



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO.67 OF 2013

- 1. MOHAMED SALIM HUSEIN**
- 2. GLADYS WANJIKU**
- 3. CHARLES MULI KAUBDU**
- 4. JOSEPH KIPLANG'AT.....PLAINTIFFS/RESPONDENTS**

=VERSUS=

EGERTON UNIVERSITY.....DEFENDANT/APPLICANT

RULING

Introduction

1. The Notice of Motion by the Defendant before me is dated 24th September 2013. The Application is brought under Order 2 Rule 15(1) (a) and (d) of the Civil Procedure Rules seeking for the following reliefs:
 - a. **THAT this Honourable court be pleased to strike out the present suit/Plaint.**
 - b. **THAT the costs of this application be provided for and borne by the Plaintiffs.**
2. The Application is premised on the grounds that the suit does not disclose any reasonable cause of action and amounts to an abuse of the court's process; that the Plaintiffs have not alleged any legally cognisable proprietary interest or rights over the suit land; that the Plaintiffs have acknowledged the Defendant's interests and rights over the suit land and thus it does not lie for the Plaintiffs to purport to claim any interests adverse to the interests that they have acknowledged and that the Plaintiffs' claim is hopeless, baseless and without a foundation in law or equity.

The Defendant's/Applicant's case

3. The Application is supported by the affidavit of the Defendant's Deputy Vice-Chancellor, Administration and Finance.
4. According to the deposition by the Deputy Vice-Chancellor, the suit property is government land and the Defendant is a public university as acknowledged by the Plaintiffs and therefore the Plaintiffs cannot maintain a suit for adverse possession against the Defendant.
5. The Defendant further deponed that the suit is precluded by the doctrine of estoppel as the Plaintiffs had before the filing of the suit acknowledged the Defendant's interest in the suit land.

The Plaintiffs'/Respondents' case

6. The 4th Plaintiff filed a Replying Affidavit on 22nd October 2013 and deponed that it is not true that the Plaintiffs have acknowledged the Defendant's interest and rights over the suit property; that the Plaintiffs have occupied the suit property for over the statutory period and the interference by the Defendant was merely allowed based on their promise to sub-divide the land amongst the Plaintiffs in return to the Plaintiffs ceding 300 Ha for the purpose of research.
7. It is the 4th Plaintiff's deposition that the Defendant is estopped from claiming the suit property after allowing the Plaintiffs to clear the bush land and develop the same thus incurring huge and colossal amounts of money and labour; that the Defendant knew that the land was already occupied and cannot purport to claim that they ceded 300 Ha to the Plaintiffs and retained 170 Ha and that it cannot be deduced from the instant application what part of the suit property the Defendant is claiming.
8. The Defendant/Applicant advocate made oral submissions on 31st October 2013 which I have considered. Although Mr. Obaga, counsel for the Plaintiffs/Respondents was in court on the day the Application came up for hearing, he walked out of court before submitting.

Analysis and findings

9. Order 15 Rule 1(a) and (d) of the Civil Procedure Rules 2010 provides that at any stage of the proceedings, the court may order to be struck out or amended any pleading on the ground that it discloses no reasonable cause of action or defence in law or it is otherwise an abuse of the process of the court.
10. While considering an Application under Order 15 Rule 1(a), the court is not supposed to consider any evidence. Indeed, a party is not required to prove any allegation in the pleadings. The court is only obliged to look at the Plaint and determine if the claim raises any cause of action as against the Defendant or any other party that the Plaintiff may wish to include in the suit by way of an amendment.
11. According to the Plaint herein, the Plaintiffs have averred at paragraph 4 that in 1996, they settled on part of all that unsurveyed land in Lamu County known as land reference number 209163/D Lamu West District and that they are lawfully and legally on the said land with the knowledge and consent of the Government.
12. The Plaintiffs have further averred in paragraph 7 that in the year 2013, the Defendant sent its officers to forcefully evict them despite the matter being under deliberations and pending before the national assembly.
13. The Plaintiffs at paragraph 13 have prayed that the Defendant be permanently restrained from interfering with the suit property mentioned in the Plaint.
14. The Plaintiff has described the Defendant in the Plaint as a public university established under the Universities Act NO. 42 of 2012.
15. According to the Defendant's Defence filed on 21st May 2013, the Plaintiffs encroachment on Land Reference Number 209163/D Lamu West District is illegal and without the consent of the Government; that the Plaintiffs have no interests or rights over the suit land and that the suit land was surveyed pursuant to the Defendant's instructions and on the basis of the allocation that was made to it by the Government.
16. Although the Plaintiffs averred in the Plaint that they settled on the suit property in 1996 with the consent of the Government, they did not state the basis on which they settled on the land and where they had come from.
17. I have perused the entire Plaint and at no point is the Plaintiff claiming the land by way of adverse possession. The Plaintiffs are not even claiming that the land is trust land and that they are entitled to it as residents of the area or as community land as defined under the Constitution or any other law.
18. It is the Plaintiff's averment that they settled on the suit property with the knowledge and consent of the Government. Even if that assertion is true, the Plaintiff can only be said to have been licensees over Government land and if indeed the Government allocated the same land to the Defendant, then the Plaintiffs have no remedy other than giving way.
19. In the case of **Heptulla Vs Noormohamed (1984) KLR 581**, the Court of Appeal held as follows:

“The Respondent could not rely on the illegal occupation of the store in his defence as he could not establish lawful occupation. There were no triable issues.”

20. In my Ruling of 25th July 2013 in this matter I stated at paragraph 23, 24 and 25 as follows;

“I have gone through the Plaintiffs’ Complaint and the Application I have not seen in the pleadings how and when the Plaintiffs’ interest in the suit land crystallised. Although the Plaintiffs averred that they have been on the suit property since 1996 and that they have carried out developments and construction of houses, they have not stated that they are claiming the land by virtue of having stayed on the suit for more than 12 years, thus acquiring interests recognizable in law. And even if their claim was for adverse possession as provided for under section 38 of the Limitation of Action Act, the same cannot succeed over government land, or land otherwise enjoyed by the Government. That is the clear reading of section 41(a) (i) of the Limitation of Action Act. Even if the government allowed the Plaintiffs to use the land as the Plaintiffs have attempted to demonstrate, they cannot claim to have any interest over such land and the principle of estoppel cannot come to their aid. Such occupation can only amount to a temporary occupational licence which cannot create any other interest on such land. Mere possession or occupation of government land cannot confer any kind of title or interest recognizable in law upon the Plaintiffs.”

21. It is common knowledge, as was held in the case of **Kyangombe Resident Association & 4 Others Vs Attorney General & 2 Others** that in order for the court to protect the right to property, a party must establish a proprietary right or interest in the land. The Constitution does not itself create these rights or interests.

22. The Plaintiffs have not shown or averred in the Complaint their proprietary interest or rights over the suit property which they have admitted to be Government land.

23. Having looked at the Complaint, and for the reasons I have given above, I find and hold that the Complaint does not disclose any cause of action as against the Defendant or the government and it is an abuse of the court process.

24. In the circumstances, I strike out the Complaint with costs to the Defendant.

Dated and Delivered in Malindi this 19th day of **December**, 2013

O. A. Angote

Judge