.
 - d. Cost of this suit.”

The plaintiff avers that he bought Kwale/Diani Beach Block 1576, the suit property, from the Ali Salim Mwakufwairwa under the sale agreements of 19th January 2015 and 15th July 2015, after conducting due diligence. That he bought the suit property with some partially constructed structures, that he intended to demolish. That on or about 22nd October 2015, he visited the said land and found the defendant had trespassed thereon and was putting up structures without his consent or authority, and hence this suit.

2. The suit is opposed by the defendant through his statement of defence dated 18th November 2015, inter alia averring that the suit property was purchased by his brother, Nassoro Omar Mguta, and he has been acting as his caretaker since 2003. That the structures the plaintiff claim to have purchased were constructed by his brother after he bought the land from Ali Salim Mwakufwairwa and Rukia Salim Mwakufwairwa in 2003. That the plaintiff is working with others since 2013 to try and dispossess his brother of the land he has peacefully been in occupation of.
3. Nassoro Omar Mguta, filed joinder application as an interested party through the notice of motion dated 1st October 2020, that was allowed on 9th Mach 2021.
4. Massoro Omar Mguta, the plaintiff in ELC No.E070 of 2022 and interested party in ELC No. 280 of 2015, filed the second suit against the four named defendants through the plaint dated 20th January 2022, seeking for:
 - a. “Declaration that title deed number Kwale/Diani Beach Block/1576 registered in the name of John Muthini Kamia on 22nd July 2015 was improperly issued and the same be cancelled.
 - b. Declaration that the current property fenced by the plaintiff since 2003 and occupied by the plaintiff since (sitting on the impugned title Kwale/Diani Beach Block/1576) be declared to be the property of the plaintiff being the rightful owner and the 4th defendant register a fresh title deed under the name of the plaintiff.
 - c. Damages be paid to the plaintiff by 1st, 2nd, and 3rd defendants for the fraudulent acts.
 - d. Further or better relief that this honourable court may deem fit and just.



e. Costs of the suit.”

The plaintiff avers inter alia that he bought half acre of Kwale/Diani Beach/641, suit land, from the 1st and 2nd defendants for Kshs.900,000. That they had agreed the vendors would subdivide the land and the 2nd and 3rd defendant would transfer his portion to him. That he fenced the portion he had bought, dug a 40 feet deep borehole in 2006, built a wall around it and a water tower through his relatives who he had left to take charge after he went to Germany. That in 2021 his brother learnt that parcel 641 had been subdivided and parcel 1576 transferred to Sally Njeri. That he also found that the 2nd and 3rd defendants had sold the same parcel to a third party. That he reported to Diani Police Station and Sally Njeri declined to take over the land on learning it was in possession of the plaintiff. That the defendant knowing well that the land was his, refunded the money paid by Sally Njeri to the 2nd and 3rd defendants, thereby wrongly gaining ownership. The plaintiff accused the 4th defendant of fraud in the transaction.

5. The 1st to 3rd defendants opposed the plaintiff’s claim through their statement of defence dated 16th February 2022, inter alia averring that the 1st defendant was not involved in selling half acre land to the plaintiff. That the 2nd and 3rd defendants had sold a half acre of land to the plaintiff from parcel 1579 which is a subdivision of parcel 641, but he is yet to complete paying the purchase price. That the borehole on parcel 1576 had been sunk by the 2nd defendant and the original land parcel 641 had an all round live fence. That on the 19th January 2015, the 2nd defendant and Sally Njeri sold parcel 1576 to 1st defendant who obtained a valid title. That plaintiff’s brother, Mwaridzo Juma Ziro, trespassed onto the 1st defendant’s land and attempted to construct a water tower prompting the 1st defendant to report to the police, and he was arrested. The 1st defendant then filed Mombasa ELC No. 280 of 2015. That the plaintiff’s house is on plot 1579 and not 1576 and this suit should be dismissed with costs.
6. During the hearing, the plaintiff in the first case, John Muthini Kamia, testified as PW1 and called Ali Salim Mwakufwairwa and Hamisi Ramadhan Chibendo who testified as PW2 and PW3 respectively. The defendant, Mwaridzo Juma Omar testified as DW1, while the interested party, Nassoro Omar Mguta testified as DW2. The record show that after close of the defence case on 19th January 2022, directions on filing and exchanging submission were given. When the matter came up for mention on 27th April 2022, the court was informed of an application dated 26th April 2022, seeking for inter alia to have the suit transferred to ELC Kwale. The application was heard and vide the ruling delivered on the 8th June 2022, Kwale ELC No. 002 of 2022 was transferred to this court. The subsequent proceedings of 4th July 2022 confirms the Kwale ELC No. E002 of 2022 had been given reference ELC No. 70A of 2022. The court then ordered on the 19th July 2022, that “Hearing 5th October 2022, when we can take additional evidence as Mr. Tindi and Mr. Mutugi have both stated they wish to adduce evidence in light of the case ELC No. 70A/2021.”
7. The subsequent hearing took place before me where Nassoro Omar Mguta, the plaintiff in ELC No. 70A of 2022, the second case, testified as 2PW1. The defendants called John Jeremiah Musyoka and Edward Malenye Kiguru, both surveyors, who testified as 2DW1 and 2DW2 respectively. Timelines for filing and exchanging consolidated submissions were given on 23rd April 2024.
8. The learned counsel for the for the plaintiff in the first case and defendants in the second case filed their submissions dated 15th May 2024, and that for the plaintiff in the second case and defendant and interested party in the first case filed theirs dated 10th June 2024. The court has considered the said submissions by the two learned counsel.
9. The issues for the determinations by the court in both cases are as follows:



- a. Whether the registration of the plaintiff in ELC NO. 280 of 2015 as the registered proprietor of Kwale/Diani Beach Block/1576, suit property, was lawfully and regularly obtained.
 - b. Whether the plaintiff in ELC No. E70A of 2022 has any legal interests over the suit property.
 - c. Whether the defendant in ELC No. 280 of 2015 trespassed onto the suit property.
 - d. Who pays the costs in each of the two suits?
10. The court has carefully considered the pleadings, oral and documentary evidence tendered by PW1 to PW3, DW1, DW2, 2PW1, 2DW1 and 2DW2, submissions by the two learned counsel, superior courts decisions cited and come to the following determinations;
- a. Both the plaintiffs in ELC Nos. 280 of 2015 and 70A of 2022 are claiming ownership of Kwale/Diani Beach/1576, suit property. Each plaintiff has filed the various documents relied on in addition to tendering oral evidence to booster their respective claims. The documents includes agreements, copies of title and certificates of official search. John Muthini Kamia filed among others copies of sale agreements, green card and certificates of official search in respect of Kwale/Diani Beach/1576, the suit property, while Nassoro Omar Mguta, who testified twice as DW2 and 2PW1, filed copies of sale agreements dated 31st December 2003, 14th April 2006 and 4th December 2006; acknowledgement notes dated 17th July 2007 and 13th August 2011 and transfer documents for Kwale/Diani Beach/1579 dated 19th August 2011, and for Kwale/Diani Beach/641 dated 14th April 2006 and another for the same parcel that is undated. This suit is a contest over the ownership of Kwale/Diani Beach/1576, and only the plaintiff in ELC No. 280 of 2015 has tendered documentary evidence that supports his ownership entitlement.
 - b. Both parties are in agreement that the suit property is one of the subdivisions from Kwale/Diani Beach/641, the mother title. Other than the suit property, the other parcel that evidently also arose from Kwale/Diani Beach/641 is Kwale/Diani Beach/1579. The plaintiff in ELC No. 280 of 2015 has not lodged any claim on Kwale/Diani Beach/1579, but one of the transfer document dated 19th August 2011, that was filed by the plaintiff in ELC No. 70A of 2022 is for Kwale/Diani Beach/1579. The evidence tendered by Ali Salim Mwakufwairwa, PW2, is that he had subdivided the mother title into eight parcels among them being Kwale/Diani Beach/1576 and 1579. He further testified that he transferred Kwale/Diani Beach/1579 to Nassoro Omar Mguta and Kwale/Diani Beach/1576 to John Muthini Kamia, and as of the date he testified, 23rd September 2021, the said Nassoro had not sued him over their transaction. From the testimony tendered by DW2, who also testified a second time as 2PW1, he bought two quarter acres of land from parcel Kwale/Diani Beach/641, mother title, and the transfer was done later. He took possession of the portion was in 2011. Indeed, Nassoro agreed during cross-examination that he does not have a transfer document in his favour for Kwale/Diani Beach/1576, and from the foregoing the court has no difficulty in finding that the parcel of land John Muthini Kamia bought was Kwale/Diani Beach/1576, while Nassoro Omar Mguta bought Kwale/Diani Beach/1579.
 - c. PW2, who is one of the original owners of Kwale/Diani Beach/1576, the suit property, confirmed to the court that they sold the land to John Muthini Kamia, and that they have no claim against him, as the vendors. Nassoro Omar Mguta appear to say that where the suit property is situated on the ground is where the portion he had bought was meant to be. The evidence and report by 2DW2, the surveyor, confirmed inter alia that;
 - i. That the building/structure of Nassoro Omar is on parcel 1579.



- ii. Water tower is partly on parcel 1576.
- iii. Well is fully on parcel 1576.
- iv. Incomplete building of Ali Salim Mwakufwairwa is on parcel 1576.
- v. Boundary beacons of plots 1576 and 1579 were relocated and are appropriately shown.
- vi. Both parcels 1576 and 1579 are subplots of Kwale/Diani Beach/641 following the subdivision survey approved on 27th October 2006 under survey map number FR/460/126.

This finding by the only expert availed leaves no doubt that the water tower claimed by Nassoro Omar Mguta to be on his land, and which was constructed by Mwaridzo Juma Ziro, who testified as DW1, is indeed partly on parcel Kwale/Diani Beach/1576 that belongs to John Muthini Kamia. The action of erecting that part of the water tower on the suit land without the owner's consent or authority amounts to actionable act of trespass. John Muthini Kamia, as the registered proprietor of the suit property, is entitled to the prayers sought in the plaint filed in ELC No. 280 of 2015.

- d. Nassoro Omar Mguta, plaintiff in ELC No. 70A of 2022, was not at any one time buying parcel Kwale/Diani Beach/1576 as the documents he filed and produced in court were mentioning parcels Kwale/Diani Beach/641 and 1579. That as the subdivision of Kwale/Diani Beach/641 had been approved in October 2006 and the copies of the title for Kwale/Diani Beach/1576 availed to the court show it was first registered on 25th January 2007, then there is no explanation tendered by Nassoro Omar Mguta why no sale agreement, acknowledgement note or transfer document in his favour made after the date of submissions made any reference to the suit property as the parcel he was buying. If he made a mistake in taking possession or erecting the water tower or any other structure on the wrong parcel, the obvious thing to do is to move and concentrate his development on the parcel that he bought. The court finds his allegations of fraud have not been established in any way and his claim against the defendants in ELC NO. 70A of 2022 fails.
 - e. Costs under section 27 of *Civil Procedure Act* follow the event unless otherwise ordered for good reasons by the court. In this instance, I find no reason to deviate from that common edict of the law on costs.
11. Flowing from the above determinations, the court finds and orders as follows:
- a. That the plaintiff in ELC No. 280 of 2015 has proved his case against the defendant and interested party. Judgement is therefore entered for the plaintiff and the following orders issued;
 - i. That the defendant and Interested party do vacate from Kwale/Diani Beach/1576, and give vacant possession to the plaintiff in thirty (30) days, in default eviction and demolition order to issue, and to be executed at their costs.
 - ii. A permanent injunction be issued restraining the defendant and interested party by themselves/servants/agents from encroaching upon/trespassing/occupying the suit property and/or in any other manner interfering with the indefeasible rights of ownership of the plaintiff over the suit property No. Kwale/Diani Beach Block 1576, upon giving vacant possession or being evicted.



- iii. The plaintiff is awarded costs in the suit.
- b. The plaintiff in ELC No. 70A of 2022 has failed to prove his claim against the defendants and the suit is dismissed with costs.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 13TH DAY OF NOVEMBER 2024.

S. M. KIBUNJA, J ELC MOMBASA

In The Presence Of:

Plaintiffs : No Appearance

Defendants : Mr Tindi And Mr Mbwiza For Defendant And Interested Party In No. 280/2015 And Plaintiff
In No 70a/2022

Leakey – Court Assistant.

