



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 124 OF 2010

RAVINDRANATH DAHYBHAI BHAGAT.....PLAINTIFF

=VERSUS=

- 1. HAMISI HAROD**
- 2. DZOMBO CHAI**
- 3. FRANCIS MAIZA**
- 4. PETER CHIRON**

5. MR. JIA

6. MRS ALICE.....DEFENDANTS

J U D G M E N T

Introduction

1. The Plaintiff commenced this suit by way of a Plaint dated 18th October 2010. In the Plaint, the Plaintiff has averred that at all material times, he was the lawful and registered proprietor of Kilifi/Kijipwa 277 (the suit property). However, in March 2010, the Defendants illegally invaded the suit premises and started constructing illegal temporary structures thereon.
2. The Plaintiff's claim is for a declaration that he is the absolute registered proprietor of the suit property and that he is entitled to quiet possession of the same.
3. The Defendants filed a Defence and Counterclaim on 22nd November 2010 and denied that they invaded the suit property in the year 2010. The Defendants further averred that the Plaintiff has never taken possession of the suit property.
4. The Defendants filed a Counterclaim and stated that the Plaintiff colluded with the first registered owner of the land and fraudulently obtained the title in the suit property belonging to the Defendants and hundreds of other occupants. The Defendants pleaded that they have been fraudulently deprived of their property and that they are legally entitled to adverse possession thereof.

The Plaintiff's case

5. The Plaintiff, PW1, informed the court that he bought the suit property for KShs.3,000,000 at a public auction. The land was sold to him by the Bank of India after being advertised in the local daily newspaper. The auction was conducted towards the end of 2008 by Mwara Investments Limited. On 8th January 2009, the Plaintiff was issued with a title deed in his name which he produced as exhibit number 1.
6. After the purchase, the Plaintiff stated that he informed the surveyor to identify the beacons. However, the surveyor was chased away by some people who were on the land. The Plaintiff informed the District Commissioner (DC) and the District Officer (DO) about the turn of events and requested for a meeting with the squatters. However, the squatters were not agreeable to any form of negotiations.
7. The Plaintiff further stated that since the year 2009, more people have invaded the suit property.
8. PW1 denied the Defendants' assertions that they have occupied the land for more than 50 years and stated that if that was the case, then the Government should have allocated them the land during the adjudication process. PW1 produced as exhibit number 2 the Application for the consent of the Board and receipt evidencing the payment of stamp duty as exhibit number 3. The Plaintiff's exhibit number 4 is the Transfer of the suit property by chargee. The index map sheet showing the location of the suit property was produced as Plaintiff exhibit number 5 while the minutes held between the Plaintiff and the squatters on 31st March 2009 was produced as Plaintiff exhibit number 8.
9. In cross examination, PW1 stated that the Defendants invaded the suit property in the year 2010. However, PW1 admitted that he never went to see the suit property before he bought it at the public auction. He however sent his surveyor before the said purchase. It was the Plaintiff's evidence that he only saw three houses on the land and that he met the 1st, 4th and 6th Defendants.

The Defendants' case

10. The evidence of the 3rd Defendant, DW1, was that he stays on the suit property and that he saw the Plaintiff for the first time around the year 2010. According to DW1, he has been staying on the suit property since 1967. It was his evidence that he has planted on the property mango trees, coconut trees and built his house on the land. His portion measures approximately 2 ½ acres.
11. DW1 informed the court that the Settlement scheme in which the suit property is situated was established in 1983. He was not lucky to get a portion of the land within the scheme and he was told to wait. According to DW1, the 1st Defendant, Hamis Harod is not in occupation of the suit property. He has his land which is plot number 96. However, the 2nd and the 4th Defendants reside within the suit property. Each one of them occupies an area of 2 ½ acres and the whole suit property measures approximately 20 acres.
12. It was the evidence of DW1 that they were not aware that the property had been charged to the Bank neither were they aware of the auction of the land. It was his testimony that they left the Kijipwa settlement scheme and settled on the suit property in 1967. The Defendant produced photographs showing the houses on the suit property as Defendant exhibit number 1(a)-(j). His house is shown as Defence exhibit number 1 (e).
13. In cross-examination, the Defendant stated that he had the authority to represent the other five defendants and that the suit property was part of the land that the government purchased through the Settlement Fund Trustees. The Settlement Fund Trustees allocated the people who were living in the area the land between 1981-1983 and issued them with title deeds. Although he was living on the suit property when the allocations were done by the Settlement Fund Trustees, he was not issued with a title deed.
14. It was the testimony of DW1 in cross-examination that he put in his application during the allocation of the plots but when he was not allocated any land, he was informed by the Chief to continue living on the land. The Defendant was not sure when the title in respect to the original allottee of the suit property was allocated the title deed.
15. DW1 stated further that he inherited the property from his forefathers and stated that he was not in a position to say whether the Plaintiff obtained the land fraudulently or not. It was the evidence of DW1 that the suit property is occupied by 16 families who were never given titles within the scheme.

16. In re-examination, it was the evidence of DW1 that the original allottee, a Mr. Mghagha was only known to them when they conducted a search on the land five years ago and that they never reached at any agreement with the Plaintiff over the suit property.
17. The 4th Defendant, DW2, stated that he stays on plot number 277 and that he was born on the property in 1961.
18. Although he was registered as a squatter in 1983 when the Kijipwa Settlement Scheme was set up by the Ministry of Lands, he was never issued with the title documents for his portion of land. DW2 denied any knowledge of the original allottee, Mr. Mghagha, and further stated that he was not aware of the public auction in respect to the property.
19. In cross-examination, DW2 stated that the suit property was government land and the settlement of squatters was done by the Settlement Fund Trustees. DW2 stated that he was not aware of the title in respect to the suit property and further stated that him, together with his neighbours, did not have title documents for their respective portions. They were told to wait for the titles during the planning and demarcation of the settlement scheme.
20. The 2nd Defendant, DW3, informed the court that he did not know the Plaintiff. It was the evidence of DW3 that he was born on the suit property 48 years ago and he was aware of the adjudication that was done in the scheme in 1983. Although the other squatters were given titles in 1983 for their portions measuring 2 ½ acres, he was not considered and he has been leaving on a portion of land within the suit property because he was born there. DW3 stated that he had no knowledge of who the original allottee was and that he was not involved in the public auction.

Analysis and Findings

21. I have considered the evidence and submissions on record. The parties to this suit are in agreement that the suit property initially fell under the jurisdiction of the Settlement Fund Trustees.
22. According to the evidence of the Defendants, they applied to be allocated the land as squatters when the government through the Settlement Fund Trustees established the Kijipwa Settlement Scheme in 1983. Although their neighbours were allocated 2 ½ acres each in the settlement scheme and issued with the titles, the Defendants were informed that they will be allocated with the titles to their portions of land at a later stage. Consequently, they continued staying on the land. All along, the Defendants were not aware that the land had been allocated to Mr. Mghagha who charged it to the Bank of India. They only discovered about the issuance of the title to Mr. Mghagha when the property was purchased by the Plaintiff at a public auction in the year 2008.
23. The Plaintiff produced in evidence the Transfer by chargee as Plaintiff exhibit number 4. According to the exhibit, the suit property was transferred to the Plaintiff by the Bank of India on 5th January 2009 at a consideration of Kshs.3,100,000. The title deed was then issued to the Plaintiff on 8th January 2009.
24. None of the parties produced the extract of title (the green card) to show the initial registered owner of the property. The only title document that was produced in evidence is the one which was issued to the Plaintiff in the year 2009.
25. The Plaintiff also produced in evidence the consent of the Bahari Land Control Board dated 4th December 2008 consenting to the transfer of the suit property to the Plaintiff. According to the said consent, the property was initially registered in the name of Boniface Mughanga. However, as I have stated above, it is not clear when the suit property was allocated to the said Boniface Mughanga by the Settlement Fund Trustee.
26. Before the promulgation of the Constitution in the year 2010 and the enactment of the Land Act and the National Land Commission Act in the year 2012, settlement schemes and Programmes were implemented under the Agriculture Act. Settlement of the landless people started in 1961 under the Land Development and Settlement Board. The programme was later on taken over by the Settlement Fund Trustees on behalf of the government.
27. Although the process of demarcation, surveying and identification of squatters for the purpose of allocating them land is the same as the process of ascertainment of rights over trust land, the Land Adjudication Act is not applicable when it comes to the ascertainment of the “claims” of the squatters on Government land.
28. A squatter occupying government land is not entitled as of right to the piece of land that he

occupies although he is supposed to be given the first priority during the demarcation and surveying process. The Defendants were not given title documents by the Settlement Fund Trustees although they say they were on the piece of land during the demarcation and surveying process. Instead, it is Mr. Mughanga who was allocated the suit property and he went ahead to charge it to the Bank of Baroda.

29. A situation like the current one arose in the case of **Michael Githinji Kimotho Vs Nicholas Murathe Mugo, Civil Appeal No. 53 of 1995** in which the Court of Appeal held as follows:

“If the appellant had been in occupation of the suit land as a squatter without any right or title to the suit land in his favour, he was obviously in no position to resist the respondent's claim. Though the Appellant had a long time been in occupation of the suit land which was government land before it was allocated to the Respondent, this would not have helped him in resisting the Respondent's claim where the latter is registered as owner of the land. Similarly, if he, the Appellant, had carried out any development on the suit land, he did so at his own peril and he could not expect any compensation in that respect. Even if for argument sake the suit land had been erroneously allocated to the Respondent, the Appellant as a squatter in the suit land had no locus standi and the so-called erroneous allocation could not be an answer to the Respondent's claim for his eviction. His position as a trespasser could not have given him any protection against the respondent's claim for possession as the registered owner of the suit land.”

30. I am in agreement with the holding in the above case. Indeed I am bound by the decision save to say that if a party proves that a title document was issued unlawfully then the court is duty bound pursuant to the provisions of Article 40(6) of the constitution to nullify such a title.
31. The Defendants have not proved on a balance of probability that the title deed that was produced as Plaintiff exhibit number 1 was unlawfully issued to the Plaintiff.
32. The Defendants have raised the defence of adverse possession pursuant to the provisions of section 7 as read together with Sections 13 and 38 of the Limitation of Actions Act.
33. I do not think that the Defendants can succeed in a claim of adverse possession where, firstly, they do not recognise the title of the Plaintiff because according to them, the Plaintiff's title was fraudulently obtained and secondly when they do not show how they dispossessed the Plaintiff of his land or discontinued the Plaintiff's possession.
34. For one to succeed in a claim of adverse possession, the land must have been in possession of the Plaintiff in the first place. As was held by the Court of Appeal in the case of **Wambugu Vs Njuguna (1983) KLR 173**, it is not enough for the Plaintiff to show that he has been in possession for more than 12 years while the **Halsbury's Laws of England, 4th Edition, Vol. 28, paragraph 768** states that time for the purpose of a claim of adverse possession begins to run when the true owner ceases to be in possession of his land. The Defendants stated that the Plaintiff or the original allottees never took possession of the suit property and could therefore not have been dispossessed or discontinued their possession.
35. One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession.
36. If the Defendants' averment is that the title which was issued to the Plaintiff was fraudulently acquired, then their cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered Land Act (repealed) and not adverse possession.
37. In any event, the only title document that was produced in evidence is the one that was issued to the Plaintiff on 8th January 2009. The Defendants did not produce the extract of title to enable the court ascertain when the first title was issued for the purpose of computing time. In the absence of an extract of the title (the green card), the court can only compute time for the purpose of establishing if indeed the Defendants can succeed in a claim of adverse possession from 8th January, 2009 when the title deed was issued to the Plaintiff. In the circumstances, and in view of the fact that this suit was filed in the year 2010, the period of 12 years had not lapsed to entitle the

Defendants to defeat the Plaintiff's title.
38. For the reasons I have given above, I find and hold that the Plaintiff has proved his case on a balance of probabilities. I shall, which I hereby do allow the Plaintiff's claim as prayed in his Plaint dated 18th October 2010 in the following terms:

(a) A declaration be and is hereby issued that the Plaintiff is the absolute registered proprietor of the suit premises known as Kilifi/Kijipwa/277 and he is entitled to quiet possession without any interference from the Defendants, their agents, servants, or anyone else claiming or acting through the Defendants and for an order of vacant possession and eviction of the Defendants.

(b) The Defendants their agents, servants or any other person claiming and acting through them be and are hereby restrained by a permanent injunction from entering, invading, constructing any kind of structures and from interfering with the Plaintiff's quiet possession and enjoyment of land known as KILIFI/KIJIPWA/277 and the Defendants be and are hereby ordered to demolish all the illegal structures on the Plaintiff's land number Kilifi/Kijipwa/277 and to remove debris thereof and in default the Plaintiff be at liberty to demolish the illegal structures and remove the debris at the Defendant's costs within 60 days from the date of the Judgment.

(c) The Officer Commanding Police Division of Kilifi and the OCS Kijipwa do ensure that security and peace is maintained in the enforcement of these orders.

(d) The Defendants to pay the costs of the suit.

Dated and delivered in Malindi this 21st Day of March 2014

O. A. Angote

Judge