



REPUBLIC OF KENYA



**Awadh v Mwanganda & 12 others (Environment & Land Case
197 of 2018) [2023] KEELC 15670 (KLR) (21 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15670 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 197 OF 2018
NA MATHEKA, J
FEBRUARY 21, 2023**

BETWEEN

SAID MBARAK AWADH PLAINTIFF

AND

VICTOR GOGO MWANGANDA 1ST DEFENDANT
MARTIN GOGO MWANGANDA 2ND DEFENDANT
SIMON MWANGANDA 3RD DEFENDANT
TATU NGALA 4TH DEFENDANT
ELVIS NDOILO MWENI 5TH DEFENDANT
MLONGO GAMBA 6TH DEFENDANT
MUYE GAMBA 7TH DEFENDANT
TOMY GAMBO MWAGANDA 8TH DEFENDANT
MARIA KAHONZI GAMBA 9TH DEFENDANT
CHIEF LAND REGISTRAR 10TH DEFENDANT
COUNTY LAND REGISTRAR - KILIFI 11TH DEFENDANT
DIRECTOR OF SURVEYS KENYA 12TH DEFENDANT
COUNTY SURVEYOR - KILIFI 13TH DEFENDANT

JUDGMENT

1. It is the Plaintiff's case that he is the registered owner of all that parcel of land known as Plot No. 1640 Section III/ Mainland North (Original No. 4237/32/111/MN) with a Title Number



CR.37473 measuring 3.340 Hectares on a Free Hold tenure without any encumbrances. The perimeter boundaries and beacons delineating the said land after survey by the Director of surveys are as per Deed Plan prepared and registered by the Director of Surveys on 23rd October, 1982 as number 167849 in the land registry. The land was part of the original larger Plot No. 427/32/MN/III which belonged to one Sheila Norton which land was subdivided into various parcels in favour of many beneficiaries to the estate of the said Sheila Norton after her death by the Government of Kenya and distributed to various parties. The plaintiff purchased his portion of land from 2 beneficiaries of the said original portion and after survey and subdivision he was issued with title for Plot No 1640/111/MN measuring 3.340 Hectares which is approximately 8 acres of land. The plaintiff avers that the defendants without any colour, consent or justification of right have tampered and interfered with the original beacons and boundaries of the plaintiff's land and constructed semi-permanent iron walled structures used as a church on the said parcel of land and have allowed their relatives, friends, strangers and the church members to encroach on the land thus inhibiting the plaintiff's rights of possession, occupation and user of a portion of about 2 1/2 acres of this parcel of land. The plaintiff seeks the Court's protection that the Court directs the Director of Surveys or any other officer that may be delegated so as to do so to establish the correct original position of the beacons and boundaries of the entire Plaintiff's land as per the registered Deed Plan No 167849 prepared by the Director of Surveys and registered and issued to him alongside the Certificate of Title to Plot No. 1640/111/MN so as to secure the 3.340 hectares owned by the Plaintiff.

2. There have been various suits filed in the High Court over the Original Plot No. 42/32/111/MN by various people leading to subdivision and issuance of titles to various beneficiaries (ie HCCC 83/94 OS) and (SRMCC Kilifi Land Cause No 1 save that the cause of action herein has not been the subject of any court proceedings between the parties to this suit. The plaintiff prays for judgment against the defendants as follows:-
 1. A Permanent Injunction to restrain the Defendants by themselves, their servants, their employees, relatives, friends or any other person from interfering with the original beacons, boundary marks delineating the boundaries of Plot No. 1640/Section III/ Mainland North and a further Injunction Order restraining the Defendant by themselves, their servants, their employees, relatives, friends or any other person whomsoever and whatsoever from encroaching and or trespassing into the plaintiff's property Plot No 1640/111/Mainland North.
 2. An order directing the Chief Land Registrar, the Kilifi County Land Registrar, Director of Surveys and the Kilifi County Surveyor to replace those beacons unlawfully removed by the Defendants to their correct position and the entire boundaries of the Plot No.1640/III/ Mainland North so as to secure the Plaintiff's 3.340 hectares which is approximately 8 acres.
 3. An order for eviction from the plaintiff's land by way of demolition and removal of any illegal structures on the suit property at the Defendants costs.
3. The 1st to 9th defendants state that there is a pending suit, being ELC No. 197 of 2008 (Mombasa) in respect of the same suit premises and also involving the same parties and/or parties under whom they litigate and thus the present matter should be stayed and/or struck out with costs. Entirely on without prejudice basis to the foregoing, the 1st to 9th defendants aver and maintain that they have occupied and/or stayed and/or resided on the suit premises for over 12 years without anybody's permission and/or authority and/or consent and further that their occupation of the land has been continues and/or open and/or public and/or uninterrupted and/or adverse to the rights and/or interest of the registered owner and as such the claim made herein is time-barred under sections 7 and 17 of the [Limitation of](#)



Actions Act (cap 22), Laws of Kenya and consequently orders of adverse possession ought to be issued to the 9th defendants in line with section 38 of the aforementioned Act.

4. This court has carefully considered the evidence and submissions therein. The Land Registration Act is very clear on issues of ownership of land and section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, 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.”

5. Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

6. The law is clear that, the certificate of title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

7. This court in considering this matter referred to the case of Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The Judge in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

8. It is a finding of fact the plaintiff is the registered proprietor of that parcel of land known as Plot No. 1640 section III/ Mainland North (Original No. 4237/32/111/MN) with a title number CR.37473. PW1 the Plaintiff testified that he bought the suit land 3 acres from Kahindi Baya and 5 acres from PW2 in 1997. At the material time the land was vacant but later the defendants encroached and have refused to vacate. PW2 the said Stanley Mwanzia Mulango corroborated the plaintiff's evidence. PW3 testified that the Plaintiff bought the land from Kahindi Baya and that he was the middle man and also a witness. DW1 Gilbert Mwanganda testified that he has lived on the suit land for 21 years. That the said Kahindi was a neighbor. He was invited by his inlaw Gambo Bigambo and he bought land there. The land was over 200 acres and was given to beneficiaries and was subdivided into many plots. DW2 Gambo Bigambo the 2nd Defendant stated that his father worked for a European who on leaving the country



decided to award the workers a portion of the land. His father was a beneficiary and he was born on that land and has not encroached. Each shareholder was given 8 acres and some portions do not have titles. He has never seen the Plaintiff and does not know him. Kahindi was their neighbor who was also entitled to 8 acres. DW3 stated that he was born on the suit land and all the Defendants are his relatives. I have perused the documents produced before this court and find that the plaintiff's deed plan is dated October 23, 1992 PEx2 and his certificate of title April 2004 PEx1. Indeed, reports from the Land Dispute Tribunal seem to suggest that it was a boundary issue and that the plaintiff was the legitimate owner of the suit land. The deed plan produced by the defence is dated September 22, 1997. Their certificates of titles for the defendants to wit No 3403, 3400, 3402 (original number 427/67) Section 111 Mainland North are dated May 22, 2012 (DEx 1 -6). It appears to me the Plaintiff's land was long subdivided and title issued before the same was done later for the defendants. It is not clear to this court whether or not we are talking of the same land and /or whether there is an overlap. The plaintiff's deed plan was never cancelled and still stands. I find that the Plaintiff was a bonafide purchaser for value. I find that the said suit land was vacant at the time of purchase and the title was obtained legally. I find that the plaintiff has established his case on a balance of probabilities and I grant the following orders;

1. An order directing the Chief Land Registrar, the Kilifi County Land Registrar, Director of Surveys and the Kilifi County Surveyor to establish the correct position and the entire Boundaries of the Plot No.1640/III/Mainland North so as to secure the plaintiff's suit land.
2. The defendants are to vacate the said land within the next 6 months from the date of this judgement and in default eviction order to issue.
3. Thereafter a Permanent Injunction to restrain the defendants by themselves, their servants, their employees, relatives, friends or any other person from interfering with the original beacons, boundary marks delineating the boundaries of Plot No. 1640/Section III/ Mainland North and a further Injunction order restraining the defendant by themselves, their servants, their employees, relatives, friends or any other person whomsoever and whatsoever from encroaching and or trespassing into the Plaintiff's property Plot No. 1640/111/Mainland North.
4. Costs of this suit to be borne by the defendants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST DAY OF FEBRUARY 2023.

N.A. MATHEKA

JUDGE

