



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 128 OF 2014

1. HAMID BIN MOHAMED

2. RUKIA HEMED alias RUKIA SAID MBARAK (suing as the Executrix of the
Estate of Said Bin Mbarak Bin Tahir.....**PLAINTIFFS**

VERSUS

1. ALI MWINYI HAJI

2. MUMBO NGANYI

3. AMANI KENGA

4. JAPHET MARAA JILANI

5. MAMBO SAID

6. KAHMIS KESI

7. RAMADHANI KITI YAA

8. KAZUNGU TSOFA

9. ABDALLA JAHA

10. ATHUMAN SALIM BAYA

11. RUKIA NASORO

12. SALIMU JABIRI

13. MTENZI MOHAMED

14. ABDHUL JAMAAN

15. MOMO KHAMIS DENA

16. ALI JUMA JAHAA

17. KAFEDHA KATANA

18. MTENZI AHAMED SAID

19. ALI MWALAGO

20. NGALA KUZE

21. FATHUMA AHMED SAIDI

22. ALII YAA NGARI

23. MZUNGU AHMED MOHAMED

24. KANZE BAYA.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By a Plaint dated 8th July 2014 as filed herein on 9th July 2014, Hamid Bin Mohamed and Rukia Hemed alias Rukia Said Mbarak (the Plaintiffs) prays for Judgment against the 24 listed Defendants herein jointly and severally for:

a) An order of permanent injunction restraining the Defendants, whether by themselves, their family members, servants, agents, employees or otherwise howsoever from entering or remaining in occupation, cutting down trees or putting up structures thereon or in any way dealing with the suit property;

b) An order of mandatory injunction compelling the Defendants, whether by themselves, their family members, servants, agents, or employees to demolish and remove all the structures and buildings they have illegally erected on the suit property;

c) General damages for trespass

d) Costs of and incidental to this suit; and

e) Any other or further relief this Honourable Court may deem fit and just to grant.

2. The Plaintiffs' prayers arise from their contention that at all times material to this suit, the 1st Plaintiff and the late Said Bin Mbarak Bin Tahir were the registered proprietors of LR No. 75/Section IV Mainland North situated at Junju within Kilifi County.

3. The Plaintiffs aver that despite the fact that they have all along been in possession and occupation of the said property, the Defendants have since March 2014 been intermittently invading the same at the incitement of local leaders, cutting down trees and have put up temporary structures thereon with a view to permanently dispossessing the Plaintiffs of the same. It is the Plaintiffs case that the Defendants' said acts constitute blatant trespass and are illegal and unlawful and hence the orders sought herein.

4. The 1st Defendant Alii Mwinyi Haji filed a Statement in person in which he admits the Plaintiffs' claim.

5. But in a lengthy Statement of Defence and Counterclaim dated 2nd September 2014 and filed herein on 3rd September 2014, the 2nd to 24th Defendants deny that the Plaintiffs are the owners of the suit property. On the contrary, they aver that they are, together with their families, the owners of the said property the same having been passed down from one generation to the next by their ancestors.

6. The 2nd to 24th Defendants therefore deny that they have invaded and or trespassed upon the said parcel of land. Instead they assert that they are valid owners thereof having lived on the land from time immemorial.

7. By way of their Counterclaim, the Defendants aver that the suit property measuring approximately 30.2 acres is their ancestral land wherein they have lived for more than 100 years without any interruption. They assert that the Plaintiffs herein have never occupied the land at all and that their purported ownership of the suit property is but a result of fraud.

8. Accordingly, the 2nd to 24th Defendants pray for Judgment against the Plaintiff for:

a) Dismissal of the Plaintiffs' suit against themselves with costs;

b) A declaration that the suit property was intended and remains for their benefit and a further declaration that the subsequent allocation, transfer and registration of the same to the Plaintiffs herein remains fraudulent, illegal, unconstitutional and in breach of trust and hence null and void ab initio;

c) A mandatory injunction be issued directing the 1st Plaintiff to forthwith surrender the title deed to the suit property herein to the lands office for cancellation and rectification/amendment of the register;

d) A permanent injunction be issued restraining the Plaintiffs by themselves, servants or agents from in anyway whatsoever undertaking any transactions therein including sale, charges, leases, sub-divisions, taking possession, or interfering in any way with the Defendants quiet use, enjoyment and occupation of the suit property.

e) Costs of and incidental to this suit.

f) Any other or further orders that this Honourable Court may deem fit to grant.

The Plaintiffs' Case

9. At the trial herein the Plaintiff called two witnesses in support of their case.

10. PW1- Rukia Hemed is the 2nd Plaintiff herein and a resident of Mtwapa Town. Relying on her Statement filed herein on 16th October 2014, she told the Court that she is the Executrix of the Estate of Said Bin Mbarak Bin Tahir who was her husband. PW1 testified that the 1st Plaintiff and her husband are the registered proprietors of the suit property.

11. PW1 told the Court that the property was initially registered in the name of her grandfather Tahir Bin Ali but upon his death, it was transferred to his sons and daughters in accordance with the Islamic Law. Subsequently, one of PW1's sons Sheikh Bin Tahir purchased the shares of the other co-registered owners. Upon his death, Said Bin Mbaraka who was his nephew and the Administrator of his estate caused the grant of letters of administration to be registered against the title.

12. PW1 further testified that the Administrator and the 1st Plaintiff then purchased the suit property from the beneficiaries of the estate of Sheikh Bin Tahir and had it transferred to themselves in 1979 upon which they have remained the owners to-date. PW1 told the Court that she lived on the suit property for many years during her childhood and that Sheikh Bin Tahir had then granted the 1st and 11th Defendants permission to put up temporary structures on a small portion of the property.

13. PW1 told the Court that sometime in the year 2000, her husband started building a Madrassa on the property for use by the children of Junju area. He however passed away in 2003 before completing the same. PW1 and her children took over and completed the madrassa in 2009. Sometime in 2012, PW1 and the 1st Plaintiff decided to hive off some five acres of their land which they gave to the families of the 1st and 11th Defendants.

14. PW1 testified that when the area Assistant Chief heard of this, he told other residents to invade the property as it was being given for "fee". The defendants then moved to the land and started clearing the same and putting up structures. PW1 told the Court the Defendants have no rights over the property and that their actions are only meant to dispossess the Plaintiffs of their land.

15. PW2- Munira Said Mbarak is a daughter of the 2nd Plaintiff. She told the Court the suit property was registered in the name of his father and his friend. Before March 2014, they took a surveyor to sub-divide the land for five (5) squatters they gave land and the local people became angry. The Assistant Chief told people the land was being given for free and the people started clearing the land and putting up structures. They have since refused to vacate despite the involvement of Kijipwa Police Officers.

The Defence Case

16. The suit was withdrawn as against the 1st and 4th Defendants who are now deceased. Despite filing a Statement of Defence and Counterclaim, the rest of the Defendants did not call any oral or other evidence in support of their case.

Analysis and Determination

17. I have perused and considered the pleadings filed herein, the oral testimonies of the Plaintiffs' witnesses and the evidence adduced at the trial. I have equally considered the written submissions placed before me by Mr. Mwakireti –Learned Counsel for the Plaintiffs and Mr. Mouko-Learned Counsel for the Defendants.

18. The Plaintiffs have sought an order of injunction to restrain the Defendants from putting up structures on the suit property. They also crave for an order of mandatory injunction to compel the Defendants to demolish and remove all structures and buildings erected by the defendants on the suit property. The Plaintiffs further urge this Court to grant them general damages for trespass.

19. Those prayers by the Plaintiffs arise from their contention that at all times material to this suit, they were the proprietors of all that parcel of land known as LR No. 75/Section IV Mainland North and situated within Junju area of Kilifi County. They accuse the Defendants of intermittently invading the property from March 2014, cutting down trees and putting up various structures thereon with a view to dispossessing the Plaintiffs of their land.

20. On their part, the Defendants deny that the Plaintiffs are the proprietors of the suit property. On the contrary, they assert that they and their ancestors have occupied the suitland for more than 100 years and that they have been in the process of petitioning the Government to process for the suit property in their respective names. In that respect, they accuse the Plaintiffs of fraudulently causing themselves to be registered as the proprietors of the suit property yet they neither occupy nor are they in possession of the same.

21. As at the time of the trial herein, this Court was informed that the 1st and 4th Defendants were deceased and the Plaintiff proceeded in that respect to withdraw the suit as against the said Defendants. Despite taking part in the proceedings herein the rest of the Defendants neither testified nor did they produce any evidence to back their claim to the land.

22. From the Certificate of Title placed before me by the Plaintiffs, the suit property is indeed registered in the names of the 1st Plaintiff and one Said Mbarak Tahir. As it emerged herein, the said Said Mbarak Tahir was until his death in 2003, the husband of the 2nd Plaintiff who

is, pursuant to a grant of probate issued in **Mombasa High Court Succession Cause No. 301 of 2004**, the executrix of his estate.

23. The 2nd Plaintiff and her daughter Muniira (PW2) testified herein that they have been in possession and occupation of the suitland ever since the year 1979. They told the Court that at some point in time in the year 2012, they decided to hive off a portion of the land measuring some five acres for purposes of gifting the same to the now deceased 1st Defendant and the 11th Defendant whose families they had had a long relationship with.

24. The Plaintiffs told the Court that when they moved to survey the land, some leaders in the area started telling other residents that the land was being dished out for free. It was then that the Defendants started streaming into their land, cutting down trees and putting up structures. The Plaintiffs reported the matter to the nearby Kijipwa Police Station on several occasions between March and April 2014 and some of the Defendants were arrested. The Plaintiffs however told the Court that none of the Defendants were ever charged in Court after they undertook to vacate the suit property.

25. The Defendants did not give any evidence at the trial herein and the Plaintiffs' testimony was therefore uncontroverted. Section 26 (1) of the Land Registration Act as it were provides that the Certificate of Title issued by the Land Registrar upon registration shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land therein is the absolute and indefeasible owner thereof. Such a title cannot be challenged save on the ground of fraud or misrepresentation to which the proprietor is shown to be a party or where the same is acquired illegally, unprocedurally or through a corrupt scheme.

26. While indeed the Defendants herein pleaded that the Plaintiffs had procured the registration of the title in their names through fraud, nothing was placed before me from which I could make an inference that the Certificate of Title produced by the Plaintiffs herein had been acquired through fraud.

27. Section 24(a) of the Land Registration Act, 2012 gives the effect of such registration as a proprietor in the following terms:

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

28. Having adduced uncontroverted evidence to demonstrate that they are indeed the registered proprietors of the land, it follows that the Plaintiffs are the absolute owners thereof and the Defendants cannot be on the same land without their permission, authority or consent.

29. The Defendants have not denied that they have erected structures on the Plaintiffs property. That on itself is evidence of encroachment upon and trespass to the Plaintiffs' property. The Plaintiffs have urged this Court for an award of Kshs 3,000,000/= for the Defendants' trespass. Looking at the circumstances herein, I think an award of Kshs 700,000/= would suffice as general damages.

30. In the premises I am satisfied that the Plaintiffs have proved their case on a balance of probabilities. The Defendants did not prosecute their Counterclaim and I did not find any merit therein.

31. Accordingly, the Counterclaim is dismissed and Judgment is hereby entered for the Plaintiffs as follows:

a) An order of mandatory injunction is hereby issued compelling the Defendants by themselves, their servants and or agents to demolish and remove all the structures and buildings they have illegally erected on the suit property within 90 days from today failure to which the Plaintiffs shall remove the same at the Defendants costs.

b) Upon expiry of the said 90 days, a permanent injunction is issued herein restraining the Defendants by themselves, servants and or agents from entering, remaining in occupation, cutting down trees or putting up structures or in any manner whatsoever dealing with the suit property.

c) General damage for the trespass in the sum of Kshs 700,000/-

d) The Plaintiffs shall have the costs of this suit and of the Defendants Counterclaim.

Dated, signed and delivered at Malindi this 24th day of July, 2020.

J.O. OLOLA

JUDGE