



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

LAND CASE NO. 96 OF 2012

MOHAMED SWALEH KARAMA HANTOOSH.....PLAINTIFF

-VERSUS-

HAMISI BARAKA MADA.....1ST DEFENDANT

BOY MADA alias BOY MOHAMED.....2ND DEFENDANT

JUDGEMENT

1. The plaintiff has sued the two defendants in his plaint dated 24th May 2012 seeking to be granted the following reliefs:

a) An order of eviction and demolition in respect of property L. R No. MN/11/7343.

b) Costs of the suit.

2. The defendants denied the plaintiff's claim by filing a statement of defence and counter-claim which was amended on 14th August 2013. The defendants aver that the plaintiff fraudulently obtained registration as the registered owner of all that piece of land L. R MN/11/7343 (CR 5552). They listed the particulars of fraud by the plaintiff in paragraph 6 of the defence. They pray in the counter-claim for orders that:

a) The plaintiff's suit be dismissed with costs.

b) A declaration that the actions by the commissioner of lands in granting title No L R MN/11/7343 to the plaintiff was fraudulent, illegal, unlawful and therefore null and void for all intents and purposes.

c) An order nullifying and or revoking grant No CR 5552 issued to the plaintiff on the 16th March 2012 and direct that plot now registered as MN/11/7343 be registered in the name of the 1st defendant.

d) Any other relief this Honourable Court may deem fit and just to grant.

3. The plaintiff testified as PW 1. He said that the suit land initially belonged to the government. He alongside others applied for and was allocated a portion of the land vide the allotment letter dated 8th October 1993 (Pex 1). PW 1 stated that he paid for the stand premiums on 28th January 1994 (Pex 2), land rents (Pex 3) and rates (Pex 5). Thereafter the Land Registrar wrote to the Director of Surveys on 9.4.1999 (Pex 4). PW 1 continued that after the processes were completed, he was issued with a title deed copy of which is produced as Pex 7. The witness continued that he never got possession because the defendants were on the land. He produced photographs of the defendants' houses as Pex 8.

4. The plaintiff said he issued them with a demand letter on 19.3.2012 but they have failed to heed. It is his evidence that the defendants got on to the land in 2012 but he does not know if they were born there. He denied being given the land by the former Member of Parliament. He was also not aware of any list given to him by the defendant's father. He urged the Court to grant him eviction orders.

5. In cross – examination, PW 1 said he filed this suit after getting the title in 2012. That before subdivision, the plot number was 67 and he was not aware his title was curved out of title No MN/11/48. That there were many houses on Plot No MN/11/48 but he did not know how long they had been on the land. That he did not know Said Hemed or Jabir Mwarauka or Boy. He knew nothing about the letter dated 31.8.2005 (MF D 11). He denied receiving letters dated 20.4.1999 and 18.4.1999 & 3.5.2012. He denied getting his title through fraud. That he had not been summoned over any cases of fraud allegations lodged by any one. This marked the close of the plaintiff's case.

6. The 1st defendant testified as DW 1 on 8th September 2016. He said he was born in Barani village Kisauni. That his father came on the suit land in 1930 and initially paid rent to Hamisi Rashid who owned plot 49 & claimed plot 48. His father died and was buried on the suit plot. That the 1st defendant's father lived with two of his brothers who also built their houses on the suit plot. That the allotment letters dated 8.10.1993 were issued to his uncles Bakari plot 67 while Rama plot No 68 (MFI D 2 (a) & (b) while for his plot 66 he did not get the letter. That plot No 66 is registered currently as title No 7343. That upon the death of Hamisi Rashid, his son sold plot No 48 to several people in the 1980s. DW 1 continued that when this son demanded for rent, a baraza was called and the residents of plot 48 approached the then area Member of Parliament Hemed to help.

7. That the Member of Parliament introduced the plaintiff as his secretary to help them get title for their sub plots. He continued that the plaintiff was given a list of 75 people living on the land. That the plaintiff processed the allotment letters for the residents except for the 1st defendant. DW 1 lodged a complaint with the lands where he learnt that the plaintiff had taken his letter. He produced his letter of complaint dated 5.10.03 as Dex 5 and the Chief's letter summoning the plaintiff dated 8.4.1999 (Dex 6). The witness said he also wrote to the Commissioner of Lands Dex 7 & 8 but never got any response. The witness further produced several letters regarding this dispute as Dex 9, 10 & 11. He asked the Court to give him back his land.

8. In cross – examination, DW 1 stated he got his ID in Kwale. That his father came from Kwale but lived in Kisauni. He did not know the size of plot 48 nor did he have the list that had the 75 names. That he qualifies to be given the land having lived on it for over 20 years. That he wrote letters complaining but never received any positive response. That the letter dated 27.3.2012 did not say the allotment was fake. In re – examination, DW 1 stated the list was given to the plaintiff to take to the lands office. That his name was on that list. He admitted the land belonged to the crown. That he went to his grandfather to get an ID. That the plaintiff has never lived on the suit land.

9. Mohamed Rajab aka Mzee Kadi gave evidence as DW 2. He stated that he was born in 1948 at Kisauni Barani village where he lived until 2011 when he relocated to Mshomoroni. DW 2 said he is also a village elder and he was a neighbour of the 1st defendant who was living on plot No 48/11/MN. That the 1st defendant's father and two uncles all had their houses built on the suit land. That the 1st defendant's father lived on the suit land from 1930 until 1988 when he died. DW 2 continued that in 1991 – 1992, a Mr Hemed vying for a parliamentary seat visited them during his campaigns in the company of the plaintiff and the area councillor Jabir Rashid when the aspirant promised to help them get titles for their lands. That after Hemed got the seat, they formed a committee whose duty was to register the names of all the people living on plot 48 and which names were then given to the plaintiff to help them process titles. According to DW 2, upto now no one has been issued with a title deed. That the suit plot in dispute has the 1st defendant's house on it.

10. DW 2 accused the plaintiff of acquiring the title for the suit plot in a fraudulent manner. That they trusted the plaintiff with the list on advice of Mr Hemed. He asked the Court to dismiss the plaintiff's case as he took advantage of them. DW 2 also stated that the 2nd defendant lives on plot No 49 not the suit plot.

11. In cross – examination, DW 2 stated that plot 48 was registered as government land. That he did not know all the people living on plot 48. That the 1st defendant was born in Kisauni. That before government gives you land, there is a process. That there are 74 houses on the plot 48 without titles. DW 2 wondered why only the 1st defendant's plot was taken. In re – examination, DW 2 gave names of some of the people he knows who are living on the suit land.

12. Boy Mohamed Kwenza sued as the 2nd defendant testified as DW 3. He stated that he lives on plot No MN/11/49 and produced a bundle of receipts issued for payment of ground rent as Dex 13. That he built his house on this plot in 1982 and produced a plan for the said house approved on 12.1.1982 as Dex 14. That they are maternal cousins with the 1st defendant and their family lived on plot No 48. That he also lived with Hussein from the time he was 8 years old while going to school and he was born in 1953. That he moved out in 1980 to live on his own and that is how he built his house for which he is paying the ground rent.

13. DW 3 continued that the D. O visited the plot to establish the occupants of plot 48. That it was after the visit by the D. O that the occupants knew the plot was government land and henceforth stopped paying ground rent. Later the people decided to ask the government to allot them the land in 1990. That a committee comprised of the people living on plot 48 was formed. A list was prepared and given to the plaintiff to follow up on the registration of the plots. That it was in this process that they learnt the plaintiff took the 1st defendant's plot. The 1st defendant then wrote letters to the lands office lodging his complaint. That in respect to their complaint the Commissioner of Lands assigned an officer to visit the land and prepare a report. DW 3 said the plaintiff also caused them to be arrested and even attempted to evict the 1st defendant in 1999.

14. DW 3 was surprised how the plaintiff acquired title for the suit plot when all along there was an existing dispute and the 1st defendant was living on the plot. He urged the Court to cancel the plaintiff's title as the plot is a birth right of the 1st defendant. That the plaintiff has never lived on the suit plot. In cross – examination, he said he came to Kisauni in 1961 to live with his uncle on plot 48. That his name was not on the list. That plot 48 was crown land which only the government can allocate. DW 3 did not know how many titles had been issued from plot 48.

15. DW 4 MWALIMU KOMBO HAMISI gave similar evidence on the history of the plot 48 as DW 1 – DW 3. DW 4 added that he was the secretary of the committee for plot 48 and 49 between 1980 – 1990. DW 4 said the 1st defendant was born on this land. That it is the area Member of Parliament who introduced the plaintiff to them to follow up for the allotment letters on their behalf. They prepared a list in triplicate – to the Member of Parliament, Chairman of the committee and the plaintiff. That the name of 1st defendant was also in the list but when the allotment letters came his was missing. On investigation, they learnt the plaintiff switched the names. DW 4 added the plaintiff has never lived on the suit plot. He asked the Court to cancel the plaintiff's name from the title and instead register 1st defendant as the owner.

16. In cross – examination, DW 4 stated he has a house both in Kwale and Kisauni plot 49 where he pays ground rent. That plot 48 created 75 sub plots while 49 created 500 sub plots. That he was the secretary upto the time the allotment letters were issued. He did not have a

share in plot 48. DW 4 denied that he was lying to Court. In re – examination, DW 4 stated he was born on plot 49 in 1946.

17. ONYINO MUKOBE testified as DW 5. He is a land officer currently working in Kisumu Lands Registry and having previously worked in Nairobi from 2000 – 2010. He confirmed writing the letter dated 20.9.2005 earlier marked as MFI D 4 which he produced as Dex 4. That the letter acknowledged the complaint by the 1st defendant and it instructed their officers on the ground to make a visit to confirm whether or not the 1st defendant was living there. That his letter confirmed 1st defendant was not allotted a plot. DW 5 could not confirm whether there was a reply to his letter.

18. DW 5 was not aware a title deed was issued to the plaintiff. That an allocation can be cancelled if found to be made in error. That it is possible any other officer may have dealt with the file in respect of the suit plot. Later DW 5 was recalled by the plaintiff for further cross – examination. During recall, he confirmed signing the letter dated 27.5.2006 addressed to the Director of Surveys. He denied lying to Court the 1st time stating that when he received the summons he did not pass through Ardhi house to see the file. This letter was produced as Pex 8. This marked the close of the defendants’ case.

19. Parties exchanged written submissions which I have read and considered. From the facts presented, the questions the Court frames for determination are:

(i) Whether or not the plaintiff has established that the suit plot was available for allocation to him by the government.

(ii) Whether the orders sought in the plaint are available to the plaintiff.

or

(iii) Whether the orders as sought in the defence and counter – claim are available to the 1st defendant.

20. From the evidence of both parties, it is not in dispute that this was government land. Since each of the parties herein are claiming the same plot, under the Evidence Act, sections 107 and 109 they are each required to establish the existence of facts they would want this Court to rely on to give a determination in their favour. The plaintiff is relying on the documents issued to him starting with a letter of allotment dated 8th October 1993, receipts for payments made and subsequently the title deed issued on 16th March 2012 in respect of title No MN/11/7343 which he pleads the defendants are occupying illegally.

21. The plaintiff in his statement filed in Court dated 24.5.2012 said nothing about the physical status of the land before he was allotted the same by the letter of allotment dated 8.10.1993. In his oral evidence before Court, he stated that people who had issues made a request to the government to be given the land. He told the Court he lives at a place called Corner Kilifi and is a businessman. What I find missing in the plaintiff’s testimony is how he knew about this land in Kisauni and when or why he applied to be allotted the same. In my opinion, this evidence was material to counter the defendants’ pleadings and evidence that they were born and were living on this land and they only got to know the plaintiff through a Mr Hemedi who was vying for the parliamentary seat for that area and who then agreed to assist the plaintiffs to secure titles for each of the plots they were occupying.

22. In the plaintiff’s documents listed from No 1 – 9, there is no field report or letter produced to show the plot was vacant at the time of allocation. There is a letter dated 16.9.2005 written by S. O Osodo addressed to the Commissioner of Lands in which the land officer stated that the plot belongs to the plaintiff. That the same was not developed contrary to claims by other people who are claiming ownership of the same. This letter on the face of it confirms some people were already claiming the land. In the letter dated 27.6.2006 addressed to the Director of surveys by DW 5 does not refer to occupation. Instead it states that the director of survey had forwarded similar deed plan number for plot No MN/11/7343 therefore DW 5 stated he could not issue title for unsurveyed plot No 67 because the L. R numbers were the same. This letter in my opinion was dealing with internal administrative issues relating to issuance of title for plot numbers MN/11/7342 and 7343 and not ownership of plot 7343.

23. Further in the letter dated 20th September 2005 written by DW 5 to the District Land Officer, Mombasa he acknowledged receipt of a complaint lodged by the 1st defendant claiming that he was residing on the plot allotted to the plaintiff. DW 5 in the letter said he had enclosed letters of complain to his addressee and asked to be provided with a ground report. The letter of 16.9.05 referred to above which said the ground was not developed cannot be taken to have been in response to the letter of 20.9.05 going by their dates of issue.

24. However the inference drawn by the contents of these two letters (i.e. of 16.9.2005 and 20.0.2005) they corroborate the defendants’ evidence that as soon as they learnt the 1st defendant’s letter of allotment was missing, they lodged a complaint with the government inter alia the Ministry of Lands. The 1st defendant also produced as Dex 13 a letter dated 3rd May 2012 authored by a Richard Abura on behalf of Permanent Secretary in referring to plot Nos. 66, 67 & 68 and the 1st defendant’s appearance before the Public Complaints Resolution Committee on 3.5.2012 with a promise that his complaint would be looked into. The defendants filed a list of documents dated 4th December 2013 containing 14 documents. Amongst their documents were copies of allotment for plots 68 & 66 which they said were issued to his neighbours and correspondences on various dates addressed to government offices from the Chief to the Commissioner of Lands from 1999 – 2012.

25. A letter of allotment is an expression of an intent by the government to confer on a person proprietary interests over land. Such an intent can only be confirmed where a party expresses a need for and the availability of plot. The defendants have from their evidence presented to Court shown their need to be allotted the plots by virtue of their occupation of the same. They called DW 2 and DW 4 who stated that the 1st defendant was indeed born on the suit plot. The fact that the 1st defendant’s ID Card was issued from elsewhere in Kwale in my view did not vitiate the fact of his occupation of the suit plot.

26. By the time the plaintiff was being issued with a title deed on March 2012, the 1st defendant had lodged his complaint over the plot. Under section 26 (1) of the Land Registration Act, a certificate of title is conclusive evidence of proprietorship except where it is proved there was:

(a) Fraud or misrepresentation 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.

27. In the instant case, the plaintiff may have paid all the taxes /stand premiums required of him to obtain his title. However the same was given to him unprocedurally and illegally because it appeared the plot was unavailable for allocation to him. Secondly the complaint lodged by the defendants had not been resolved at the time title was issued. There was no evidence to support the contents of the letter of 16.9.2005 which again was conflicted by the letter of 20.9.2005 issued by DW 5. The persons mandated with the issuance of the titles ought to have sorted out the dispute first before issuing the plaintiff with the title for the suit plot. The plaintiff could only deny knowledge of the defendants' complaints by bringing evidence of the ground report as at 8.10.1993 to show the plot was vacant when he was given which I find he failed to discharge.

28. Consequently, I find in the circumstances of this case that the plaintiff's prayer for eviction is lacking in merit and is hereby dismissed. The effect of the dismissal of the plaintiff's suit is that the defendant's claim as set out in the amended counter – claim dated 14th August 2013 succeeds. Accordingly I enter judgement for the defendants as prayed in the counter – claim with costs of the suit awarded to them.

Dated, signed & delivered at Mombasa this 2nd November 2018

A. OMOLLO

JUDGE