



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 96 OF 2012

YAA BAYA MWARO.....PLAINTIFF

=VERSUS=

KARISA KAZUNGU THOYA.....DEFENDANT

J U D G M E N T

Introduction

1. The Plaintiff moved this court by way of a Plaint dated 25th June 2012 and filed on the same day.
2. The Plaintiff is seeking for an order of rectification of the Register relating to Title Number Malindi/Pumwani Phase 1/430 (the suit property) by canceling the registration of the Defendant as the proprietor of the said Title and instead registering the Plaintiff as the proprietor of the same.
3. The Defendant filed his defence on 1st August 2012 and denied the Plaintiff's averments. The matter proceeded to full trial. The Plaintiff called five witnesses while the Defendant called three witnesses.

The Plaintiff's Case

4. The Plaintiff averred in his Plaint that in the year 1984, he settled on an unregistered parcel of land situated at Bomani Village in an area commonly known as Magarini-Mabomu measuring 15.3 hectares which land is now registered as Malindi Pumwani Phase1/430 (the suit property); that he build his 3 houses thereon, planted numerous trees and cultivated the suit property exclusively, openly and continuously without any interruption from the Defendant or any other person.
5. The Plaintiff further averred in his Plaint that during the demarcation and adjudication of claims to the suit property in the year 1986, the Defendant unlawfully allocated himself the suit property and that on 5th September 2006, the Defendant was registered as the proprietor of the suit property.
6. The Plaintiff finally averred that he objected to the allocation of the suit property to the Defendant but his objection was not heard and determined as provided for in the Land Adjudication Act and that the registration of the suit property in the name of the Defendant was obtained by means of fraud and misrepresentation.
7. The Plaintiff, PW1, appeared before me on 11th February 2013 and stated that he moved onto the suit property during the colonial era. He cleared the suit property which was bushy and planted

- cashew nuts, mango trees and coconut trees. He also put up his home and that is where he has been staying until now.
8. It was the Plaintiff's testimony that he has buried his family members on the suit property including his mother, father, wife and brother.
 9. During the adjudication and demarcation process, the Plaintiff testified that the adjudication officers refused to take his identification details and informed him that they were aware that the suit property had been purchased by the Defendant.
 10. According to PW1, he was informed that the suit property had been purchased by the Defendant from one Thulla whom he had never seen before.
 11. PW1 testified that although the officials from the land adjudication department promised to give him an alternative land, it never happened. It was his testimony that he filed a dispute before the Gongoni Lands Disputes Tribunal which ruled in his favour (Plaintiff).
 12. The Plaintiff produced as exhibit number 1 the decision of the Tribunal. He also produced the official search and the abstract showing that the Defendant was the registered owner of the suit property as exhibits 2a and b respectively.
 13. The Plaintiff also produced as exhibit 3 the photographs showing the houses he has constructed on the suit property and the trees that he planted. It was his testimony that he was paid Kshs.26,000 by the Kenya Electricity Transmission Company when the company had its power lines pass over his land. The Plaintiff produced as exhibit number 4 the banking slip from Kenya Commercial Bank for the withdrawal of the said Kshs.26,900.00.
 14. In cross examination, the Plaintiff stated that he took possession of the suit property before independence and that the suit property measured 40 acres.
 15. He reiterated that he was informed that the suit land had belonged to a Mr. Thulla but he never left the land. He agreed that according to the official search, the suit property is registered in the name of the Defendant.
 16. On the issue of the decision of the Tribunal, it was the Plaintiff's testimony that the Tribunal had ordered that he cultivates part of the land and not the plot which was disputed.
 17. The Plaintiff's son (PW2) stated that he was born on the suit property 31 years ago and that, that is the only place he calls his home.
 18. PW2 confirmed that the adjudication and demarcation of the suit property was done in 1986. His father, the village elder and himself were present during the demarcation process.
 19. PW2 stated that his father's details were not taken by the lands officials during the adjudication process because the land had purportedly been sold to the Defendant by a Mr. Thulla, the registered owner. It was the witness's testimony that although another land was to be given to the Plaintiff, and which was identified, it was later on allocated to the Defendant's mother whereafter the Plaintiff filed a dispute with the Gongoni Land Dispute Tribunal which was decided in the Plaintiff's favour.
 20. According to PW2, the Plaintiff should have been given priority in the allocation of the suit property because he was already on site.
 21. During cross-examination, PW2 produced his national identity card which showed that he was born in 1968.
 22. The Plaintiff's other son, PW3, stated that he has lived on the suit property for 40 years with his father and brothers. He stated that the Defendant had never lived on the suit property.
 23. During cross-examination, the witness admitted that they have been aware that the title deed to the suit had been issued to the Defendant although it was his father who was entitled to the property.
 24. The Plaintiff's neighbour, PW4, informed the court that the suit property belonged to the Plaintiff; that he had known the Plaintiff as his neighbour since 1948 when the Plaintiff moved to the area and that he assisted the Plaintiff to clear the land.
 25. It was PW4's evidence that for all those years, the Plaintiff planted mango trees and coconut trees and cultivated the suit property without any interference; that the Plaintiff's children were born on the suit property and that the Defendant's land borders the suit property.
 26. In cross-examination, the witness stated that when the Plaintiff and himself moved to their respective parcels of land, there were wells known as "Thulla"; that the area is also called "Kwa Thulla" and that he was allocated plot number 346 within the settlement scheme.
 27. The Plaintiff's last witness, PW5, informed the court that she was Mr. Thulla's granddaughter. The said Mr. Thulla died in 1974 and his only surviving child is called Abubakar Masud.

- According to the Statement of the witness, Masud Bin Bwana Tulla's children were Mwanashangazi Masud (her mother), Mohamed Masud, Said Masud and Abubakar Masud.
28. According to PW5, the initial land reference number of the suit property was 11623 and the said land belonged to her grandfather bwana Masud. She testified that all along the suit property was used by the Plaintiff and that in 1979, the said land was taken by the government and converted into a settlement scheme whereupon the same was allocated to people.
29. PW5 stated that her grandfather was never compensated for the land and further that it is their family which is entitled to the suit property.

The Defendant's Case

30. The Defendant, DW1, appeared before me and stated that he bought the suit land from Said Bin Thula for Kshs.65,000.
31. According to the Defendant, the said Said Bin Thula owed Kilifi Plantation Kshs.45,000 and the property was charged to the said organisation which was not being serviced. The Defendant produced the Sale Agreement as Defence exhibit number 1 and the Notification of charge as defence exhibit number 2.
32. After repaying the loan that was owing, the Defendant stated that he was given the title document after obtaining the consent of the Land Control Board which he produced as defence exhibit number 3. The Defendant also produced the Transfer document as defence exhibit number 4.
33. According to the Defendant, the land he purchased measured 21 acres and the same was duly registered in his name. It was after the purchase of the land that the Defendant found the officials from the Ministry of Lands surveying the land upon which he informed them that indeed he had purchased it. The Defendant produced exhibit number 6 being the letter from the Ministry of Lands and Housing in respect to the suit property and the Letter of Offer from the same Ministry as defence exhibit number 6 and 7.
34. According to the letter of offer, the Defendant was allocated plot number 430 by the Settlement Fund Trustees after paying the requisite fees. The Defendant produced the receipts evidencing the payments he made as defence exhibit numbers 8a, b, c and d.
35. The Defendant further stated that he was informed to surrender the title in respect to the land that he had initially bought, which he did. The Defendant produced as defence exhibit number 9 the surrender document. The Defendant was subsequently issued with a title for plot number 430 which he produced as defence exhibit number 10. The Settlement Fund Trustees thereafter issued a letter to the Defendant stating that he had cleared with the Settlement Fund Trustees. The letter was produced in evidence as defence exhibit number 11.
36. The Defendant finalised his evidence in chief by stating that he is currently staying next to the suit property and that the Plaintiff does not occupy the suit property as claimed.
37. On cross-examination, the Defendant stated that he has put up a house on plot number 344 which abuts the suit property; that the said property was sold to him by one Said Masud who is related to Bwana Tulla, the original owner.
38. The Defendant denied that he purchased the suit property at a public auction and that by the time he bought the plot in 1995, the property had already been taken over by the Settlement Fund Trustee in 1975.
39. It was the Defendant's testimony that he was offered the land by the government on 14th June 2000 and he surrendered the original title deed which he had for the same property on 20th December 2000.
40. The Defendant called his sons, DW2 and DW3 who did not say anything different from what their father, DW1, had informed the court.

Submissions

41. The Plaintiff's advocate filed his written submissions on 19th June 2013 while the Defendant's Advocate filed his submissions on 18th July 2013.
42. The Plaintiff's counsel submitted that the Plaintiff had shown by way of evidence that he has been residing on the suit property since the year 1948; that the suit property was originally known as

- plot number 11623 and was registered in the name of Masud Bin Bwana Thulla on 16th July 1974.
43. Counsel further submitted that the entire area was declared a settlement scheme for the purpose of settling the residents in the area as shown in defence exhibit number 6 and that during the adjudication process, the Defendant was occupying a different parcel of land which was allocated to his mother, Kadzo Baya. He was not occupying the suit property as at the time of the adjudication.
 44. The Plaintiff's counsel further submitted that according to the Defendant's own testimony, the Government had acquired the Title to the suit property in 1979 and that the original title issued under the Land Title Act had become invalid. Consequently, there was no valid title that was capable of being transferred to the Defendant in 1994 or 1995; that the person who purported to sell the property to the Defendant was not the original owner because the original owner died in 1974.
 45. The Plaintiff's counsel finally submitted that prior to the alleged sell of the land to the Defendant, the Plaintiff had been in continuous physical occupation and possession of the suit property; that the occupation was continuous, open and notorious and was even known to the family of the registered owner and that there was no discontinuance of possession by the Defendant since the year 1948; that the Plaintiff's actions of building of his residence and cultivating thereon were inconsistent with the enjoyment of the suit property by the then registered owner. Therefore, it was submitted, the said Title had long since been extinguished by the adverse possession of the Plaintiff and that there was no valid title capable of being sold and transferred to the Defendant in view of section 17 of the Limitation of Actions Act.
 46. The Defendant's counsel submitted that the suit property was initially owned by Masud Bin Thulla; that the Defendant legally acquired the suit property from the said Masud Bin Thulla and that the Plaintiff has never owned L.R. Number 11623.
 47. After the Government acquired the suit property, it was submitted that the Defendant surrendered the title and a Surrender was duly registered.
 48. On the issue of demarcation and adjudication, it was submitted that the Defendant was identified and allocated the suit property pursuant to the recommendations of the plot identification committee; that the Plaintiff was not involved in the demarcation and adjudication process neither did he show how the Defendant hampered his efforts to be allocated land by any fraudulent means or by misrepresentation.
 49. The Defendant's counsel finally submitted that the award of the Land Dispute Tribunal Case Number 104/7/2005 was arrived at without jurisdiction.

Analysis

50. I have agonised over this matter for a long period, not so much on the points of law but on the facts and the evidence before me.
51. It is not clear to me whether indeed the homestead of the Plaintiff is within the boundaries of Malindi Pumwani Phase/430 as claimed by the Plaintiff or whether the said homestead falls within a different parcel of land as claimed by the Defendant. None of the parties provided to this court the relevant survey plans to support their claims.
52. It is not in dispute, at least from the testimony of the witnesses and the submissions by counsels that part of the suit property was originally known as plot number 11623 and was registered in the name of Masud Bin Bwana Thulla on 16th July 1974.
53. According to defence exhibit number 6, which is a letter from the Ministry of Lands, part of plot number 430 was initially plot number L.R.NO.11623 registered under the Land Title Act.
54. It is not clear from the said letter the acreage of L.R. No 11623 but from the certificate of Postal Search as on 23rd March 2004, the said land measured 21.22 acres. The suit property is approximately 15.3 Ha (approximately 40 acres).
55. According to defence exhibit number 6, it was discovered during the demarcation and survey that L.R. No. 11623 was part of Pumwani I scheme and that the Plot Identification Committee identified the Defendant who was the owner of L.R.11623 by virtue of a title he held for the allocation of Malindi/Pumwani Phase I/430.
56. The Letter from the Project Manager, Magarini states as follows:

“During the Demarcation survey it was discovered that the plot was part of Pumwani I Scheme and Karisa Kazungu had a title of the plot-certificate of ownership. It was also discovered that he had not been compensated. The area was given plot no. 430 Pumwani I.....And also because he already had a document ascertaining that the plot was his it was decided that he be allocated the plot.”

- 57.Indeed, the contents of the said letter is in conformity with the evidence of PW1 that during the demarcation and adjudication process, he was informed by the officials from the land adjudication section that he could not be allocated the land because they were aware that the same land had been purchased by the Defendant. The officials from the Ministry of Lands promised to give him another land which they never did.
- 58.That is the same position that the Defendant has taken in this matter. It was the Defendant's testimony, which I have reproduced above, that after the purchase of L.R. No.11623 measuring 21 acres from Said Bin Thula, he found the officials from the Ministry of Lands surveying the land upon which he informed them that he had purchased the land. He thereafter surrendered the title document in respect to L.R. NO.11623 and was allocated the suit property.
- 59.Land for settlement used be acquired by the Settlement Fund Trustee (the law has now changed-see the Land Act, No. 6 of 2012) from either private proprietors or the Government. It is not clear from the facts and evidence of this case how the Government acquired L.R. No. 11623 in 1979 for the purposes of converting it into a settlement scheme.
- 60.However, from the evidence before me, the Government officials decided to allocate L. R. No. 11623 which was already part of Pumwani I Scheme to the registered owner instead of compensating the owner and settling whoever would have been identified as the person who was “squatting” on the land, the Plaintiff, somewhere else.
- 61.One of the most pertinent processes of allocating land within a settlement scheme is the identification of beneficiaries and verification of squatters on the land. The “Squatters” are and must be given priority during the planning, demarcation and surveying of a settlement scheme.
- 62.From the evidence on record, it is not in dispute that the Plaintiff was one of the squatters in Pumwani I Scheme. All his neighbours, including the Defendant who was allocated plot number 344 where he has settled were allocated land in the scheme. The only reason why he was not allocated the suit property, as I have stated above, was because the land he was “squatting” on had already been purchased by the Defendant from the original owner, one Masud Bin Bwana Thulla on 24th February 1997.
- 63.Although the Defendant stated in his testimony that the Plaintiff is occupying a different portion of land, he did not inform the court the parcel number that the Plaintiff is occupying.
- 64.The process of planning, demarcation and survey of Pumwani I Scheme was finalised and the Plaintiff's neighbours were allocated land and the titles were issued to the individuals who completed payment of the loans to the Settlement Fund Trustee.
- 65.The Plaintiff called his neighbour, PW4, who informed the court that he has known the Plaintiff since 1948, and that the Plaintiff has since then been utilizing the suit property without any interference. PW4 was allocated plot number 346 which he had also occupied since 1948.
- 66.The Plaintiff's sons, PW2 and PW3 reiterated that they were born on the suit property. They stated that the only reason why their father was not allocated land by officials from the Ministry of Lands was because the land had been sold to the Defendant by Masud Bin Bwana Thulla.
- 67.The creation of settlement schemes is meant to settle the landless people and to regularise situations where people have been staying on either government land or private land without the requisite legal documents. The ascertainment of the rights of squatters over land which has been declared to be a settlement scheme should not be confused with the ascertainment of land rights and interests of individuals on customary and land trusts.
- 68.The law that was applicable for the ascertainment of land rights and interest over trust land is the Land Adjudication Act, Cap 284. The said Act has an elaborate mechanism of appeal in the event an individual is aggrieved by the decisions of the Land Adjudication and Settlement Officer, the Land Adjudication Committee, the Land Arbitration Board and the Minister's Appeal Committee.
- 69.However, with the promulgation of the Constitution in 2010 and the establishment of the National Land Commission vide the constitutional provisions, the National Land Act, 2012 and the Land Act, 2012, all the functions of the Land Adjudication and Settlement department which was within

- the Ministry of Lands have been transferred to the National Land Commission.
70. The Management and implementation of settlement programmes have also been transferred from the Ministry of Lands to the National Land Commission.
 71. The law which previously governed the setting up of settlement schemes was the Agriculture Act, cap 318. Under section 168 (3) of the said Act, the Director of Land Adjudication and Settlement was appointed as the administrator of Agricultural Settlement Fund by the Settlement Fund Trustees. The Director of Land Adjudication and Settlement therefore wore two hats; he was in charge of the adjudication and consolidation of land rights and interests for trust land pursuant to the provisions of the Land Adjudication Act and was also authorised to establish settlement schemes pursuant to the provisions of the Agriculture Act.
 72. Because of the absence of a law to govern the settlement of squatters in settlement schemes viz-a-viz the decision of the district settler selection committee, the Plaintiff filed his complaint with the Gongoni Land Disputes Tribunal after the officials from the Ministry of Lands refused to allocate him the suit property during the planning, demarcation and surveying of the Pumwani 1 settlement scheme. The Tribunal decided the matter in his favour.
 73. The proceedings of the Land Disputes Tribunal were produced as Plaintiff's exhibit number 1.
 74. I have perused the said proceedings and the Plaintiff's narration of events in those proceedings is consistent with the evidence he gave in this matter, so was the Defendant's.
 75. On 7th February 2006 the Tribunal found that the Defendant's title in respect to plot number 430 should be revoked. It would appear that the Defendant did not appeal against the said decision.
 76. I agree with the Defendant's counsel's submissions that the Tribunal did not have jurisdiction to make the award that they made because the lands dispute tribunals did not have jurisdiction to interfere with the rights of a registered owner of the land or cancel a Title Deed.
 77. However, it is instructive that more often than not, the land disputes tribunal's used to arrive at their decisions in respect of the legal owners of the parcels of land in the rural set up in a just manner, the lack of their jurisdiction notwithstanding. Consequently, the court cannot close its eyes to the observations and proceedings of the tribunal when dealing with matters which had already been dealt with in such tribunals.
 78. I therefore do not see why I should not agree with the Tribunal's observation that indeed, the Plaintiff was the rightful owner of the suit property until 5th September 2006 when the Defendant was issued with the Title Deed for Malindi/Pumwani Phase 1/430. In any event, the Defendant has never challenged the decision of the Tribunal.
 79. The Defendant did not adduce any evidence to show that Masud Bin Bwana Thulla or his son, Said, ever took possession of L.R. No. 11623 before he purportedly sold it to him on 24th January 1997.
 80. The general principle is that until the contrary is proved, possession in law follows the right to possess, and in order for one to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it (**see Wambugu Vs Njuguna (1983) KLR 173**).
 81. The evidence before this court shows that Masud bin Bwana Thula lost his rights to the land twelve years after the Plaintiff took possession of it in 1948.
 82. Although the Defendant stated that he bought L.R. 11623 from Masud Bin Bwana Thulla on or about the year 1997, there was no evidence that the said Bwana Thulla was in possession of L.R. No. 11623 as at the time of the transaction. It is, according to PW1, PW2, PW3 and PW4, the Plaintiff and his family who were in possession of the land as at the time of the purchase of the same by the Defendant.
 83. By the time the Defendant purported to purchase L.R. NO. 11623 which he surrendered on 20th December 2006 and was issued with a Title Deed for the suit property, his title and by extension, Mr. Masud Bin Bwana Thulla's title to the suit property had been extinguished by the operation of the law.
 84. Mr. Masud Bin Bwana Thulla's title in respect to L.R. No. 11623 having been extinguished by the adverse possession of the land by Plaintiff, there was no valid title that would have been passed to the Defendant in 1997. Consequently, he could also not pass any valid title to the Ministry of Lands at the time of planning, demarcating and surveying of Pumwani Phase I settlement scheme on the basis that he the (Defendant) had already purchased L.R. 11623 which formed part of the Pumwani Phase I Settlement Scheme. The legal position is that the law concerning prescription

and adverse possession affects not only the present holder of the title but also their predecessors **(See Karim Vs Gicheru 1988 (KAR))**”.

85. The Defendant was neither the legitimate title holder of the suit property, a squatter on the property nor a landless person to deserve to be allocated the land in the settlement scheme.
86. In any event, the evidence adduced in this court showed that Masud Bin Bwana Thulla, the registered proprietor of L.R.11623 died in 1974.
87. The Sale Agreement dated 17th December 1994 (D exhibit 1 and 2) shows that L.R. NO. 11623 was sold to the Defendant by one Said Masud Abubakar. The Defendant admitted in his testimony that Said Masud is a relative to Masud Bin Bwana Thulla, the registered proprietor of L.R.11623.
88. However, the transfer document, defence exhibit number 4, shows that L.R. No. 11623 was transferred to the Defendant by Masud Bin Thulla on 24th January 1997, many years after the said Masud Bin Thulla had died.
89. There is no evidence on record to show that Said Masud was the administrator of the estate of Masud Bin Bwana Thulla and consequently he could not pass a good title in respect to L. R. No. 11623 to the Defendant.
90. The purported transfer of L.R. No. 11623 to the Defendant by somebody who was already dead can therefore only amount to fraudulent dealings in the suit property by the Defendant and Said Masud Abubakar.
91. Although the Defendant averred at paragraph 7 of his defence that he bought L.R. No. 11623 at a public auction, he denied during cross-examination that the property was bought at a public auction.
92. The Defendant having been issued a Title Deed in respect to Malindi/Pumwani Phase 1/430 by the Director of Land Adjudication and Settlement on the basis that the Defendant was the legitimate owner of L.R.NO.11623, which was not the position, I find and hold that the issuance of a title deed to the Defendant for Malindi/Pumwani Phase 1/430 was unlawful null and void
93. The Settlement Fund Trustees should have allocated the suit property to the Plaintiff for having occupied it since 1948 and not to the Defendant.
94. I also find and hold that the Plaintiff having been in continuous and exclusive occupation and possession of the suit property and his occupation having been open and notorious before the Defendant purported to purchase the same from Masud Bin Bwana Thulla, the Plaintiff acquired the suit property by way of adverse possession before the purported purchase in 1997.
95. For the reasons I have given above, I find and hold that the Plaintiff has proved his case on a balance of probability and I allow the Plaintiff's Plaint dated 25th June 2012 in the following terms:

(a) An order for the rectification of the Register relating to Malindi/Pumwani Phase I/430 by canceling the registration of the Defendant as the proprietor of the said title and instead registering Yaa Baya Mwaro as the proprietor thereof be and is hereby issued.

(b) The Defendant to pay to the Plaintiff the costs of the suit.

Dated and Delivered in Malindi this 27th day of **September**, 2013

O. A. Angote

Judge