



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 196 OF 2015

1. CAMPUS CITY LIMITED1ST PLAINTIFF/RESPONDENT
2. DAVID SLATER.....2ND PLAINTIFF/RESPONDENT
3. CHRIS GONTIER.....3RD PLAINTIFF/RESPONDENT
4. ANTHONY HEWITT-STUBBS & 45 Others.....4TH PLAINTIFF/RESPONDENT

VERSUS

1. GABRIEL BARAKA THOYA.....DEFENDANT/APPLICANT
2. JOHN MUTAZA.....2ND DEFENDANT/APPLICANT
3. JOE KAZUNGU YAA MANGI.....3RD DEFENDANT/APPLICANT
4. NAYENI MIBUYUNI SQUATTER.....4TH DEFENDANT/APPLICANT

JUDGMENT

BACKGROUND

1. By a Plaint dated and filed herein on 28th October 2015 the Plaintiffs pray for Judgment to be entered against the Defendants for: -

1. *A declaration that the Plaintiffs holding titles to various parcels of land sub-divided from the larger LR No. 1705/233 (CR 27007) are in lawful occupation of the said properties situated within Kilifi County, Mbuyuni Bofa Area and its environs on account of them being bona fide purchasers for value;*
2. *An order of permanent injunction restraining the Defendants jointly and severally either by themselves, their agents, servants or otherwise howsoever from interfering with the quiet possession of the Plaintiffs of the various properties the subject of this suit on LR No. 1705/233 situated within Kilifi County, Mbuyuni Bofa Area;*
3. *An order of permanent injunction restraining the Defendants either by themselves, their agents, servants or otherwise howsoever from occupying, selling, charging, leasing, or in any way alienating and/or disposing of LR No. 1705/233 situated within Kilifi County, Mbuyuni Bofa Area;*
4. *Without prejudice to the foregoing a declaration that in the event that it is necessary for the government and/or government agency, to compulsorily evict the purported squatters on LR No. 1705/233 situated within Kilifi County, Mbuyuni Bofa Area(sic);*
5. *Special damages amounting to Kshs 14,835,000/-;*
6. *General and exemplary damages as this Honourable Court may deem fit;*
7. *Interest on (5) and (6) above at Court rates until payment in full;*

8. The Defendants to bear the costs of this suit; and

9. Any other and/or further relief that this Honourable Court may deem fit.

2. The Plaintiff prayers are anchored on their averments in the Plaint that at times material to this suit, they have been the bona fide holders of title of various parcels sub-divided in the larger LR No. 1705/233(CR 27007) having purchased the same from three individuals; namely Charles Howard Hewitt-Stubbs and Anthony Hewitt-Stubbs (as administrators of the estate of Charles Howard Hewitt-Stubbs) and David Ewart Lennard Slater at various amounts of consideration.
3. The Plaintiffs avers that on or about 25th September 2015, the 2nd-4th Defendants invaded, trespassed and destroyed the perimeter wall and fixtures of properties located on the suit property and injured several workers and employees of the Plaintiffs. Further, between 2nd and 4th October 2015, the Defendants accompanied by about one hundred rowdy members of the public forcefully evaded the suit property, blocked roads, and threatened the Plaintiffs' members and occasioned them actual bodily harm. The Defendants have since asked the Plaintiffs, their families and employees to leave the suitland or face dire consequences.
4. Accordingly, it is the Plaintiffs case that unless the Defendants are restrained as sought in the prayers hereinabove, they stand to lose their hard earned investments and developments in the suit property.
5. But in their Statement of Defence dated 23rd February 2015 as filed herein on 23rd February 2016, the four Defendants jointly deny that the Plaintiffs are the beneficial owners of the suit premises. In particular, they assert that LR No. 1705/233 does not exist and that even if it does exist, the same was obtained fraudulently.
6. The Defendants assert that they have since the 1800s lived on LR No. 1750/50, the same having been their ancestral land even before the commencement of the land adjudication process. They deny that LR No. 1705/233 is a sub-division of LR No. 1705/50 which they occupy.
7. The Defendants further aver that the suit premises being LR No. 1750/50 is within the ten mile(Coastal) strip and was initially never Government land and if the Government acquired the same, it never considered the Defendants' interest in the property and as such the land ought to revert to the Defendants.
8. It is further the Defendants case that they never destroyed any walls and fixtures as stated by the Plaintiff. At any rate, they assert that the issue of trespass is already before the Kilifi Law Courts for determination and hence the same ought not to be part of the issues herein for determination.
9. By an application dated 7th September 2016, the four Defendants applied to have the Commissioner of Prisons, the National Land Commission, the Land Registrars Mombasa and Kilifi, the Director of Survey, Kilifi, the Ministry of Lands and Housing as well as the Honourable the Attorney General to be enjoined as Defendants in the suit. The said application was allowed by Angote J on 15th September 2016 and the Defendants were allowed to amend their defence as appropriate within 14 days. None of them ever entered appearance although the A-G called one witness to testify herein.

THE PLAINTIFFS CASE

10. At the trial herein the Plaintiffs called a total of three witnesses in support of their case.
11. PW1-Gitonga Wambugu Kariuki is a Director of Campus City Ltd (the 1st Plaintiff). He told the Court that prior to the purchase of the disputed property, he carried out due diligence and thereafter entered into a Sale Agreement with one David Slatter and Anthony Stubbs. Thereafter he fenced his property-comprising ten acres. He had bought each acre for Kshs Ten Million.
12. PW1 told the Court that the Defendants who are members of a group calling itself Nayeri Squatters thereafter invaded the land they had bought and destroyed the fencing before proceeding to construct all sorts of structures thereon. PW1 told the Court that in the process he met two of the Defendants although he could only recall the name of the 1st Defendant Baraka Thoya.
13. PW1 further told the Court that at some point, the Defendants referred the matter to the National Land Commission(NLC). Upon conclusion of its hearings, the National Land Commission determined that the land belonged to PW1 and that he should be allowed to have quiet enjoyment thereof. The National Land Commission decision was communicated by a Letter dated 18th January 2016 addressed to the Mayeni Mibuyuni Squatters (the 4th Defendant).
14. PW2-Christopher Stuart Guantier is the 3rd Plaintiff herein. He testified that he saw an advert for LR No. 1705/233/94 in the newspapers. He then got an Advocate to do due diligence on the land. PW2 was acting for a group of people with whom they wanted to build a medical teaching clinic. He proceeded to purchase the half an acre of land.
15. PW2 told the Court that they have since been unable to do anything on the land after the perimeter wall was decimated by people some of whom he knew.
16. PW3- Wambua Alloys is a Quantify Surveyor. He told the Court that his firm received instructions to prepare estimates concerning the suit property whose fence had been destroyed. He did the estimates which captured demolition of coral fencing and another done by barbed wire. He estimated the costs at Kshs 14,344,995/-.

THE DEFENCE CASE

17. On their part, the Defendants called three witnesses in support of their case.

18. DW1- Michael Mataza Kilumo is the 2nd Defendant told the Court that his grandparents and the parents lived on the disputed land in which he was also born. He testified that the Plaintiffs were their neighbours and he had known them previously as they would rear sheep in the neighbouring plot. They had many white neighbours and sometimes DW1's family would allow their sheep to graze on their land.

19. DW1 testified that at some point in time, the 4th Plaintiff started fraudulently creating titles and harassing the neighbours using the Police.

20. DW1 further told the Court that at some point in time, they had referred the matter to the National Land Commission. The Plaintiffs brought the matter to Court as they were waiting the determination of the case by the National Land Commission. He denied that the Defendants had ever destroyed any fence and accused the Police of harassing them at the behest of the Plaintiffs.

21. DW2-Simon Maiyo Chebet is a Superintendent of Prisons based at the Kilifi G.K Prison. He told the Court that the Defendants had previously written a letter to them asking for confirmation of the ownership of the land which borders that of the Defendants. They wrote back confirming that the land belongs to the GK Prisons-Kilifi. Their letter dated 24th February 2015 made reference to LR Nos. 1705/233/55, 56, 69, 70, 86 and 99.

22. DW2 told the Court that they have a live wire fence which covers their portion of the land. He did not know those who stay outside the fence. From their records, the original Parcels was LR No. 1705/50.

23. DW3-Jacinta Makau is a Physical Planning Officer in the Ministry of Lands Housing & Physical Planning. She told the Court that she had been in that office since 2007. She testified that she did not know a colleague by the name C. Kitonga.

24. DW3 was however stood down after it emerged that she had not carried the documents that were relevant to the Defence case.

ANALYSIS AND DETERMINATION

25. I have perused and considered the pleadings filed herein by the parties as well as the Written Statements and the oral testimonies of the witnesses who testified before me. I have equally considered the material and evidence placed before me during the trial, the detailed submissions filed by the Learned Advocates for the respective parties as well as the authorities to which they referred me.

26. It is the Plaintiffs' case that at all times material, they were the registered owners of various parcels of land sub-divided from a larger parcel of land that was known as LR No. 1705/233. They accuse the Defendants of invading the said parcels of land, destroying the perimeter fences they had erected thereon and proceeding to construct all manner of structures thereon.

27. On their part the Defendants deny that the Plaintiffs are the owners of the parcels of land that they claim. They assert that there is no such parcel of land known as LR No. 1705/233 and that if indeed the same exists, its registration was obtained fraudulently.

28. The Defendants aver that they and their ancestors have lived on the disputed parcels of land since the 1800s and further that the land in which they are was not Government land available for allocation to the Plaintiffs in the manner purported to have been done herein. They deny destroying the Plaintiffs fences and/or any other property and urge this Court to dismiss the suit with costs.

29. In support of their case the Plaintiffs called three witnesses. PW1 told the Court that he bought the properties through a Sale Agreement between the owners and Campus City Ltd, (the 1st Plaintiff) a company in which he is a founder and director. He named the vendors as David Slatter and Anthony Stubbs. He told the Court that he bought each of his ten acres of land at an "average price" of Kshs ten million per acre after which he took possession thereof.

30. He testified that the land was later invaded by a group calling itself Nayeni Squatters. The said group subsequently made a complaint to the National Land Commission (NLC) over the matter. In its determination communicated vide a letter dated 18th January 2016, the National Land Commission ruled in favour of PW1.

31. Under cross-examination PW1 stated that he owned five different parcels of land. He admitted that he had not listed all the five in his witnesses statement save for two-LR No. 1705/233/16 and LR No. 1705/233/17. He admitted that he did not personally know the names of those who had invaded the land or the name of his caretaker whom he claimed had been chased away by the invaders. He also admitted that even though the Plaintiffs are listed to be 49 in number, only 22 of them gave him authority to swear affidavits on their behalf.

32. On his part, PW2 who is the 3rd Plaintiff herein told the Court that he bought his LR No. 2705/233/94 through a firm of Advocates having seen an advert of the same in a Local Newspaper. It was his case that when he saw the land, he a pathologist by Profession joined up with a group of like-minded individuals and came up with an idea of building a medical institution. They bought the half-acre piece of land but were unable to carry out their intention after the Defendants invaded the land and destroyed the wall.

33. Under cross-examination, PW2 told the Court that his Parcel of land was originally LR No. 1705/50/2 before it was sub-divided even though the pleadings indicated that the land was LR No. 1705/233. He admitted that his parcel of land was not specifically pleaded in the suit and also told the Court that he did not physically know the people who invaded the land.

34. The Plaintiffs third witness was a Quantity Surveyor. He produced a report dated 5th September 2016 in which he quantified the cost of the demolished fence at Kshs 14,344,995/.

35. From the material placed before me, it was not clear who the other Plaintiffs were other than the four listed herein and the 22 who gave authority to PW1 to swear Affidavits on their behalf. It was therefore safe for this Court to assume that the Plaintiffs are 26 as opposed to the 49 shown on the body of the pleadings.

36. A perusal of the said material reveals that the Plaintiffs were the proprietors of separate and distinct properties but all of which drew their titles from LR No. 1705/233. The said title was formerly known as LR No. 1705/50 and was initially registered in the names of one Charles David Howard Hewitt-Stubbs and David Ewart Lennard Slater (the 2nd and 4th Plaintiffs). That land initially measuring 98.08 Ha was subsequently sub-divided into many parcels of land. The Plaintiffs are the registered proprietors of a number of parcels emanating from these subdivisions.

37. While the Defendants claim that the Plaintiffs registration was fraudulent, nothing was placed before this Court to demonstrate that the Plaintiffs had acquired their titles in a manner other than that prescribed by law.

38. Indeed while the Plaintiffs claim to have been entitled to the land having lived on the same from the 1800s, they did not produce anything before the Court to demonstrate how they acquired the land. It is trite from the history of the ten-mile Coastal strip to which they derive their claim that prior to the enactment of the Land Titles Ordinance of 1908, there was no formal set of laws governing land use, acquisition and occupation at the Coast.

39. When it came into effect Section 15 of the Land Titles Ordinance required all persons who claimed interest in land along the Coastal strip to lodge their claims with the Recorder of Titles. Any dispute that arose from the claims was dealt with by the Land Registration Court. Where the Recorder of Titles was satisfied that a claim was valid, a Certificate of Ownership would issue to the Claimant.

40. Otherwise Section 17 of the Land Titles Act (now repealed) provided that all land situated in an area to which the Act applies in which no claim for a Certificate of Ownership has been made shall be deemed to be Government Land. Thus all land which is not private land within the said Coastal strip is government land and the Defendants claim that the Government had no title and could not purport to allocate the disputed land to the Plaintiffs is spurious and without any foundation in law.

41. It is indeed telling that while the defendants on the one hand dispute the fact that the land in issue was Government land, they on the other hand purported that the land being claimed by the Plaintiffs belonged to the G.K Prisons Kilifi. DW2 was a witness from the said Prison and he clearly told this Court that the land they occupy which originated from LR No. 1705/50 was covered by a live wire fence and he did not know those who stayed outside the fence.

42. From their letter dated 24th February 2015, the Kilifi G.K. Prisons was clear that their parcels of land were LR No. 1705/233/55, 56, 69, 70, 86 and 99. Those are not the parcels or sub-divisions registered in the names of the Plaintiffs herein and the insinuation that the Plaintiffs got themselves registered as owners of parcels of land belonging to the Government was equally without basis.

43. Section 26(1) of the Land Registration Act No. 3 of 2012 provides that: -

(1) The Certificate of Title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the Proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the Certificate, and the title of that proprietor shall not be subject to challenge, except-

a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) Where the Certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

44. Accordingly, in the absence of the existence of the circumstances enumerated under Section 26(1) (a) and (b) of the Land Registration Act, this Court is duty bound to presume that the Plaintiffs are the absolute and indefeasible owners of the suit properties. The Defendants as I have stated did not adduce any evidence in support of fraud, illegality or irregularity in the processing and/or acquisition of the Plaintiffs titles.

45. In the circumstances of this case, I am satisfied that the Plaintiffs have proved their case against the Defendants to the required standard.

46. In regard to the issue of Special damages, I have considered the Report by the Quantity Surveyor dated 5th September 2016 as produced herein by PW3. That report estimates the value of the damage done to the Plaintiffs walls at Kshs 14,344,995/-. This Court notes however that while the Plaintiffs produced a number of photos in evidence showing a number of individuals apparently destroying the wall and carrying away concrete blocks, no evidence whatsoever was placed before me to show that the persons in those photographs were either the four Defendants before me and/or the agents of the said Defendants. I will therefore decline the invitation to compel the Defendants to pay for the damage.

47. In the result, the Plaintiffs' suit is allowed in terms of Prayers 1,2, and 3 of the Plaint.

48. The Plaintiffs will also have the costs of this suit.

Dated, signed and delivered at Malindi this 20th day of September, 2019.

J.O. OLOLA

JUDGE