



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

HCCC NO. 1 OF 2012

PROFESSOR NIMROD JUNIAHS MWANG'OMBE.....PLAINTIFF

=VERSUS=

1. MWARO BAYA

2. CHOGA TSANGWA

3. PAHE GALOLA MWAROBA

4. BETTY NDAWA

5. LULU KARIOBA

6.. SANTA NAMANI

7. KAI JACKSON

8. BAKARI MAKORANI DHADHOH

9. GRACE MWAROGO

10. PANTALEO MWAMBURI.....DEFENDANTS

J U D G M E N T

1. In the Amended Plaintiff dated 25th July 2013, the Plaintiff averred that he is the registered proprietor of L.R. No.5054/200 measuring 0.3543 Ha; that on diverse dates between the year 2009 and 2011, the Defendants wrongfully entered into the suit property and that the Defendants unlawfully parceled out his suit property amongst themselves and put up permanent, semi permanent and temporary structures.

2. The Plaintiff is seeking for an order of eviction and for general damages for trespass.

3. The 1st, 2nd, 3rd, 5th, 7th, 8th and 10th Defendants field their respective Defences on 10th September 2013 and denied the averments in the Plaintiff.

The Plaintiff's case;

4. The Plaintiff, PW1, informed the court that the Defendants invaded the suit property which is registered in his name.
5. According to PW1, he saw the Defendants on his parcel of land in the year 2011.
6. According to PW1, he intended to develop a house on the suit which he cannot do because of the said invasion.
7. The Plaintiff produced in evidence the grant in respect to the suit property that was registered in his favour on 31st January 1994. the letter of allotment and the Rate Clearance Certificate was also produced in evidence by the Plaintiff.
8. The Plaintiff also produced in evidence the letter dated 15th April 2013 from the Assistant Chief which stated that the suit property belonged to the Plaintiff.
9. In cross-examination, PW1 stated that there was a caretaker on the suit property and that he had several meetings with the Defendants with a view of convincing them to move out.
10. The Plaintiff's sister-in-law, PW2, stated that although she stays in Mombasa, she was instructed by PW1 to be watching over the suit property.
11. It was her evidence that while on a routine check of the plot, she found the Defendants having invaded the land she reported the issue to the Assistant Chief.
12. It was the evidence of PW2 that the Assistant Chief informed the Defendants that indeed the land in question belonged to the Plaintiff and they should vacate.
13. While the Plaintiff was negotiating the matter, it was the evidence of PW2 that the Defendants sued him in Kilifi SPMCC No. 121 of 2011.

The Defendants' case:

14. The 1st Defendant, informed the court that he went to the suit property in May 1998 when he was looking for a place to build his own house.
15. According to the 1st Defendant he met several other people who were living on the suit property.
16. The 1st Defendant informed the court that it was not until the year 2011 that the Plaintiff started claiming the suit property.
17. In cross-examination, the 1st Defendant stated that he has put up a mud walled structure on the suit property and that he has no other place to go. It was the evidence of the 1st Defendant that he does not have land where he was born.
18. The 2nd Defendant stated that while he was looking for masonry chores in the month of June 1996, he saw a mud house in the thicket and on inquiry on how one could acquire land in the area, he was informed to clear the bush and set up a house. That is how he ended up putting up a house on the suit property.
19. On cross-examination, DW2 stated that he did not know the owner of the land as at the time he settled on the suit premises.
20. The 3rd Defendant, DW3, stated that he entered the suit property in the year 2000 with his brother Tsagwa Chonge, DW2, who showed her where to built a house.

21. It was the evidence of DW3 that she occupies a portion of the suit property measuring 50 ft by 50 ft.
22. The 5th Defendant, DW4, informed the court that when she went to her friend Kaana Binenge in the month of February, 1992 in Shingile village, she inquired on how she could get land in the village.
23. It was her evidence that she selected a portion of the suit property whereafter she cleared the land.
24. After clearing the land, it was the evidence of the 5th Defendant that she put up a mud walled house where she has been staying to date.
25. DW4 stated that it was not until the year 2011 that they saw a surveyor putting in place beacons in respect to the suit property.
26. The 7th Defendant, DW5, informed the court that on 6th June 1997, while passing through Shingile village, he saw mud houses in a thicket. He immediately thought it was a good idea for him to settle on the suit property so as to avoid paying rent.
27. However, it was not until the year 2011 that he saw people who introduced themselves as Government personnel fixing beacons around the suit property.
28. It was the evidence of DW5 in cross-examination that he occupies land measuring 10 ft by 40 ft although the land he has fenced measures 70 ft by 70 ft.
29. According to DW5, it was not until the year 2011 that they saw the Plaintiff.
30. The 8th Defendant testified as DW6. DW6 informed the court that he purchased a portion of the suit property on 31st May 2007 from Kenneth Chai Chivatsi for Kshs.50,000; that he has put up a structure which has cost him Kshs.550,000 and that the sale agreement that was signed by the parties was witnessed by the Assistant Chief.
31. It was the evidence of DW6 that he was shocked when he learnt later the suit premises belongs to the Plaintiff.
32. DW6 produced in evidence the copy of the sale agreement and the plan for his residential house.
33. In cross-examination, it was the evidence of DW6 that he never conducted an official search on the property before he purchased it and that he is still willing to purchase the land from the Plaintiff.
34. The 10th Defendant, DW7, stated that he was given a parcel of land curved out of plot number 5054/199 which is adjacent to the suit property by a friend in March 2000. According to the 10th Defendant, he built his residential house on the land and that it was not until 3rd April 2011 that he met the Plaintiff who told them that he had constructed a house on his parcel of land.
35. When the surveyors visited the suit property, the 10th defendant stated that they confirmed that indeed his house “has touched the edge of plot number 5054/200.”
36. The Defendants called four independent witnesses, DW8, DW9, DW10 and DW11 who reiterated the evidence of all the Defendants.

Submissions:

37. The Plaintiff's advocate submitted that the Defendants have failed to adduce evidence to justify their continued trespass into the Plaintiff's parcel of land; that the Defendants' trespass occurred in the year 2009 and not on the alleged years.

38. Counsel submitted that all the Defendants failed to establish claims of adverse possession against the Plaintiff.

39. The 1st, 2nd, 3rd, 5th and 7th Defendants filed joint submissions.

40. According to the Defendants, when the Plaintiff purchased the suit property, they were already cultivating and living on it that the Plaintiff did not tell the court the process he followed in purchasing the suit property and that they are the owners of the suit property.

41. The 8th Defendant submitted that he purchased the suit property and that he is willing to negotiate with the Plaintiff to be allowed to stay on the land.

42. The 10th Defendant submitted that his house is on plot number 5054/199; that only a small portion of the house is on plot number 5054/200 and that by the time he was putting up his house, there were no beacons on the land.

Analysis and findings:

43. The Defendants in this matter have not denied that they are residing on plot number 5054/200 which is registered in favour of the Plaintiff.

44. According to the grant that was issued to the Plaintiff, the Plaintiff was registered as the proprietor of the suit property on 31st January 1994.

45. Except for the 8th Defendant who purchased the suit property from one Kenneth Chai Chivatsi, all the other Defendants informed the court that they found the suit property unoccupied and decided to clear the bush and put up their houses.

46. All the Defendants entered the suit property after the same had been registered in favour of the Plaintiff.

47. Although the Defendants stated that they started entering the suit property as early as 1996, there is no evidence before me that that is the case.

48. I say so because PW2, the Plaintiff's caretaker, informed the court that she stays in Mombasa and she used to visit the suit property frequently to check on it.

49. It was the evidence of PW2 that when she noticed the Defendants putting up temporary structures, she informed the Plaintiff who promptly reported the issue to the Assistant Chief. The Assistant Chief then informed the Defendants to vacate the suit property.

50. The evidence before me shows that the Plaintiff and his agent were vigilant all along and never allowed the Defendants to stay on the suit property for more than twelve years.

51. The Plaintiff's right to own property as enshrined by Article 40 (1) of the Constitution must be protected.

52. If the Defendants claim is that they invaded the suit property because they are landless Kenyans, then the statutory body which ought to settle them is the National Land Commission. This court cannot and will not allow people to invade private land just because they are landless and have no place of abode.

53. As for the 8th Defendant, the person who sold to him a portion of the suit property did not have authority to do so.

54. Considering that the Defendants did not even explain where they came from in the first place before

invading the Plaintiff's parcel of land, or under what circumstances they invaded the land, I find and hold that the Plaintiff's right to recover the suit property is not time barred.

55. The Defendants have also not proved that the title being held by the Plaintiff was unlawfully acquired.

56. Consequently, I allow the Plaintiff's Plaint dated 25th July 2013 in terms of prayer numbers (1) and (c).

Dated and delivered in Malindi this **24th** day of **July** 2015.

O. A. Angote

Judge