



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**ELC NO. 132 OF 2013**

**CATHERINE NJERI KAMAU.....PLAINTIFF**

**-VERSUS-**

**GRACE WAITHERA NYOKABI.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR MPEKETONI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. In his Complaint, the Plaintiff has alleged that she is the owner of parcel of land known as Lamu/Lake Kenyatta/474; that she has settled on the land with her family and that the Defendants have colluded with the police to have her arrested for being in occupation of the suit land.
2. The Plaintiff is praying for an order of permanent injunction as against the 1<sup>st</sup> Defendant and for an order directed to the 2<sup>nd</sup> Defendant to cancel the Title Deed which is in the name of the 1<sup>st</sup> Defendant and have the Title Deed issued in her name.
3. In her Defence and counter-claim, the 1<sup>st</sup> Defendant denied that the Plaintiff is in possession of the suit land; that she is the legal owner of the suit land and that the Plaintiff trespassed on a small portion of the suit land in the year 2010 when she was sick and away.
4. The 1<sup>st</sup> Defendant is seeking for the eviction for the Plaintiff from the suit land.
5. The 2<sup>nd</sup> Defendant averred in his Defence that the Plaintiff occupied the suit land as a squatter and without any authority from the 2<sup>nd</sup> Defendant and that the mandatory notice of intention to sue the Government prior to the institution of the suit was never issued.

**The Plaintiff's Case.**

6. In her evidence, the Plaintiff, PW1, informed the court that she was allocated the suit land in the year, 2010 by the Land Adjudication and Settlement Office; that she cleared the land and that it was not until August of the same year that the 1<sup>st</sup> Defendant informed her that she was occupying her land.
7. According to PW1, the suit property was repossessed from the first allottee by the Settlement Fund Trustees in the year 1997 and that after the ground report was done, she was allocated the land.

8. PW1 informed the court that although she formally requested to be issued with a Title Deed, the S.F.T never issued her with the same; that she has been on the land since the year, 2010 and that the 1<sup>st</sup> Defendants Title Deed should be cancelled.
9. According to PW1, by the time she was charged in the lower court for being on the suit land illegally, the 1<sup>st</sup> Defendant had not been issued with a Title Deed yet.
10. However, it was the evidence of PW1 that the Title Deed was issued to the 1<sup>st</sup> Defendant in the year 2013 through corruption and that she is the one who is entitled to the land and not the 1<sup>st</sup> Defendant.
11. The village elder of Mpeketoni, PW2, informed the court that the plaintiff is a resident of his village; that she is the one who is in occupation of the suit land and that he has never seen the 1<sup>st</sup> Defendant on the suit land.
12. According to pW2, the Plaintiff is living on the suit land with her seven (7) children and that she has developed the whole land.
13. It was the evidence of PW2 that the Plaintiff has been in occupation of the land since the year 2004 and that in the year 2009, her house got burnt and they had to raise funds to assist her put up another house on the land.

#### **The Defendants' case**

14. The 1<sup>st</sup> Defendant, DW1, stated that she was allocated the suit property by the Settlement Fund Trustees in the year 2002; that she cleared the land and planted trees and that when she fell ill in the year 2004, she went to stay with her brother in Kibaoni.
15. It was the evidence of DW1 that she paid the requisite 10% deposit to SFT in the year, 2005 and that she found the Plaintiff clearing the land in year 2010.
16. DW1 stated that despite being ordered out of the land by the Settlement Fund Trustees, the Plaintiff declined to leave and that is when she reported the issue of the Plaintiff's illegal occupation of her land to the police.
17. According to PW1, she paid a further sum of kshs. 70,000 to the Settlement Fund Trustees in the year 2012 and that the Settlement Fund Trustees then discharged the land and had the Title Deed issued to her.
18. Dw1 stated that although the land is approximately 18 acres, the Plaintiff is occupying 6acres; that she is the one (DW1) who planted the mature trees that are on the land and that the Plaintiff applied to the Settlement Fund Trustee to be allocated the suit land in the year 2013, which application was rejected.
19. Dw2 informed the court that she knew the 1<sup>st</sup> Defendant in the year 2002 when she went to the suit land; that he lives in the neighbourhood and that he is the one who cleared the land which was very bushy.
20. It was the evidence of DW2 that the 1<sup>st</sup> Defendant cleared two (2) acres and put up a temporary structure. She left the land in the year 2004 when she fell ill.
21. However, in the year, 2009, she saw the Plaintiff start clearing the land despite telling her that the land belonged to the 1<sup>st</sup> Defendant.
22. It was the evidence of DW2 that PW2 only came is the area in the year 2010 and cannot know what happened in the year 2004.

23. Another neighbor to the suit land, DW3, stated that the 1<sup>st</sup> Defendant was allocated the suit land in the year 2002 and that he assisted him to clear the land the same year.

24. It was the evidence of DW3 that the Plaintiff invaded the 1<sup>st</sup> Defendant's land in the year 2009.

25. The Land Adjudication and Settlement officer in charge of Mpeketoni, DW4, informed the court that in the year 2010, his office found the Plaintiff had cleared 1 ½ acres of the suit land and that she was living on the land with her husband.

26. DW4 informed the court that the land was initially allocated to a Mr. Hamze in 1997 and that the said allocation was cancelled in the year 2002. The 1<sup>st</sup> Defendant was then allocated the suit land.

27. It was the evidence of DW4 that according to the records, it is the 1<sup>st</sup> Defendant who is the owner of the suit land.

28. According to DW4, a ground report had been done in the year, 2007 which showed that although the suit land had trees, it was not occupied by anyone.

### **Submissions.**

29. The Plaintiff's advocate submitted that the 1<sup>st</sup> Defendant did not comply with all the allocation conditions; that the 1<sup>st</sup> Defendant has all along been indolent and that the Plaintiff has proved that she entered the land legally.

30. The 1<sup>st</sup> Defendant's advocate on the other hand submitted that the Plaintiff did not give cogent evidence on how she acquired title to the land; that the Plaintiff's plaint does not comply with the provisions of Order 2 Rule 10 of the Civil Procedure Rules and that the Plaintiff did not plead the particulars of fraud.

31. Counsel submitted that the 1<sup>st</sup> Defendant was legally issued with the Title Deed and therefore acquired the right to own the land.

### **Analysis and findings**

32. In her Plaint, the Plaintiff averred that she is entitled to parcel of land number Lamu/Lake Kenyatta/474 situated at Majembeni in Mpeketoni, Lamu, by virtue of having lived on the land since the year, 2010.

33. On the other hand, the 1<sup>st</sup> Defendant's case is that she was allocated the suit land by the Settlement Fund Trustees (S.F.T) in the year 2002 and was subsequently issued with a Title Deed in the year 2013.

34. It was the evidence of the 1<sup>st</sup> Defendant that indeed, she is the one who cleared the suit land in the year 2002 and only left to live with his brother when she was taken ill in the year 2004.

35. The evidence that was produced in this court by the Land Adjudication and Settlement Officer, DW4, shows that the suit property was initially allocated to Ali Hamza Ali by the Settlement Fund Trustees by way of a letter dated 31<sup>st</sup> January, 1997.

36. When Mr. Hanmza failed to meet the conditions in the letter of allotment, the Settlement Fund Trustees informed him by way of a letter dated 4<sup>th</sup> March, 2002 to remedy "the breach of conditions" within forty five (45) days which he never did.

37. The letter of allocation issued to Mr. Hamza was subsequently cancelled by the Settlement Fund Trustee vide their letter dated 5<sup>th</sup> August, 2002.

38. On 19<sup>th</sup> September, 2002, the suit land was allocated to the 1<sup>st</sup> Defendant. On 7<sup>th</sup> February, 2003, the 1<sup>st</sup> Defendant was asked by the Settlement Fund Trustees to remedy the breach of conditions which included to construct a shelter on the land and to cultivate atleast one acre with either annual or perenual crops.

39. According to PW1, she cleared a portion of the land in the year, 2002 and paid the requisite 10% deposit to the Settlement Fund Trustees on 15<sup>th</sup> March, 2005.

40. Indeed, the settlement officer and the 1<sup>st</sup> Defendant produced in evidence the receipt evidencing the payment of kshs. 4,625 in respect to the suit land.

41. The allocation of the suit land to the 1<sup>st</sup> Defendant was never cancelled. Instead, the Settlement Fund Trustees discharged the suit land after the 1<sup>st</sup> Defendant paid a further sum of kshs. 70,000 and issued to the 1<sup>st</sup> Defendant a title Deed on 7<sup>th</sup> June, 2013.

42. The Plaintiff informed the court that she entered the suit land in the year 2010, cleared it and settled thereon.

43. The Plaintiff did not inform the court the circumstances under which she took possession of the land.

44. Considering that the land was already registered in the name of the Settlement Fund Trustees by the year 2010, and the same had been allocated to the 1<sup>st</sup> Defendant, the Plaintiff had no legal or beneficial right to enter the said land.

45. Having not cancelled the letter offer, the land belonged to the 1<sup>st</sup> Defendant and the Plaintiff could therefore not have entered the said land legally.

46. Considering that the 1<sup>st</sup> Defendant is in possession of a Title Deed, and in the absence of evidence to show that she acquired the said title either fraudulently or by mistake, I find and hold that the Plaintiff has not proved her case on a balance of probabilities.

47. The 1<sup>st</sup> Defendant is the legal owner of the suit land and the Plaintiff only took advantage of the 1<sup>st</sup> Defendant's absence on the land to trespass on the suit land.

48. In the circumstances, the Plaintiff should give way.

49. For those reasons, I dismiss the Plaintiff's Plaint dated 5<sup>th</sup> August, 2013 with costs and allow the 1<sup>st</sup> Defendant's counter-claim dated 18<sup>th</sup> September, 2013 in the following terms:

*a) An order of eviction of the Plaintiff from parcel of land known as Lamu/Lake Kenyatta II/474 be and is hereby issued.*

*b) The Plaintiff to pay the costs of the suit and the counter-claim.*

**DATED AND SIGNED AT MACHAKOS THIS 2<sup>ND</sup> DAY OF MAY, 2017.**

**O. A. ANGOTE**

**JUDGE**

**DATED, DELIVERED AND SIGNED AT MALINDI THIS 12<sup>TH</sup> DAY OF MAY, 2017.**

**J. O. OLOLA**

**JUDGE**