



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 90 OF 2015

ALICE WANJIKU NJOROGE

CAESER GIKUNJU MUNENE.....PLAINTIFFS

VERSUS

1. SUSAN WAMBUI KABUU

2. LAND ADJUDICATION AND SETTLEMENT LAMU

3. LAND REGISTRAR LAMU

4. THE HON. ATTORNEY GENERAL.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By a Plaint dated and filed herein on 10th June 2015, Alice Wanjiku Njoroge and Caesar Gikunju Munene (the Plaintiffs) pray for an order of rectification of the register and for the Plaintiffs to be registered as proprietors of LR No. Lake Kenyatta/2786.
2. Those prayers arise from the Plaintiff's contention that they were the first in time to gather and clear the said parcel of land and that their names were the first to be recorded against the land as at the time of land adjudication and settlement carried out in the area by the 2nd Defendant. It is their case that they were later surprised to find out that their names were left out and that the 3rd Defendant had instead issued title for the suit property in the name of the 1st Defendant who had already been issued with a title deed for LR No. Lake Kenyatta/1145.
3. But in her Defence and Counterclaim dated 27th July 2015, Susan Wambui Kabuu (the 1st Defendant) denies that the Plaintiffs have any colour of right to the suit property. Instead, the 1st Defendant asserts that the Plaintiffs took advantage of her absence following an illness to enter the land and lay a claim thereto. Upon her return, the 1st Defendant reported the invasion of her property to the area Chief and the 2nd Defendant who then urged the Plaintiffs to vacate the land and proceeded to register the same in her name.
4. The 1st Defendant denies that she also owns LR No. Lake Kenyatta/1145. On the contrary she asserts that the said parcel of land belongs to her younger brother and that in any event, there was no bar for one to own more than one piece of land within the area.
5. By way of her Counterclaim, the 1st Defendant avers that she was lawfully allocated the suit property and was issued with a title therefor on 28th August 2006. However, on 13th June 2013 when she paid for the discharge of charge, the 2nd Defendant refunded her the amount and refused to take any payments from her on account that the suit property had been allocated to the Plaintiffs.
6. The 1st Defendant avers that the purported allocation of the suit property to the Plaintiffs by the 2nd Defendant is fraudulent and unlawful. She asserts that the 2nd Defendant has no power or right to unilaterally cancel a validly issued title without the due process of the law and urges this Court to dismiss the Plaintiffs' suit and enter Judgment in her favour for: -

1. An order for the removal of the restriction lodged at the instance of the 2nd Plaintiff in respect of LR No. Lamu/Lake Kenyatta 1/2786;

2. An order for eviction of the Plaintiffs from LR No. Lamu/Lake Kenyatta 1/2786; and

3. Costs of this suit together with interests.

7. The Honourable the Attorney General did enter appearance for the 2nd, 3rd and 4th Defendants herein on 10th August 2015 but did not file any response to either the plaintiffs' suit and/or the 1st Defendant's Counterclaim

The Plaintiffs' Case

8. At the trial herein the Plaintiffs called two witnesses who testified in support of their case.

9. PW1- Caesar Munene Gikunju is a farmer in Mpeketoni and the 2nd Plaintiff herein. Relying on his statement filed herein on 10th June 2015, PW1 testified that sometimes before land adjudication was done in the Lake Kenyatta 1 Settlement Scheme, the 1st Plaintiff himself gathered and/or cleared the suit property and thereafter took possession of the same. The two cultivated the land, developed it and constructed residential houses thereon without interruption from the 1st Defendant or anyone else.

10. PW1 told the Court that at the said time, the 1st Defendant gathered and cleared LR No. Lake Kenyatta 1/1145 wherein she resides to-date. PW1 testified that the 1st Defendant was later erroneously registered and issued with title for the suit property. He told the Court it was against the spirit of the adjudication and settlement for one individual to benefit twice in the same adjudication section.

11. PW1 further told the Court that they remain in occupation of the suit property to-date although the 1st Defendant is the one currently in possession of the title documents. He told the Court that if they are evicted from the land, they shall be rendered destitute since they have no other place to call as their home.

12. PW2- Bernard Nyaga Muchiri is a Pastor, businessman and a farmer at Mpeketoni. Relying on his Statement dated and filed herein on 21st May 2019, PW2 testified that the plaintiffs are his neighbours and that they had cleared and developed the suit property long before land adjudication in the Lake Kenyatta 1 Settlement Scheme. PW1 told the Court that during that time, the 1st Defendant had cleared LR No Lake Kenyatta 1/1145 where she resides and that the 1st Defendant was erroneously registered as the proprietor of the suit property.

The 1st Defendant's Case

13. Susan Wambui Kabuu (DW1) testified as the sole witness in her case. Relying on her Statement dated and filed herein on 12th August 2016, DW1 testified that she used to live with her younger brother Francis Gachoka Kabuu at Central Location when they decided to look for land. They found a parcel of land then owned by one Julia Wamaitha who wanted to go back upcountry due to the presence of wild animals in the area.

14. DW1 told the Court that her younger brother was then not in possession of an Identity Card but they both contributed a sum of Kshs 5,000/- for her parcel of land measuring some 10.5 acres. The two siblings then took over the land and commenced cultivation of the same planting different crops thereon.

15. DW1 testified that when a taskforce in charge of allocation of the land went to the area, the land was solely registered in her name as the brother still did not have an Identify Card. That is how the title deed later came out for LR No. Lake Kenyatta 1/1145 in 2006 bearing the 1st Defendant's name.

16. PW1 told the Court that before acquiring this land from Julia, she had cleared and cultivated her own parcel at Kibauni Area of Mpeketoni. She then planted cashew nuts, mangoes and other trees thereon. She also constructed a semi-permanent house wherein she lived for some two or so years. DW1 told the Court she then became ill and went back to live with her brother. While she was away, her house and plants got burnt but she soon thereafter rebuilt the house and left her son Peter Kamau to take care of the same.

17. DW1 told the Court she was later on 28th November 1997 issued with a Letter of Retention/Offer for the parcel of land measuring ten acres. That letter required her to report to the District Settlement Officer to be shown the boundaries. She did so on 4th December 2006 and was issued with a Letter of Acceptance for the Plot No. 2786 Lake Kenyatta 1. In August 2006, she was issued with a title for the property.

18. DW1 further told the Court that when she had fallen ill in 1998 during the El Nino rains, the 2nd Plaintiff entered the said Plot No. 2786 without her knowledge or consent. DW1 learnt of his presence on the land after one year. He refused to get out of the land inspite of numerous requests from the 1st Defendant, the Area Chief and the Settlement Officer. DW1 told the Court she had never met the 1st Plaintiff and only saw her name from a letter of allotment issued to her in 2013.

Analysis and Determination

19. I have perused and considered the pleadings, the oral testimonies of the witnesses and the evidence adduced at the trial. I have equally perused and considered the rival submissions placed before me by the Learned Advocates for the parties.

20. The two Plaintiffs instituted this suit praying for an order for the rectification of the register for the parcel of land known as LR No. Lake Kenyatta/2786. From the material placed before me however, it was apparent that the correct reference for the parcel of land is LR No. Lamu/Lake Kenyatta 1/2786. It was not in dispute that a Title Deed for the said property measuring 4.5 Ha was issued to the 1st Defendant

on 28th August 2006.

21. It is the Plaintiff's case that they are the ones who have been in occupation and possession of the said property and that the registration of the 1st Defendant as the proprietor thereof was erroneous.

22. On the other hand, the 1st Defendant asserts that she is lawfully registered as the proprietor of the said property having been the original occupant thereof. She accuses the two Plaintiffs of taking advantage of an illness which made her to temporarily move away to stay with her younger brother at Bahari Ward in Lamu, to encroach upon the land and to occupy the same.

23. The 1st Defendant told the Court that when she learnt of the encroachment by the Plaintiffs, she reported them to the Area Chief as well as the Land Settlement Officer and that in recognition of her earlier occupation of the land she was issued with a Title Deed therefor. Accordingly, the 1st Defendant has urged this Court to order the removal of the restriction registered on the land at the behest of the Plaintiffs as well as eviction of the Plaintiffs from the suit property.

24. In respect of a rectification of the register, Section 80 of the Land Registration Act No. 6 of 2012 provides thus: -

“(1) Subject to subsection (2) the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land/lease or charge for valuable consideration unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought or caused such omission, fraud or mistake or substantially contributed to it by act or default.”

25. In the matter before me, it was not disputed that by virtue of her registration as the proprietor of the disputed property, the 1st Defendant came to be the registered proprietor of the two parcels of land each measuring about ten acres in what was hitherto known as Lake Kenyatta Settlement Scheme. While the Plaintiffs insisted that such ownership was inconsistent with the spirit of adjudication of land within the scheme, the 1st Defendant responded that it was neither strange nor illegal for farmers within the Scheme or elsewhere within the Republic of Kenya to own more than two pieces of land.

26. As it were, neither the Plaintiffs nor the 1st Defendant called those in charge of the Settlement Scheme Programme to testify herein and thus given the failure of the 2nd Defendant to participate in these proceedings, this Court was left to grope in the dark as to whether or not the said spirit of one-person –one-parcel of land existed or not.

27. It was however apparent that even as the 1st Defendant insisted there was no restriction on how many parcels one could be allocated at the Scheme, she sought to dissociate herself from the ownership of LR No. Lake Kenyatta 1/1145- the other parcel which is registered in her name, insisting that the same belonged to her younger brother one Francis Gachoka Kabuu.

28. In response to the accusation by the Plaintiffs that she also owns the said LR No. Lake Kenyatta 1/1145 and said to be measuring some 10.5 acres, the 1st Defendant asserts at paragraphs 8 and 9 of her Defence and Counterclaim as follows: -

“8. In reply to Paragraph 10 of the Plaint, the Defendant avers that the parcel of land reference number Lamu/Lake Kenyatta 1/1145 belongs to her younger brother who, for lack of an Identity Card at the time of allocating the land by the Settlement office caused had (sic) his land registered into the 1st Defendant's name for the Defendant to hold in trust for him.

9. The 1st Defendant states that she is in the process of transferring land reference number Lamu/Lake Kenyatta 1/1145 to her younger brother Francis Gachoka Kabuu and retain her rightful piece of land reference number Lamu/Lake Kenyatta 1/2786.

29. It was quite interesting however that while the 1st Defendant insisted throughout that the said Plot No. 1145 did not belong to her but to her brother, she states as follows in the relevant portion of her recorded statement as filed herein on 12th August 2016: -

“We used to live with my younger brother Francis Gachoka Kabuu at Central Location. We decided to look for our own shamba. We found one piece situated at Baharini Area owned by Julia Wamaitha who was mother to Francis Njeru Chege. So she said wanted to go back upcountry due(to) the presence of many wild animals. She so said she wanted us to compensate her for her efforts in clearing the bush. My brother did not have an ID Card. I contributed some 5000/- and my brother contributed Kshs 5000/- We refunded Julia Wamaitha who then went back upcountry after having given us possession of the land. It was 10.5 acres. We continued to cultivate that land and planted cotton, maize, and perennial trees like cashew nuts and mangoes.

When the taskforce came to enquire who the genuine landowners were in 1995-1996, I was at home. I informed the task force officers that the land was owned by both of us. I showed them letter from Julia Wamaitha sale agreement (sic) but since my brother did not have an ID Card, I requested them to register it in my name.”

30. A proper consideration of that Statement reveals that the 1st Defendant was not present on the disputed property during the visit by the task force that was in charge of land adjudication but was instead resident in Plot No. 1145 which she refers to as “home”. The taskforce registered her name and she was accordingly issued with a title deed bearing her sole name in the year 2006. It was in this respect worthy of note that there is nowhere in her Statement where the 1st Defendant claims to have been registered by the same task force as the person in occupation of the suit property.

31. As to how she came to learn of the presence of the Plaintiffs on the suitland, the 1st Defendant avers as follows at paragraphs 22 and 23 of her Statement of Defence and Counterclaim: -

“22. The 1st Defendant avers that while she was still recuperating from her illness at Baharini Ward, the Plaintiff unlawfully trespassed onto her land without her consent or authority whatsoever. The 1st Defendant (wrote) a letter to the 2nd Plaintiff, asking him to vacate the said piece of land. However, the 2nd Plaintiff went to the District Officer who instructed the Chief, Hongwe, to call a meeting in which the 2nd Plaintiff requested for a licence to bury his son as he had nowhere to dig a grave because he was living as a squatter on Amu Ranch Land and he could not be allowed to bury there.

23. On the 3rd of June 2013, the 1st Defendant went to the Settlement Offices at Lamu and paid 20,000/- the required amount to obtain the land’s discharge of charge. The money was later refunded and on enquiry, the 1st Defendant was informed that the said Plot had been allocated to the Plaintiffs.

Accordingly, it was apparent that as at the time the Plaintiff was issued with the title deed for the suit property on 28th August 2006, the said property was still charged to the Settlement Fund Trustees and no discharge of Charge had been issued to enable a Title Deed to be processed.

3 Again, the circumstances under which the 1st Defendant came to be issued with the Title Deed for the suit property can be discerned from page 2 of her recorded Statement in which she states as follows at paragraphs 3 to 6 thereof: -

“Long before the title deeds were issued and handed over to us by the former President Mwai Kibaki, I had already been given my letter of allotment called “Letter of Retention/Offer” dated 28th November 1997 for Plot No. 2287 (sic) measuring approximate ten acres. The letter required me to report to the District Settlement Officer to be shown the boundaries and be issued with a letter confirming that the land was mine.

I did so and on 4th December 2006, I was issued with a letter of Acceptance to sign for the same land number 2786 Lake Kenyatta. I signed the acceptance and returned it to the Settlement Officer who showed me the beacons and the ground status was that two acres were covered with annual crops and there was a house. I had planted seasonal plants such as maize and cotton and cleared the rest of the land.

I was required to pay some 10% of the total charges before issuance of title. I paid Kshs 3070/- on 4th February 2006 vide receipt Number 6454133 issued by the Settlement Office Lake Kenyatta.

In Mid-August 2006, title to all Mpeketoni lands were issued and handed over by present(sic) Mwai Kibaki. Since I had already paid the necessary fees and charges required then, I collected my own title which bore my names Susan Wambui Kabuu. I continued to cultivate the land and live there together with my sons.”

34. I have looked at the said Letter of Offer dated 28th November 1997. It is curious that unlike the other Letters of offer issued to the Plaintiffs herein albeit much later on 15th January 2013, by the same office, the 1st Defendant’s letter does not give any deadlines for acceptance of the offer nor any monies to be paid. The said letter signed by an Acting Director of Land Adjudication and Settlement one A.K. Cherwon simply reads as follows: -

“Settlement Plot- Letter of Retention/Offer

I am pleased to inform you that pursuant to the report of the Task Force constituted by the Minister for Lands and Settlement to determine the problems affecting Lake Kenyatta Settlement Scheme, the Government through the Settlement Funds Trustees has offered you to retain Plot No. 2786 of approximately ten acres in the said Settlement Scheme.

Kindly report to the District Land Adjudication and Settlement Officer Lamu District so that you are shown the plot boundaries and be issued with a letter confirming this before documentation.”

35. As it were, there was as I have found herein no evidence that the task force ever found the 1st Defendant on the suitland. In her own words, she was found in her home in Plot No. 1145. There was also absolutely no evidence offered by the 1st Defendant that she complied with the letter and by visiting the offices of the 2nd Defendant who were to show her the boundaries of her plot. The only documented evidence of her visit to those offices was some four (4) months after she received her title from the former President when she proceeded on 4th December 2006 to pay the sum of Kshs 3070/- for what was described as “10% Land deposit and Conveyancing Fees for Plot No. 483/2786 LKSS 1.”

36. On that same 4th day of December 2006, the Land Settlement Officer issued the 1st Defendant with a letter stating inter alia as follows: -

RE: Acceptance Letter Plot No. 483/2786

This is to confirm that the settler for the above mentioned plot has been shown plot boundaries and has accepted the offer of Plot No. 2786 in Lake Kenyatta 1 Settlement Scheme No. 483 in Lamu District. The Settler has also paid 10% Land deposit and Conveyance Fees as required by the Settlement Fund Trustees.”

37. That being the case, it was evident that the Title Deed issued to the 1st Defendant on 28th August 2006 was indeed a product of a mistake or fraud. As at the time the title deed was issued, the 1st Defendant had neither responded to the alleged offer given to her some nine (9) years earlier nor had she paid any amount of money for the acquisition thereof. The claim by the 1st Defendant that she had paid the necessary fees and charges when she collected the title bearing her name was therefore a complete fabrication and without any basis.

38. That the 1st Defendant is seeking orders of eviction against the Plaintiffs in her pleadings herein further erases her claim that she has always remained on the property and been developing the same with her family. The 2nd Defendant must have been aware of this position and hence their allocation of the properties to the Plaintiffs and the rejection of the Kshs 20,000/- paid by the 1st Defendant on 3rd June 2013 for purposes of discharging the charge on the title deed which had already been issued to herself some seven (7) years earlier.

39. In the premises, this Court was persuaded that the Plaintiffs had proved their case on a balance of probabilities. The 1st Defendant's Counterclaim is punctuated with all manner of falsehoods and at best half-truths. It has no basis and must be dismissed.

40. Accordingly, I dismiss the 1st Defendant's Counterclaim and allow the Plaintiffs' suit as prayed.

41. The Plaintiffs shall have both the costs of their suit and of the Counterclaim.

42. It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF JULY, 2021.

J.O. OLOLA

JUDGE