



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 16 OF 2010

RAPHAEL MLEWA MKARE & 515 OTHERS.....PLAINTIFFS

=VERSUS=

AGRICULTURAL DEVELOPMENT CORPERATION.....DEFENDANTS

J U D G M E N T

1. This suit was commenced by 516 Plaintiffs (the Plaintiffs) by way of a Plaint dated 18th March, 2010.
2. In the Plaint, the Plaintiffs averred that they are residents of Kisiwani area and that they “occupy and work on the land in the area as of right being ancestral land part of which is what is claimed to be land parcel number 513 measuring over 3000 acres.”
3. The Plaintiffs further averred that the Defendant has been carrying out its agricultural activities in the neighbourhood of the said Kisiwani Village covering an area of not more than 300 acres; that the Defendants have over time been expanding its operations and in the process have attempted to restrain them from accessing and using their ancestral land and that the land that the Defendant is claiming belongs to them.
4. It is the Plaintiffs' case that in the year 2007, the Defendant sub-divided the suit property into five (5) portions thus prejudicing their rights.
5. The only prayers that the Plaintiff have sought in the Plaint is for a permanent injunction and the costs of the suit.
6. The Defendant filed its statement of Defence on 19th March, 2010.
7. Although the Defendant purported to file an amended statement of Defence and Counter-claim on 16th October 2013, the same was filed without the leave of the court, contrary to the provisions of the Civil Procedure Rules. Consequently, this court shall not consider the amended Statement of Defence and Counter-claim as a pleading in this matter.
8. In the Statement of Defence filed on 19th March, 2010, the Defendant averred that the Plaintiffs are trespassers on the suit property; that the suit property belongs to Lands Limited, the Defendant's subsidiary and that LR NO. 513 Malindi measures 955 acres and not 3000 acres as pleaded in the Plaint.
9. According to the Defendant, the Plaintiffs are not entitled to an order of permanent injunction.

The Plaintiffs' case:

10. Kenga Mitzanze Iha, PW1, informed the court that he was 92 years old and that he lives in Kisiwani. According to PW1, he was born in Kisiwani and his late father was known as Mitsanze Iha.

11. PW1 informed the court that he used to work for Mr. Guram Ali before he retired, whereafter he became a councillor of the area and the Chairman of Kisiwani area.
12. PW1 stated that Mr. Gulam Ali used to plant sugarcane on his land in Kisiwani. According to PW1, the same land that was owned by Mr. Gulam is what came to be known as the "ADC land".
13. It was the evidence of PW1 that he differed with Mr. Gulam which led to his arrest and charging in court. However, he was acquitted and thereafter Mr. Gulam caused his house and other nine houses in Kisiwani to be razed down. The nine houses, according to PW1, were all within the land owned by Mr. Gulam.
14. The evidence of PW1 was that the late politician, Hon. Ronald Ngala, intervened and informed them to settle on Mr. Gulam's land.
15. Before Gulam acquired the land in question, PW1 informed the court that the land was previously owned by a man nicknamed "Mzungu Mweusi" before he sold it to Asian who later on transferred the land to Mr. Gulam. Mr. Gulam then sold the land to "Kisima Farm."
16. PW1 informed the court that after acquiring the land from Mr. Gulam, "Kisima Farm" tried to fence off the land but they (the Plaintiff and others) resisted the attempt.
17. According to PW1, they resisted the fencing of the farm because the land was theirs. However, PW1 informed the court that "Kisima Farm" proceeded to fence the land that it had acquired from Mr. Gulam and started rearing cattle.
18. After "Kisima Farm" left the land, it was the evidence of the Plaintiff that "ADC" (the Defendant) took over the land.
19. According to PW1, the land he has been utilising is the same land that ADC, the Defendant, is claiming; that ADC has been ploughing the land and that he does not have a title document to the land.
20. It was the evidence of PW1 that ADC took over the land when they were already in occupation; that some of their houses were burned down and that the Defendant has encroached on their land.
21. PW1, informed the court that despite their pleas to the Chief and the District Commissioner, they have not been assisted to recover their land from the Defendant.
22. In cross-examination, PW1, stated that he used to stay on the land belonging to Mr. Gulam while working for him.
23. According to PW1, they used to pay "Ijara" (land rent) annually to Mr. Gulam. However after Mr. Gulam left, they stopped paying the "Ijara".
24. PW1 stated that it was Honourable Ngala who asked them to stop paying the "Ijara" because the land belonged to them.
25. PW1 informed the court that he was not aware that the land he was staying on had been surveyed although he was aware that the neighbouring parcels of land were surveyed.
26. PW1 stated that where they are staying, they are around 20 people. PW1 informed the court that Mr. Gulam burnt their houses in 1952, which is the same thing that the Defendant did in the year 2014.
27. According to PW1, the land that was utilised by Mr. Gulam, Kisima Farm and currently by the Defendant is the same land that they are occupying.
28. In re-examination, PW1 stated that they used to farm the whole land except where Mr. Gulam had constructed his house and that they used to pay to Mr. Gulam "Ijara" before cultivating the land.
29. It was the evidence of PW1 that they used to pay "Ijara" of Kshs.50 annually because the government had categorised the land as belonging to Mr. Gulam, until Hon. Ngala told them to stop paying.
30. PW2 informed the court that he was born in 1943. It was his evidence that he has two families, with one family having settled in Kijiwetanga while the other one in Kisiwani.
31. According to PW2, his land in Kisiwani is family land and it measures $\frac{3}{4}$ of an acre.
32. PW1 stated that initially, the suit property was utilised by a white man named "Mzungu Mweusi" who used to plant sugarcane and people used to work for him in his farm.
33. It was the evidence of PW2 that his grandfather worked for "Mzungu Mweusi" without any problem. When he left, a Mr. Gulam Hussein took over the farm and their families continued living on the land measuring approximately 20 acres. This was before independence.
34. When Gulam Hussein left, PW2 informed the court that Mr. Gulam Ali took over and differed with the employees who were on the land. According to PW2, Gulam Ali burnt down their houses. When the people whose houses were burnt down complained, Hon. Ronald Ngala

- advised them to continue staying on the land.
35. It was the evidence of PW2 that when Gulam Ali left, Kisima Farm took over the land and fenced it off. However, the people who were residing on the land brought down the fence.
 36. After independence, PW2 informed the court that the Defendant took over the land from Kisima Farm.
 37. In cross-examination, PW2 stated that his father was born on the suit property; that he (PW2) went on the suit property 40 years ago and that he has been living on the land since the year 1960.
 38. PW2 stated that when Mr. Gulam burnt the houses on the suit property, it was his grandfather who was living on the land and that they are currently occupying around 2,000 acres.
 39. The evidence of PW3 was that he hails from Sabaki sub-location, Kwa Ndomo ADC area.
 40. According to PW3, he was a councilor of the area between 1983 until 1991 and that ADC is within the area he was representing- Sabaki Ward.
 41. PW3 stated that the land currently known as "ADC" was previously an area owned by whites who used to raise sheep. However, in the 70's the land was converted into government land.
 42. According to PW3, there used to be two farms. One known as "Kisima farm" owned by a white man while the other one was known as "Top farm" and was owned by an Asian. Both parcels of land are now known as "ADC farm".
 43. According to PW3, when the white men came, the people who had settled on the area were moved and they settled in the surrounding areas.
 44. The movement of people from their ancestral land, according to PW3, has been the source of conflict ever since then.
 45. It was the evidence of PW3 that when ADC took over from "Kisima Farm" and "Top Farm", the managers started setting aside portions of land for construction and sale.
 46. PW3 informed the court that it is the Giriama who were officially allocated the suit land in 1895.
 47. Due to the continuous sub-division and selling of the suit property, PW3 stated that the people who were displaced from the land were annoyed and that the suit property actually belongs to the Plaintiffs.
 48. In cross-examination, PW3 stated that his house is on plot M62; that they were told that the land in question was required by the government for development; that the suit land should revert to them if it is not being used for the intended purpose and that plot 5B is what used to be known as "Top farm".
 49. According to PW3, the Plaintiffs are claiming the whole of plot 513 which they are cultivating.

Defence case:

50. The current manager of the Defendant, DW1, informed the court that he was posted in Malindi as a Manager in the year 2013.
51. DW1 stated that he found squatters had invaded one of the Defendant's farms known as "Top farm" and were interfering with the Defendant's operations.
52. The evidence of DW1 was that the Defendant owns Kisiwani complex which consists of two farms known as "Top farm" and "Home farm" measuring 3,000 acres and 1,000 acres respectively.
53. According to DW1, the Defendant's offices are situated on "Home farm" which has not been invaded while their cattle and goats graze on "Top farm". The Defendants also cultivate various crops on "Top farm".
54. It was the evidence of DW1 that currently, the squatters are cultivating approximately 2,500 acres of "Top farm" leaving a mere 500 acres for the Defendant's activities. DW1 produced in evidence the numerous letters addressed to the squatters directing them to vacate the land.
55. DW1 denied that the Defendant has been selling the land; that the land belonging to the Defendant is 3,048.3 acres and that the same has been surveyed and title documents issued. The map showing the extent of the Defendant's land was produced in evidence.
56. According to DW1, the Plaintiffs do not have houses on the 2,500 acres that they have invaded. According to DW1, the Plaintiffs usually invade the land for purposes of cultivating it then go away.
57. On the issue of ownership of the land, DW1, informed the court that although the land has been registered in the name of Land Limited, the said company is a subsidiary of ADC and therefore

- holds the suit property on behalf of the Defendant.
58. The Defendant's previous manager, DW2, informed the court that in the year 2013, the Plaintiffs invaded the Defendant's land after it had ploughed it and started planting on it. This was despite the injunctive orders that were in place.
 59. DW2 stated that by the time he was transferred to Kilate, the Plaintiffs, led by their Chairman, had invaded 1,200 acres of "Top farm".
 60. DW2 denied that the Plaintiffs stay on the disputed land.
 61. DW3 was the Defendant's manager in Malindi between August 2009 to September 2010.
 62. According to DW3, this suit was filed when there was sporadic invasion of "Top farm" during the rainy season.
 63. DW3 stated that when the rains started in May 2010, they had already ploughed 600 acres of land in readiness for planting before some of the Plaintiffs invaded the ploughed farm and started planting.
 64. DW3 informed the court that other than planting on the farm which they had ploughed, the Plaintiffs also attacked the Defendant's animals and a report was made to the police to that effect.
 65. When the Defendant hired police officers to guard the farm, DW3 informed the court that the Plaintiffs attacked the said police officers and hacked one of them to death and seriously injured another one in May 2010.
 66. Before May, 2010, DW3 informed the court that some people used to cultivate about 20 acres of the Defendant's land during the rainy seasons and then go back to their homes. This, according to DW3, was an agreement that the Defendant had entered into with some people who are not the Plaintiffs; that the figure of 513 Plaintiffs is made up and that when a police officer was killed in the year 2010, they all ran away.
 67. In cross-examination, DW3 stated that there were people who used to cultivate the portions of the suit property and that they never lived on the land.
 68. The Defendant's Corporation Secretary, DW4, informed the court that he also doubles up as the Company Secretary of Lands Limited a subsidiary of the Defendant.
 69. According to DW4, the Plaintiffs are people who have been invading the Defendants land, cultivate it and then go back to their homes.
 70. DW4 informed the court that other than LR. No. 513, the Defendant also owns LR. No. 456, 467, 470, 480, 485, 488, 489, 1949, 5061, 482, 483, 490 and 464; that the Defendant owns this parcels of land through its subsidiary, Lands Limited and that the Defendant acquired Lands Limited in 1971.
 71. DW4 stated that the Defendant purchased all the plots in Kisiwani in 1977 from Kisiwani Farm Limited and Kisiwani Estate Limited and that the title documents were issued in favour of Lands Limited.
 72. According to DW4, before the Defendant's subsidiary purchased the suit properties for consideration, the consent of the Land Control Board was sought and granted on 12th February 1976; that the invasion of the suit property started in the year 2005 and that although it is plot number 513 which has been heavily invaded by the Plaintiffs, they have also invaded the other portions of land belonging to the Defendant.
 73. DW4 was categorical that the Plaintiffs do not dwell on the land and that they usually put up temporary structures during the planting season and then go back to their homes.
 74. DW4 informed the court that the Defendant's land was gazetted in the year 2003 and as such it cannot be sold; that Lands Limited can sell the land that is not in the schedule and that "Home farm" is not one of the parcels of land that has been invaded by squatters.
 75. DW4 concluded his testimony by stating that the Plaintiffs opportunists who want land for free.

Submissions:

76. The Plaintiff's advocate submitted that the Plaintiffs were on the suit land long before the colonial government laid a claim on the land; that this court was mandated by the 2010 Constitution to address historical injustices and that the colonial administrators surveyed off huge chunks of land and registered the same in the name of private individuals.
77. Counsel submitted that we should not ignore history; that with the killing of a police officer on the disputed land in the year 2010, history was repeating itself because in 1895, a colonial police

- officer had been killed in exactly similar circumstances and that that is bound to be repeated if the injustices visited on the Plaintiffs are ignored and swept under the carpet.
78. The Plaintiff's advocate submitted that history shows that the Plaintiffs' struggle is well documented, factual and of long standing and that the Plaintiffs have the right to own property.
79. Counsel submitted that before land is registered, it must first belong to indigenous people of the area and that the manner in which the Defendant acquired the suit property and its predecessors in title shows that the Plaintiffs were neither compensated nor consulted when it was converted from community land to private land.
80. Counsel submitted that the acreage of land that the Defendant has admitted as having lost to the Plaintiffs has never been used for the intended activities; that the Defendant has been in the business of subdividing the land which they hold in trust for the public to individuals and that this is the same land that was taken away from the Plaintiff and their predecessors.
81. The Plaintiffs' counsel finally submitted that the suit land belongs to the Plaintiffs and that being in possession, they should enjoy the protection of this court.
82. The Defendant's counsel submitted that the Plaintiffs have sued the wrong party; that PW1 admitted that the land initially belonged to private persons and that indeed, the Defendant's subsidiary purchased the land for consideration.
83. The Defendant's counsel submitted that the periodic invasion of the suit property by the Plaintiffs has been resisted by the Defendant and that the Plaintiffs do not have a cause of action.
84. The Defendant's counsel submitted that the Defendant has proved its counter-claim.

Analysis and findings:-

85. This matter has had a chequered and sad history. So chequered and sad has been the history that on 20th May, 2010, a police officer who was guarding the farm was killed by people who were claiming that the land belongs to them.
86. According to the submissions by the Plaintiffs' advocate, the killing of the police officer on the disputed land on 20th May 2010 "was history repeating itself because in 1895, a colonial police officer was killed in exactly similar circumstances," and, according to the Plaintiff's advocate, that history is bound to be repeated if the "injustices are ignored and swept under the carpet instead of being addressed with finality."
87. The above sentiments, to say the least, are very unfortunate and scaring, and more so coming from an advocate of this court.
88. The Plaintiffs in this matter are praying for one substantive order, a permanent injunction restraining the Defendant, its agents, servants and all persons acting through it from interfering with their portions of land in the area where they cultivate.
89. The Plaintiffs have pleaded in the Plaint that there have been occasions when, having cultivated and prepared their land for planting, the Defendant would move in and plant its own crops on the same land and at other times the Defendant would allow its livestock to feed on the Plaintiffs crops.
90. It is the Plaintiffs' case that they are residents of Kisiwani area and occupy and work on the disputed land as of right, the land measuring over 3000 acres being their ancestral land.
91. On the other hand, the Defendant's case is that the Plaintiffs are trespassers on the land owned by a company known as Lands Limited, which is a subsidiary of the Defendant.
92. The only issue for determination therefore is whether the Plaintiffs are entitled to the disputed parcel of land.
93. Although the Plaintiffs in this matter are 516, it is only three witnesses who testified on their behalf.
94. PW1 informed the court that he was aged 85 years and that the disputed parcel of land was originally owned by a white man who was nicknamed "Mzungu Mweusi".
95. According to PW1, "Mzungu Mweusi" later on left the land in the hands of an Asian known as Gulam Ali who was engaged in the planting of sugar cane on the land.
96. PW1, informed the court that he was employed by Mr. Gulam Ali and worked for him until when they differed. Mr. Gulam, according to PW1, caused for his arrest and arraignment in court although he was subsequently acquitted.
97. After his acquittal, PW1 stated that Mr. Gulam razed down his house and the houses of the other

- people who were working for him on the farm. That was when the late Hon. Ronald Ngala intervened and had Mr. Gulam Ali arrested. According to PW1, the late Hon. Ronald Ngala advised them not to move from the land that was then owned by Mr. Gulam Ali.
98. PW1 stated that Mr. Gulam Ali transferred the land that they were occupying to “Kisima Farm” who tried to fence it but they resisted. According to PW1, “Kisima Farm” kept cattle on the land until when they transferred it to ADC (the Defendant).
99. According to PW1, when ADC took over the land from “Kisima Farm”, he was already utilising it, amongst other people.
100. When he was asked the arrangement he had with Mr. Gulam, PW1 stated that he was on the land because he was working for Mr. Gulam and that he used to pay to Mr. Gulam an annual tax known as “Ijara”. However, after Mr. Gulam left, he stopped paying the “Ijara”.
101. PW1 did not explain to the court his relationship with the other Plaintiffs, or at what particular point in time the rest of the Plaintiffs joined him on the farm.
102. PW1 did not also present any evidence to this court in the form of photographs to show the house that he is currently occupying and whether he is currently living on the land that the Defendant is claiming or he only uses the land for cultivation.
103. Indeed, no evidence was produced by PW1 on the acreage of the land that he is claiming and his clan or family lineage.
104. The evidence of PW2 was that it was his grandfather who first occupied the suit land while working for “Mzungu Mweusi”.
105. According to PW2, when “Mzungu Mweusi” left, Mr. Gulam Hussein took over the farm and accommodated the people “Mzungu Mweusi had left behind. This, according to PW2, was before independence.
106. According to PW2, Gulam Hassan left and Gulam Ali took over the farming activities on the land. It is Gulam Ali who burnt down the houses of the people who were working and living on the farm.
107. Gulam Ali, according to PW2, left the land in the hands of “Kisima Farm”.
108. According to PW2, they are currently utilising more than 2000 acres for farming.
109. Again PW2 did not tell the court his relationship with the rest of the Plaintiffs and how the rest of the Plaintiffs are claiming the land, or the acreage that each Plaintiff is entitled to.
110. PW3 was a councilor of Sabaki Ward between the year 1983 until 1991.
111. PW3 gave the history of the disputed land as follows: The land currently known as “ADC” was previously an area owned by whites who used to rear sheep; that the land was converted to government land in 1970's; that when the white men came, the people who had settled on the land were pushed to the fringes and that it is the people who were pushed to the fringes who are claiming for their land.
112. PW3 did not tell the court the people or families or clans that were originally on the land before the white men came and pushed them to the fringes.
113. The Plaintiffs three witnesses were all unanimous that the land was owned by a white man (Mzungu Mweusi) before it changed hands to the “Gulams” and then to “Kisima Farm”.
114. The Plaintiffs' case, as I understand it, is that the area that was subsequently owned by “Mzungu Mweusi, “Gulam”, “Kisima farm” and then Lands Limited was their ancestral land, and that they have been utilising it, the above ownership notwithstanding.
115. The gap that has not been filled in the Plaintiffs' case is the relationship amongst themselves and how each one of them, or their ancestors settled in the area, either before it was surveyed in 1933 as shown in the map that was produced in evidence or thereafter.
116. The three witnesses in this matter did not give a cogent history, or any history at all, on the Plaintiffs' origins, viz a viz their claim that the land is their ancestral land.
117. The evidence before this court shows that the Plaintiffs do not live on the parcels of land in dispute. All that they have been doing is to cultivate the land and retreat back to their respective homes.
118. According to the evidence before me, the cultivation of the land belonging to the Defendant's subsidiary started on a small scale before it increased to an area covering approximately 2,500 acres.
119. It is not clear how the 516 Plaintiffs expect this court to hold that indeed the suit property is their ancestral land without availing to the court their respective family trees or even producing copies

- of their national identity cards for the court to establish their claim.
120. In any event, how do the 516 Plaintiffs intend to subdivide the whole land registered in the name of the Defendant's subsidiary? Which acreage will each Defendant be allocated and by whom?
 121. The suit property belongs to Lands Limited, a company wholly owned by the Defendant, which is a state corporation.
 122. The evidence produced by the Defendant's witnesses shows that the Defendant's subsidiary, Lands Limited, purchased land reference numbers 456, 467, 470, 480, 485, 488, 489, 513, 29, M53 and M3B from Kisima Farm Limited vide an Indenture dated 7th June, 1976 for Kshs.1,309,900. These parcels of land are the ones known as "Top Farm".
 123. The Indenture in respect to the above parcels of land measuring 3,048.3 acres was registered on 3rd July 1976. The Land Control Board of Kilifi gave the consent for the transfer of the above parcels of land to Lands Limited on 14th April, 1976.
 124. Other than the above parcels of land, Lands Limited also purchased a parcel of land known as LR No. 1949 measuring 218.2 hectares (approximately 546 acres.)
 125. The above parcels of land were all surveyed in 1933 vide survey plan number 32820.
 126. The evidence produced by the Defendant therefore shows that before its subsidiary purchased the disputed land for consideration in 1976, the land was private land.
 127. Indeed, PW1, PW2 and PW3 admitted that the land had been owned by a white man, two Asians and Kisima Farm Limited before the Defendant acquired it.
 128. Considering that the Kilifi Land Control Board gave its consent before the land was transferred to the Defendant's subsidiary, it is highly unlikely that the Plaintiffs, or their predecessors were living or utilising the suit property in 1976.
 129. It is common knowledge that the Defendant was established by an Act of Parliament in 1965 to promote production of Kenya's essential agricultural inputs such as seeds and high grade livestock (See section 12 of the Agricultural Development Corporation Act.)
 130. It is also common knowledge that after the establishment of the Defendant in 1965, it purchased several parcels of land in the country that were formally owned by private persons and especially those parcels of land that were being sold by the departing whites (read colonialists).
 131. It may be true, as stated by PW3, that the Defendant or its subsidiary has been selling the parcels of land that were acquired using public resources, notwithstanding the provisions of the Agricultural Development Corporation (Special Farms) Rules, 2001 which prohibits the subdivision and selling of special farms which have been duly gazetted. Kisiwani farm, measuring 3,902, is one of such farms.
 132. If the Plaintiffs' argument is that the Defendant's officials have been selling land owned by the Defendant, then any of them has the right under the public trust doctrine, to file a suit to have the purported sell declared a nullity by this court.
 133. However, the Plaintiffs, or any one else, has no right under the Constitution and the land statutes, to invade private or government land with a view of tilling and appropriating it on the ground that he is remedying a historical injustice. Such a move will only lead to anarchy and a constitutional crisis in this country.
 134. The suit property is therefore land belonging to the government and the Plaintiffs or any other person have no right to occupy it or utilise it for their private benefit. In the case of **Mombasa Technical & Training Institute, Mombasa Civil Appeal No. 286 of 2010**, the Court of Appeal held as follows:

“Regardless of the length of time the respondents remained on the suit property, their status remained that of illegal squatters. In considering the legitimacy of the respondents' expectation, we cannot fail to take note of the issue of land and squatters in this county is a sensitive and emotive issue in view of the number of people who are landless. To create a precedent that a legitimate expectation for allocation of government land can arise to of an occupation declared illegal by statute would be opening a pandoras box which would compound the problem of land by encouraging squatters invasion of Government land.”

135. I could not agree more. The Defendants act of forcibly entering the land belonging to the Defendant's subsidiary cannot be encouraged by the court.

136.Indeed, the Constitution at Article 67 (2)(e) has mandated the National Land Commission to initiate investigations, on its own initiative or on a complaint,into present historical land injustices and recommend appropriate redress.

137.The mechanism of how the National Land Commission will deal with the issue of historical land injustices is still under debate. Once Parliament passes legislation on how that issue will be dealt with, the Plaintiffs will present their complaints to the Commission.

138.However, it cannot be said that people should or can investigate by themselves what they consider a historical land injustice and then proceed to appropriate private or government land. That is not what the framers of the Constitution intended, and this court cannot support that supposition.

139.The totality of the above discourse and evidence before the court leads me to only one conclusion; the Plaintiffs have not proved their case on a balance of probabilities.

140.As I had already stated above, the Defendant filed an amended Defence and Counter-claim without the leave of the court. I shall therefore not consider the said Amended Defence and Counter-claim.

141.For the above reasons, I dismiss the Plaintiffs' Plaint dated 18th March, 2010. with costs.

Dated and delivered in Malindi this 15th day of April, 2016.

O. A. Angote

Judge