



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO.63 OF 2012

JOSEPH ANTONY MARUBU.....PLAINTIFF

=VERSUS=

KAHINDI CLINTON BAYA.....DEFENDANT

JUDGEMENT

Introduction

1. According to the Plaintiff's Complaint dated 18th December, 2012, the Plaintiff is the registered owner of land known as LAMU/'WITU/681 measuring approximately 6.4 Ha (the suit property).
2. The Plaintiff averred in his Complaint that the Defendant has since trespassed on his land and proceeded to plant maize and erected three temporary residential structures thereon; that the Defendant is wasting the said land and that the Defendant's continued occupation of the suit property is illegal and unconstitutional.
3. The Defendant filed his Defence and Counter claim on 1st March, 2013 in which he averred that the dispute herein should be adjudicated by the Land Disputes Tribunal; that the Plaintiff's claim is time barred by virtue of the provisions of section 7 of the Limitation of Actions Act and that this court does not have jurisdiction to entertain the claim.
4. The Defendant further averred in his Defence that in the year 2006, the Plaintiff fraudulently and illegally obtained a title deed in respect to the suit property in which he was in occupation; that the discharge of charge was not signed by the Permanent Secretary and that the Plaintiff has never occupied the land.
5. In the Counter claim, the Defendant has stated that he is the owner of the suit property which he has developed and that he has lived in the suit property since 1993 and therefore acquired the same by adverse possession.
6. The matter proceeded for hearing on 26th May, 2014 in the absence of the Defendant.

The Plaintiff's case

7. The Plaintiff, Pw 1, informed the court that he lives in Murang'a. Pw 1 stated that he was allocated the suit property by the Settlement Fund Trustee on 26th March, 2001. After receiving the letter of allotment, he paid the requisite 10% on 30th March, 2001. He cleared the balance of Ksh.40,000 in the year 2007. Pw 1 produced the letter of offer and receipts evidencing the payments he made as PEXB 1 and 2 (a)-(c) respectively.
8. The Plaintiff was thereafter issued with a title deed which he produced as PEXB3. The discharge of charge by the Settlement Fund trustee was produced as PEXB4 and the transfer document was

- produced as PEXB5.
9. The Plaintiff stated that the land in question is his and the Defendant should be permanently enjoined from using it.

Submissions

10. The Plaintiff's advocate submitted that Defendant has not rebutted the evidence produced in court by the Plaintiff.
11. The Plaintiff's counsel submitted that the Defendant's Counter-claim should be dismissed and judgement be entered in favour of the Plaintiff.

Analysis and findings

12. The Plaintiff produced in evidence the letter of allotment dated 26th March, 2011 for parcel of land known as Witu Lamu/681 measuring approximately 6.4.Ha (the suit property).
13. According to the receipts that were issued to the Plaintiff by the Settlement Fund Trustee, the Plaintiff paid to Settlement Fund Trustee Ksh.4,000 being the 10% deposit on 30th May, 2001. On 7th October, 2005, the Plaintiff made a further payment of Ksh.40,000/- to the Settlement Fund Trustee. The Title Deed for Lamu/Witu/681 was then issued to the Plaintiff on 28th August 2006. The title deed was produced as PEXB3.
14. The Defendant did not call any evidence to rebut the Plaintiff's evidence. There is no evidence to show that the Plaintiff's Title Deed was issued fraudulently.
15. Although the Defendant pleaded the defence of limitation of time in his Defence, he did not call any evidence to prove that he has been on the suit property for over twelve years and that within that, it was the Plaintiff or his predecessor in title who had the title document.
16. In any event, even if it is true that the Defendant has been in occupation since the year 1993 as pleaded in his Defence, his right over the suit property has never crystallizes. It is trite law that one cannot lay a claim of adverse possession over Government land or land owned by the Settlement Fund Trustees. In the case of Gitu=vs=Ndungu & 2 Others(2001) KLR 149, the Court of Appeal upheld the decision of Boniface Oredo=vs=Wabomba Mukili Civil Appeal No.170 of 1989 in which it was held that the interest of the Settlement Fund Trustee in the suit property was not extinguishable under the Limitation of Actions Act. The bench of five judges went ahead to find that the earlier case of Eliud Nyongesa Luseneke=vs=Nathan Wekesa Omoche, Civil Appeal No.134 of 1993 which had held that time could run as against the Settlement Fund Trustee was wrongly decided.
17. In view of the fact that the Plaintiff was issued with the Title Deed by the Settlement Trust Fund in the year 2006, and the Plaintiff filed the suit in the year 2012, the claim for adverse possession by the Defendant cannot succeed.
18. Consequently, and in view of the evidence that has been placed before me, I find that the Plaintiff has proved his case on a balance of probabilities.
19. For the reasons I have given above, I shall, which I hereby do, allow the Plaintiff's Plaint dated 18th December, 2012 in the following terms;
- a. **A declaration be and is hereby issued that the Plaintiff is the lawful and genuine registered owner of all that parcel of land known as Lamu/Witu/681 and the Defendant to give vacant possession.**
 - b. **A permanent injunction be and is hereby issued restraining the Defendant by himself, his agents, servants, representatives or any other person claiming under him from continuing to occupy the Plaintiff's land known as LAMU/WITU 681 or from carrying out farming activities of any nature and from erecting permanent or temporary structures thereon.**
 - c. **The Defendant to pay to the Plaintiff the costs of the suit.**

Dated and delivered in Malindi this 11th day of July, 2014

O.A. ANGOTE

JUDGE