



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 99 OF 2016

OMAR SWALEH.....PLAINTIFF

VERSUS

HALIMA BAKARI

AWADH SHEVO JILLO.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By his Plaint dated and filed herein on 28th April 2016 Omar Swaleh (the Plaintiff) prays for Judgment against the two Defendants jointly and severally for:-

- a) An order of vacant possession of the suit property being all that parcel of land known as Title No. Tana River/Witu/589 and eviction of the Defendants and any person claiming through them from the suit property.*
- b) An order of permanent injunction restraining the Defendants from trespassing onto the suit property and/or undertaking any activity thereon or in any manner preventing the Plaintiff and his family members from utilizing the property.*
- c) An order for the removal or withdrawal of the Caution dated 21st April 2015 registered against the suit property on 30th April 2015.*
- d) Costs of this suit and interest at Court rates.*

2. The Plaintiff's suit is anchored on his assertion that he was at all times material to this suit the registered owner of the suit property and that sometime in the year 2001 he allowed the 1st and 2nd Defendant's family members to cultivate a small portion of the land. However, when one of the said family members passed away in October 2003, the Defendants purported that the Plaintiff had sold the suit property to their relative and refused to vacate the land thereafter.

3. The Defendants however refute the Plaintiff's assertions. In a Statement of Defence filed herein on 12th July 2016, the Defendants aver that the 1st Defendant and her family are the sole beneficial owners of the property the same having been bought by her deceased husband from the Plaintiff. It is the Defendant's further case that they have resided on the suit property for years and there is therefore no basis for the Plaintiff to evict them therefrom.

The Plaintiff's Case

4. At the trial herein, the Plaintiff called two witnesses who testified in support of his case.

5. PW1-Omar Swaleh (the Plaintiff) testified that he is the registered owner of the suit property measuring approximately eighteen acres. The said property was allocated to him in 1995 by the Lands Adjudication and Settlement Department. Thereafter a Charge was registered against the Title in favour of the Settlement Fund Trustees(SFT)

6. PW1 further testified that sometime in the year 2001, one Mohamed Awadh Gawana (now deceased) who was a husband to the 1st Defendant and the father to the 2nd Defendant approached him and sought to lease a portion of the suit property. At the said time the

property was yet to be registered in the Plaintiff's name and PW2 was awaiting for its discharge from the Settlement Fund Trustee aforesaid.

7. PW1 testified that he subsequently allowed the said Mohamed to enter into the suit property and to commence cultivation on the small portion of land. When the said Mohamed died on 10th October 2003, the Defendants started claiming that the deceased had purchased the land and they refused to vacate therefrom. PW1 told the Court that he neither sold the suit property nor any part thereof to the said Mohamed and the Defendants therefore have no colour of right to occupy the suit property or any portion thereof.

8. PW1 further told the Court that sometime on or about 30th April 2015, the 2nd Defendant acting on his own behalf and the members of his family proceeded to lodge a Caution on the land claiming to have a beneficial interest thereon. It was PW1's testimony that he has since been unable to make use of his land and title.

9. PW2-Ali Omar Swaleh is a son of the Plaintiff. He told the Court that his father was allocated the suit property by the Government and that his family had paid all the requisite fees for the land. He testified that the husband to the 1st Defendant Mohamed visited his father in 2001 and asked to be allowed to use one acre for farming.

10. PW2 further testified that when the said Mohamed died in 2003, his son, the 2nd Defendant herein came to PW2's father and requested for an extension of the lease to use the land. The 2nd Defendant then wrote an agreement which he gave PW2's father to sign. PW2 told the Court that his father does not know how to read and write and so he just signed the agreement without knowing what it entailed. At that time PW2 was away in Mombasa.

11. PW2 told the Court that on his return from Mombasa he saw the Agreement his father had signed and realised there was a problem. When he conducted a search at the Lands Registry, he realised that the Defendants had lodged a Caution against the land. That is what prompted them to file this suit.

The Defence Case

12. The Plaintiff closed his case on 2nd May 2017 and this matter was fixed for Defence hearing on 3rd July 2017. On that date it would appear the Court was not sitting and the Plaintiff moved to the Court Registry and fixed the matter for hearing on 5th October 2017. On the said date however, the Defendants requested for and were granted an adjournment. As it were, the Defendants similarly were not in Court on two subsequent dates when the matter came up for hearing. On 19th July 2018, the Defendant's Advocates on record closed their case after pointing out that they were unable to trace them.

Analysis and Determination

13. The evidence as adduced before me by the two witnesses was that the Plaintiff is the registered owner of all that parcel of land known as Title No. Tana River/Witu/589. The Plaintiff testified that the said parcel of land was allocated to him in the year 1995. In this regard, he produced a Letter of Offer dated 31st August 1995 from the Director Land Adjudication and Settlement indicating that the land had been allocated to him.

14. It was further the Plaintiff's evidence that he paid all the requisite fees and Charges as stipulated under the Offer pursuant to which he was issued with a Discharge of Charge by the Settlement Fund Trustees on 28th December 2011. He produced a copy of a Title Deed showing that the property measuring 7.2 Ha had been registered in his name on 28th August 2006.

15. The two witnesses further testified that sometime in 2001 before the Plaintiff obtained title to the property, one Mohammed Awadh Gawawa, the husband to the 1st Defendant and father to the 2nd Defendant approached the Plaintiff and requested for one acre of the suit property for purposes of cultivation. The Plaintiff agreed to lease a portion of the land to the said Mohammed.

16. It was their testimony that when the said Mohammed passed away in 2003, his family led by the Defendants started laying claim to the entire suit property on the purport that the deceased had purchased the same from the Plaintiff. The Plaintiff denies that he sold the property as alleged by the Defendants or at all. The Defendants have nevertheless refused to vacate the portion they were cultivating and have since 30th April 2015 lodged a caution against the Plaintiff's title.

17. In their Statement of Defence filed herein on 12th July 2016, the Defendants refuted the Plaintiff's position on the land and asserted that they were the beneficial owners of the suit property after the Plaintiff sold the land to the said Mohammed Awadh Gawawa sometime in 2003.

18. The Defendants did not attend Court even after being granted more than a year to appear and present their case. There was accordingly nothing offered in rebuttal of the Plaintiff's case herein.

19. As it were, Section 26(1) of the Land Registration Act provides that a Certificate of Title is conclusive evidence that the person named as the proprietor of the land is the absolute and indefeasible owner thereof unless the said title be found to have been procured irregularly or through fraud or corruption.

20. From the material placed before me, the Plaintiff is the registered proprietor of the suit property herein. It is their case that the Defendants have refused to vacate a portion of their land that was leased to the husband of the 1st Defendant (now deceased) and that the Defendants have registered a Caution on the suit property thereby inhibiting the Plaintiff's use of their land. This Court has power under Section 73(1) of the Land Registration Act to order the removal of such caution.

21. Accordingly and in the absence of any evidence on the contrary, this Court is persuaded that the Plaintiff's case against the Defendants has merit. Judgment is accordingly entered for the Plaintiff as against the Defendants as prayed in the Plaint.

22. The Plaintiff will also have the costs of this suit.

Dated, signed and delivered at Malindi this 26th day of June, 2019.

J.O. OLOLA

JUDGE