



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 163 OF 2014

HARUSI KENGA CHAI.....PLAINTIFF

VERSUS

ABDALLA KAGULA

SALIM SAID KITUNGUU

MTAANI KISUMU NDOGO UPGRADING PROJECT

(Sued through its Chairman NELCON CHAI.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By her Complaint dated and filed herein on 27th August 2014 as amended on 24th May 2017, Harusi Kenga Chai (the Plaintiff) prays for Judgment against the three Defendants jointly and severally for:-

a. A permanent injunction restraining them by themselves, agents, servants, workmen, legal representatives, administrators or anyone claiming interest through them from trespassing, entering, remaining, constructing, alienating, selling, leasing, transferring and/or dealing with the suit property (Plot No. 329 LR 5054/1145) in any manner whatsoever;

b. A declaration that the Plaintiff is the lawful owner of the suit property being Plot Number 329 LR 5045/1145 situated within Mtaani/Kisumu Ndogo upgrading project;

c. Costs of this suit and interest thereon.

2. It is the Plaintiff's case that at all times material to this suit, she has been the actual and/or beneficial owner of the suit property having acquired the same by virtue of her being a member of the Mtaani/Kisumu Ndogo Upgrading Project (the 3rd Defendant) which Project was then settling squatters.

3. The Plaintiff avers that she is a fully paid up member of the 3rd Defendant and that she has paid survey fees and fees for a beacon certificate for the suit property which she had already developed. To her dismay, the same plot was later on allotted to Abdalla Kugula (the 1st Defendant) and Salim Said Kitungu (the 2nd Defendant) through connivance and collusion with the 3rd Defendant and as a result she has not been issued with a Beacon Certificate and an allotment letter to the suit property.

4. In or about August 2014, the 2nd Defendant brought in building materials into the suit property and started demolishing the Plaintiff's house thereon. The Plaintiff asserts that the 1st and 2nd Defendants have no right whatsoever to the suit property which she has occupied for a period in excess of 30 years and that their actions amount to trespass and deserve to be restrained by this Court as sought in her prayers.

5. But in their Statement of Defence and Counterclaim dated 10th November 2014 as amended on 31st August 2017, the three Defendants deny that the Plaintiff has been the actual and/or beneficial owner of the suit property. They further deny that the Plaintiff had paid membership fee to the 3rd Defendant and/or that she had developed the suit property.

6. By way of their Counterclaim, the Defendants aver that the 1st Defendant is the absolute owner of the suit property and accuse the Plaintiff

of interfering with his use and possession thereof without any colour of right and/or justification. The Defendants accuse the Plaintiff of being a fraudster and of forging receipts purporting to be the property of the 3rd Defendant.

7. Accordingly the Defendants pray for dismissal of the Plaintiff's suit and for:-

a. A permanent injunction to issue restraining the Plaintiff, her servants, agents and/or employees from interfering with the 1st Defendant's peaceful enjoyment and use of the suit property; and

b. Costs of this suit.

THE PLAINTIFF'S CASE

8. At the trial herein the Plaintiff testified as the sole witness in support of her case.

9. Testifying as PW1, she told the Court that she acquired the suit property in the 1970s and that she was settled on the same by the 3rd Defendant by virtue of her membership thereof. She told the Court that as a member of the 3rd Defendant, she paid all her membership fees and the suit property which she had already developed was identified as Plot No. 329. PW1 also paid survey fees and fees for a Beacon Certificate.

10. PW1 told the Court that she was surprised when later on the 3rd Defendant colluded with and allocated the land to 1st and 2nd Defendants. PW1 testified that as at that time, she had been in occupation of the property for more than 30 years and that the 1st and 2nd Defendants have no developments thereon.

11. PW1 testified that the 1st Defendant has since secretly and fraudulently processed and obtained a Letter of allotment for the entire Plot No. 5054/1145 and that sometimes in August 2014, the 1st and 2nd Defendants brought in building materials to the property and started demolishing the Plaintiff's house.

THE DEFENCE CASE.

12. The Defendants called a total of three witnesses in support of their case.

13. DW1-Said Salim Kitungu is the 2nd Defendant herein. He told the Court that he was the first person to be allocated the suit property which was previously Plot No. 329 but is now known as LR No. 5054/1145. He was living on the Plot in 1992 when he was allocated the same.

14. DW1 told the Court that the Plaintiff is married to one Kenga Chai and that together the two live on a plot of land half a mile away from DW1's. DW1 further told the Court that the said Kenga Chai has a plot neighbouring the suit property being Plot No. 1146. That plot has a foundation structure built on it.

15. DW1 testified that in the year 2003, the Plaintiff's husband made a complaint against DW1 at the DO's office in regard to the same property. The DO however made a decision in favour of DW1.

16. DW1 further told the Court that the suit property is registered in the name of the 1st Defendant who is his brother. DW1 gave his brother the suit property in 1996. His brother was later issued with an allotment letter on 27th March 1998 after making the requisite payments. When they went to the DO's office, DW1 was only representing his brother as he had already given him the piece of land.

17. DW2-Abdalla Mwakumega Kugula is the 1st Defendant herein. He testified that he acquired the suit property from the 2nd Defendant who was the first to be allotted the land. When DW2 acquired it, he had it transferred to his name.

18. DW2 testified that the Plaintiff's husband Chai Kenga owns Plot No. 1146 which is behind his plot. DW2 has never encroached or entered into that neighbouring plot. DW2 denied that he colluded with anyone to defraud the Plaintiff of her land.

19. DW3-Nelson Kazungu Chai is the Chairman of the 3rd Defendant. He told the Court that the 3rd Defendant Project was started in 1990 and he became the Chair in 1992. The Project was meant to develop or upgrade Mtaani Kisumu Ndogo Area of Kilifi town. It was a big area with about 842 plots.

20. DW3 testified that the 3rd Defendant had three Committees. He was a squatter in the area which was then Government land and was made the Chair of one of the Committees known as the Committee of Residents. Only those who had houses and some structures were allocated land. They brought in a surveyor and everyone was given plots measuring basically the same sizes.

21. DW3 further testified that the 2nd Defendant previously occupied what was deemed a road reserve. He was moved from there and was allocated Plot No. 329. At that time there were no houses on the land. DW3 told the Court that the Plaintiff was not their member and she never lodged any complaint with the Project. It was the 2nd Defendant's name which was in their Register but he later asked the Project to transfer it to the name of the 1st Defendant. The Committee accepted his request.

Analysis and Determination

22. I have carefully perused and considered the pleadings filed herein as well as the oral testimonies of the witnesses who testified before me. I have equally considered the evidence adduced and the written submissions as filed herein by the Learned Advocates acting for the parties herein.

23. The Plaintiff herein prays for a declaration that she is the lawful owner of a piece of land formerly known as Plot No. 329 but now known as LR No. 5054/1145 situated within Mtaani/Kisumu Ndogo Upgrading Project in Kilifi. Accusing the 1st and 2nd Defendants of trespassing thereon, the Plaintiff also craves an order of a permanent injunction to issue restraining the Defendants from trespassing into, entering, remaining in, carrying out any construction, alienating or in any manner dealing with the said property.

24. According to the Plaintiff, she has been in occupation of the suit property for more than 30 years having been a squatter thereon. The suit land which previously belonged to the Government was later donated to the squatters living within the area. Those squatters including the Plaintiff in turn formed an organization known as Mtaani-Kisumu Ndogo Upgrading Project which organization was entrusted with the duties of ensuring that every squatter had received his or her right portion that they had developed.

25. It was the Plaintiff's case that having formed the organization, they were then informed to pay registration as well as membership fees. The Plaintiff told the Court that she paid the requisite fees for the portion of land which she had developed by putting up a permanent building thereon. That portion of land was identified by the organization as Plot No. 329 and was duly allocated to herself.

26. However sometime in August 2014, the 1st and 2nd Defendants herein started bringing in building materials to the suit property claiming that the parcel of land had been given to them by the Upgrading Project sued herein through its Chairman as the 3rd Defendant. Thereafter the 1st and 2nd Defendants started demolishing the Plaintiff's house and the Plaintiff reported the matter to the Area Chief who in turn advised her to institute these proceedings in Court.

27. On their part, the Defendants deny that the suit property belonged to the Plaintiff. It is their case that the property was allotted and registered in the name of the 1st Defendant and that it is the Plaintiff who has been interfering with the 1st and 2nd Defendants ownership and occupation thereon. While conceding that the organization was entrusted with the duty of settling lawful and rightfully deserving squatters, the Defendants deny that the Plaintiff was such a squatter on the suit property and/or that she had put up a permanent building thereon which the 1st and 2nd Defendants are said to have demolished.

28. From the material placed before me, it was indeed evident that the dispute between the parties has been on-going for a period of time and that attempts have been made by officials of the 3rd Defendant organization as well as the area Provincial Administration to settle the same in vain. Both sides of the dispute produced documents before me from which they trace their ownership of the disputed parcel of land.

29. None of the parties herein produced the Constitution or any other document relating to the formation of the said Mtaani-Kisumu Ndogo Upgrading Project. It was however not disputed by either side that it was the organization entrusted with the duty of identifying the areas occupied by the squatters in the area and everyone of them was settled in their respective portions or other unoccupied portions of the land as they deemed appropriate.

30. From the documents presented before me, it was evident that the upgrade was being done through a partnership involving the Ministry of Local Government, the County Government of Kilifi and the German NGO-GTZ. While the disputants claim to have been squatting on the land for a long period of time, it was evident that the Project was only started in 1990 with the individuals being required to register as members and to pay for a survey of the portions they occupied for purposes of being issued with beacon certificates and thereafter allotment letters for processing of title deeds.

31. According to the Plaintiff, she was the first to be settled on the suit property but was later surprised to discover that the officials of the Project had colluded with the 1st and 2nd Defendants and issued the 1st Defendant with a Beacon Certificate and an Allotment Letter for the suit property.

32. Nelson Kazungu Chai (DW3) was the Chairman of the Project from around 1992. Testifying herein, DW3 told the Court that the Project operated through three Committees. The first Committee was the Project Promotion Committee which was chaired by an Official deputized by the Commissioner of Lands while the second, the Technical Task Force Committee was chaired by the Town Clerk, Kilifi Town Council. The third, a Committee of Residents was chaired by DW3 himself. DW3 denied that the Plaintiff was their member and/or that she had a house on the suit property at the time when the Project was settling squatters on the land.

33. It was however DW3's testimony that the 2nd Defendant was at the time occupying a portion of land which after they brought a surveyor to the land, was found to be a public road reserve. His Committee then moved the 2nd Defendant from the road reserve to the vacant plot which they identified as Plot No. 329. Initially, they entered the 2nd Defendant's name in their Register but later, on the 2nd Defendant's request, it was transferred to the 1st Defendant who was subsequently issued with an Allotment Letter.

34. As it were the circumstances that led to the Plaintiffs claim to the suit property can be discerned from the Minutes of the proceedings of a meeting of DW3's Residents Committee and the DO Bahari held in the DO's Office on 26th March 2003. From the said minutes annexed to the 1st Defendant's Replying Affidavit filed herein on 30th October 2014 in response to the Plaintiff's application for injunction (Annexure 'AK6'), it was evident that the 2nd Defendant was the first to apply for the suitland in 1994 while the Plaintiff applied in 1995.

35. Contrary to the Plaintiff's claim that she had occupied the property for more than 30 years and that she had by then developed a permanent building on the suit property, the minutes show that the suit property was vacant in 1993. While she neither held a beacon

certificate nor an allotment letter, she had moved into a section of the suit property and dug up a pit latrine thereon.

36. Having heard the dispute in the joint sitting with the area District Officer, it was decided that the 1st Defendant would remain as the owner of the suit property and that he should compensate the Plaintiff for the pit latrine at the cost of Kshs 300 per foot. The 3rd Defendant's Register of property owners accordingly to-date reflect the 1st Defendant as the proprietor of the suit property.

37. In the circumstances I was not persuaded that the Plaintiff had been allocated the suit property and/or that she was entitled thereto. While she purported that she had occupied the property for more than 30 years and that she had put up a permanent house thereon, it did emerge from her cross-examination that she was indeed residing with her husband Mzee Kenga Chai some two to three plots away from the disputed parcel of land.

38. In the premises, I did not find any merit in the Plaintiff's suit. On the contrary, I was persuaded that the Defendants had proved their Counterclaim to the required standard. Accordingly I make orders as follows:-

i. The Plaintiff's suit is hereby dismissed;

ii. The Defendant's Counterclaim is hereby allowed as prayed; and

iii. The Defendants shall have the costs of both the dismissed suit as well as the Counterclaim.

Dated, signed and delivered at Malindi this 13th day of March, 2020.

J.O. OLOLA

JUDGE