



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ENVIRONMENT AND LAND CASE NO. 27 OF 2011**

**ATHMAN OMAR DZUNGA.....PLAINTIFF**

**- V E R S U S -**

**SAUMU HUSSEIN MARJAN & ANOTHER.....DEFENDANTS**

**JUDGEMENT**

[1] The plaintiff in this case states that he is the registered owner entitled to possession of LR.NO. 1043/111/43 in Mazeras Kilifi Town. He avers in his plaint that on 8th May, 2008 that Provincial Survey Office Coast Province visited the suit property for purposes of establishing the boundaries and in the process land beacons showing the extent of the suit property. The plaintiff avers that the defendants on or about June 2008 trespassed on suit property took part of the suit property and have thereafter uprooted the beacons and wrongfully constructed permanent structures in the suit property. The plaintiff states that the defendants have misused, damaged, wasted, destroyed and/or degraded the suit property denying the plaintiffs the enjoyment of the same.

[2] The plaintiff prays for a permanent injunction restraining the defendants their agents and servants from entering, remaining, continuing in occupation or in any other way interfering with the suit property. The plaintiff equally prays for a mandatory injunction compelling the defendants themselves their servants and agents to demolish the structures erected thereon at their cost failing which the plaintiff do demolish the same at the defendants costs.

[3] The defendants denied that the allegations of the plaintiffs. They averred that they are the original owners of the land since 1926 when the same was allocated to them by the colonial Government. They denied having deprived the plaintiff of his land. They alleged that the allocation of the plaintiff of the suit land was fraudulent as the suit property was not available for such allocation. They averred in their pleadings para 12 that they have overriding interest of rights acquired by adverse possession over the suit parcel of land having been in continuous and uninterrupted possession over the suit land and use since the year 1926. They argued that the suit is time barred by the Limitation of Action Act and hence it is incompetent.

[4] This case was fixed for hearing on 2nd July 2014. The defendants were served on 20th March, 2014 through their advocates. A return of service was filed in court on 28th March, 2014. On 2nd July, 2014 one Athman Omar Dzunga told the court that he has the title for a plot at Mazera Trading Centre No. 1043/111/43. he produced the title as Exhibit 1. He said he saw the advertisement in the Gazette for the plot in 1977 and he applied. He stated that he paid Ksh. 1,000 his deposit he produced the receipt dated 20th May, 1977. He stated that he was given a letter of allotment on 9th September, 1978 which showed the balance of payment and he paid and got the title on 1st November, 1978. The plaintiff said that he asked the surveyors to come and show him the beacons. There were no people living there. He averred that he was shown the beacons in 1978. The surveyors wrote to the plaintiff and said that they would show the beacons and they came on 2nd May, 2008. He stated that the beacons were later removed and he suspected that it was the defendants. After a short while he saw construction going on, on the plot and he took photographs of the unfinished building and another finished building. He said he had sued the defendants because these are the people who know his plot. He asked the court to help him get his plot.

The defendants did not appear and did not defend this suit. They had been served. The evidence of the plaintiff stood on its own and it was uncontroverted. The plaintiff explained to Court how he saw advertisement in the Gazette and how he applied for the same. He produced receipts for such application dated 20th May, 1977 and the letter of allotment dated 9th September, 1978 showing a standing premium of Kshs. 491/70. He further produced a letter dated 26th March, 1982 telling him that arrangements are underway to prepare his title. This letter was from the Department of Lands. The plaintiff also produced an official receipt A0378606 for Kshs. 125000 for survey and beacon relocation for LR. NO. 1043/111/43 Mazaras dated 07/04/08. There was equally a letter dated 2nd May, 2008 from the Provincial Survey Office Mombasa informing the plaintiff of the site visit on Thursday 8th May, 2008 for beacon identification from LR. No. 104333/111/43 Mazaras. From the foregoing, I am convinced that LR. No. 1043/111/43 Mazaras belong to the plaintiff. I reject the assertion by the defendants that they have been on the land since 1926 and that this is their ancestral land. I also reject the claim that the defendants have been on the plot for a period of over 12 years and that they have obtained land by adverse possession. The defendants assertion in para 5 of their defence that the land is ancestral land and their claim for adverse possession in para 12 are contradictory claims. I reject those claims. A suit for adverse possession can only ran when there is a registered interest. This title was issued on 18th September, 1978. No adverse possession could be said to have accrued before the title was issued by the Government. The land was clearly Government land. There was no proof that this land was ancestral prior to 1978 and there was neither no evidence lead before me that the defendants had acquired any adverse possession on the premises. I grant the plaintiff his prayers in the plaint as per para (a) (b) (c) and (d) of his plaint dated 22nd February, 2011.

**Dated and delivered in open Court at Mombasa this 4th day of September, 2014.**

**S.MUKUNYA**

**JUDGE**

**4.9.2014**

In the presence of:

Umara Advocate for the plaintiff.