



REPUBLIC OF KENYA
IN THE ENVIROMENT AND LANDS COURT

AT MALINDI

ELC NO.104 OF 2013

ABDULRAZAK MUHSIN SHARIFFPLAINTIFF

VERSUS

KADZO MASHA KAZUNGU.....1ST DEFENDANT

MORRIS MULEWA.....2ND DEFENDANT

JUDGEMENT

1. or about 21st June 2013, the Plaintiff Abdulrazak Muhsin Shariff filed this suit against the Defendants praying for Judgment to be entered against the Defendants jointly and severally for: -

(a) An order of eviction from the plaintiff's premises otherwise known as Plot No. 9313, situate in Malindi Constituency within Kilifi County and subsequent demolition of all or any structures standing thereon at the cost of the Defendants.

(b) A permanent injunction restraining the defendants either by themselves, servants, agents, employees, legal representatives or any other person claiming interest through them from interfering in any way with the plaintiff's use and enjoyment of Plot No. 9313, situate in Malindi Constituency within Kilifi County.

(c) Damages for trespass and obstruction of Profitable Developments

(d) Costs and Interest of the Suit.

(e) Any other relief that this court shall deem fit and just to grant.

2. The basis for filing the suit is the fact that the Plaintiff contends that he is an allottee from the Government of Kenya and therefore the beneficial owner of the parcel of land more particularly known as Plot No. 9313 measuring approximately 0.2 Hectares, situate in Malindi within Kilifi County. It is the Plaintiff's case that on or about 10th June 2013, the Defendants without any colour of right or proprietary interest, legal or any justifiable cause, entered upon the Plaintiff's said parcel of land without his knowledge, consent, connivance and/or acquiescence and started developing illegal structures thereon.

3. The Plaintiff avers in the Plaint that despite demand made including a report made to Malindi Police Station on 14th June 2013, the Defendants have refused, overlooked, neglected and/or failed to stop the trespass and construction of structures on the suitland. By reasons of the matters aforesaid, the Plaintiff

states that he has been deprived the use and enjoyment of his land and he has thereby suffered and continues to suffer loss and damage. Accordingly, the Plaintiff prays for orders of eviction to issue forthwith, damages for trespass and a permanent injunction against any interference with the land as outlined in the Prayers listed hereinabove.

4. The Defendants did not file a defence to the Plaintiff's suit. There were however a series of applications filed by both the Plaintiff and the Defendants seeking various orders before the suit was set down for hearing. In a Replying Affidavit sworn on 23rd July 2013 in response to the Plaintiff's application dated 21st June 2013, the 1st Defendant Kadzo Masha Kazungu indicates that the reason for their said entry into the land is the fact that the land belongs and has always been in occupation of the family of one Charo Wa Shutu of whom she is a member. The long and short of their defence as can be gleaned from the Affidavits filed therefore is that the defendants are entitled to the property in dispute based on inheritance and/or adverse possession.

5. By an application dated 19th December 2013, the Plaintiff moved to Court alleging that the Defendants were in contempt of Court Orders. Subsequently on 11th February 2014, the Honourable Justice Angote then seized of the matter visited the site and made certain observations. Consequently, in a Ruling delivered on 19th March 2013, the Learned Judge found that the 1st Defendant herein had indeed acted in violation of the Court's Orders issued earlier on 24th June 2014 and sentenced her to serve a period of three months imprisonment. In addition, an Order of Mandatory injunction was issued directing the Defendants to demolish and remove all developments made on the suit property and to restore the property to its earlier state. It is apparent that the said structures were subsequently demolished in compliance with the Court's Order.

6. On 21st February 2017 when this matter came for hearing neither the Defendants nor their counsel on record attended court. The Plaintiff took the witness stand and testified that he is an allottee from the Government of Kenya and therefore the beneficial owner of the suit property. In support of his case, he produced a Letter of Offer of Allotment dated 4th August 1994 from the Commissioner of Lands indicating that he was indeed allocated the property. The Plaintiff also produced various receipts showing that he paid a total of Kshs 27,704/= to the Department of Lands as required upon his acceptance of the offer.

7. The Plaintiff further testified that on or about 6th December 2012, the Director of Surveys in Nairobi issued him with a Deed Plan No. 188990 and thereupon the Original Unsurveyed Residential Plot No. 4 Malindi which he had been allocated became known as Plot No. 9313, Malindi. It is this plot measuring approximately 0.1263 Hectares which the Defendant entered into on 10th June 2013 and began construction of various structures thereon.

8. The Plaintiff was not cross-examined and his testimony in court stands unchallenged.

9. Arising from their absence in court when this matter came up for hearing, the Defendants who are apparently husband and wife, did not lead any evidence and thus failed to produce evidence that they are entitled to the land as defendants in the lineage of inheritance. In the various affidavits filed in court, I did not see any grant of Letters of Administration entitling them to pursue the land on behalf of the said Charo Wa Shutu family.

10. In contrast, the Plaintiff has shown that he is beneficially entitled to the land. He got the land surveyed and was issued with a Deed Plan. The claim that the Defendants are entitled to the land by reason that they have acquired prescriptive rights over unalienated public land is untenable and such a claim cannot be sustained since time does not accrue as against the Government. The provisions of Sections 41 and 42 of the Limitation of Actions Act Cap 22 of the Laws of Kenya expressly exclude Government Land from operations of the said Act.

11. Indeed, even though the land was allocated to a private individual-the Plaintiff, in 1994, the Defendants have not shown that they were in occupation or use of the premises in circumstances that

would result in the presumption of adverse possession.

12. I note from the record that a mandatory injunction was indeed issued at the interlocutory stage and all the developments in the suitland were demolished and the suit property was restored to its earlier state pursuant to the court's orders of 19th March 2014.

13. Accordingly, I hereby enter Judgement and allow the Plaintiff's claim in the following terms: -

(i) A permanent injunction to issue restraining the Defendants either by themselves, servants, agents, employees or any other person claiming interest through them from interfering in any way with the Plaintiff's use and enjoyment of Plot No. 9313, situate in Malindi Constituency within Kilifi County.

(ii) Costs and interests of the suit.

Dated, signed and delivered at Malindi this 13th day of July, 2017.

J.O. OLOLA

JUDGE