



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO.238 OF 2015

MIRIAM MBEKE NYAMASYO & 2 OTHERS.....PLAINTIFFS

VERSUS

DISHON ODHIAMBO & 6 OTHERS.....DEFENDANTS

JUDGMENT

(Plaintiffs having been allotted land in a Site & Service Scheme by the 7th defendant; 1st -6th defendants encroaching on the land and undertaking developments; plaintiffs seeking the eviction of the 1st – 6th defendants; 1st – 6th defendants being persons who claim that the land is their ancestral land or purchased from a person who claimed that he owns the land; the vendor not having any title to the land; persons thus buying from a party with no title and cannot be protected; no evidence that this is the ancestral land of the other defendants; argument that the plaintiffs only hold an allotment letter and cannot sustain their action; allotment letter being an interest in land and the holder thereof can move to court to protect his interest; in any event no better title availed by the 1st – 6th defendants; 7th defendant acting maliciously in not protecting the plaintiffs whom they allotted the land; judgment entered for the plaintiffs)

1. This suit was commenced through a plaint which was filed on 28 September 2015. The three plaintiffs aver that they have filed this suit on behalf of all plot owners of Miritini Site & Service Scheme and I have seen an order issued in Mombasa ELC Miscellaneous Application No. 38 of 2015 which granted leave to the plaintiffs to proceed with this suit on behalf of all the plot owners of Miritini Site & Service Scheme (The Scheme). The 1st plaintiff owns the Plots No. 628 and 629; the 2nd plaintiff the Plots No. 622 and 721; whereas the 3rd plaintiff owns the Plot No. 734, all situated in the Scheme. The plaintiffs contend that the 1st – 6th defendants have trespassed into their plots and built structures hence denying them their rightful use of the property. They aver in their plaint that they have complained to the 7th defendant, the County Government of Mombasa, Department of Lands, Housing and Physical Planning, but no action has been taken, and that in fact, the 7th defendant is aiding the trespassers. In the suit, the plaintiffs seek the following orders :-

(i) The defendants be restrained by an order of injunction from trespassing, constructing, selling or in any way dealing with Plot No. 622, 628, 629, 721 and 734 or any other plot no allocated to them in Miritini Site & Service Scheme.

(ii) An order for vacant possession for any trespassers in Miritini Site & Service Scheme.

(iii) Costs of this suit.

2. The 1st – 6th defendants filed defence and counterclaim. They averred that some of them have been living on the suit premises for over 20 years and have built permanent residential and commercial houses and are therefore not trespassers. They averred that they are members of a Self Help Group and are not goons. They pleaded that they have a priority claim of ownership since they have been in occupation without interruption or interference by the plaintiffs. They pleaded that the plaintiffs do not have title, and that if allotment letters were issued, the plaintiffs and the 7th defendant were aware that the plots are already occupied. They averred that they have commenced a process of being allocated the land by the National Land Commission through their Matopeni Self Help Group. In their counterclaim, they pleaded that they have a priority claim to the land and have commenced the process of having the land regularly allocated to them. They have sought the following orders :-

(i) The plaintiffs be restrained by an order of injunction from interfering with the defendants' quiet enjoyment of the land pending the regular allocation of the same by the National Land Commission and the County Government of Mombasa.

(ii) The plaintiffs' suit against them be dismissed and/or struck off with costs to the defendants.

3. The plaintiffs filed a reply to defence and defence to counterclaim. They pleaded that the plaintiffs have never gone to any court of law to seek any prescriptive rights by way of adverse possession and their assertion that they have been in the land for a long time has never been

sanctioned by the law. They averred that the land was properly allocated to them by the Municipal Council of Mombasa which was the trustee and planning authority of land within its jurisdiction. They stated that they pay plot charges to the County Government of Mombasa and that the County Government has committed itself to issue certificates of leases. They reiterated that the defendants are trespassers.

4. The 7th defendant filed defence vide which it pleaded that the plaintiffs do not have title to the plots. It denied receiving any complaints from the plaintiffs and denied encouraging other persons to trespass.

5. PW-1 was Stephen Muindi Mutisya, the 2nd plaintiff. He is employed here in Mombasa. He testified that in the year 2003, he purchased the plot No. 721 in Miritini Site & Service from one Gordon Odira Odhiambo. They proceeded to the Municipal Council of Mombasa and signed a transfer. He was then issued with an allotment letter dated 6 June 2003. He produced a search issued by the County Government of Mombasa to demonstrate that he is the owner of the plot. He produced receipts to show that he has been paying the rates. He stated that he also purchased the Plot No. 622 from one Kassim on 21 September 2011 and he produced the sale agreement and transfer. He was issued with an allotment letter dated 6 May 2013. He stated that in April 2014, he got information that people were trespassing on their plots and disposing them claiming to own them. He went to his Plot No. 721 and found a two roomed brick house put up. He stated that the occupants were chasing away the rightful owners. He later came to learn that they are the 1st to 6th defendants. He stated that when he purchased the plot there were no persons here. Cross-examined, he stated that he was yet to get a title deed and that the scheme was to be approved by the Commissioner of Lands. He wished to develop his plots in the year 2014 but the fence was interfered with.

6. PW-2 was Miriam Mbeke Nyamasyo the 1st plaintiff. She is a business lady living in Nyali. She testified that she purchased the Plots No. 628 and 629 from one Gerald Mwatha in the year 2007 and they proceeded to the Municipal Council of Mombasa where the Plots were transferred to her. She had the transfer instruments and search issued by the 7th defendant. She has also been paying ground rent and she had receipts. She produced an approval for development of the plots. She stated that she took a contractor to the plot but they were chased away by people who claimed that they owned the plots. She had fenced the plots using poles and barbed wire but these were pulled down.

7. PW-3 is a medical doctor. He stated that he applied for a plot in Miritini in the year 1998 and was allocated the Plot No. 734. He then started making payment for the plot. He had a search from the 7th defendant showing that the plot is registered in his name. He stated that he was shown the plot on the ground and viewed it, and there was no one on the ground, but subsequent visits have not been easy, as other people have put up "mabati" structures. He did not know who had put up the structures on his plot.

8. With the above evidence, the plaintiffs closed their case.

9. DW-1 was Salim Mgunyi Mruche, the 4th defendant. He had a witness statement which he adopted as his evidence in chief. In that statement, he has averred that he has been resident in Miritini in Matopeni since 1971 when the land was owned by his parents. He got married here and has been living on the land with his family. He stated that he has been using the land for domestic purposes, especially agriculture, to earn a living, and they decided as a family to welcome different tribes to also reside in the place. He stated that they have been living with them peacefully and most have constructed permanent residential and business premises. He produced 13 photographs to show his occupation. He stated that the occupants have formed a group called Matopeni Community Group. He produced a certificate of registration for the group and a list of members. He stated that it was his father, Mbuja Mbechenga, who invited other persons to occupy the land and they would give him what he referred to as "kajama" (seemingly a small fee to be allowed to occupy land). He stated that he has a business permit for a bar named Jumbo Bar & Restaurant, a receipt book for rent, and electricity bills. He testified that they wrote a letter dated 5 October 2015, to the National Land Commission seeking title but did not get a response to the letter. He closed by saying that he was born on the land.

10. Cross-examined, he stated that he was born in 1961 and that this land was left to him by his parents. He stated that he built his residence but he had no building plan approval. He stated that he has never seen surveyors come to the ground and that there are no beacons. He was not aware that people applied for and were given the plots by the Municipal Council of Mombasa. He stated that he has never seen Municipal Council personnel on the land. He could not recall when the Matopeni Group was formed (though the registration shows 15 February 2015). He conceded that the electricity bills he produced in evidence were not his and so too the receipt book. He asserted that nobody has come to the land to claim ownership.

11. DW-2 was Peter Mutinda, the 2nd defendant. He sells clothes. He testified that he moved into Mombasa in the year 1999 and developed friendship with Mbuja Mbechero. He (Mzee Mbuja) told him that he owns the land and he could show him a place to build. He then sold to him a piece of the land for KShs. 300,000/= in the year 2014. He proceeded to build a permanent house. Mzee Mbuja died in the year 2015 or 2016. The witness offered that the 4th, 5th and 6th defendants are Mzee Mbuja's sons. They formed the Group so as to agitate for the land and he had a letter from the Ministry of Lands for the survey of the land. He was of the view that this land should be allocated to them. He stated that the plaintiffs have not been on the land. Cross-examined, he stated that Mzee Mbuja did not show him any land ownership document. He later learnt that this was Government land. He found this out in the year 2016. He never got building approval when he developed his house. He stated that he has not seen County employees on the land nor any beacons. He was not aware that some people hold allotment letters.

12. DW -3 was Joseph Kilonzo Mutiso, a mason. He testified that he came to live on the land in the year 2013 after buying a piece of it from Mzee Mbuja who told him that he owns the land. He proceeded to build a permanent house. He asked that they be given the land as they have been on the land for a long time. He stated that he has never seen the plaintiffs on the land. Cross-examined, he did state that Mzee Mbuja did not show him any land ownership documents. Neither did he inquire of its ownership from the County Government. He also did not seek approval for his building. He has never asked on what basis other people claim the land.

13. DW-4 was Mudzo Mbuja, the 6th defendant. He stated that his father, Mzee Mbuja, died in the year 2016. He mentioned that he lives on the land with his family. He wished to have title to the land that he occupies. Cross-examined, he stated that he has lived on the land since the year 1971 when he was born, though I did make a note that he must be much older. He stated that he has not seen the land being surveyed and does not know that the Municipal Council allocated the plots.

14. With the above evidence, the 1st – 6th defendants closed their case. I declined an adjournment on behalf of the 7th defendant meaning that the 7th defendant offered no evidence.

15. I invited counsel to file written submissions which they did.

16. In his submissions, Mr. Tindi, learned counsel for the 1st – 6th defendants, inter alia submitted that under Section 26 of the Land Registration Act, 2012, only a certificate of title is conclusive proof of proprietorship. He submitted that the process of allotment is being challenged before registration and hence the issue of proprietorship has not been finalized to enable the plaintiff be entitled to the prayers that they have sought. He referred to the case of *Shadrack Kuria Kimani vs Stephen Gitau Nganga & Another (2012) eKLR*, to support the proposition that a letter of allotment is not equal to title to property. He submitted that the letters of allotment have a condition that they are subject to approval by the Commissioner of Lands. He submitted that no approval letter has been issued by the Commissioner of Lands. He submitted that the defendants cannot be referred to as trespassers. He submitted that they have been on the land and that they have written to the National Land Commission to be issued with title. He referred to the evidence of the defendants who said that they were born on the land and submitted that this land is their ancestral land. He referred to Section 28 of the Land Registration Act, 2012, that provides for overriding interests, one of which is a customary trust. He relied on the case of *Peter Gitonga vs Francis Maingi Mikiara* on the doctrine of customary trust. He submitted that the allotment letters were obtained through a corrupt scheme. He also asked me to take into account the witness statements and affidavits of the defendants who did not attend to testify.

17. On his part, Mr. Kenzi, learned counsel for the plaintiffs, inter alia submitted that the plaintiffs have demonstrated that they are the bona fide allottees of the plots in the Scheme. He referred me to the documents that the plaintiffs hold and submitted that the letters of allotment and the sale agreements are proof of ownership. He pointed out that the defendants have no documents for the land and even those who claim to have purchased did not have any written agreement contrary to the requirements of Section 3 (3) of the Law of Contract Act, Cap 23, and Section 38 (1) of the Land Act, 2012. He refuted that they have any right under customary trust. He acknowledged that the 7th defendant did not adduce any evidence in defence, but referred me to an affidavit filed by the 7th defendant, in response to the plaintiffs' application for injunction, which affidavit supported the position that the plaintiffs are the rightful allottees of the plots.

18. M/s Mwangi Njenga & Company, which firm is on record for the 7th defendant, inter alia submitted that the case of the 7th defendant is that the parcels of land are held by it under a trust under the Miritini Site & Service Scheme and beneficiaries issued with letters of allotment. He referred me to the affidavit of Caxton Mbaru Kai filed on 18 January 2016. He submitted that contrary to the plaintiffs' claim, the 7th defendant has not encouraged, nor permitted trespassers to be on the land. He submitted that the orders sought by the plaintiffs do not affect the 7th defendant and that the plaintiffs have failed to disclose a cause of action against the 7th defendant. He submitted that the suit against the 7th defendant should be dismissed with costs.

19. I have considered all the above. First, all counsel have in one way or another made reference to documents, statements, or affidavits, which were not produced during the hearing. Mr. Kenzi and M/s Mwangi Njenga & Company Advocates, made reference to the affidavit of Caxton Mbaru Kai, whereas Mr. Tindi, made reference to the witness statement of the 1st defendant and his affidavit of 15 October 2015, sworn in reply to the plaintiffs' application for injunction. I am not aware of any provision of the law which supports the proposition that judgment be based on evidence not produced during the hearing. I will refer to Order 18 Rules 2 and 3 which provide as follows :-

Order 18 Rule 2 :Statement and production of evidence

Unless the court otherwise orders—

(1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence, and may then address the court generally on the case. The party beginning may then reply.

(3) After the party beginning has produced his evidence then, if the other party has not produced and announces that he does not propose to produce evidence, the party beginning shall have the right to address the court generally on the case; the other party shall then have the right to address the court in reply, but if in the course of his address he cites a case or cases the party beginning shall have the right to address the court at the conclusion of the address of the other party for the purpose of observing on the case or cases cited.

(4) The court may in its discretion limit the time allowed for addresses by the parties or their advocates.

Order 18 Rule 3 : Witnesses to be examined in open court

The evidence of the witnesses in attendance shall be taken orally in open court in the presence of and under the personal direction and superintendence of the judge

20. It will be seen from the above that evidence is supposed to be adduced in court during a hearing. There is however a narrow window for acceptance of affidavit evidence in Order 19 Rule 1 which provides as follows :-

Order 19 Rule 1: Power to order any point to be proved by affidavit

Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the

affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:

Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

21. There is thus discretion under Order 19 rule 1 for the court to order that a particular fact or facts be proved by affidavit.

22. However, within the course of these proceedings, neither party asked that any fact be proved by way of affidavit or a witness statement without the deponent or maker of the statement being called to be cross-examined. Such evidence cannot be introduced into the proceedings during the submissions stage. The other party has a right to challenge the evidence in such affidavits or statements and will not be able to do so unless the same are produced during the hearing. I am afraid that in those circumstances, I cannot base this judgment on affidavits or statements which were not adduced during the hearing. The judgment will therefore be based on the pleadings and evidence that the parties produced in court.

23. The disputed land appears to be in a site and service scheme that was under the now defunct Municipal Council of Mombasa which is the predecessor to the 7th defendant. The Municipal Council of Mombasa did enter into an agreement to sell these plots to various purchasers, some of whom sold their plots, with the approval of the local authority. The allottees and the purchasers from the original allottees, comprise the plaintiffs in this case. I have seen some of the agreements that the original allottees had with the 7th defendant's predecessor, the sale agreements to the 2nd purchasers, and the consents by the 7th defendant and/or its predecessor approving these transfers. Some, like the 1st defendant, have proposed to develop their plots and have submitted building plans which have been approved. The position on the ground however, is that the 1st – 6th defendants, have trespassed into their plots. Of the defendants who testified, the 2nd and 3rd defendants stated that they purchased land within the area from one Mbuja Mbechengo (sometimes also referred to as Mbuja Mbechero or Mzee Mbuja). Mzee Mbuja however did not have any title document to the land nor any document to demonstrate ownership of it. When they purchased the land, they did not inquire from the local Government on its ownership. They say that they built on the land, but even prior to building, they did not obtain any approval of building plans from the 7th defendant. The 4th and 6th defendants are sons of Mzee Mbuja and they allege that this is their ancestral land.

24. In his submissions, Mr. Tindi emphasised that the plaintiffs only have a letter of allotment and nothing more and cannot be protected. I do not agree. In as much as a letter of allotment is not a title deed, it is a document which demonstrates that the holder thereof has an interest in the land in issue. That interest may be inchoate, but it is an interest all the same, and the holder of the allotment letter has every right to protect his interest. Indeed, in the case of *Nancy Wanjiru Kuniya (Suing as administrator of the estate of Augustine Kuniya), Nakuru ELC No. 295 of 2014*, a suit was filed by a holder of an allotment letter in a Site & Service Scheme, seeking to cancel a leasehold title issued to the defendant. The evidence therein showed that the land was allotted to the plaintiff, but somehow, title issued to the defendant. I heard the case and held for the plaintiff and proceeded to cancel the title of the defendant. Mr. Tindi, referred me to the case of *Shadrack Kuria Kimani vs Stephen Gitau Nganga & Another*. In that case, the plaintiff had title and sued the defendants who had encroached on his land. The defence of the defendants was that the title of the plaintiff was obtained fraudulently as they held an allotment letter. Judgment was entered for the plaintiff. I however note that in that case, the defendants never came to court to adduce evidence in defence and therefore the plaintiff's evidence was uncontested. In other words, it ended up being an uncontested case. But neither is the situation in the *Shadrack Kuria* case the same situation that we have here as the 1st – 6th defendants have no title document nor indeed any documentation that would support their contention that this land belongs to them. Where a person has an allotment letter and the other does not, then the holder of the allotment letter, must be held to have a better title, unless the other party can demonstrate other right that would entitle him to the land, which would be superior to the allotment letter. In our situation, the defendants have none. The 4th and 6th defendants claim that this is their ancestral land but save for their oral evidence, nothing else backs up this assertion. Neither is there anything to demonstrate that Mzee Mbuja ever had title to this land or held any ancestral rights to it. This is a Site & Service Scheme which must have been surveyed into plots. If indeed, the 4th and 6th defendants had overriding ancestral claims over the land, why didn't they file suit to challenge this area being made a Site & Service Scheme?

25. My assessment of the evidence is that Mzee Mbuja and the 4th and 6th defendants came into the land much later after the area had already been made a Site & Service Scheme. They simply invaded the land and encouraged others to also move in. Mzee Mbuja was in fact audacious enough to sell portions of the land. These buyers did not demand from Mzee Mbuja any document of title and they do not even appear to have entered into any written agreement. They had a duty to conduct due diligence before parting with their money for the land in the Scheme. Some developments were undertaken but none received the approval of the 7th defendant as is required. In those circumstances, I do not see how anybody claiming to have purchased or developed land in the Scheme can be protected.

26. Mr. Tindi in his submissions tried to argue that there is an ancestral trust in favour of the 1st – 6th defendants and he referred me to the case of *James M'Ngaruthi R'Rintari & Another vs Muguna M'Rintari, Meru ELC No. 35 of 2002*. That was a case where one brother had title and the other brother came to court to claim that it was actually family land. This was upheld by the court which held that the other brother also has a share in the land. That is not the position in this case. The plaintiffs are not the brothers or relatives of the 1st – 6th defendants and it cannot be said that they hold their allotment letters through some sort of a customary trust in favour of the 1st – 6th defendants.

27. I cannot fault the plaintiffs for coming to court seeking the eviction of the 1st – 6th defendants from their land. As I have said, although they only hold allotment letters, they are entitled to protect the interest in the allotment letters. The 1st – 6th defendants have not demonstrated that they have a title that is more superior to that held by the plaintiffs and cannot hinge their defence on the assertion that the plaintiffs only have an allotment letter. The defendants have not demonstrated to me that they should be allowed to continue with possession of the land that has been allotted to the plaintiffs. I therefore find that the plaintiffs are fully entitled to the orders of eviction and permanent injunction against the 1st – 6th defendants. I find no merit in the 1st – 6th defendant's counterclaim and the same is dismissed.

28. I am surprised that in its defence, the 7th defendant pleaded that it does not recognize the plaintiffs yet it is the very 7th defendant or its

predecessor, who issued allotment letters to the plaintiffs. The defence of the 7th defendant was in the circumstances malicious. The plaintiffs have availed letters of complaints of encroachment to the 7th defendant but the 7th defendant has not taken any steps to stop the developments that the 1st – 6th defendants or other occupants of the Scheme are undertaking without approval. The 7th defendant's conduct must be chastised. In those circumstances, the costs of this suit will be paid jointly and/or severally by all the defendants.

29. Judgment accordingly.

DATED AND DELIVERED THIS 3RD DAY OF MARCH 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA