



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 74 OF 2017

NAOMI ROBERT AND 110 OTHERS.....PLAINTIFFS

VERSUS

NASSER KHALIFA ISSA.....DEFENDANT

JUDGMENT

BACKGROUND

1. In their Complaint dated and filed herein on 3rd April 2017, the 111 Plaintiffs pray for Judgment against the Defendant for:-

i. A permanent injunction restraining the Defendant, his agents, servants or any other person acting under the instruction of the Defendant from barring the Plaintiffs from accessing Plot Nos. 73, 79, 92 and 98 in Magarini within Kilifi County;

ii. A declaration that the Plaintiffs are the rightful owners of Plot Nos. 73, 79, 92 and 98;

iii. Costs of this suit; and

iv. Any other order the Court may deem fit and just.

2. The above prayers arise from the Plaintiffs contention that they have been in actual possession of the said Plots of land since time immemorial cultivating the same and growing thereon cashew nuts, mango trees, maize and cassava among other crops. As a result of the prolonged occupation, the Plaintiffs who refer to themselves as the Kapupuni Group aver that their grandparents and Kin have been buried over time on the suit plots.

3. The Plaintiffs accuse the Defendant of inviting them to a meeting on 12th December 2016 whereupon he demanded that the Defendants vacate the suit plots on the ground that he wanted to build apartments thereon. The Defendant thereafter proceeded with the help of the Provincial Administration to bar the Plaintiffs from accessing the said plots and proceeding to cultivate the same for his own use. Despite notice of intention to sue, the Defendant has ignored or neglected to vacate the land and hence this suit.

4. In a Statement of Defence and Counterclaim dated 7th July 2017 and filed herein on 21st July 2017, Nasser Khalifa Issa (the Defendant) vehemently denies that the Plaintiffs have been in actual possession of the suit plots as alleged. It is his case that the Plaintiffs' Kapupuni Group is a well-known illegal group terrorizing the lawful land owners within Mamburi and Magarini areas by forcefully entering onto their land and claiming all land within the area to belong to their ancestors.

5. The Defendant accuses the Plaintiffs of invading and forcefully entering his Plot No. 79 at Kagombani, chasing away his workers on site, damaging the wire fence and beginning to cultivate the land without his permission.

6. By way of the Counterclaim, the Defendant states that he is the Administrator of the Estate of Said Bin Sweshum Elkhassiby and Mwanashau Bint Hamisi who were the registered owners as tenants in common of Plots Nos. 39, 79, 80, 219 and 220 Mamburi. It is the Defendant's case that shortly after the Plaintiffs filed this suit and in the absence of any Court order, the Plaintiffs proceeded to forcefully and violently enter into the Defendant's Plot No. 79, allocated portions thereof to themselves and started cultivating the same.

7. The Defendant further asserts that he had compensated the 40th Plaintiff Edward Karisa Mumbo to the tune of Kshs 124,500/- for his crops that had been removed from the suit property and demands that the said Plaintiff be compelled to refund the same.

8. In this regard the Defendant prays for Judgment to be entered against the Plaintiffs and that:-

a) The Plaintiffs suit be dismissed with costs.

b) The Plaintiffs be forcefully evicted from the Defendant's Plot No. 79 Mambui.

c) The 40th Plaintiff be ordered to refund the sum of Kshs 124,500/ paid to him by the Defendant.

d) The 40th Plaintiff be forcefully evicted from the three acres portion earlier allocated to him.

e) Costs of this suit.

The Plaintiff's Case

9. On 9th May 2018 when the matter came up for hearing, neither the Plaintiffs nor their Advocates attended Court. Being satisfied that the Defendant who fixed the matter for hearing had duly notified the Plaintiffs of the hearing date, the Plaintiffs' suit was dismissed for non-attendance. A new date was thereafter fixed for the hearing of the Defendant's counterclaim.

The Defence Case

10. In support of their Counterclaim, the Defence called one witness who testified in that regard.

11. DW1-Nasser Khalifa Issa (the Defendant) told the Court that he is the Administrator of the Estate of Said Bin Sweshum Elkhassiby and Mwanashau Binti Hamisi who were the registered owners of Plot No. 79 Mambui. He accused the Plaintiffs of invading the said Plot of land and proceeding thereafter to plant maize and other food crops thereon.

12. DW1 testified that he had earlier identified the 40th Plaintiff as the only genuine squatter who had been residing on their land and that he had decided to allocate him some three acres elsewhere plus a compensatory sum of Kshs 124,500/- for his crops which he had planted on the land. DW1 however told the Court that since the 40th Plaintiff had ganged up with the other Plaintiffs herein, it is only proper that he vacates the land he had been given and refund the sum of Kshs 124,500/-

Analysis and Determination

13. I have considered the pleadings herein and the testimony of the sole Defence witness. I have also considered the exhibits placed before me by the Defendant as well as the written submissions of Ms Ruttoh, Learned Counsel for the Defendant.

14. Testifying as DW1 in the Counterclaim, the Defendant told the Court that he is the Administrator of the Estate of the registered proprietors of Plot No. 79 Mambui. He produced a Copy of the Provisional Certificate of Title in evidence as he indicated the original title was misplaced.

15. DW1 told the Court that shortly after the Plaintiffs filed this suit, they proceeded to invade the suit property, sub-divided the same amongst themselves and started cultivating the same. He denied that the Plaintiffs had lived on the land since time immemorial as they claimed and/or that they had buried any of their kinsmen on the land.

16. From the material placed before me, it is apparent that the Defendant is the lawful heir of all that property described as Plot No. 79 Mambui. The Plaintiffs did not adduce any evidence before me to show that they have any legal right or claim over the said parcel of land.

17. As the registered proprietor of the suit property, the Defendant has the absolute ownership thereof together with all rights and privileges belonging or appurtenant thereto. Arising from the interest conferred upon the Defendant by dint of his registration as the proprietor of the land, the Plaintiffs had no right to invade, occupy and/or cultivate the same without his consent.

18. In the result, I find and hold that there is merit in the Counterclaim. In the absence of any contrary testimony to that of the Defendant, I find that the Defence case has been proved to the required standard as the Plaintiffs did not controvert any bits thereof.

19. Accordingly and for the avoidance of doubt, I did not find any merit in the Plaintiff's claim herein. The Plaintiffs' suit is therefore dismissed. On the other hand, I was satisfied that the Defendant had proved its Counterclaim. Judgment is accordingly entered for the Defendant as against the Plaintiffs as prayed in the Counterclaim.

20. The Defendants will have the costs of both the Plaintiffs' suit and the Counterclaim.

Dated, signed and delivered at Malindi this 11th day of July, 2019.

J.O. OLOLA

JUDGE