



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 156 OF 2013

PETER KAMAU NJAU.....PLAINTIFF

VERSUS

EMMANUEL CHARO TINGA.....DEFENDANT

J U D G M E N T

Introduction:

1. In his Complaint dated 3rd September 2013, the Plaintiff averred that he is the registered proprietor of parcel of land known as Kilifi/Jimba/1223 and 1224; that on 30th August 2013, the Defendant trespassed onto the two properties and that the Defendant is now in the process of building a permanent structure on the suit property.
2. The Plaintiff is seeking for a permanent injunction restraining the Defendant from interfering with the suit property and for an order of eviction.
3. In his Defence, the Defendant averred that he is a beneficial owner of parcel of land number Kilifi/Jimba 135 having been recognised as a squatter on the said land by the Kilifi Jima Settlement Scheme Local Land Committee in 1997.
4. The Defendant further averred that he has carried out developments in the suit property since 1997 by building permanent structures, casuarina and coconut trees.
5. In his counterclaim, the Defendant averred that part of parcel of land known as Kilifi/Jimba 135 was illegally subdivided into several plots including the suit properties.
6. The Defendant is seeking in the counterclaim for a declaration that he is the true owner of Kilifi/Jimba/1223 and 1224 and for a permanent injunction restraining the Plaintiff from interfering with the use of the suit property.

The Plaintiff's case:

7. The Plaintiff, PW1, relied on his statement dated 2nd February 2015 and filed in court on the same day.
8. According to PW1, he purchased the suit property from Joel Ngaruiya and Lilian Wairumi Ngaruiya who were the registered owners of parcel of land number Kilifi/Jimba 135.
9. PW1 stated that he paid the full consideration of the purchase price and the initial owner of Kilifi/Jimba/135 subdivided the same to create several subdivisions, including the suit property.
10. It is the Plaintiff's case that the consent of the Land Control Board was obtained and that he took possession of the suit property after the purchase.
11. The Plaintiff produced in evidence the Sale Agreement between Joel Ngaruiya and Lilian

- Wairimu Ngaruiya and himself dated 1st July 2005.
12. In cross examination, the Plaintiff stated that when he purchased the suit property in the year 2005, the land was vacant.
 13. According to the evidence of PW1, he does not live on the land although he had retained someone to be looking after the suit land.
 14. PW1 informed the court that he neither had the consent of the Land Control Board nor the duly registered Transfer document in court.
 15. Joel Ngaruiya, PW2, informed the court that the Plaintiff purchased the suit properties from him and Lilian Wairimu.
 16. It was the evidence of PW2 that he was issued with a title deed jointly with his wife on 31st January 1981.
 17. PW2 informed the court that he subsequently subdivided the land into various portions and that he sold to the Plaintiff Kilifi Jimba/1223 and 1224.
 18. In cross-examination, PW2 stated that although the land was sub-divided, he did not have the consent of the Land Control Board to subdivide the land.
 19. PW2 could also not remember when he did the sub-division of plot number 13 or when he signed the Transfer document.

Defence case:

20. In his statement, the Defendant, DW1, informed the court that he is a beneficial owner of parcel of land number Kilifi/Jimba/135 measuring approximately 0.20 Ha having squatted on the land since the year 1996.
21. According to DW1, he has developed the suit property by building permanent structures and planted casurina and coconut trees and that he has enjoyed an uninterrupted quiet possession of the land before and after the verification exercise that was conducted by the Kilifi/Jimba Settlement Scheme who recognised him as a squatter of the land.
22. The Defendant informed the court that plot number 135 was illegally subdivided into plot numbers 1223, 1224, 1225 and 1226; that it is not true that he has trespassed on plot numbers 1223 and 1224 and that the purported subdivision was meant to dispossess him of the suit property.
23. The Defendant is seeking for the cancellation of the Plaintiff's title after living on the land for many years.
24. According to DW1, he knew Joel in 1999 when he found them cultivating the suit property whereafter they went to the Chief's office to resolve the dispute.
25. DW1, informed the court that he had constructed seventeen (17) houses on the land which he has rented.
26. In cross-examination, DW1 stated that he did not have the approval of the County Government of Kilifi to construct houses on the suit property.

Submissions:

27. The Plaintiff's advocate submitted that the Plaintiff was issued with the title deeds on 12th April 2011 and that the Defendant trespassed into the suit properties on 13th August 2013 and illegally commenced construction on the land.
28. Counsel submitted that this court has previously held that leases issued through a Task Force report are null and void; that the Defendant did not challenge the Plaintiff's title in his Defence and that the Task Force has no jurisdiction to allocate land.
29. The Plaintiff's counsel submitted that it is not prudent for the Defendant to allege that he had beneficial right over Kilifi/Jimba/135 but after sub-division of the land laid his claim on the Plaintiff's portions; that where there are two persons in a piece of land, the person who has the title is in actual possession and the other is a trespasser.
30. The Plaintiff's counsel finally submitted that a claim for adverse possession by the Defendant cannot lie because plot number 135 has never been in the name of the Defendant and that in any event, after the sub-division of plot number 135, the claim for adverse possession was extinguished.

31. The Defendant's counsel submitted that the Plaintiff did not conduct due diligence when purchasing the suit property; that had he conducted due diligence, he would have found out that the Defendant lives on the suit property and that the title in possession of the Plaintiff was illegally obtained.
32. The Defendant's advocate submitted that the Defendant has had an open, quiet, peaceful and uninterrupted possession of a portion of Kilifi/Jimba/135 since 1996; that a claim for adverse possession can be raised in a counterclaim or a Plaintiff and that in any event the Plaintiff's title was illegally obtained.

Analysis and findings:

33. The Plaintiff's claim in this matter is that at all material times, he was the sole registered proprietor of parcel of land known as Kilifi/Jimba/1223 and 1224, a subdivision of Kilifi/Jimba 135.
34. According to the Plaintiff and the evidence of PW1, the Defendant trespassed on the suit property on 30th August, 2013.
35. The Defendant on the other hand informed the court that he is the beneficial owner of the suit property having lived on the land since 1996.
36. In his Defence, the Defendant has denied the Plaintiff's averment that he legitimately acquired the suit property from Mr. Joel and his wife.
37. Indeed, other than his testimony that he has a beneficial interest in the suit property having lived there since 1996, the Defendant informed the court that the title deed in possession of the Plaintiff was illegally acquired.
38. The evidence of PW1 was that he acquired the suit premises from one Joel Ngaruiya and Lilian Wairimu Ngaruiya vide an agreement dated 1st July 2005. The purchase price was Kshs.500,000.
39. PW1 admitted that even after acquiring the suit property in the year 2005, he never took possession of the same.
40. Other than the Sale Agreement of 1st June 2005, the Plaintiff produced in evidence the copies of the title deeds for the two parcels of land.
41. There was no evidence that was produced by PW1 and PW2 to show how parcel of land number Kilifi/jimba/135 was subdivided. Indeed, the Plaintiff did not produce any document to show that the Land Control Board gave its consent to have the suit property subdivided pursuant to the provisions of Section 6(1)(b) of the Land Control Act.
42. The person who sold the suit properties to the Plaintiff, PW2, did not inform the court how he acquired the suit property.
43. Indeed, other than stating that he was issued with a title deed jointly with his wife on 31st January, 1981, no evidence was produced to show that the parcel of land number 135 was ever registered in favour of the sellers.
44. In the Defence, the Defendant denied that the Plaintiff is the registered owner of the suit property. It was necessary for the Plaintiff to either produce a certified copy of the green card or an official search to dispel the Defendant's averment that he is not the legitimate owner of plots 1223 and 1224.
45. The mere production of a Title Deed without any evidence from the District Land Registry to show the existence of the title is a dangerous path that cannot afford this court the opportunity to conclusively state that the Plaintiff acquired the suit property lawfully.
46. Where the fact of registration of an individual as a proprietor of a parcel of land is challenged, the proprietor of such land can only prove that fact by producing a certified copy of the extract of the register or an official search. Even after the production of such documents, the registered proprietor has to show that the land was registered in his name lawfully.
47. Although pursuant to the provision of Section 37(1) of the Registered Land Act a document signed by a Registrar is to be presumed to have been so signed, it is only an entry in a register that can be received in proceedings as conclusive evidence of the matter (see Section 37(3) of the Registered Land Act-repealed). In the case of **Munyu Maina, Civil Appeal Number 239 of 2009**, the Court of Appeal held as follows:-

“We state that when a registered proprietor's root of title is under a challenge, it is not sufficient to dangle the instrument of title as proof of

ownership. It is this instruments of title that is challenged and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

48. The above holding of the Court of Appeal clearly shows the Defendant having denied that the Plaintiff was the registered owner of the suit properties in his Defence, the Plaintiff should have done more than what he did.
49. In fact, other than the non production of the consent of the Board to show that the subdivision of Plot No. 135 was approved by the Board, the Plaintiff did not produce the Consent of the Board to show that the transfer of the suit property from Joel Ngaruiya and his wife to the Plaintiff was ever sanctioned by the Board.
50. It is trite law that if land is agricultural, the same cannot be transferred or subdivided without the consent of the Board. Indeed, the Board could not have given its consent if there were people in occupation of the land.
51. The absence of the consent of the Land Control Board before the transfer of the suit property to the Plaintiff lacks credence to the Defendant's testimony that he has been on the land since the year 1996.
52. If indeed the Plaintiff entered into an agreement of sale with the Ngaruiya's in the year 2005, the Plaintiff did not offer any explanation as to why the title deed was not issued to him until the year 2011. The Plaintiff did not also produce in evidence the Transfer document and evidence of payment of stamp duty.
53. The Plaintiff did not also explain what he did with the property between the year 2005 when he entered into the agreement of sale and the year 2011 when the title deed was issued to him
54. The evidence produced in this court shows that the Defendant is in occupation of the suit land.
55. Indeed, the letter from the Chief, Watamu location, confirms the fact that the Defendant has been in occupation of a portion of land known as Plot number 135 since 1997. That position was confirmed by another Chief of the same location in the letter dated 10th October 2006. The two letters were produced in evidence as DEXB1.
56. In the circumstances, this court is satisfied that the Defendant has not only occupied the suit property for more than 12 years, but the Plaintiff has failed to establish his proprietorship interest over the suit property to the required standards.
57. For those reasons, I dismiss the Plaintiff's Plaint dated 3rd September 2013 with costs and allow the Defendant's counterclaim dated 19th February 2014 as prayed.
58. I however decline to allow the prayer for damages for trespass.

Dated and delivered in Malindi this **11th** day of **March**, 2016.

O. A. Angote

Judge