



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MALINDI**  
**CIVIL SUIT NO. 79 OF 2006**

**STEPHEN RAPHAEL GARAMA .....PLAINTIFF**

**VERSUS**

**ROBERT BAYA MRAMBA & 9 OTHERS .....DEFENDANTS**

**JUDGMENT**

1. The facts leading to this suit are not in dispute. The suit property was not registered prior to 1999. In or about the year 1999 some persons were settled by the Settlement Fund Trustees in a settlement scheme known as Malindi/Jimba or Kilifi/Jimba, created upon government land. In the same period, plot no. KILIFI/JIMBA/85, the suit property herein was allotted to one Baya Mwandunga Baya. The property measures 5.6ha. Subsequently the suit land was sold to the plaintiff and transferred to him in the year 2000. On 28th January, 2000 the plaintiff obtained a title deed in his name under the Registered Land Act.
2. The plaintiff has come to court alleging that the ten defendants some time after his registration, did unlawfully trespass onto the suit property and remain thereon. He is seeking two prayers, namely vacant possession and permanent injunction to restrain the defendants from encroaching on or dealing with the suit property in any manner.
3. For their part, the 1st and 6th Defendants filed statements of admission to the plaintiff's claim. The rest of the defendants disputed the same. In the further amended statement of defence filed on 13th June, 2012 upon the directions of the court given on 30th May, 2012, the defendants assert that they have been in occupation of the suit property since the year 1990 and should have been registered as owners thereof.
4. They allege that the registration of the plaintiff as the proprietor was fraudulent. They have therefore since the year 2005 resisted his efforts to remove them therefrom. They allege that they are the rightful persons entitled to be registered as proprietors on the basis of these averments.
5. These defendants have counterclaimed for various portions of the suit land Kilifi Jimba/85 as follows:
  - i. John Shadrack Kalu (3rd defendant) - 1acre
  - ii. Shadrack Juma Kalu (2nd defendant) - 2 acres
  - iii. Charo Pepo (4th defendant) - 2.5acres
  - iv. Chrispus Gona Kalama (5th defendant) -  $\frac{3}{4}$  acre
  - v. Samuel Kitsao Lughanje (7th defendant) – 1 acre

- vi. Luwali Mwambirangi (8th defendant) – 2 acres
- vii. Hajiri Mahenzo Yaa (9th defendant) – 1 acre
- viii. Margaret Kazungu (10th defendant) – 1 acre.

6. I note, in passing that the further amended statement filed pursuant to the court's direction differs in some respects with the original one filed on 10th November, 2010. Although I noted minor discrepancies in paragraph 1& 3 of the latest pleading, paragraph (g) therein was substantially altered by deleting the last phrase in the paragraph namely “and are in the process of instituting an appropriate suit for the purpose.”
7. I also note that besides the basic payment of shs. 75/= being filing fees, the defendants did not pay any fees on their counterclaim, not even the shs. 1500/= basic fee. Be that as it may, the pleading will be considered as a proper pleading for purposes of the suit. Suffice also to state that the counterclaim is disputed by the plaintiff who pleads inviolable title as a first registered owner.
8. In the course of the trial, the plaintiff adduced evidence which tallies with the pleaded case. The 1st and 6th defendants also gave evidence in accordance with their statements of admission. Of the remaining defendants only the 4th (DW2) testified. And the defence called Joseph Mwachina Mwarabu (DW3) and Johnson Katana Kalume (DW4). The key plank of the evidence of the 1st and 6th Defendant is that they had occupied the suit property as squatters prior to registration. That upon learning that the original owner Baya had transferred it to the plaintiff they were agreeable to amicably settling the matter so that they would be allowed to continue occupying their portions. The other defendants claim that as the original occupants of the suit property, they and not the plaintiff were entitled to be registered as owners.
9. Having considered all the pleadings, the evidence and the submissions of the respective parties, it is clear that only two related key issues require determination. That is, who between the plaintiff and the defendants is entitled to be in possession of the suit property and whether the prayers in the claim or counterclaim ought to be granted.
10. The plaintiff is the first registered owner of the suit premises. His title is protected vide Section 27 – 30 of the Registered Land Act. If I understood the defendant's case as pleaded and through the evidence adduced, it is that by virtue of their alleged long occupation of the land, they and not the plaintiff or his predecessor were entitled to be allotted the land during the preparation of the scheme.
11. What the defendants are saying is that the settlement of persons in the scheme was not properly conducted else they and not an “outsider” - the plaintiff-should have acquired the land. Although they alleged fraud in their further amended defence, the same is not particularized as required by the rules of pleadings. Besides no evidence of fraud involving the plaintiff was tendered before the court by the defendants.
12. As regards the settlement exercise, the Agriculture Act sets out a comprehensive procedure for creation of schemes, ascertainment of interest to holdings and resolving disputes. The defendants were seemingly quite aware of the exercise. Indeed two of them, namely the 4th defendant (DW4) and his witness Johnson Katana admit to the fact. According to DW4 his allotment letter eventually issued for plot no. 710 but he refused to follow it up because he claimed to have been residing on plot 85, the suit property. He did not apparently take up the matter with the relevant officials.
13. The same complaint regarding allotment was repeated by another defence witness Joseph Mwachia Mwarabu (DW3). He too got a letter of offer that did to correspond with the physical location of his residence. From the evidence of the defence, there was a scramble as genuine and other squatters settled on and laid claim to different land portions which on the face of it were hitherto government land. All admittedly entered as squatters but the resettlement plan has been riddled with problems as narrated by DW4, the leader of the squatters.

14. The defence rather than proving the alleged fraud against the plaintiff appears to raise a moral argument that as residents in the area they were more entitled than the plaintiff. Their evidence however shows that they too came from elsewhere to settle on the land. They do not say much about the original allottee Baya who later sold the suit land to the plaintiff. An initial claim for adverse possession was dropped on the realization that the number of years of occupation did not qualify for such a claim. Besides the land was government land.
15. In the submissions of the defendants' counsel claims of violation of constitutional rights and historical injustices were bandied about. However noble those claims might sound, the court can only act on the basis of evidence and the law. The same constitution cited by the defendants also protects the plaintiff's right to ownership of lawfully acquired property. It cannot be taken away except in accordance with the law. The nature of the "interest" which counsel for the defendants asserts in his submissions "the court cannot ignore" must be an interest known and proven in accordance to the law. This alleged interest the defendants have failed to demonstrate to be superior to or valid against the plaintiff's title.
16. On the plaintiff's side there is evidence by the 1st and 6th defendant recognizing his title. 1st defendant said he and 6th defendant moved onto the land in 1997 and found the 4th & 5th defendants thereon, while others came later. The chief however, informed him that the land belonged to one Baya Mwadungo the person who got the letter of allotment two years later and sold the land to the plaintiff. Although the sixth defendant said the 5th defendant was already in occupation, and purported to give him a portion of the land to settle in, he admitted that soon after, the chief informed him that the land had a different bonafide owner. Reviewing all the evidence, I am satisfied that the plaintiff is the bona fide registered owner of the suit property entitled to possession thereof.
17. The defendants claim thereto is in my view weak and incapable of defeating or challenging the title. What the defendants are basically asking of this court is to cancel the old allotments and to create a new scheme of allocations without sufficient proof that the first one was fraudulent, or that the plaintiff was involved in the fraud. The relevant government officials have not even been joined in the suit. I decline the invitation in the circumstances. The plaintiff's claim has been established on a balance of probabilities and is allowed. Prayers (a) and (b) are granted. The counterclaim has no merit and is accordingly dismissed. Due to the nature and age of the proceedings, I direct that each party bears its own costs.

Delivered and signed at Malindi this **15th** day of **April, 2013** in the presence of Mr. Angima for the defendant, plaintiff's counsel absent.

**C. W. Meoli**

**JUDGE**

MR. ANGIMA

I ask for copy of proceedings and judgment.

**C. W. Meoli**

**JUDGE**

COURT – Same be supplied.

**C. W. Meoli**

**JUDGE**