



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 41'B' OF 2012

HASSAN HASHI SHIRWA

OMAR ALI HAMED.....PLAINTIFFS

=VERSUS=

SWALEH MOHAMED

SALEH MOHAMED

BAKARI ALI MZEE

OMARI WAZIRI

ABDALLA WAZIRI

AYUB SHEKUE

ABDILLAHI MOHAMED

ABDALLA SHEE.....DEFENDANTS

JUDGEMENT

Introduction

1. The Complaint before me was filed on 15th March, 2012. In the Complaint, the Plaintiffs have averred that they are the registered owners of parcel of land known as L.R. No. 28359, CR No.47803 situated in Kiongwe, Lamu District measuring 150 ha for a term of 99 years [the suit property].
2. It is the Plaintiffs' averments that in the month of November 2011, the Defendants illegally entered and attempted to remain on the Plaintiffs' land; that the Plaintiffs confronted and successfully prevented the Defendants from further entry and the matter was reported to police.
3. According to the Plaintiffs' Complaint, the Defendants have threatened to continue with the trespass on the suit property and that the said trespass is an infringement of the Plaintiffs' constitutional right to own property.
4. The Plaintiffs are seeking for a permanent prohibitory injunction restraining the Defendants from entering upon, constructing, selling, leasing or interfering with the Plaintiffs' possession and quiet enjoyment of the suit property.

5. The Defendants filed a Defence and Counter-claim on 26th June 2012 and stated that the suit property is Government land; that the Defendants and the entire Kiongwe Mjini Community have been settling and squatting on the land for over fifty [50] years and that they have lawfully held, managed and used the said land as a community.
6. The Defendants further averred that the Plaintiffs are not the owners of the suit property and that the documents in possession of the Plaintiffs have been obtained by way of forgery and fraud.
7. In the Counter-claim, the Defendants have stated that they are the lawful and legal squatters on the subject land and that they are entitled to be issued with ownership documents by way of adverse possession.
8. The Defendants have prayed in the Counter-claim for a declaration that they are the lawful and legal squatters in the suit property and for a declaration that the Grant that was issued to the Plaintiff be declared null and void.
9. Mr. Geoffrey Birundu, Pw 1, was the Chief Land Registrar, Coastal Region, at all materials. Pw 1 informed the court that on 18th September 2013, he wrote to the Plaintiffs' advocate and attached on the said letter documents in support of the transactions involving the suit property.
10. According to the witness, the first document that he annexed on the said letter is a copy of the Grant in favour of the Plaintiff. It was the evidence of Pw 1 that the Grant was signed on 13th April 2010 and registered at the Coastal registry on 11th May 2010 as CR number 47803/1. It was the evidence of Pw 1 that that was the first time the Grant in respect of the suit property was registered by himself. It was of Pw 1 that the Grant was accompanied with a deed plan whose number is 305856.
11. Pw 1 referred the court to the letter of allotment that was issued to the Plaintiff and annexed on his letter. According to the witness, the Plaintiff paid to the Government Ksh.81,202 being the charges that were indicated in the letter of allotment. The witness referred the court to the copy of the receipt evidencing the payment of the said amount. A copy of a banker's cheque of Kshs.81,290/= addressed to the Commissioner of Lands was also produced in evidence by Pw 1.
12. It was the evidence of Pw 1 that the Commissioner of Lands prepared the Grant in favour of the Plaintiffs and forwarded it to him at the Coastal Registry for the purpose of registration. The witness produced a letter dated 7th May 2010 by the Commissioner of Lands forwarding the Grant in respect of L.R.No.28359-Lamu to him for registration.
13. Pw 1 further stated that before a title is issued, the physical planner is supposed to go to the ground and "plan" for the land whereafter the Director of Surveyor authenticates what the physical planner would have done. The two departments are under the Commissioner of Lands and they provide technical assistance to the Commissioner of Lands.
14. Pw 1 further stated that the process of "planning" the land and surveying was properly conducted and that is what led to the issuance of a deed plan. Pw 1 produced copies of the Land Rent invoice dated 20th April 2010 for Ksh.163,200 addressed to the Plaintiffs, receipts showing the paid up rent and the rent clearance certificate dated 22nd June 2012.
15. The certificate of postal search as on 11th July, 2012 was also produced by Pw 1 showing the Plaintiffs as the registered proprietors of the suit property.
16. The last document that was produced by Pw 1 is a letter by Mr. Ochieng E.O for the Commissioner of Lands dated 25th June 2012 and addressed to the Defendant's advocate. According to Pw 1, Mr. Ochieng authored the letter dated 25th June 2012 before seeing the title documents in respect to the suit property. The witness informed the court that Mr. Ochieng had informed him that he made a mistake by writing the said letter which stated that the Grant and deed plan for the suit property was a forgery.
17. According to Pw 1, the Grant was duly signed by the Commissioner of Lands on the advice of the Physical Planner and the Director of Surveys. The Grant was then forwarded to him for registration. It was the evidence of Pw 1 that before the title document was issued to the Plaintiffs, the suit property was Government land and that the doctrine of adverse possession is not applicable over government land. The witness produced a bundle of documents which were filed in this court on 18th February, 2013 as PEXB 1.
18. Pw 1 finalized his evidence in chief by stating that the Grant that was issued in favour of the plaintiff is genuine.
19. In cross-examination, Pw 1 stated that there were conditions in the letter of offer that were

- supposed to be met by the Plaintiffs. One of the conditions required the Plaintiffs to pay the charges stipulated therein within 30 days. However, the Plaintiffs made their payment after four years.
20. Pw 1 informed the court that if an allottee of land does not pay the requisite charges within 30 days, then the Government was at liberty to allocate it to somebody else. However, payments can still be received by the Government even after the lapse of 30 days.
 21. Pw 1 informed the court that according to the Part Development Plan (PDP), the Physical Planner went to the ground and then prepared the PDP which was duly signed by the Commissioner of Lands.
 22. Pw 1 stated that it is the Physical Planner who can be in a position to explain if the land was allocated by the District Development Committee or not and that Mr. Ochieng, who is his colleague, would not have known the position of the Grant.
 23. In Re-examination, Pw 1 stated that after a deed plan has been issued, that land ceases to be available for allocation to any other person.
 24. The 2nd Plaintiff, Pw 2, stated that the suit property belongs to him and the 1st Plaintiff having been allocated with the same between 1995 and 1996 by the Government.
 25. It was the evidence of Pw 2 that a letter of allotment was issued to him in 1998 which was one of the documents in the "Plaintiffs' Supplementary Affidavit" filed in court on 17th April 2013. The documents in that list were produced as PEXB 2 by consent. The 2nd Plaintiff referred the court to the said letter of allotment and the PDP attached thereto.
 26. Pw 2 stated that they requested to be allowed to pay the requisite charges after the expiry of 30 days stipulated in the letter of allotment which request was allowed by the Government.
 27. Pw 2 stated that they were subsequently issued with a deed plan after they paid Ksh.82,000 to the Government. The title document was subsequently issued to them and since then, they have been paying the requisite rent and rates which were exhibited in his bundle of documents. Pw 2 also produced in evidence the official search for the suit property.
 28. Pw 2 informed the court that he knew the Defendants having been born in Kiongwe Mjini. It was his evidence that the Defendants stay in Kiongwe Mjini which is 6Km to the suit property. Pw 2 stated that none of the Defendants is residing in the suit property.
 29. According to Pw 2, the Plaintiffs' applied to the Government to allocate them the suit property so that they could harvest "murrum", a fact the Defendants knew about. However, some of the Defendants invaded the suit property and put up three structures on the suit property after this suit was filed. The photographs that were taken showing the structures in the suit property were produced in evidence.
 30. It was the evidence of Pw 2 that he has since received threats from the Defendants, some of whom carry guns.
 31. In Cross-examination, the 2nd Plaintiff, Pw 2, stated that they were allocated the suit property after going through the Physical Planner's office.
 32. It was the evidence of Pw 2 that they did not pay the requisite fees within 30 days because they were awaiting the issuance of the deed plan after the land was surveyed. The said deed plan was not issued until in February, 2010.
 33. It was the evidence of Pw 2 that he was born in Kiongwe Mjini and that he knew all the Defendants. According to Pw 2, Kiongwe Mjini is different from where the suit property is situated; that the Defendants only put up structures in the suit property when they filed the present suit and that they took the photographs of the said structures.
 34. Pw 2 maintained that the suit property was located in an area known as Ngogwe, which was six kilometers from Kiongwe Mjini and that the residents of Kiongwe Mjini had no objection when the property was allocated to them.
 35. According to Pw 2, they built, with the help of donors, a mosque for the residents of Kiongwe Mjini and on that basis, the elders had no objection with the allocation of the suit property.

The Defendants' case

36. Mr. Abdalla Shee Omar, Dw 1, informed the court that he is a farmer and he stays in Kiongwe Mjini. Dw1 stated that he has stayed in Kiongwe Mjini for over 30 years where over 200 people are residing. Although he could not tell the acreage of the land the Defendants were claiming, he

- stated that the people staying at Kiongwe Mjini, including himself, have been planting cotton, mangoes amongst other crops in the suit property.
37. It was the evidence of Dw 1 that the 2nd Plaintiff stays in Mpeketoni and not Kiongwe Mjini and that they never invaded the suit property as claimed by the Plaintiffs. All they did was to report to the District Officer and the District Commissioner about the allocation of their land. The witness produced the letter that they received from the District Commissioner after their complaint as DEXB 1.
 38. Dw 1 further stated that they went to see the District Physical Planner with a view of having their land sub-divided. It was his evidence that the Physical Planner should sub-divide the land and have it allocated to them.
 39. According to Dw 1, went to the County Council's offices to complain about the allocation of their land where they were given a letter dated 20th September 2012. They also lodged a complaint about the allocation of the suit property with Hon. Orengo, the then Minister of Lands who promised to investigate their claim. Dw 1 finalized his evidence in chief by stating that the title held by the Plaintiffs' is non-existent and should be nullified by this court.
 40. In cross-examination, the witness reiterated that he stays in Kiongwe village.
 41. Bakeli Ali Mzee, Dw 2, stated that he was 80 years old and a farmer. It was his evidence that he stays in Kiongwe Mjini and that is where he was born. The witness stated that the 2nd Defendant was born in Kiongwe Mjini although he lives in Mpeketoni.
 42. It was the evidence of Dw 2 that he has been cultivating the suit property although he stays in the village. It was his evidence that he wants the court to assist the community to get back the suit property.
 43. In cross-examination Dw 2 stated that there are about 40 houses within Kiongwe Mjini occupied by approximately 200 people. It was his claim that the community wants all its land.
 44. The 1st Defendant, Swaleh Mohamed, appeared in this matter as Dw 3. Dw 3 stated that he was both a farmer and a fisherman. According to Dw 3, he was born in Kiongwe Mjini and that is where he resides. It was his evidence that he has been cultivating the suit property and that because of the lifestyle of his community, they keep on moving.
 45. Dw 3 informed the court that although the 2nd Plaintiff was born in Kiongwe Mjini, he has never stayed there.
 46. Dw 3 stated that when they learnt that the Plaintiffs had obtained the title document in respect to the suit property, they lodged a complaint with the District Commissioner and the then Minister for Lands, Hon Orengo. It was the evidence of Dw 3 that the Minister made inquiries with the Commissioner of Lands and eventually gave them a letter dated 10th May 2012. Dw 3 produced the letter as D EXB 2.
 47. It was the evidence of DW3 that the Commissioner of Lands, through Mr. Ochieng, denied that the title which was in possession of the Plaintiffs emanated from his office. According to Dw 3, the Commissioner of Lands directed the Physical Planner to prepare a Part Development Plan in respect to the Community's land which was produced as DEXH 3. Dw 3 prayed that the Plaintiffs' Grant should be cancelled by this Court.
 48. In cross-examination, Dw 3 stated that more than 20 families leave in Kiongwe Mjini. It was his evidence that those families usually cultivate the suit property and then go back to their houses in Kiongwe Mjini.
 49. The 3rd Defendant, Omari Waziri appeared as Dw 4. It was his evidence that he stays in Kiongwe Mjini and that he has lived there for over 35 years.
 50. Dw 4 stated that he has been cultivating the suit property and that they lodged their complaint with the District Commissioner when they learnt that the suit property had been allocated to the Plaintiffs.
 51. According to Dw 4, the Grant that was issued to the Plaintiffs should be cancelled by this court for having been issued fraudulently.
 52. The 5th Defendant, Ayub Shekue stated that he was born in Kiongwe Mjini 23 years ago. According to Dw 5, he stays with many other families at Kiongwe Mjini who have more than 50 houses. The 5th Defendant informed the court that the title document that was issued to the Plaintiffs' should be cancelled.

Submissions

53. The Plaintiffs' advocate filed his submissions on 20th March 2014. The Plaintiffs' advocate further submitted that the Plaintiffs' Grant is genuine and valid. The Plaintiffs' Counsel submitted that the documents in the supplementary list of documents filed on 17th September 2013 shows the procedure that the Plaintiffs followed to acquire the suit property.
54. The Plaintiffs' counsel further submitted that under the repealed Constitution, the President had powers to alienate public land and such powers were vested in the Commission of Lands. Counsel relied on the case of **R-vs-Commissioner of Lands & Another, Misc. Application NO.395 of 2012** where Odunga J held that a title to land can only come into existence after the issuance of the letter of allotment and meeting the conditions therein and actual issuance thereafter of title documents.
55. The Plaintiffs' counsel referred the court to the letter that was authored by the Principal Land Registration Officer, Pw 1, dated 18th September 2013 in which he confirmed that Grant number 395856 and registered as CR 47803/1 was lawfully and rightfully registered in the Plaintiffs' names.
56. The Plaintiffs' counsel further submitted that the Principal Land Registration Officer, Pw 1, dismissed the letter dated 25th June, 2012 authored by Mr. Ochieng E.O; that the Defendants never challenged the documents that were produced by the Plaintiffs and that the Plaintiffs have proved that they acquired the suit property procedurally and free from any encumbrances.
57. According to Counsel, section 24 (a) of the Land Registration Act, 2012 provides that the registration of a person as a proprietor of land vests upon that person the absolute ownership of that land and that the rights of a proprietor of land acquired for valuable consideration is indefeasible except as provided for under the Act. Counsel also referred the court to the provisions of section 23 of the repealed Registration of Titles Act. Counsel relied on the case of **Paul Nyira & Another vs Jane Kendi Ikinuya & 2 Others Hcc No.747 of 2007, Mutsonga Vs Nyati(1984) KLR23** to buttress his argument.
58. The Plaintiffs' counsel further submitted that the Defendants are not and have never been in possession of the suit property and that their entire case collapsed when the court visited the suit property; that the suit property is in Ngoe and not Kiongwe Mjini and that Kiongwe Mjini is not in the Plaintiffs' title.
59. The Plaintiffs' counsel finally submitted that the Plaintiffs were issued with a Grant on 11th May 2010 and consequently, the Defendants claim for adverse possession as against the Plaintiff cannot succeed. In any event, it was submitted, before the registration of the land in the Plaintiffs' favour, the suit property was Government land. Counsel submitted that it is trite law that one cannot claim adverse possession as against the Government.
60. The Defendant's advocate filed his submissions and authorities on 23rd April, 2014. Counsel submitted that the Defendants interest in the suit property is not singular/private in nature but representative of a whole village community in which they live in. Consequently, it was submitted, the main issue for determination is whether the rights of the many, commonly referenced as public interest, is subservient to the rights of the Plaintiffs.
61. According to counsel, if it were to be argued that the Plaintiffs' title has ticked all the right boxes, that cannot be said that the same title was obtained regularly.
62. The Defendants' counsel further submitted that an official from the Ministry of Lands labeled as a forger the Plaintiffs' title vide a letter dated 25th June 2012; that the presumption at law under section 83 of the Evidence Act is that all information provided by Government bodies is accurate if produced under the title of the relevant body or Ministry and that a different set of people have claimed ownership of the suit property.
63. The Defendants' counsel further submitted that the Plaintiffs did not explain why they delayed in paying the land rent charges; that the whole village draws its livelihood from the suit property and that the Bajan community are nomadic people who do not have permanent settlements. Counsel relied on the case of **Munyu Maina-vs-Hiram Githi ha Maina(2013) e KLR** to buttress his arguments. Counsel implored this court to apply the oxygen principle in as far as interrogating the extent of the veracity of the Plaintiffs' title.
64. The Defendant's counsel submitted that this is not a case of a party undertaking an academic exposition of legal principles. The court, it was submitted, ought to expand its jurisdiction to

achieve the greatest degree of justice to the greatest number of people as was stated in the case of **East African Cables Limited -vs-The Public Procurment Board & Another, Civil Appeal No.109 of 2007.** Counsel also relied on the **R-vs-Registrar of Titles & 4 Others J.R.No.9 of 2011(Nairobi).**

65.The Defendants` counsel finally submitted that this court should take judicial notice of the fact that the National Land Commission has recently selected Lamu County as an area in need of redress and that the suit property has been identified for a settlement scheme for the benefit of the community; that the National Land Commission is the constitutional body currently mandated to interrogate interests in land in Kenya and that the Government, through the National Land Commission, has undertaken to issue to the Defendants the titles.

Analysis and findings

66.The issues for determination in this matter are follows;-

- (a) Was the suit property lawfully allocated to the Plaintiffs?**
- (b) Are the Defendants entitled to the suit property?**

67.It is not in dispute that the suit property otherwise known as L.R. No. 28359 and registered as CR 47803 is government land. This fact was admitted by the Defendants in their Defence at paragraph 4 where they pleaded as follows;-

“The Defendants vehemently deny the contents of paragraph 4 of the Plaint and state that the subject land is a Government Land....”

68.Government land, as defined by the Government land Act (repealed), is land that was vested in the Government of Kenya by dint of sections 204 and 205 of the Constitution that was contained in Schedule 2 of the Kenya Independence Order in council, 1963 and Sections 21, 22, 25 and 26 of the Constitution of Kenya (Amendment) Act 1964.

69.The Government Lands Act (now repealed), which replaced the 1915 Crown Lands Ordinance, was enacted to make further and better provisions for regulating the leasing and other depositions of Government Land. Under this Act, it is only the President or the Commissioner of Lands who was allowed to make grants or disposition over unalienated Government land. The President would then sign documents granting title although he could delegate these powers to the Commissioner of Lands.

70.Unalienated Government land, under the repealed Constitution and the Government Land Act, unlike Trust land, was not vested in local communities and it was not held in trust for them by the County Government land, as defined by the Government land Act (repealed), is land that was vested in the Government of Kenya by dint of sections 204 and 205 of the Constitution that was contained in Schedule 2 of the Kenya Independence Order in council, 1963 and Sections 21, 22, 25 and 26 of the Constitution of Kenya (Amendment) Act 1964.

71.The Government Lands Act (now repealed), which replaced the 1915 Crown Lands Ordinance, was enacted to make further and better provisions for regulating the leasing and other depositions of Government Land. Under this Act, it is only the President or the Commissioner of Lands who was allowed to make grants or disposition over unalienated Government land. The President would then sign documents granting title although he could delegate these powers to the Commissioner of Lands.

72.Unalienated Government land, under the repealed Constitution and the Government Land Act, unlike Trust land, was not vested in local communities and it was not held in trust for them by the County Councils.

73.According to the Plaintiffs` pleadings and evidence, they were allocated the suit property by the Government by way of a letter of allotment dated 14th July, 1998. The said letter of allotment is one of the documents in the Plaintiffs' supplementary list of documents. These bundles of documents were produced as PEXB 3 by Pw 2 by consent. The same letter of allotment was also produced by the Principal Land Registration Officer, Pw 1.

74. According to the said letter of allotment, the suit property was “a proposed site for quarrying”. The Plaintiffs were required to pay Kshs.81,292 to the government towards the stand premium and other charges within 30 days. Attached on the letter of allotment is a copy of a part development plan (PDP) number LMU1281.2.97 which was approved on 5th May 1997. The part development plan (PDP) shows that the land was for “proposed site for quarrying activities”. The PDP number corresponds with the number indicated in the letter of allotment.
75. Both Pw 1 and Pw 2 produced in evidence a copy of the banker's cheque addressed to the Commissioner of Lands dated 8th April, 2010 and bank slip for the same amount showing that the bank received the cheque on behalf of the Commissioner of Lands on 8th April, 2010.
76. According to the evidence of the Principal Land Registration Officer, Pw 2, after the Plaintiffs' paid the requisite charges, the Commissioner of Lands, having been satisfied with the contents of the Part Development Plan, the Survey Plan and the Deed Plan prepared and signed a Grant in favour of the Plaintiffs.
77. In the supplementary list of documents, Pw 2 referred the court to the letter by their surveyor, E.M.J Kiguru dated 29th June 2009 in which the surveyor forwarded to the Director of Surveys several documents showing that he had completed the survey of land represented in PDP number LMU 1281.2.97. The documents which the surveyor forwarded to the Director of Surveys included field notes, the surveyor's report, the index to comps, computations, the survey plan, the copy of the letter of allotment and the beacon certificate.
78. The Plaintiffs also produced in evidence the letter dated 3rd February, 2010 forwarding to the Director of Surveys a copy of the Deed Plan for checking, signing and sealing. It was the evidence of the 2nd Plaintiff that it was after the deed plan had been prepared that they made the payment of Ksh.81,290. Pw 2 produced in evidence a letter dated 8th April 2010 forwarding the banker's cheque for Ksh.81,290.
79. According to the evidence of the Principal Land Registration Officer, Pw 1, this amount was towards the payments that had been indicated in the letter of allotment. It was the evidence of Pw 1 that although the amount was supposed to have been paid within 30 days from the date the letter of allotment was issued, the Government would still legally accept this amount even after the 30 days if the land had not been allocated to somebody else. I agree with the position of Pw 1.
80. A letter of allotment cannot be declared invalid on the basis that the payments have been made after the lapse of 30 days in a situation where the government proceeds to receive the said payments. However, if the government allocates the same land to somebody else after the lapse of 30 days, then it will be in order for the Government to decline to receive the said payment. In such a situation, the first allottee will not have a basis to claim for the same land.
81. Pw 1 and Pw 2 produced in evidence a letter dated 7th May, 2010 authored by the Commissioner of Lands forwarding the Grant in respect to the suit property to the Registrar of Titles, Mombasa. Pw 1 stated that he is the one who was the Registrar of Titles at that time in Mombasa and that he personally received the Grant from the Commissioner of Lands.
82. I have perused the said letter and it states as follows:-

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“Forwarded herewith, please find a Grant duly signed and stamped for your registration”

83. The letter is signed by J. N. Osoro for the Commissioner of Lands. P W 1 and P W 2 produced in evidence the Grant that was issued to the Plaintiffs. The said Grant was issued pursuant to the provisions of the repealed Registration of Titles Act. It was registered as CR 47803/1 by Pw 1 on 11th May 2010. The Grant is a lease hold of 99 years whose annual payable rent is indicated as Kshs.13,600 measuring 150ha. Attached on the Grant is a Deed Plan number 305856.
84. The Deed Plan which is attached on the Grant is in all respects similar to the Survey Plan FR No. 496/36 which was produced in evidence by Pw 2 in his supplementary list of documents. The Survey Plan was duly authenticated by the Director of Surveys on 20th January 2010. Pw 1 and Pw 2 also produced the official search which shows that the Plaintiffs were the registered proprietors of L.R.No.28359 Lamu as at 11th July, 2012.

85. The evidence in this court shows the Plaintiffs` have been paying to the Government the requisite annual rent.
86. The Principal Land Registration Officer produced in evidence a copy of a letter dated 25th June 2012 by Ochieng G.O and addressed to the Defendants` advocate. In the said letter, Mr. Ochieng in reply to the Defendants` advocate`s letter stated that after perusing the copies of the letter of allotment and Grant number CR 47803 issued in respect of LR 28359, he found that the two documents were forged and did not originate from the Commissioner of Lands` office.
87. In his letter dated 18th September 2013, and his oral evidence, the Principal Land Registration Officer, Pw 1, stated that Grant Number 28359 and registered as CR No.47803/1 on 11th May 2010 exist and was lawfully registered in the names of the Plaintiffs. It was the evidence of Pw 1 that Mr. Ochieng was not seized of the facts pertaining to the land in question when he wrote the letter of 25th June, 2012 and that it was him, Pw 1, who registered the Grant when he was the Registrar of Titles in charge of the Coastal registry.
88. Attached on the Plaintiffs` supplementary list of documents was another letter dated 11th September 2013 by a Mr. Iseri Kirungu of the National Land Commission. The said letter by Mr. Kirungu confirmed that according to the available records, L.R.No.28359, Lamu is registered in the names of the Plaintiffs.
89. The procedure relating to the allocation of Government land was clearly captured by Njagi J in the case of **AFRICAN LINE TRANSPORT CO.LTD Vs THE Hon .AG, Mombasa HCCC No.276 of 2013** as follows;

“Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows.

A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot.”

90. That is what happened in this particular case. The suit property was identified by way of a P.D.P number LMU.1281.2.97 for quarrying activities. After the P.D.P was prepared and approved on 5th May 1997, a letter of allotment was issued to the Plaintiffs on 14th July 1998. By way of a letter dated 19th November, 2009, the Commissioner of Lands directed the Director of Surveys to survey the “unsurveyed quarrying site and prepare a deed plan”. The survey plan no. 496/36 was prepared by EMJ Kiguru and authenticated by the Director of Surveys on 20th January, 2010 who then issued a land reference number 28359 to the suit property. A deed plan number 305856 dated 9th February, 2010 was then prepared and the Commissioner of Lands sent the Grant to the coastal registry for registration. The said Grant was eventually registered in favour of the Plaintiffs by Pw 1. That is the procedure that ought to be followed before a Grant can be issued lawfully.
91. In the case of **Munyu Maina v Hiram Gathiha Maina, Civil Appeal number 239 of 2009**, the Court of Appeal held as follows;-

“We state that when a registered proprietor`s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

92. The Plaintiffs have successfully shown how they acquired their title by producing all the documents that must be in place before a Grant can be issued and registered in favour of person.
93. The Defendants` advocate submitted that this court ought to expand its jurisdiction to achieve the greatest degree of justice on the greatest number of people.
94. My answer to that is that this Court`s jurisdiction can only be exercised within the confines of the Constitution and the laws of this country. The Constitution, at Article 40(1) states as follows;-

“Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property of any description and in any part of Kenya.”

95. One of the limitations to the right to own property is provided for under Article 65, which deals with ownership of land by non-citizens. According to that Article, a person who is not a citizen can only hold land on the basis of a leasehold tenure.

96. The other limitation to the right to own property is provided for under Article 40(6) which provides as follows;-

“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

97. The Plaintiffs have shown that they acquired the suit property lawfully. Indeed, no evidence was called by the Defence to show that the Plaintiffs acquired the Grant unlawfully to enable this court to order for its cancellation.

98. The letter by the former Minister for Lands dated 10th May, 2012 (DEXB 2) simply stated that the Commissioner of Lands had been directed to look into the matter. The letter by the then District Commissioner of Lamu West dated 8th May, 2012 and addressed to the Commissioner for Lands (DEXB 1) stated that he (the DC) had no objection to the PDP which had been prepared for the residents of Kiongwe Mjini if the land was not committed. None of those letters called into question the Plaintiffs' Grant.

99. The Defendants' counsel submitted that a whole village draws its livelihood from the suit property and that it has been doing so since time immemorial.

100. This court visited the suit property on 22nd November 2013. This court observed that the Defendants and other family members stay in an area called Kiongwe Mjini. All the houses are in that area. From Kiongwe Mjini, the court drove to where the suit property is situated, which was approximately six kilometres away.

101. The fact that all the Defendants live at Kiongwe Mjini was reiterated by the Defendants while testifying. It may be true that the Defendants, being members of the Bajuni community keep on moving and that they used to cultivate the suit property before returning to their homes in Kiongwe Mjini. However, and as I have already stated, the suit property is Government land and was at the time of allocation, unalienated Government land.

102. Under the repealed Constitution and the Government Lands Act, the Government could allocate to individuals unalienated Government land. However, such alienation could only be effected legally after the planning process was completed. It is during the planning process that the Physical Planner is supposed to ascertain if indeed the land in question is available for allocation and advise the Commissioner of Lands accordingly.

103. As I have shown above, a Part Development Plan for the suit property was prepared by the Physical Planner and approved by the Director of Physical Planning and the Commissioner of Lands in 1997. By this time, the property according to the Physical Planner was available for quarrying purposes and that is why it was allocated to the Plaintiffs.

104. It is therefore not true that the suit property is in respect to the entire village because, as observed by the court during the site visit, there was more land between Kiongwe Mjini and where the Plaintiffs' land is.

105. It is true, as submitted by counsel, that the Defendants have the right under the Constitution to the equitable access to land. It is also true that it is only the National Land Commission that has the constitutional mandate to manage, alienate and allocate public land.

106. All unalienated Government land, after the promulgation of the Constitution in August 2010, is classified as Public Land and ought to vest and be held by the County Government in trust for the people resident in the county and administered on their behalf by the National Land Commission. **(See Article 62(1) (a) and 62(2) of the Constitution).**

107. However the suit property was registered in favour of the Plaintiffs on 11th May 2010, that is, before the promulgation of the Constitution. The suit property cannot be said to be public land because the land is not unalienated Government land. This fact has been admitted by the National Land Commission itself.

108. The right to access land can and should be achieved within the confines of the law. That right

cannot be achieved by taking private land and allocating it to the landless people of this country. 109. Section 134 of the Land Act, 2012 provides that the National Land Commission shall, on behalf of the national and county Government, implement settlement programmes to provide access to land for shelter and livelihood. That function is supposed to be achieved by reserving public land, which includes unalienated Government land, and where Public land is not available, by purchase of private land subject to the Public Procurement and Disposal Act, 2005. That is the law that should be followed by the National Land Commission in fulfilling the rights of people to access land.

110. The Court of Appeal was confronted with a situation similar to what the Defendants are now claiming in the case of **Michale Githinji Kimotho -Vs- Nicholas Murathe Mugo, Nairobi Civil Appeal No. 53 of 1995** and it held as follows:

“If the appellant had been in occupation of the suit land as a squatter without any right or title to the suit land in his favour, he was obviously in no position to resist the respondent's claim. Though the appellant had for a long time been in occupation of the suit land which was government land before it was allocated to the respondent, this could not have helped him in resisting the respondent's claim where the latter is registered as owner of the land. Similarly, if he, the appellant, had carried out any development on the suit land, he did so at his own peril and he could not expect any compensation in that respect. Even if for argument sake the suit land had been erroneously allocated to the respondent the appellant as a squatter in the suit land had no locus standi and the so called erroneous allocation could not be an answer to the respondent's claim for his eviction. His position as a trespasser could not have given him any protection against the respondent's claim for possession as the registered owner of the suit land.

111. Having found that the Plaintiffs were allocated the suit property lawfully, and in view of the fact that the Defendants have not proved the allegations of fraud in the acquisition of the Plaintiffs' title, I find and hold that the Plaintiffs have proved their case on a balance of probabilities. On the other hand, the Defendants have not proved their Counter-claim on a balance of probabilities, or that they have acquired the suit property by way of adverse possession.

112. The Plaintiffs were registered as the proprietors of the suit property on 11th May 2010. Before then, the suit property was unalienated Government land. It is trite law that pursuant to the provisions of section 41 of the Limitation of Actions Act, one cannot acquire prescriptive rights over Government land.

113. In the circumstances and for the reasons I have stated above, I allow the Plaintiffs' claim in terms of the Plaint dated 15th March, 2012 with costs and dismiss the Defendants' Counter-claim dated 26th June, 2012 with costs.

Dated and delivered in Malindi this 6th day of June, 2014.

O. A. Angote

Judge