



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO 65 OF 2011

JAMES PETER KINYUNGU MBANDI.....PLAINTIFF

VERSUS

NGUMBAO GODA DZOMBO & 71 OTHERS.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By a Plaint dated 13th May, 2011 as 'Amended' on 17th July, 2017, James Peter Kinyungu Mbandi (the Plaintiff) prays for Judgement against the 72 Defendants herein for: -

a) Vacant possession;

b) Damages for loss of use;

c) Mesne profits from the date of the quite notice until the date of vacant possession; and

d) Costs of the suit.

2. The Plaintiff's prayers arise from his assertion that at all times material to this suit, he was the registered proprietor of all that parcel of land known as Kilifi/Kijipwa/96. He accuses the Defendants of illegally and without any colour of right entering onto the property and erecting structures thereon.

3. It is the Plaintiff's case that as a result of the Defendant's wrongful acts he has been denied the use, benefit and enjoyment of the property and has suffered loss and damage.

4. But in their Statement of Defence and Counterclaim dated 1st August, 2011 as Amended on 17th February, 2014, the Defendants deny that the Plaintiff is the registered proprietor of Plot No. 96 Kilifi Settlement Scheme and put him to strict proof thereof.

5. They further deny that they have entered the property illegally and without any colour of right as stated by the plaintiff. They assert that they have been in continuous possession of the suit land without any interruption for more than 60 years with the full knowledge of the Plaintiff.

6. By way of the Counterclaim, the Plaintiffs aver that the suit property is their ancestral land they having been born thereat. They aver that sometime in 1982 or thereabouts they did engage the Government on their need to be securely settled on the suit property and other neighbouring parcels as a result whereof the Government proceeded to declare the Kijipwa Settlement Scheme.

7. It is the Defendants' case that as they awaited allocation and registration of various parcels of lands they learnt to their utter shock and surprise that the Plaintiff who was then a very senior Government official in the then Ministry of Lands had clandestinely and fraudulently been allocated and registered as the proprietor of the suit property.

8. The Defendants assert that the Plaintiff has never been a resident of or lived in Kijipwa Area and his allocation and subsequent registration was and remains actuated by fraud, illegality and misrepresentation and is null and void ab initio.

9. Accordingly the Defendants pray for Judgment to be entered in accordance with heir counterclaim as follows: -

a) dismissal of the Plaintiff's suit against the Defendants with costs

b) a declaration that the suit property as part of the Kijipwa Settlement Scheme was intended to and remains for the benefit of the Defendants who have all along been in physical possession and occupation thereof;

c) a mandatory injunction to be issued directing the Plaintiff to forthwith surrender the Title Deed to the suit property to the 6th Defendant in the counterclaim for cancellation and rectification/amendment of the Register and in default the 6th Defendant to proceed to cancel the same and to issue appropriate title deeds in favour of the Defendants;

d) a permanent injunction be issued restraining the Plaintiff from dealing with and/or interfering with the Defendants' quiet use, enjoyment and occupation of the suit property; and

e) costs of and incidental to this suit.

THE PLAINTIFF'S CASE

10. At the trial hereof the Plaintiff called 1 witness in support of his case.

11. PW1 – Silvester Maundu Mbadi told the court that the Plaintiff was his father and had donated to him a Power of Attorney dated 11th April, 2011 to enable him proceed with this case.

12. PW1 told the court that the Plaintiff is the registered proprietor of the suit property and was issued with a title therefor on 5th November, 1997. PW1 told the court the property has always been vacant save for some time between 2000 and 2005 when some 42 squatters invaded the same. After discussions with his father however, the squatters agreed to move to one side of the property which measures approximately 41.06 Ha. or 101.4 acres.

13. PW1 told the court that the squatters had agreed to move to a section measuring 37 acres and an agreement to that effect was prepared before an Advocate. The squatters however failed to move and invited other squatters into the land hence the institution of this suit.

THE DEFENCE CASE

14. The Defence equally called 1 witness in support of their Defence and Counterclaim.

15. DW1 – Roy Kifalu Rimba testified that he occupied a portion of the suit property like other residents. He asserted that they have stayed on the land without interruption for a long time.

16. DW1 told the court that in 1980 he together with other residents engaged the Government on the need to securely settle residents within the parcel of land. The Government then proceeded to declare the land a settlement scheme under the Settlement Fund Trustees.

17. DW1 further testified that as they awaited for allocation of the land, they came to learn that the Plaintiff who was then a Senior Government Official in the Ministry of Lands had been allocated and registered as the proprietor of the suit property to the detriment of area residents. The Defendants protested the move and went to see the Minister concerned. The Minister ordered the cancellation of the Plaintiff's title but nothing was done thereafter.

18. DW1 told the court that the Plaintiff was not a resident of Kijipwa Settlement Scheme and was therefore not entitled to be allocated the suit property. It was his conclusion that the Plaintiff had taken advantage of his senior rank to collude with other officials at the Lands office to be allocated the land.

ANALYSIS AND DETERMINATION

19. I have perused and considered the pleadings, the oral testimonies of the witnesses who testified and the evidence adduced herein. I have equally perused and considered the written submissions and authorities filed herein by the Learned Advocates for the parties.

20. It is not contested that the Plaintiff is the registered proprietor of all that parcel of land known as Kilifi/Kijipwa/96. The Plaintiff accused the Defendants of illegally and without any colour of right entering onto the said property and proceeding to erect structures thereon. The Plaintiff asserts that as a result of the defendants' wrongful acts he has been denied the use, benefit and enjoyment of the suit property and that he has been unable to effect any developments thereon.

21. On their part the Defendants aver that the suit property is their ancestral land in which they and their parents were born. They assert that they have lived on the land without interruption for a period in excess of 80 years. They accused the Plaintiff of procuring his registration as the proprietor of the suit property fraudulently and in a clandestine manner and urge this court to declare that they are the rightful owners of the suit property.

22. From the material placed before me, the Plaintiff was allocated the suit property measuring 101.1 acres on 2nd March, 1982 before being issued with a title deed therefor on 5th November, 1997. It was apparent that ever since the allocation, the Plaintiff has not occupied and/or utilised the suit property in any manner. According to PW1 who is a son to the Plaintiff, the land was always vacant until sometime between the years 2000 and 2005 when the Defendants invaded the same.

23. According to the Defendants however they have lived on the land for more than 80 years. Their sole witness Roy Rimba (DW1) told the court that since 1980, the Defendants have been agitating to have the entire area of Kijipwa declared a settlement scheme and for the Government to settle the locals thereon. In support of this position, the Defendants produced a number of correspondence emanating from the area residents addressed to various Government offices. One such letter dated 22nd February, 1982 addressed to the then President of the Republic of Kenya in regard to Plot No. 285/111/4 MN reads in the relevant part in Kiswahili as follows: -

“Tunaiomba serikali yako tukufu itupatie makao kwa kutugawia shamba katika plot tuliotaja hapa juu ambayo rahamani yake tumeichanganya na barua hii. Tukiwa wananchi tulioishi ndani ya shamba hii kwa muda wa miaka mingi toka mababu zetu, na tumefanya makao ya kudumu. Orodha ya majina yafuatayo ni orodha iliyochukuliwa toka mwaka 1977 mwezi wa Juni ambayo orodha hiyo ilipelekwa kwa ofisi ya DC Kilifi wakati DC Shuria alipotuidhini kuchukua majina ya wakaaji wa sehemu hiyo na kumpelekea ofisini mwake. Madhumuni ya orodha hiyo alitueleza, kuwa sehemu hiyo huenda ikagawanywa kwa wakaaji wa sehemu hiyo ambayo ingeitwa “Kijipwa Settlement Scheme.” Tangu wakati huo tumekuwa na matumaini makubwa ya kupatiwa makao katika sehemu hii, lakini matumaini yetu yamefia kwa kuona sehemu za mfuoni kunapasuliwa shamba za wakubwa...”

24. According to DW1, the Government heeded their call and the area was declared a settlement scheme named Kijipwa Settlement Scheme. As they were awaiting survey and allocation however, they were surprised to learn that the Plaintiff who was then a senior officer at the Ministry of Lands and Settlement had been allocated a large chunk of the land in which they lived thereby rendering a number of them as squatters thereon.

25. From the correspondence adduced by the Defendants it was clear to me that contrary to the statement by PW1 that the Defendants had trespassed to the parcel of land between the years 2000 and 2005, the Defendants had been in the land much longer and they were the reason the Plaintiff had been unable to occupy and/or utilise the land since it was allocated to him in 1982.

26. And while the Plaintiff denied using his office to get himself allocated the suit property, it was clear that by virtue of his office at the time being the Director of Settlement in the Ministry of Lands and Settlement, his office was involved in the allocation and he was aware of the problem of the landless squatters in the area at the time he was allocated the suit property. In one official letter dated 19th September 1984 addressed to the Permanent Secretary in the Ministry, the Plaintiff writes in regard to Plot No. 43 Kijipwa Settlement Scheme as follows: -

“The Scheme was demarcated and settled, however there was local politics and the official squatters who had been registered earlier shown their plots. Indeed the Department had a full time Technical Assistant to be showing the settlers their plots. This small scheme of about 1050 acres had generated a lot of politics and before last year’s parliamentary and local elections, some aspiring candidates agitated people to move and occupy the land in the area. Some of the squatters also had resisted moving to their plots and remained squatting on other people’s plots. This is particularly for all large Plots including Plot 43.

The owners have not been able to move and develop their plots. They have written and complained and also seen the District Commissioner of the Area, but it appears so far no action (has been) taken to force out the people to their Plots and those who were moved recently to the area to be moved back to the areas where they had come from....”

27. As it were, the Plaintiff did not deny the Defendants’ contention that he was not a resident or squatter in the area when the Kijipwa Settlement Scheme was set up and that he could not therefore have been a beneficiary thereof absent collusion with other officials of the Ministry of Lands where he worked as a senior official. Nor did he contest the fact that while other residents were being allocated a mere 2.5 acres per household, he had ended up with a whopping 101.1 acres.

28. In their counterclaim, the Defendants enjoined the Director of Land Adjudication and Settlement, the Chief Land Registrar, the Commissioner of Lands, the District Land Registrar Kilifi and the Honourable the Attorney General. It was expected of them to come and explain how the Plaintiff ended up being allocated the suit property. As it turned out, despite being served with pleadings, they all neglected to come to court to defend the suit. This court can only make an inference that they had no response to the Defendants’ counterclaim.

29. In the circumstances I was not satisfied that the Plaintiff had made out a case to warrant the orders sought herein. On the contrary, I was persuaded that the Defendants had been in the suit property long before the Plaintiff obtained his title thereto and are entitled thereto.

30. Accordingly the Plaintiff’s case is hereby dismissed while the Defendants’ counterclaim is allowed as prayed.

31. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF NOVEMBER, 2019.

J.O. OLOLA

JUDGE