



REPUBLIC OF KENYA



KENYA LAW
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Mwazara & 4 others v Mwakazi & another (Environment & Land Case 147 of 2021) [2023] KEELC 240 (KLR) (23 January 2023) (Judgment)

Neutral citation: [2023] KEELC 240 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 147 OF 2021
AE DENA, J
JANUARY 23, 2023

BETWEEN

ALI RASHD MWAZARA 1ST PLAINTIFF
RASHID BAKARI MWABUHOYA 2ND PLAINTIFF
MOHAMED MOHAMED MWABOHAYA 3RD PLAINTIFF
ATHUMANI MWALIMU MWAKASHI 4TH PLAINTIFF
ALI SAID MWAGONDA 5TH PLAINTIFF

AND

MOHAMMED ABDULLAH MWAKAZI 1ST DEFENDANT
ABDALLAH HAMISI MWAKAZI 2ND DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated November 30, 2019 filed on January 20, 2020 against the defendants the plaintiffs seek the following orders; -
 - (a) An injunction restraining the 1st and 2nd defendants by themselves, servants and/ or agents from residing, trespassing and using any part of plot known as Kwale/ Ngombeni/274.
 - (b) An order for eviction against the 1st and 2nd defendants from plot No. Kwale/ Ngombeni/274.
 - (c) Damages.
 - (d) Costs.



2. The suit is contested and the defendants filed a statement of defence on 2/3/2021 dated 2/3/2021. They denied the plaintiffs claim and stated that they were legally entitled to the suit land by being in actual physical possession as against the plaintiffs who were not in possession. That the plaintiffs had frustrated progression of criminal case no. 764 of 2018 by failing to attend court since 2018. They prayed that the plaintiff's suit be dismissed with costs.
3. The matter was heard by way of Viva Voce evidence, on October 12, 2022. The plaintiffs called one witness. The defendant did not call any witnesses. Their advocate on record Mr. Makasembo failed to attend court and the matter proceeded exparte there being sufficient proof of service of the hearing notice. This court also noted that the matter had been adjourned several times at the instance of Mr. Makasembo.

Plaintiffs Case

4. In their plaint the plaintiffs averred that they have always been the registered owners of plot No. Kwale/Ngombeni/274 (hereinafter referred to as the suit land) and were entitled to the possession of the same. PW1 was Rashid Bakari Mwabohoya the second plaintiff. He adopted his witness statement dated 16/12/21 as his evidence in chief. According to the witness statement the suit land is registered in the names of Ali Rashi Mwazara, Rashid Bakari Mwabohoya, Mohamed Mohamed Mwabohoya, Athman Mwalimu Mwakashi and Ali Said Mwangonda. That they were in physical possession however the defendants had trespassed on the suit land, erected illegal structures and continued to build others. That the defendants had not heeded despite notice to stop and move out of the suit land. The plaintiff produced the documents in the Plaintiff list of documents dated 16/12/2021 as part of his evidence. In addition, he told this court that the search showed Fatuma Salim Mwakiboko who is his paternal grandmother and they inherited the land via a Kadhi's order. He prayed that the court should remove the defendants from the land.
5. With the above the plaintiffs closed their case.

Determination

6. As earlier stated the defendants entered appearance and further filed their statement of defence. However, during the hearing of the suit, the defendants did not call any witness and therefore failed to substantiate the allegations made in their defence. No documents were filed that would be able to counter the plaintiff's testimony. Consequently, the defense on record remain mere allegations. I find support in the case of *Kenya Power & Lighting Co Ltd v Rasul Nzembe Mwadzaya* [2020] eKLR, where several authorities were cited in support of this position. The court stated thus; -

“It is noteworthy that the Appellant in its amended statement of defence filed on October 15, 2012, denied all the allegations raised by the respondent and attributed contributory negligence on the part of the Respondent. Although a defence was filed on behalf of the Appellant, no witness was called to prove that defence. Since no evidence was adduced in support of the defence case, the defence on record therefore remained as a mere allegation. This is the position in law and was restated in the case of Edward Muriga through Stanley Muriga v Nathaniel D. Schuler, Civil Appeal No.23 of 1997, where the Court of Appeal stated: -

“In this matter, apart from filing its statement of defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere



allegations. Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

13. Further, it is trite that if no evidence is tendered to support an averment in a pleading, in this case, the defence, such averment stand as such as mere statement. Further, if there is no rebuttal of evidence by a party, that evidence remains uncontroverted. In the case of *John Wainaina Kagwe v Hussein Dairy Ltd*[2013]eKLR, the Court of Appeal held as follows:-

“The Respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify meaning that the allegations in its defence with regard to the blame worthiness of the accident on the Appellant either wholly or substantially remained just that mere allegations. The Respondent thus never tendered any evidence to prop up its defence. Whatever the Respondent gathered in cross-examination of the Appellant and his witnesses could not be said to have built up its defence. As it were therefore, the Respondent’s defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tended to exonerate it fully from culpability. It was thus substantially to blame for the accident....”

7. The foregoing did not remove the responsibility of the plaintiff to prove his case. In the case of *Susan Mumbi v Kefala Grebedhin*; (Nairobi HCC No. 332 of 1993 Justice Juma stated in the following simple words; -

“The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the Plaintiff to prove her case on a balance of probability and the fact that the defendant does not adduce any evidence is immaterial.”

I will therefore proceed to determine whether the Plaintiff is entitled to the orders sought which in my view is the main issue for determination.

8. PW1 from the pleadings and testimony claims that the plaintiffs are registered owners of the suit land. He produced a copy of the Title deed Kwale/ Ngombeni/274, an Official search for Kwale/ Ngombeni/274 and an Order issued in Kadhi’s Kwale succession cause No. 153 of 2017. The title produced bears the names of Ali Rashid Mwazara, Rashid Bakari Mwabohoya, Mohamed Mohamed Mwabohoya, Athman Mwalimu Mwakashi and Ali Said Mwagonda as registered absolute proprietors as trustees. It was issued on 28th June 2017. The official search produced is dated 4/05/2017 and reveals that as at 9/6/82 the registered proprietor of the suit land was Fatuma Mwachiro Suleiman who PW1 told this court was his paternal grandmother and also produced succession proceedings in Kadhi’s Succession Cause No. 153 of 2017 in respect of the Estate of Fatuma Suleiman Mwakiboko commenced by Ali Rashid Mwazara the 1st plaintiff herein, who was the only surviving heir of Fatuma Suleiman as shown in the order. The order issued therein names 8 heirs to the deceased being the sons (5No.) and daughters (3No.). The order also depicts how the shares were devolved to the various heirs of the deceased sons and daughters.

9. Item No. 16 of the Kadhi’s order is to the effect; -

“That parcel of land Kwale/ Ng’ombeni/274 be and is hereby vested in; -



- a) Ali Rashid Mwazara
- b) Rashid Bakari Mwabahoya
- c) Mohamed Mohamed Mwaboya
- d) Athumani Mwalimu Mwakashi
- e) Ali Said Mwangonda

Item 17 of the order further states ‘That the heirs in order (16) herein above holds the land on their own behalf and that of others heirs’

10. It is therefore clear from the above that while the plaintiffs are registered owners they do so as heirs and trustees of the other beneficiaries in accordance to the shares that were devolved to them which are stated in the order. The title deed also confirms that they hold the same as trustees. My curiosity was however drawn to the defendants Mohammed Abdullah Mwakazi and Abdallah Hamisi Mwakazi who claimed they are legally entitled by dint of being in actual possession. A look at the Kadhi’s orders herein did not include the said two defendants as heirs to whom any shares were devolved. I need not say more. In any event they were not in court to lead evidence of their actual occupation and whether or not it would qualify them as legally entitled to the suit land. I have already rendered myself on the import of their failure to produce evidence before this court.
11. From the foregoing it is my view that the plaintiffs have proved on a balance of probabilities that they are the registered owners of the suit land though I place a rider that they are also holding the same as trustees of other beneficiary heirs to the exclusion of the defendants herein. I will not make any finding on the prayer for damages because counsel did not address the court on the same. Consequently, this court enters judgement for the plaintiffs against the defendants in the following terms;-
- i. That an injunction be and is hereby issued restraining the 1st and 2nd defendants by themselves, servants and/ or agents from residing, trespassing and using any part of plot known as Kwale/ Ngombeni/274.
 - ii. That an order for eviction is hereby issued requiring the 1st and 2nd defendants to vacate the suit land plot No. Kwale/ Ngombeni/274 within 90 days from today failure to which the plaintiffs shall be at liberty to forcefully evict the defendants in accordance to the law.
 - iii. Costs of this suit shall be to the plaintiffs.

Orders accordingly

DELIVERED AND DATED AT KWALE THIS 23RD DAY OF JANUARY, 2023

A.E. DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Mkan for the Plaintiff

N/A for the 1st and 2nd defendants.

Mr. Daniel Disii Court Assistant.

