



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**HCCC NO. 5 OF 2007**

**WAMAITHA KIRIKA.....PLAINTIFF**

**MUGO J. KIRIKA.....PLAINTIFF**

**VERSUS**

**MOHAMED SAAD SHAKUE.....DEFENDANT**

**TIMA SHAKUE.....DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. By a Complaint dated 29<sup>th</sup> December 2006 and filed herein on 30<sup>th</sup> January 2007, the two Plaintiffs Wamaitha Kirika and Mugo J. Kirika pray for Judgment against Mohamed Saad Shakue(1<sup>st</sup> Defendant) and Tima Shakue(2<sup>nd</sup> Defendant) for vacant possession of all those premises described as Portion 200 Watamu and previously known as unsurveyed Plot No. 36 Watamu.
2. The Complaint was amended a number of times the last being on 7<sup>th</sup> October 2013 when following the death of the 1<sup>st</sup> Plaintiff earlier on on 16<sup>th</sup> April 2012, her name was removed and substituted by that of the original 2<sup>nd</sup> Plaintiff who happens to be her husband.
3. The gist of the Plaintiff's case is that the deceased is the registered owner of the said LR No. Portion 200 situate in Watamu measuring approximately 0.0437 Ha (the Suit Property). In or about the year 2000, the Defendants without any colour of right entered the suit property and began to put up unauthorized structures thereon. Despite demand made and notice of intention to sue, the Defendants have refused to vacate the suit property.
4. However in the Written Statement of Defence filed herein on 14<sup>th</sup> September 2007, the Defendants deny that they entered the suit premises in or about the year 2000 as claimed by the Plaintiff. It is their case that they have all along lived on the suit land since 1958 and have been exclusively using and cultivating the same since the year 1978.
5. It is the Defendants' case that they are the rightful owners of the suit property and that they have obtained the necessary permits and authority of the relevant offices to construct structures thereon.

**The Plaintiff's Case**

6. At the trial herein, the Plaintiff called two witnesses in support of their case and produced a number of documents. PW1- Mugo Kirika told the Court that the suit property was registered in the name of his deceased wife Wamaitha Kirika who had donated to him a power of attorney prior to her death.
7. According to PW1, sometimes in the year 2000, he saw some structures on the suit property and reported the presence of the same to the area Chief. The Defendants were then summoned by the Chief but they refused to vacate the land.
8. PW1 told the Court that the land was allocated to his wife in 1979 and she accepted and paid for the same as per Plaintiffs Exhibits 3, 4 and 5. By a letter dated 20<sup>th</sup> February 1992, they were informed to collect the Certificate of Grant from the Registrar of Titles office in Mombasa. They obtained the Grant and a Deed Plan attached thereto (Pexh 6). Thereafter, they have been paying rent and rates to the authorities (Pexh 7 and 8).

9. PW1 further testified that as at the time the land was allocated to his wife, it was unsurveyed. It was later surveyed. They did not have the finances to develop the same as his wife was then ailing. He however fenced the same. When he noticed the construction on the land and reported to the Chief, he summoned the two Defendants who are a husband and wife. That was the first time PW1 met the Defendant who eventually refused to vacate the land.

10. PW2 –Caxton Kai is a Surveyor for the County Government of Mombasa. He told the Court that he was stationed in Malindi between 1996 and 2012 when he was transferred to Mombasa. PW2 testified that the Plaintiff went to their offices in 1998 and requested to be shown Plot No. 200 Watamtu. PW2 went with the Plaintiff to Watamu where he identified the Plot and the beacons thereon. The beacons are still intact to-date.

11. PW2 told the Court that when they visited the land in 1998 with the Plaintiff, the Plot was vacant. However when he recently went back after being asked by the Plaintiff to be a witness in the case, he found two houses, one was complete but the other was not as windows had not been fitted and were instead covered with iron sheets. PW2 produced his Survey Report following the visit to the land (Pexh 13).

### **The Defence Case**

12. On their part the Defendants called one witness. DW1- Tiwia Shakue Musa told the Court that she was born on the property. She did not know the Plaintiffs until the time they sued her. She told the Court that her parents were on the land before she was born. They went to the land in 1965 while DW1 was born there in 1971. DW1 was married to Mohamed Shakue (the 1<sup>st</sup> Defendant) but they separated and the 1<sup>st</sup> Defendant now stays in Lamu.

13. DW1 told the Court that when she got married in 1988, they stayed with her husband on the suit property. In 1992, surveyors from the Government visited the land, demarcated it and allocated it to those who were residing thereon. DW1 was told her Plot was number 36. She was given some papers but they got burnt up after her house got burnt around 1993.

14. DW1 further testified that she only knew the Plaintiff when he filed the suit. The Plaintiff never told them to vacate the land prior to filing the suit. She told the Court that it was not true that the Plaintiffs had been on the land since 1978 as they claimed.

### **Analysis and Determination**

15. I have considered the pleadings, the testimonies of the witnesses and the evidence adduced herein. I have equally perused and considered the submissions filed.

16. The Plaintiff herein is the legal representative of the Estate of Wamaitha Kirika with whom they initially filed this suit on 30<sup>th</sup> January 2007. It was the Plaintiff's case that the late Wamaitha Kirika who subsequently passed on at the Nairobi Hospital on 16<sup>th</sup> April 2012 was the registered owner of the suit property. According to the Plaintiff, the suit property was at the time of its acquisition in 1979 referred to as unsurveyed Plot No. 36 Watamu.

17. In support of their case, the Plaintiff produced, inter alia a Letter of Allotment dated 11<sup>th</sup> June 1979 from the Commissioner of Lands, copies of payment receipts for the payments made as well as the Deed Plan and Official Map for the area. It was the Plaintiff's case that upon being issued with the Certificate of Grant dated 17<sup>th</sup> February 1992, they have continually paid rates and rents as required by law.

18. According to the Plaintiff the suit property was vacant at the point of allocation and remained so until sometime in the year 2000 when the Defendants invaded the same and began putting up structures thereon. Even after they approached the Defendants to vacate the land and cease the building of any further structures thereon, the Defendants declined to do so and remain on the suit property to-date.

19. In her testimony before this Court, the 2<sup>nd</sup> Defendant (DW1) admitted that she lived on the land. It was however her case that contrary to the Plaintiff's assertions that she moved into the land in the year 2000, her parents had occupied the land since the year 1965 and that she had been born thereon in the year 1971. Later on in 1988 when she got married to the 1<sup>st</sup> Defendant they continued staying on the land where they had since put up a permanent building.

20. According to the 2<sup>nd</sup> Defendant, sometime in the year 1992, Government Surveyors went into the Watamu area, surveyed it and demarcated the Plots which were then allocated to those who were residing thereon. During the exercise, she was allocated Plot No. 36 which is the land she had been occupying and had remained thereon to-date. It was however her case that even though the Government Surveyors gave her some papers to signify her ownership of the land, the same were destroyed in a fire that razed her house sometime in 1993.

21. As it turned out, the Defendants did not produce anything in Court to show that they owned the piece of land in dispute. Indeed during her cross-examination in Court, the 2<sup>nd</sup> Defendant conceded that even though they had occupied the land for a while, the same belonged to the Government.

22. If indeed the Government had allocated the land to her in 1992 and her documents of ownership got burnt as she purported herein, there was no reason advanced as to why the records from the Government Agency that carried out the alleged exercise were not called upon to produce them in Court.

23. According to the records (Pexh 13) as produced by PW2, the Commissioner of Lands gave authority for a survey to be carried out on the area which comprised Government land on 13<sup>th</sup> July 1978. The said Survey was done and was completed on 13<sup>th</sup> April 1982 before being approved and authenticated on 8<sup>th</sup> October 1982. This fits in with the Plaintiff's explanation that when the land was allocated to them it was

an unsurveyed Plot as indicated in their letter of allotment dated 11<sup>th</sup> June 1979. That being the case, the Defendant's assertion that Government Surveyors went to the land in 1992 is simply not true.

24. Even though the Defendants aver in their Defence and testimony before this Court that they settled on the land either in 1958 or in 1965, they did not state the basis upon which they settled on the land or even where they had come from before settling therein.

25. I have perused the entire Statement of Defence and other documents filed by the Defendants. Other than stating that they have been on the land for a long period, there is nowhere in which they claim the land by dint of adverse possession. They do not claim that the land is trust land and/or that they are entitled to it as residents of the area or as a community land.

26. Whatever the case, the Defendants admit that they settled on the property with the knowledge that it was Government land. That being the case, the Defendants could only at best have been licencees over that Government land. Once the Government allocated the land to the Plaintiff, the said land was unavailable for subsequent allocation and the Defendants have no other resources but to give way.

27. In the circumstances and for the reasons advanced hereinabove, I am satisfied that the Plaintiff has proved his case on a balance of probabilities. Judgment is accordingly entered for the Plaintiff as against the Defendants as prayed in the Plaint. The Defendants shall have 45 days within which to vacate the suit premises otherwise the Court Bailiff to proceed to evict them forthwith.

28. The Plaintiff shall also have the costs of this suit.

**Dated, signed and delivered at Malindi this 24<sup>th</sup> day of January, 2019.**

**J.O. OLOLA**

**JUDGE**