



**Denge v Ndegwa & 3 others (Environment & Land Case 348 of 2015)  
[2024] KEELC 14016 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 14016 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 348 OF 2015  
NA MATHEKA, J  
DECEMBER 18, 2024**

**BETWEEN**

**MANGALE MWACHIMERA DENGE ..... PLAINTIFF**

**AND**

**SAID MINGA NDEGWA ..... 1<sup>ST</sup> DEFENDANT**

**ZUHURA MPHA NDEGWA ..... 2<sup>ND</sup> DEFENDANT**

**KAHONDI BAYA ..... 3<sup>RD</sup> DEFENDANT**

**MBOTZE NDEGWA ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The amended plaint states that at all relevant times to this suit, the Plaintiff is the bonafide legal and beneficial owner of a piece of Un Surveyed Land at the Proposed Majaoni Settlement Adjudication Scheme Measuring Approximately One Decimal Eight Naught (1.80) Acres on Plot No 384 Section 11 Mainland North. The Plaintiff avers that she has been on the piece of land over seventy years and the land was a private property for a white man who sold it to a company that did not use the land and squatters invaded the land, she bought the piece she is occupying and she has been there all along. The Plaintiff avers that she bought the land and that the Land Adjudication Committee awarded her the land to continue utilizing the same till all the Adjudication process as per the *land Adjudication Act*, Cap 284 Laws of Kenya is finalized. That sometimes on or about August, 2013, the Defendants without any colour of right and/or legal claim and/or justification whatsoever moved into the suit land and started cultivating and/or using it. The Plaintiff avers and states that her tenure and right over the subject property herein is unfettered, the demarcation of boundaries thereon having been clearly and completely identified by the Adjudication Tribunal. The Plaintiff avers that the Defendants herein have trespassed into the said parcel of land on the Proposed Majaoni Settlement Adjudication Scheme and thus their acts are oppressive. The Plaintiff also avers that the Defendants have deliberately without any



justifiable reason whatsoever, forcibly, invaded and trespassed upon the said Un Surveyed Land at the Proposed Majaoni Settlement Adjudication Scheme Measuring Approximately One Decimal Eight Naught (1.80) Acres on Plot No 384 Section 11 Mainland North and denied the Plaintiff his right of use and enjoyment of the land. The Plaintiff further avers that unless the Defendants are restrained by way of an order herein sought, they would continue with their illegal action on the said Plot and thus occasioning the Plaintiff irreparable loss and prejudice. The Plaintiff prays for judgment against the Defendants for;

- a. A permanent injunction restraining the Defendants either acting by themselves, their employees, agents, and/or servants and/or through any other means whatsoever from trespassing, alienating, encroaching, wasting, damaging, dealing and/or interfering with unsurveyed Land at the Proposed Majaoni Settlement Adjudication Scheme Measuring Approximately One Decimal Eight Naught (1.80) Acres on Plot No 384 Section 11 Mainland North and/or do issue direction compelling the Defendants, their servants, agents and/or employees to pull down their constructions and/or structures and/or development lying on the Plaintiffs piece of Land.
  - b. A Declaration that the plaintiff is the legal and/or beneficial owner of all that piece of unsurveyed Land at the Proposed Majaoni Settlement Adjudication Scheme Measuring Approximately One Decimal Eight Naught (1.80) Acres on Plot No. 384 Section 11 Mainland North in Mombasa county contained Land's Adjudication Section of Majaoni Adjudication Section which said piece of land is to be surveyed.
  - c. Costs and interest.
  - d. Any other relief the court may deem fit.
2. The defendants deny that the plaintiff is the bonafide legal and beneficial owner of a piece of unsurveyed land at the proposed Majaoni Settlement Adjudication Scheme measuring approximately one decimal eight naught (1.80) Acres on Plot No. 384 Section II Mainland North and avers that the said parcel of land was bought in the year 1966 by one Ndegwa Mwakirema Denge who has also referred to as Mwachirema (now deceased) together with the 4<sup>th</sup> defendant who was his wife. The defendant avers that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants who are the children of the said Ndegwa Mwakirema Denge (now deceased) and the 4<sup>th</sup> defendant herein were born and raised in the suit premises herein. The defendants aver that the plaintiff has never been an owner and or resided in the suit premises since she used to visit family of the late Ndegwa Denge and the defendants herein. That she used to only stay for not more than a week and go back to her matrimonial home at Kinagoni Samburu.
  3. That the defendants have at all material times been living at the suit premises and are still living therein. That the defendants only know the suit premises as their home having been acquired by their father one Ndegwa Denge now deceased as herein before been demonstrated. The defendants aver that in fact it is the plaintiff who under the influence of one Managale Mwachirema who has been selling portions of the suit premises to third parties without any color of right and or justification which move was opposed by the defendants herein hence causing the filing of this suit.
  4. This court has considered the evidence in this matter. PW1 testified and stated that his mother bought the land in 1967 from one Karisa Mwaro and used it for cultivation. That the defendants have now trespassed and denied him the right to use the said land. The plaintiff testified that the mother lived in Utange then moved to Samburu. That they sold a different plot and the defendants do not live on the suit land.



5. Section 3 (1) of the Trespass Act, Cap 294 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.”

6. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. The plaintiff produced minutes of a meeting by the Chief Bamburi where the resolution stated that the was to revert to the plaintiff's mother Kupha Mwakirema. It stated that;

“Any land that is still open including the 3 fenced plot has been reversed back to Kupha Mwakirema.”

7. It is noted in the minutes that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants refused to sign the said resolution. There is no description of the said land and it is not clear what parcel is in dispute as quoted above. The plaintiff did not call any other witness to corroborate his testimony. The other parties who were at the meeting never gave evidence. Section 107 (1) and (2) of the Evidence Act 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”

8. In *Miller vs Minister of Pensions* 1947 All E.R. 372, Lord Denning puts this standard of proof in the following terms;

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

9. In *James Muniu Mucheru vs National Bank of Kenya Ltd* C.A Civil Appeal No 365 Of 2017 (2019) eKLR, the Court stated as follows:

“Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the Courts will make a finding based on which party's version of the story is more believable.”

10. DW1, the 2<sup>nd</sup> defendant testified that she was born on the suit land. That her father bought the land. That they refused to sign the resolution at the Chief's office and went to object to the District Commissioner. The defendants maintain that the land in question belongs to the Ndegwa family and that there has been no dispute until the death of Mzee Ndegwa Mwachirema. I find that the plaintiff has failed to prove his case on a balance of probabilities and the same is dismissed. There will be no orders as to costs as the parties are relatives.



It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 18<sup>TH</sup> DAY OF DECEMBER 2024.**

**N.A. MATHEKA**

**JUDGE**

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