



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MALINDI ELC CASE NO. 78 OF 2014

MOHAMED BWANA OBO ATHMAN & 24 OTHERS.....PLAINTIFFS

VERSUS

KENYA AIRPORT AUTHORITY.....DEFENDANT

JUDGMENT

Background

1. By their Plaint dated and filed herein on 25th April 2014, the 25 Plaintiffs pray for Judgment against the Defendant for: -

a) An order declaring that the Plaintiffs are the owners by the right of prescription and or by way of adverse possession of Portion No. 21 Lamu registered as CR 35747;

b) An order of injunction restraining the Defendant by itself or through its agents, employees, servants, assignees and or any other person from interfering in any manner including fencing off the suit property and with the Plaintiffs quiet enjoyment of the suit property;

c) In the alternative, a declaration that the Government do acquire Portion No. 21 Lamu registered as CR 35747 from the Plaintiffs by compensating them as provided by the law;

d) Any other relief that the Court may deem fit and reasonable; and

e) The costs of this suit.

2. The Plaintiffs who aver that they bring this suit on behalf of all the residents of Manda island situated within Lamu County assert that at all times material, they were the owners, occupiers and or beneficiaries of an interest under Section 28(e) and or (h) of the Land Registration Act, 2012 of the said Portion No. 21 Lamu registered as CR No. 35747.

3. The Plaintiffs aver that they are entitled to the suit property having acquired the same by the right of prescription and or adverse possession since they have been in occupation and use of the land without interruption from the year 1964 to-date. In the alternative, the Plaintiffs contend that the Government had promised to allocate to them the suit property and that in actual sense demarcation and identification of boundaries had started and the Plaintiffs were thus optimistic of being allocated the same.

4. It is the Plaintiff's further case that by a resolution made on 2nd November 2012, it was resolved that the Defendant would compensate them before undertaking any project on the suit property including the extension of the Lamu Airport. In total disregard of those resolutions however, the Defendant has commenced fencing the suit property thereby effectively blocking the Plaintiffs from accessing the same in violation of the Plaintiffs' right as protected under the Constitution.

5. But in its Statement of Defence and Counterclaim dated 7th April 2016 as filed herein on 12th April 2016, the Kenya Airports Authority (the Defendant) avers that the suit as filed is procedurally inept, devoid of merit and that the same does not disclose any reasonable cause of action against the Defendant.

6. The Defendant denies that the Plaintiffs are the owners, occupiers and/or beneficiaries of any interest in the suit property as alleged or at all. On the contrary, the Defendant avers that it is the legal and/or registered and or beneficial owner of the suit property having been issued with Grant No. CR 35747 on 14th June 2002. The Defendant further asserts that the Plaintiffs claim for adverse possession and or right of

prescription of the suit property is not permissible in law as one cannot claim and/or acquire an interest adversely against Government.

7. While admitting that there were some consultations with the Plaintiffs, the Defendants asserts that the Government resolved to allocate the Plaintiffs alternative land from the Manda Island Airport to enable the smooth, uninterrupted and or unhindered expansion of the Airport. The responsibility of allocating the alternative land however fell squarely within the purview of the Government and not the Defendant as stated by the Plaintiffs.

8. The Defendant however admits that it had undertaken to compensate the Plaintiffs for the improvements made on the suit property upon a proper valuation being undertaken by the relevant Ministry and avers that it has already compensated some of the Plaintiffs herein accordingly.

9. By way of its Counterclaim, the Defendant avers that as the legal and/or registered owner of the suit property, it had sometime in the year 2012 embarked on a massive expansion, rehabilitation and/or reconstruction of the Manda Island Airport in Lamu with a view to improving the accessibility and/or economic livelihood of the County of Lamu. It was then realized that the Plaintiffs herein had encroached and/or illegally occupied the area.

10. The Defendant then commissioned the Ministry of Land, Housing and Urban Development which carried out a valuation of the structure and proceeded to draw compensation cheques in favour of all squatters who were deemed suitable for compensation. The Plaintiffs have however since declined and/or refused to vacate the suit property.

11. Accordingly, the Defendant prays that the Plaintiffs' suit be dismissed with costs and that instead Judgment be entered in its favour against the Plaintiffs for: -

i) A declaration that the Defendant is the legal and/or registered and or rightful owner of all that parcel of land known as Portion 21 by virtue of the Grant No. CR 35747;

ii) A declaration that the Plaintiffs and or their agents and representatives and any other person claiming under them, without any colour or right, encroached and/or trespassed on the suit property.

iii) A permanent injunction be issued compelling the Plaintiffs and or their agents and representatives and any other person claiming under them to vacate land parcel Number Portion 21;

iv) The orders of this Honourable Court be supervised and/or enforced by the Officer Commanding Police Division (OCPD) Lamu County;

v) Costs of the suit and the Counterclaim

vi) Interest on (V); and

vii) Any other relief that this Honourable Court may deem fit.

The Plaintiffs' Case

12. From the record, it would appear that the Plaintiffs failed to take any steps to prosecute the suit after instituting the same. By a Notice of Motion application dated 6th June 2018 as filed herein on 19th June 2018, the Defendant sought orders as follows: -

1. That this suit be hereby dismissed with costs for want of prosecution; and

2. That the Defendant's Counterclaim against the Plaintiff be allowed as prayed.

13. When that application came up for hearing on 10th July 2018, the Plaintiffs had not filed anything in opposition thereto despite evidence that the same had been served upon their Advocates on record on 20th June 2018. Accordingly, the Court allowed the prayers seeking dismissal of the Plaintiff's suit and proceeded to fix the Defendant's Counterclaim for hearing.

The Defence Case

14. At the hearing of their Counterclaim, the Defence called one witness.

15. DW1-Ali Godana Daye works in the Operations Department at the Defendant's Manda Airstrip in Lamu. He told the Court that the suit property measuring 194.0 Ha was granted to the Defendant by the Government for the operations of an Airport and that a title was issued in the name of the Defendant in 2012.

16. DW1 testified that the suit property previously belonged to the Government and that it was partly fenced having been earmarked for the expansion of the Airstrip in the year 2004. DW1 further told the Court that squatters had inhabited parts of the land and that they were engaged in small scale farming thereon.

17. DW1 further testified that to enable the expansion to proceed, the squatters were given notice to vacate the land after a valuation of their

developments thereon was done in 2012. After the said valuation, the Defendant prepared agreements with the squatters and proceeded to compensate them in the period 2014-2015. 21 of the original 25 squatters accepted payment and arrangements were put in place by the National Land Commission to relocate them. To-date, only the 1st Plaintiff remains on the land.

18. DW1 further told the Court that the continued occupation of the land by the 1st Plaintiff is illegal and an infringement on the Defendant's rights to own property and that the same compromises the safety and security of the Airport operations. The Defendant had also paid for the fencing of the facility and continues to suffer loss due to the occupation.

Analysis and Determination

19. I have perused and considered the pleadings filed, the evidence of the sole witness for the Defence and the evidence placed before me. I have equally considered the submissions filed herein by the Defendant's Advocates on record.

20. The Plaintiffs had instituted this suit claiming declarations that they had acquired the suit Property-Land Portion No. 21 Lamu (CR 35747) measuring approximately 194.0 Ha by way of adverse possession and or by the right of prescription. They had also sought orders of injunction restraining the Defendant from interfering in any manner and in particular by fencing the said property. In the alternative, the Plaintiffs had sought a declaration to compel the Government to acquire the suit property from themselves by compensating them as by law required.

21. The Defendant herein disputed the Plaintiffs' claim and sought instead by way of its Counterclaim a declaration that it is the legal, registered and or rightful owner of the suit property. The Defendant also urged the Court to declare the Plaintiffs as trespassers on the property and to issue a permanent injunction compelling the Plaintiffs to vacate the land.

22. As it turned out, the Plaintiffs failed and or neglected to prosecute their claim and on 10th July 2018, following an application by the Defendant, the Plaintiffs' suit was dismissed for want of prosecution.

23. In support of its Counterclaim, the Defendant, a Government entity established under the Kenya Airports Authority Act, Cap 395 of the Laws of Kenya, called one witness who produced a copy of a Grant No. CR 35747 issued to the Defendant by the Commissioner of Lands on 15th March 2002.

24. The witness-Ali Godana Daye -told the Court that prior to the Grant, the suit property belonged to the Government of the Republic of Kenya which had earmarked it for the expansion of the Manda Airstrip in Lamu Island. He told the Court that a number of squatters had thereafter encroached upon the partly fenced land and had engaged in small-scale farming thereon.

25. The Defence witness told the Court that when the Government eventually decided in 2012 to proceed with the expansion for which the land had been earmarked, the Defendant carried out a valuation of the developments made by the squatters on the land. While a majority of the squatters accepted the compensation, the 1st Plaintiff herein in particular had refused to vacate the land.

26. It was further the Defendant's case that the continued occupation of the land by the remaining squatters compromised the safety and security of the Manda Island Airport as they had put up structures on the approach and near the area designed for the landing of aircrafts. Accordingly, the Defendant urged this Court to compel the remaining Plaintiffs to vacate the land.

27. From the material placed before me, it was clear to me that the Plaintiffs' claim to the land was without basis. A perusal of the Grant produced herein clearly reveals that the suit property was registered in the name of the Defendant on 14th June 2002 even though the Grant was signed on 15th March 2002. By the time this suit was filed on 25th April 2014, 12 years had not lapsed and a claim for adverse possession pursuant to Section 7 of the Limitations of Actions Act had not therefore crystallised even assuming that it was possible.

28. At any rate, the Defendant herein is a state agency and any land registered in favour of such an agency is defined as public land. Under Section 42 of the Limitation of Actions Act, one cannot lay a claim of adverse possession against the Government. In light of the said Section 42 of the Limitation of Actions Act as read together with Article 62(1) (b) of the Constitution, the Plaintiffs claim on the suit property was clearly misguided and without basis.

29. As it were, the Defence testimony and the evidence placed before me remains uncontroverted. That evidence points to the fact that the suit property was at all times Government land earmarked for expansion of the Manda Island Airport. There was also evidence that the Plaintiffs were made aware of the ownership of the property and that they were asked to vacate and even offered compensation on humanitarian grounds.

30. Nothing was placed before me to demonstrate that the Plaintiffs had acquired ownership of the property either by prescription or through adverse possession. On the contrary, the Defendant has proved on a balance of probability that it was entitled to the orders sought in the Counterclaim. In the absence of the Plaintiffs and their Counsel to cross-examine the evidence placed before the Court, the defence evidence remained unchallenged and uncontroverted.

31. Accordingly, this Court is satisfied that there is merit in the Defendant's Counterclaim. Judgment is accordingly entered for the Defendant as prayed in the Counterclaim.

32. The Defendants shall have the costs of both the Plaintiffs suit and of its Counterclaim.

Dated, signed and delivered at Malindi this 25th day of September, 2020.

J.O. OLOLA

JUDGE