



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 92 OF 2011

STEPHEN WAMBUA KITHUKA *suing for and on behalf of* GETRUD BINT ALI & CRISPUS SINGO.....PLAINTIFF

=VERSUS=

ABDUL KARIM

OMAR.....D

DEFENDANT

J U D G M E N T

Introduction

1. On 11th July 2011, the Plaintiff moved this court by way of a Plaint of the same day.
2. In the Plaint, the Plaintiff averred that he is the registered owner of land known as Chembe/Kibabamshe/412 which he acquired in the year 2001; that he has been in occupation of the said land as the owner for the last 10 years and enjoyed peaceful occupation.
3. The Plaintiff has averred that in June 2011, the Defendant trespassed and entered into his plot and started removing beacons and replacing them with new ones.
4. The Plaintiff claims for permanent injunction restraining the Defendant, his servants, agents, family members and any other person deriving interest from them from trespassing and entering on the suit property.
5. The Defendant filed his Defence and Counter-Claim on 25th July 2011 and denied the Plaintiff's averments.
6. According to the Defendant, the Plaintiff's parcel of land has overlapped his land being land reference number 5469, Malindi registered under the Land Titles Act, Cap 282; that he is the bona fide purchaser of L.R. NO.5469, Malindi; that L.R. No. 5599 borders the Defendant's land and that the owner of portion number 5599, Malindi placed beacons by mistake along the Indian Ocean front of and within land portion number 5469 under the mistaken believe that it was properly placed to mark the site cover of land portion number 5599 extending to the high water mark.
7. According to the Defendant's defence, the owner of portion number 5599, Malindi after wrongfully placing the said beacons, erected a stone perimeter wall hiving off part of portion number 5469; that land portion number 5599 unlawfully overlapped land portion number 5569 and because of that mistake, the Plaintiff's parcel of land has overlapped the Defendant's land.
8. The Defendant seeks for declaratory orders that the parcel of land known as Chembe/Kibabamshe/412 has overlapped land portion number 5469, Malindi and a permanent injunction restraining the Plaintiff or his agents from interfering with land reference number CR 49072, 49075 and portion number 5469, Malindi.

9. The parties appeared before me on 6th February 2013, when the Plaintiff, PW1 testified.
10. PW1 informed the court that he was testifying on behalf of Getrude Bint Ali and Crispus Singo pursuant to a Power of Attorney in respect of parcel number Chembe/Kibabamshe/412. He produced as exhibit 1 the Power of Attorney.
11. It was PW1's evidence that Chembe/Kibabamshe/412 is registered in the names of the Plaintiffs. The title deed in respect to the said property was issued to the Plaintiff's on 19th February 2001, the witness produced as exhibit number 2 the title deed.
12. PW 1 also produced in evidence the letters of offer in respect to the suit property which they received from the department of land adjudication and settlement.
13. After the Plaintiffs were given the letter of offer, they paid the requisite fees amounting to Kshs.8,329. The witness produced in evidence the letter of offer and the receipt showing the payments that were made by the Plaintiffs as exhibit numbers 3 and 4 respectively.
14. PW1 testified that he knew the Defendant in the year 2010 when he went to clear the suit property. The witness stated that he was not aware that the portion of land which the Defendant says is his is within the Chembe/Kibabamshe Settlement Scheme; that it is true that the surveyor's report shows that portion number 5469 overlaps the Plaintiffs' parcel number 412 and 411 and that portion number 5469 has taken half of parcel of land number 412 and a quarter of parcel of land number 411.
15. According to PW1, the embargo in respect to the suit property was lifted by the Government vide legal gazette notice number 2505. As at the time he bought the suit property, the embargo by the Government had been lifted.
16. It was PW1's evidence that portion of land number 5469 is not within Chembe/Kibabamshe Settlement Scheme. PW1 produced as exhibit number 5 the letters from the Ministry of Lands showing that there was no official embargo in respect to the said scheme.
17. In cross examination, PW1 stated that the first Plaintiff used to be his girlfriend and insisted that no embargo was ever placed on the suit property. PW 1 further stated that he did not know the difference between a general and a fixed boundary.
18. PW1 finally stated in cross examination that the suit property was allocated to the Plaintiff's in 1999; that he had not constructed any structure on the suit property and that on the map, there is an access road but on the ground, an access road does not exist.
19. In re-examination, the witness stated that plot number 5469 has fixed boundaries while Chembe/Kibabamshe/412 has general boundaries; that the suit property is on the first row of the beach and that an embargo just stops a transaction temporarily. The parties produced by consent the Title Deed in the Plaintiff's bundle of documents.
20. PW2 testified on 28th May 2013 and informed the court that she was an assistant surveyor and had two years of experience in the field.
21. PW2 was in possession of the report prepared by the District Surveyor dated 27th September 2011. The witness admitted that the report in her possession was not conclusive and she was stepped down.
22. The District Surveyor, PW3 testified on 24th June 2013 and stated that he had prepared a report dated 26th June 2013 in respect to the properties in dispute.
23. PW3 informed the court that his report captured the status of the land on the ground and the maps captured portion number 5469 Malindi and parcel of land number Chembe/Kibabamshe/412.
24. According to the surveyor, land portion number 5469 has a survey plan with a fixed boundary while parcel of land number Chembe/Kibabamshe/412 falls under the Chembe Settlement Scheme which has a general survey boundary.
25. PW3 stated that plot number Chembe/Kibabamshe/412 is in the Registered Index Map (RIM) which was prepared from aerial photographs.
26. According to PW3, parcel of land number Chembe/Kibabamshe/412 and portion of land number 5469 share a common boundary in the eastern direction. He confirmed the position of the boundary with the assistance of beacon numbers 331 and 333 which the two plots share. However, the other boundaries do not coincide especially in the northern direction. The witness stated that portion number 5469 engulfs plot number Chembe/Kibabamshe/412 and 411.
27. Other than engulfing parcels of land number Chembe/Kibabamshe/412 and 411, the witness testified that the southern boundaries of portion number 5469 also extend up to the area of

- Chembe/Kibabamshe/375.
28. The area covered by the map in respect to Chembe/Kibabamshe/412 is approximately 3.38 Ha while what is indicated in the copy of the title deed is 3.2 Ha. The area covered by portion number 5469 on the ground by portion number 5469 is 7.429 Ha which is the same as shown on folio reference (F/R) no.213/76.
 29. The witness informed the court that the final authentication of fixed boundaries was done in 1990 while the general boundary in figure number 2 which is in respect to the Plaintiffs parcel of land Chembe/Kibabamshe/412 in his report was done in 1978.
 30. The witness differentiated the general and fixed boundaries. According to the witness, fixed boundaries do not move, and even if they did, they are not supposed to exceed 1mm while general boundaries, which are prepared from unrectified aerial photo enlargement, were never rectified. The area covered was just an approximation and the Registered Index Map that was prepared is what was used for the registration of the land within the scheme. According to the witness, the position of the general boundaries can be misidentified to the degree of plus or minus 15 meters.
 31. PW4 reinstated that the Registered Index Map (RIM) was prepared in the year 1978 after the area was declared an adjudication section. The witness stated that the titles within Chembe/Kibabamshe were issued under the Registered Land Act cap 300 (repealed). The surveyors report was produced as Plaintiff's exhibit number 6.
 32. In cross examination, PW3 stated that while identifying beacons, one uses survey controls which are ordinarily constructed using concrete and iron pins and then connected to the national system of survey.
 33. It was PW 3's testimony that Chembe/Kibabamshe/412 was prepared using the unrectified photo enlargement and therefore their positions are not available because the boundaries have never been fixed by the land registrar.
 34. The witness identified the boundaries of Chembe/Kibabamshe/412 after scaling its figure and after identifying beacons number 331 and 332 and concluded that both parcel of land number Chembe/Kibabamshe/412 and portion number 5469 are existing at the same place.
 35. The witness finally stated that the aerial photograph was used for mounting of the settlement scheme in 1978; that there is no standard of error given for general boundaries but the occupied error in the instance case is 15 meters and that that is why the land registrar is supposed to determine boundaries in case of a boundary dispute.
 36. The court sought clarifications from the witness. The witness informed the court that the fixed boundaries in respect to portion number 5469 were done in 1990. The witness further stated the surveyor who fixed the boundaries should have known the existence of the survey which gave rise to the general boundaries that was done in 1978 by looking at the available records like the maps of the surrounding areas.
 37. The Defendant, DW1, informed the court that his title is for portion number 5469, Malindi which was registered in his favour on 20th November 1990.
 38. The Defendant stated that he was issued with a deed plan number 148579 dated 24th August 1990 which he produced as defence exhibit number 1.
 39. According to the Defendant, his land measures 7.42 Ha while the land the Plaintiff purports to be his measures 3.2 Ha; that plot number Chembe/Kibabamshe/412 had an embargo imposed by the Government. The Defendant produced a letter dated 13th July 2012 showing that parcel of land number 412 was affected by the government embargo as defence exhibit number 2.
 40. DW1 produced an official search for portion number 5469 as exhibit number 3 showing that he is the registered owner of the said land.
 41. In cross-examination, DW1 stated that he bought portion number 5469; that the title was not in his name because the registered owner sold the land to him after being given a Power of Attorney and that he does not know the Directors of the registered owner of portion number 5469. The Defendant stated that the property was transferred in his name on 26th October 2011 while the suit was filed in July 2011.

Plaintiff's Submissions

1. The Plaintiff's counsel submitted that the areas of Chembe Kibabamshe, Jimba and Madeteni are situated in the former 10 mile coastal strip in Coast Province, which was under the sovereignty of

- the Sultan of Zanzibar who later transferred it to the crown and formed part of Kenya protectorate.
2. According to the Plaintiff's counsel, some portions of land in the area were areas claimed under the Land Titles Act, cap 282. The portions of land described as L.R. NO.5045, 5042 and 4239 which were within the subject area were claimed as such and registered under the Registration of Titles Act as CR8336/1.
 3. According to counsel, these portions were surrendered to the Crown in exchange of other lands in the City of Nairobi vide a surrender registered as CR. 8226/4 by Dwarkedas Kenjee while portions described as L.R. 4239 and 5045 were vested by the crown to the Kilifi Trust Land Board as Gede Special Settlement Scheme area vide Gazette Notice Number 90 of 1963 and depicted on Boundary Plan number 179/62 leaving a strip of land of approximately 300 meters from the high water mark. This strip of land, and land reference no. 5042 remained Crown land.
 4. Counsel then submitted on how the Land Adjudication Act Cap 284 was wrongly applied to parts of Chembe Kibabamshe, Jimba and the whole of Madeteni which were not Trust lands and consequently, the Commissioner of Lands initiated the process of cancellation of the title deeds in those areas in 1986 and rectified the registers.
 5. Counsel submitted that the land, including parcel number Chembe/Kibabamshe/412 which falls within Government land, were allocated to squatters by the Settlement Fund Trustees.
 6. The Defendant's counsel submitted that this court should uphold the survey report dated 26th June 2013 in solving the current dispute; that the Defendant produced a certificate of ownership and a certificate of search which confirms that he is the proprietor of land portion number 5469 Malindi and that there was no order restraining the Defendant from being registered as the proprietor of the land after the suit was filed.
 7. According to the Defendant's counsel, the current dispute is on boundaries and not the ownership of land; that it is the Plaintiff who trespassed into the Defendant's land and that he is the one who should pay the costs of the suit.
 8. The Defendant's counsel finally deponed that the Plaintiff's hands are soiled considering that parcel of land number Chembe/Kibabamshe/412 has an embargo imposed by the Government.

Analysis

1. The dispute herein is just one of the myriad problems that bedevil Chembe Kibabamshe area. It is one of the many cases of double, triple and quadruple allocation of titles in that section by the Ministry of Lands under different land tenure systems. The Plaintiff's counsel submitted at length as to how the confusion in the allocation of the land in the said area began and how the Government has been attempting to deal with the said confusion.
2. The Plaintiff's counsel did not however avail to this court the documents and legal notices showing that the whole ten mile coastal strip is Government land and not Trust land. Counsel also did not show by way of evidence the surrender of the titles that had been issued to individuals in the said area under the Land Titles Act in exchange for other lands in Nairobi.
3. Indeed, counsel has mixed up two legal issues pertaining legal regime governing land along the ten mile coastal strip in which the suit property falls.
4. On the one hand, counsel states that upon realization that the Land Adjudication Act, Cap 284 had been wrongly applied to Chembe Kibabamshe, which was not Trust Land, the Government through the Commissioner of Lands in 1986 initiated a process of cancellation of the defective title deeds and rectification of the Registers. According to counsel, the Government realised that the whole area was government land.
5. On the other hand, the Plaintiff's counsel submitted that the Land Adjudication Act, Cap 284 was applied to Chembe Kibabamshe and that the process of adjudication was finalised on 30th May 1978.
6. According to the provisions of Section 3 of the Land Adjudication Act, the Act is only applicable to the ascertainment of rights over Trust/Customary lands and not Government land.
7. The Department of Land Adjudication and Settlement which was previously in the Ministry of Lands is comprised of two divisions, namely, the Land Adjudication Division and the Settlement Division.
8. The Land Adjudication Division deals with the ascertainment of land rights and interests of individuals on customary/trust lands pursuant to the provisions of the Land Adjudication Act and

- the administration of Group Ranches. The Division applies strictly the provisions of the Land Adjudication Act in the ascertainment of the said land rights.
9. The Settlement Division, on the other hand, settles the landless poor and also regularizes the ownership of land occupied by squatters on unalienated Government land. The said Division, through the Settlement Fund Trustees could also purchase private land and settle people.
 10. The Settlement programmes were implemented under the Agriculture Act under sections 167 and 168, Cap 318. These programmes started in 1961 under the Land Development and Settlement Board to settle indigenous people on land bought from former European land owners. Later, the programme evolved and was mandated to settle poor landless Kenyans. The Settlement Programme was undertaken through the Settlement Fund Trustees on behalf of the Government (The National Land Commission has now been given the mandate to manage and administer Settlement Programmes by dint of Section 134 and 135 of the Land Act, 2012).
 11. 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.
 12. According to the evidence of the surveyor, PW3, the general boundary of parcel of land number Chembe Kibabamshe/412 (the plaintiff's land) was done in 1978. The witness informed the court that before the preparation of the said general boundaries, the area of Chembe/Kibabamshe was declared as an adjudication section.
 13. The witness produced the survey plan for portion number 5469 being F/R number 213/76 dated 24th August 1990.
 14. According to the witness, portion no.5469 measuring 7.429 consumed parcel of land number 412, 411 and part of 375.
 15. It was the witness's evidence that had the surveyor who prepared the survey plan for portion number 5469 which has fixed boundaries checked the records from the Survey of Kenya and the Director of Physical Planning, he would have discovered that the area was surveyed in 1978.
 16. I have looked at the diagrams that were drawn by PW3 showing the extent of the boundaries of portion number 5469 and the boundaries of parcel of land number Chembe Kibabamshe/412. It is obvious that although the boundaries for parcel of land number Chembe Kibabamshe/412 are general, portion number 5469 which has fixed boundaries is on “top” of parcels number Chembe Kibabamshe/412, 411 and part of 375. This is therefore not a boundary dispute as contemplated by section 21 of the Registered Land Act, cap 300 (repealed).
 17. When land is declared an adjudication area or a settlement scheme, enlarged and unrectified photographs are usually supplied by Survey of Kenya to the Land Adjudication and Settlement Department for use in the demarcation process. Those are the maps that the demarcation officers use for either ascertaining the rights of the residents of an area over Trust land or ascertaining the claims of squatters over Government land.
 18. Upon receipt of the said maps, the demarcation officers then determine the ground position of the boundaries, photo-identify them and plot them on the enlarged photographs.
 19. It is only after the Chief Land Registrar confirms the completeness of the Registered Index Map that he forwards it to the District Land Registrar for issuance of individual titles.
 20. It was not uncommon for the general boundaries to be created and shown in the Registered Index Maps for an area and then title documents issued many years later.
 21. Unlike the general boundaries which are recognised under the repealed Registered Land Act, a fixed boundary survey is a survey of land with accurate linear and angular measurements to aid the registration of a title.
 22. According to the Plaintiff's exhibit 3, parcel of land number Chembe Kibabamshe/412 was within a settlement scheme, and the same was allocated to the Plaintiffs by the Settlement Fund Trustees on 30th June 1999. The Plaintiffs paid the requisite fees and were issued with a Title Deed on 20th February 2001. The title was issued pursuant to the survey that had been in prepared in the year 1978 inn Chembe Kibabamshe.
 23. Considering that the area had already been surveyed, the rights of the residents of the area could be ascertained if the land was Trust land. If the land was Government land, then the people residing on the land would be considered as squatters and the same map would be used to ascertain their claims. The later scenario is what happened in this particular case.

24. The Defendant did not explain the process that was followed for the creation of portion number 5469 in 1990 and how the land was transferred to him in the year 2011. Although the title document shows that the property was transferred to the Defendant on 26th October 2011, the Sale Agreement and the Transfer Documents were not produced in evidence.
25. No evidence was called by the Defendant to show how the survey in respect to portion number 5469, Malindi was conducted in 1990 in view of the fact that the area had already been declared a settlement scheme and surveyed in 1978.
26. In view of the fact that the aerial photographs and the Registered Index Map of parcel of land number Chembe Kibabamshe/412 were prepared in 1978 and the said parcel of land was allocated to the Plaintiffs by the Settlement Fund Trustees, I find and hold that the Plaintiffs have proved their case on a balance of probabilities. On the other hand, the Defendant did not prove his Counter Claim at all.
27. I therefore allow the Plaintiffs' claim dated 11th July 2011 as prayed and dismiss the Defendant's Counter Claim with costs.

Dated and Delivered in Malindi this **18th** day of **October**, 2013

O. A. Angote

Judge