



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 159 OF 2011**

**SALIM ABDALLA BAKSHWEIN.....PLAINTIFF**

**VERSUS**

**ERASTUS JUMA KING'ALE & 20 OTHERS.....DEFENDANTS**

**JUDGMENT**

**BACKGROUND**

1. By his Complaint dated and filed herein on 7<sup>th</sup> October 2011, Salim Abdalla Bakhshwein (the Plaintiff) prays for Judgment against the 21 Defendants named therein for an order of eviction and a permanent injunction restraining them from dealing with all that parcel of land known as Portion No. 150 Malindi measuring 300 acres and situated at Mere Sub-Location, Ganda Location, Malindi.
2. The Plaintiff's prayers arise from his assertion that he is the registered proprietor of the said parcel of land. He accuses the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of using their elective positions within the area to incite the area residents to invade the suit property and to share it among themselves. It is his case that the Defendants some of whom entered the land with his permission have since invaded various parts of the expansive parcel of land and have since stopped the Plaintiff from accessing the land and/or carrying out any developments thereon.
3. In their Statement of Defence filed many years later on 6<sup>th</sup> February 2017, the Defendants aver that if indeed the Plaintiff is the registered owner of the suit property, then such registration is irregular, unprocedural and illegal. It is their case that they have been in possession and occupation of the suit property long before the Country gained independence in 1963 and that they have developed the same by building dwelling houses and carrying out agricultural and commercial activities thereon.
4. The Defendants further assert that they are the grand children of the slaves of one Mohamed Ayesha and Ahid Bin Omar who were settled on the suit property by the said Slave Owners long before independence. They accuse the Plaintiff of acquiring the title to the land fraudulently by creating fictitious documents in relation thereto and urge the Court to dismiss the suit with costs.
5. Prior to the filing of the Statement of Defence, some 85 Claimants including the initial 21 Defendants proceeded to Court on 26<sup>th</sup> June 2013 and filed an Originating Summons against the Plaintiff being Malindi HCCC No. 111 of 2013 in which they seek a determination as follows:-

***1. That the Plaintiffs are entitled to be declared as proprietors of their respective plots within Portion No. 150 Malindi Title No. LT. 36 Folio 2184 which they have acquired by adverse possession, having lived and worked on the same for over 12 years since the late 1950's and used it peacefully and without any interference from their defendants and their processors.***

***2. That the Plaintiffs are entitled to be registered and issued with Certificate of title over the same in the place of the Defendant/Respondents.***

***3. That the Plaintiffs are entitled to costs of this suit.***

6. It is the Claimants' case in the Originating Summons that they have occupied the suit property for a long uninterrupted period of time and that they have since acquired the same by way of adverse possession.
7. In a Replying Affidavit filed herein on 17<sup>th</sup> April 2014, the Plaintiff denies the claims made by the Claimants in the Originating Summons and urges the Court to dismiss the same.

8. On or about 1<sup>st</sup> September 2014, the two matters were consolidated with Malindi ELC 159 of 2011 as the lead file. Directions were also issued that the pleadings filed in HCCC No. 111 of 2013(OS) be treated as a Plaint and Defence and that viva voce evidence be adduced at the trial.

### **THE PLAINTIFF'S CASE**

9. At the trial herein the Plaintiff called two witnesses.

10. PW1-Salim Abdalla Bakshwein is the Plaintiff herein. He told the Court that he is the registered proprietor of the suit property measuring 304 acres. He inherited the property from his father the late Abdalla Salim Bakshwein.

11. PW1 testified that his family initially used the land as a ranch to rear beef cattle for sale. Later on however, they teamed up with other neighbouring farms and set up a wildlife sanctuary where they kept wild animals such as rhinos, Zebras and giraffes. They also set up and operated a restaurant on the land to cater for guests who would be visiting the sanctuary.

12. PW1 told the Court that the idea of a wildlife sanctuary did not however get far as the Government declined to give them a permit for the same. The family then partnered with one Carlo Mistraliongi who took over the restaurant and operated a boat riding enterprise over the seasonal Lake Chemchem situated in the area until sometime in 1999.

13. PW1 further testified that during all that time, the property was fully fenced by an electric wire. Around the year 2006, PW1 started rearing horses on the farm. This did not go down well with the Defendants who had started eyeing the property and PW1 was forced to stop the new venture when some of the locals killed one of his horses by pushing it down the cliff.

14. PW1 told the Court that he then reverted to rearing livestock on the land but some people started bringing in their own animals onto the land for grazing thereby contaminating the same. Others started cultivating portions of the land while others have been cutting down the Casuarina trees planted by the Plaintiff on the land.

15. PW1 testified that they had initially settled the 3<sup>rd</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants temporarily on a portion of the land measuring about two acres. The said Defendants settled with their families on the land but their children and relatives thereafter started encroaching on other portions of the suit property where they have now constructed illegal housing structures, have cut down the trees and continue to alienate the land to strangers.

16. On being cross-examined, PW1 told the Court that he had no evidence in Court to show that they had fixed an electric fence around the suit property. He also had no documents to show where they sourced the wild animals or to support the fact that they ran a restaurant on the land. He told the Court that their fence was vandalized in 2002 and that they had always sought help from the Police and the Provincial Administration.

17. PW2-Abdalla Salim Bakshwein is a son of the Plaintiff. He testified that he is the one who actually manages the suit property on a daily basis. PW2 told the Court that his family keeps livestock on the farm and that as at 2015 they had 64 sheep and goats thereon which were cared for by their workers. They had also planted about 100 Casuarina trees in 2005 and they had now matured up.

18. PW2 further told the Court that their workers are constantly being threatened and intimidated. There have been numerous acts of trespass on the property which they always report to the authorities.

19. During cross-examination PW2 told the Court that he got into the land between 2003 and 2005. He recalled that some time back in 1991 a settlement had been reached to settle three families on a portion of land. He could not recall when the electric fence was built but he stated that it was there until around the year 2002.

### **THE DEFENCE CASE**

20. On their part, the Defendants called three witnesses who testified in support of their case.

21. DW1- Silas Khamisi Nzaro is the 16<sup>th</sup> Defendant. He testified that he was born on the suit property in 1979 and he has lived there ever since. He has built his home on the land and they use some of it for farming and rearing livestock.

22. DW1 further told the Court that his father Nzaro Kalama died and they buried him on the same piece of land. Since he was born, he had never seen anyone trying to stop them from using the land. He told the Court that the Plaintiff has never stayed on the land.

23. During his cross-examination DW1 told the Court that his plot of land is about 16 acres. He told the Court that he did not remember seeing any electric fence built on the land.

24. DW2- Emmanuel Kahindi Kiponda is the 2<sup>nd</sup> Defendant. He told the Court that he started living on the land when he was born, some 67 years back. His parents lived on their 1.5 acre portion of land and when they died, they were both buried on the suit property.

25. During cross examinations, DW2 told the Court that it was true there used to be a hotel run by a Whiteman on the property. The locals had issues with him and he left. The locals removed the fence surrounding the hotel by cutting it.

26. DW2 further told the Court that he had moved briefly to Lango Baya Area where he unsuccessfully vied for a Councilor's seat. He stayed there for about five years before getting back to the suit property.

27. DW3- Kabibi Charo Kambi told the Court that she has four houses on the suit property. She has lived on the land for 70 years-all her life. She told the Court that they have never destroyed anything belonging to the Plaintiff and that she never saw any animals belonging to the Plaintiff on their land. Her parents and elder siblings had been buried on the land.

28. During cross-examination she told the Court that the land she lives in belongs to her father and that she has never gone to the area Chief's Office in regard to any dispute over the property.

### **ANALYSIS AND DETERMINATION**

29. The Plaintiff Salim Abdalla Bakhshwein filed this suit against 21 Defendants on 7<sup>th</sup> October 2011 seeking orders of eviction and a permanent injunction to issue restraining them from dealing with land Portion No. 150 Malindi. Some two (2) years later on 26<sup>th</sup> June 2013, a group of 25 Claimants including the 21 Defendants earlier sued filed an Originating Summons against the Plaintiff in Malindi HCCC No. 111 of 2013 wherein they sought to be declared the owners of the same parcel of land on the basis that they had acquired the same under the doctrine of adverse possession.

30. By an order issued herein on 1<sup>st</sup> September 2014 the two suits were consolidated with the consequence that the claim for adverse possession by the 85 Claimants was considered a Counterclaim to the Plaintiff's suit.

31. In their Statement of Defence filed herein on 6<sup>th</sup> May 2017, the 21 Original Defendants appeared to cast doubt on the Plaintiff's Claim to be the registered proprietor of the suit property. It was however clear to me from the Originating Summons and the testimony of the Defendants at the trial that that was no longer a matter in contention.

32. It was the Defendants case that the vast property measuring 304 acres or thereabout was occupied by many families who have for more than 40 years known the place as their only home. The Defendants asserted that their grandfathers and their fathers had occupied the property many years back and that their occupation had been peaceful and continuous without any interruption from any quarter. By virtue of the long occupation, it was their case that the Plaintiff's title had been extinguished by operation of the law and that they had hence become entitled to the land under the doctrine of adverse possession.

33. According to the Plaintiff however, the Defendants were recent invaders and trespassers to the suit property which his family has been using as a ranch to rear livestock and where they intended to set up a wildlife sanctuary.

34. From the material placed before me, it was evident that the dispute over the suit property has been going on for some time now. In a letter dated 3<sup>rd</sup> November 2009 authored by the District Officer, Malindi and addressed to the area Divisional Criminal Investigations Officer, the District Officer one JW Jenga states :-

#### **"RE: LAND DISPUTE GANDA MERE PLOT 150 MALINDI**

*The above named portion belongs to Salim Abdalla Bakhshwein who is the registered owner of the land. This office has been handling the above dispute where we have several (sic) warned squatters from invading the plot. Many have heeded but three squatters are currently in the Plot and inciting others to cultivate in the land.*

*This letter is to hereby request you to take action because the three squatters namely*

*1. Kaingu Karisa*

*2. Karisa Kaingu*

*and one other are not genuine squatters."*

35. It was further evident that over time, a number of the so-called squatters had been arrested and charged in Court with a number of offences such as Forcible Detainer, stealing and creating a disturbance. There are also minutes showing various meetings held before the Area Provincial Administration with a view to finding an amicable solution among the disputants.

36. Acquisition of title by way of adverse possession has been the subject of many Judicial decisions in this Country. In *Mbira -vs- Gachuhi(2002) EA 137*, the Court stated that:-

***".....a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption."***

37. Re-affirming the same position more recently in *Mtana Lewa -vs Kahindi Ngala Mwamgandi(2015) eKLR*, the Court of Appeal held as follows:-

***“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years.”***

38. In the matter before me the three (3) Defence witnesses testified that they had lived on the suit property ever since they were born. That assertion was however not supported by any evidence. From the correspondence availed herein it is apparent that the Defendants stay on the suit property may not have been as long as they want this Court to believe.

39. According to the Plaintiff, they had fenced off the area for purposes of establishing a wildlife sanctuary. That assertion is supported by a Letter dated 4<sup>th</sup> February 2011 from then Provincial Commissioner Coast Province E.G. Munyi addressed to the District Commissioner Malindi in which he states as follows:-

**“LAKE CHEM CHEM SANCTUARY**

***You probably have heard or are aware of the above mentioned game sanctuary which for reasons known to the proprietors is not functional today. However it is an area that is rich in Flora and Fauna and I personally had a chance to visit the area during my tour of duty as a District Officer in 1991 when the sanctuary was being established. At that time the few squatters who were there were amicably settled outside the fenced portion of the sanctuary area.***

***However, I gather from a complaint lodged in this office by Mr. Salim Bakhshwein that there is a deliberate effort by some individuals to encroach into the fenced area and who in the process of doing so, are cutting down indigenous trees some of which are over 25 years old.***

***I have advised Mr. Salim to seek redress from a Court of Law but in the meantime it is better if you held a baraza in the area to dissuade the squatters from further encroachment and destruction of the perimeter fence.”***

40. The existence of the said fence was indeed admitted by DW2-Emmanuel Kahindi Kiponda who told the Court during cross-examination that the locals had issues with a Whiteman who was running a hotel in the suit property and that they proceeded to cut off the fence after the Whiteman left. The Whiteman alluded to must have been one Carlo Mistralongi who according to the Plaintiff they partnered with to operate a restaurant built on the property until sometime in 1999.

41. While a number of the Defendants may have lived around the area for a considerable period of time, it was apparent that the portion of land they occupied previously was public land and not the suit property. This can be discerned again from a letter dated 24<sup>th</sup> March 1992 addressed to the Plaintiff's then Advocates Messrs Hamilton Harrison and Mathews by the then District Commissioner H.C. Wamubeyi. In a letter dated 25<sup>th</sup> February 1992 the Plaintiff had sought through the said Advocates to be leased part of the Government land in the area to enable them create a large wildlife sanctuary. That application was rejected by the said District Commissioner Kilifi in his letter aforesaid in which he states as follows in the relevant portion:-

**‘LAKE CHEM CHEM SANCTUARY**

***The District Committee is satisfied beyond reasonable doubt that the local people who are residing on the Government land in question are not willing to surrender the Government land for any project. This is because they are aware of the fact that the Government has directed that squatters residing on Government land should have the land demarcated and allocated to them, so that they legally own it after demarcation, and issue of title deeds. They are also against any restrictions on their use of Lake Chem Chem, facilities which they have used uninterrupted for many years.***

***If your client has any private land which he legally owns and would like to restrict himself to this private land by establishing a sanctuary, then he should present this application afresh by presenting proof of ownership and the matter will be considered afresh and application approved.”***

42. In the circumstances before me, while there was evidence of massive encroachment of the suit property, I was not satisfied that the Defendants had made out a case for adverse possession. It would not have been possible for the Defendants to reside within the suit property before they brought down the fence. While DW2 did not indicate when they cut down the fence, PW2 Abdalla Salim Bakshwein stated during cross-examination that the fence was there until the year 2002.

43. At any rate, all the evidence pointed to the fact that the Plaintiff never neglected or omitted to take action against the Defendants or any other person who tried to encroach onto his vast parcel of land. It could thus not be said from the totality of the evidence herein that the Defendants stay on the land prior to the filing of this suit had been continuous, peaceful and uninterrupted for the 12 years prescribed by statute.

44. Ultimately, this Court noted that there were a total of 85 Defendants herein. In presenting their Counterclaim, they omitted to specify the specific areas of the 304 acre parcel of land to which they were entitled. In my view it was important to prove their claim for each of them to lay a claim to a specific portion of the property and prove their claim to a specific portion of the property and prove exclusive, peaceful and continuous possession thereof for the requisite period.

45. Accordingly I was not satisfied that the Defendants had proved their claim as presented in the Originating Summons as filed on 26<sup>th</sup> June 2013. On the contrary, I was satisfied that the Plaintiff had proved his case on a balance of probabilities. As a result, I allow the Plaintiff's suit as prayed and dismiss the Defendant's Counterclaim with costs to the Plaintiff.

Dated, signed and delivered at Malindi this 23<sup>rd</sup> day of January, 2020.

J.O. OLOLA

JUDGE