



**REPUBLIC OF KENYA**  
**ENVIRONMENT AND LAND COURT OF KENYA**

**AT MALINDI**

**LAND CASE NO. 36 OF 2011**

**JUMWA JAMES BAYA suing as Administrator to the estate of late**

**JAMES BAYA NZARO.....PLAINTIFF**

**=VERSUS=**

**ABDALLA A. ABDALLA.....DEFENDANT**

**J U D G E M E N T**

**Introduction**

1. The Plaintiff's claim in this matter is that on or about the year 2000, the Defendant, while in the company of the Ministry of Lands official and Administration Police, invaded his land known as parcel number Kilifi/Vipingo/1 situated at Vipingo, Kilifi County (the suit property).
2. The Plaintiff has averred in his Plaint that on 26<sup>th</sup> April 2006 her husband was issued with a Title Deed over the same parcel of land; that the Defendant has occupied the suit property without any right whatsoever and that the Defendant should vacate and hand over vacant possession of the suit property. The Plaintiff is also seeking for the revocation of the Defendant's title deed.
3. In his Defence and Counter-claim, the Defendant averred that he derived his title in respect to Plot number 1/Takaungu Group in the year 2000; that the purported title document given to the Plaintiff's deceased's husband was from a settlement scheme that was created during the existence of the Plaintiff's title and that before the Plaintiff's father was issued with the title deed in respect of the suit property he had acknowledged that he had trespassed into the Defendant's plot and agreed to leave upon receipt of Kshs.4,000 as compensation from the Defendant.
4. The Defendant's claim in the Counter-claim is that the alleged title for plot number Kilifi/Vipingo/1 was unlawfully issued on the ground of duplicity and that the said title document should be revoked.

**The Plaintiff's case:**

5. The Plaintiff's son, Pw 1, informed the court that he was born in 1964 in the suit property. According to Pw 1, he saw the Defendant for the first time in the year 2000 in the company of some officers from the Ministry of Lands. The Defendant and the said officers then informed Pw 1 and his neighbour that the Defendant's land had been consumed by parcel of land number (Kilifi/Vipingo/1) and parcel of land number Kilifi/Vipingo/6.
6. It was the evidence of Pw 1 that when the Defendant visited the suit property, both the Plaintiff's late husband and her neighbour did not have title documents for the suit property despite having stayed on the land for many years. However, Pw 1 informed the court that a title deed in the name

- of his late father was issued in the year 2006. The title deed was produced as PEXB 2.
7. In cross-examination, Pw 1 stated that the Defendant informed them that they had encroached onto his land by 15 metres.
  8. It was the evidence of Pw 1 that the Government allocated his father the suit property in the year 1974 but the title deed was not issued until the year 2006.
  9. It was the evidence of Pw 1 that although the Plaintiff's family has trees on the suit property, there is no house. The house which was on the land was demolished at the behest of the Defendant.
  10. According to Pw 1, the suit property is within a settlement scheme which was created in the 1960's. It was the evidence of Pw 1 that the boundary dispute between the Defendant and the Plaintiff was solved by the Chief and all the people who had planted trees on what was thought to be the Defendant's land were compensated by the Defendant.
  11. The Plaintiff's other son, Pw 2, stated that he saw the Defendant for the first time in the year 2000 when he went to the suit property claiming that it was his land. However, when they were given the title document in the year 2006, they realized that the land that the Defendant was claiming was indeed theirs.
  12. Pw 2 admitted that the Defendant paid him Ksh.4,000 in the year 2000 whereafter he demolished his house which was on the suit property. According to Pw 1, the Defendant took 3 acres and left for them 3 acres and that it is the Chief who ordered him to demolish the house in the year 2000.
  13. In cross-examination, Pw 2 stated that it was him who demolished his house; that his father's house is intact and that his late father never complained when the Defendant invaded the suit property.
  14. The Plaintiff's neighbour, Pw 3, stated that he has a title deed for parcel of land number Kilifi/Vipingo/6. It was his evidence that the Plaintiff's late husband is the owner of parcel of land number Kilifi/Vipingo/1 and that the two parcels of land abut each other. The witness produced the copy of the title deed in respect to his land as PEXB5 and the map as PEXB6.
  15. Pw 3 stated that in the year 2000, the Defendant claimed that a portion of his land belonged to him. It was at this particular point in time that both him and the Defendant went to see the Chief whereupon the Defendant paid him Ksh.6,000 for the trees that the Defendant was claiming. By that time the title deeds in respect to the settlement scheme had not been issued.
  16. It was the evidence of Pw 3 during cross-examination that he is staying on a portion of the land that the Defendant is claiming having been issued with the title document.
  17. According to Pw 3, after identifying his beacons, the Defendant took a portion of the Plaintiff's land and a portion of his land and combined them. The Defendant then brought down the house belonging to Pw 2 and paid them for the trees that were on the land. Pw 3 further stated that the Defendant also gave the Plaintiff's family trees to construct other houses. He was also paid (Pw 3) for the trees that he had planted on the portion that the Defendant was claiming to be his.

### **The Defendant's case:**

18. The Defendant, Dw 1, stated that he bought the suit property from Suleiman and Mohamed. He did his investigations and found that the land belonged to their father, now deceased. The Defendant produced the Certificate of Postal search as DEXB1 and a copy of the Grant as DEXB2. The Defendant also produced the survey plan that he obtained from Nairobi as DEXB3b. A copy of the title was produced as DEXB 4 and the Indenture dated 14<sup>th</sup> December 2000 was produced as DEXB5.
19. After purchasing the land, the Defendant stated that he went to the ground in the company of a surveyor and found people on the land who told him that they had trees and houses on the land that he was claiming to be his. On that basis, the Defendant paid Pw 3 Ksh.6000 for the trees and Pw 2 Ksh.4,000 for his house. The letters evidencing those payments were produced as DEXB 11 and 12 respectively. The Defendant also paid off another squatter by the name Kitao Charo Ksh.16,250/- and gave him ½ an acre of land. The said Kitao Charo is still staying on the land.
20. It was the evidence of Dw 1 that after these payments, the people who were occupying his land left and that he is not aware of how the title deeds were issued to the Plaintiff and her neighbours. It was the evidence of Dw 1 that because his title was issued in 1913, the Plaintiff's title deed is void and should be cancelled.

21. In cross-examination, Dw 1 stated that the surveyor identified the beacons to his land and that Suleiman, the owner of the land, died in the year 1987. It is his heirs who transferred the suit property to him after the Land Control Board gave its consent in the year 2001. The land was eventually transferred to him.
22. The Kilifi District Land Adjudication and Settlement Officer, Dw 2, stated that the letter dated 1<sup>st</sup> November, 2000 authored by his office was in respect to the Vipingo settlement Scheme.
23. According to Dw 2, the letter dated 1<sup>st</sup> November 2000 shows that there was an anomaly during the creation of the scheme because the land known as NAI/14/2 was private land having been allocated in 1913. The witness produced the letter dated 1<sup>st</sup> November 2000 as DEXB 10.
24. It was the evidence of Dw 2 that some people encroached on private land and that they were erroneously allocated private land during the demarcation process.

## Submissions

25. The Plaintiff's counsel submitted that registration confers on an individual absolute ownership of land and that the Plaintiff's title was obtained lawfully; that the Defendant's claim for adverse possession cannot succeed and that the Defendant did not adduce any reasons to warrant the revocation of the Plaintiff's title.
26. The Plaintiff's advocate further submitted that although the original proprietor of plot number 1/Takaungu Group died in 1987, the records show that he was present in the year 2000 when the Board gave its consent for the transfer of the property to the Defendant which is a fallacy; that there was no evidence that the said land was ever registered in the names of the beneficiaries of the estate of Suleiman Bin Ali for them to pass title to the Defendant a good title and that the Defendant obtained the title in respect to Plot number 1/Takaungu fraudulently. Counsel relied in the case of **Heptulla Vs Noor Mohamed(1984) KLR 580** in which the court held that no court ought to enforce an illegal contract where the illegality has been brought to its notice.
27. The Plaintiff's counsel finally submitted that the Defendant did not tender any evidence to show that the Plaintiff has encroached on his land.
28. On the other hand, the Defendant's advocate submitted that the Defendant derived his title in the year 2000 and that the Plaintiff title was obtained long after his title came into existence.
29. Counsel submitted that the Plaintiff did not adduce evidence to contradict the Defendant's evidence or to show that the Plaintiff's plot was not part of the Defendant's plot.

## Analysis and findings

30. The facts of this case are these: The Plaintiff's late husband, together with Pw 3 settled on the land being claimed by both parties as squatters. According to the Defendant, after purchasing the suit property from the administrators of the Estate of the registered owner Plot 1 Takaungu Group, he went to the ground to identify the beacons of the said land in the company of a surveyor.
31. After identifying the beacons in the year 2000, the Defendant realized that the land was occupied, partly by the Plaintiff and partly by Pw 3. He entered into an informal arrangement and paid off the Plaintiff's son, Pw 2, the money that was equivalent to his house being Ksh.4,000. Pw 3 was paid Ksh.6,000 being compensation for the trees that he had planted on part of the land that the Defendant was claiming to be his. Other than Pw 2 and Pw 3, there was another squatter who was also staying on the land that the Defendant had purchased. The Defendant paid the said squatter Ksh.16,250 and allowed him to occupy 1/2 of an acre of the said land.
32. From the evidence adduced in this court, the Plaintiff's son, Pw 2 demolished his house after he was paid Kshs.4, 000/-. However, it would appear that by that time, the Government had created a settlement scheme within that area and in the year 2006, it issued title deeds to the Plaintiff's late husband and Pw 3. It is upon the acquisition of the title deed in respect of Kilifi/Vipingo/6 that was issued on 29<sup>th</sup> August 2006 that the Plaintiff is claiming for a portion of land which the Defendant had claimed to be his.
33. The issues for determination are as follows;-

(a) **Is Land parcel number Kilifi/Vipingo/1 measuring approximately 1.8 Ha part of**

**plot No.1 Takaungu Group?**

**(b) Is the Plaintiff entitled to all the land known as Kilifi/Vipingo/1?**

**(c) Is the Defendant entitled to land known as Plot 1 Takaungu Group?**

**(c) Which title is valid between the two?**

34. The Plaintiff produced in evidence a copy of the Title Deed for Kilifi/Vipingo/1 issued on 29<sup>th</sup> August, 2006 in the name of James Baya. The Plaintiff also produced as an exhibit the title deed for Kilifi/Vipingo/6 measuring 2.2Ha in the name of Ismail Ibrahim Barawa, Pw 2, issued on 9<sup>th</sup> January, 2008.
35. The sub-division scheme for Vipingo settlement scheme, Kilifi District was produced as PEX6. Both parcels of land number Kilifi/Vipingo/ 1 and 6 front the Malindi-Mombasa highway. It is on the basis of the said sub-division scheme that the Plaintiff and Pw 2 were issued with title deeds in the year 2006 and 2008 respectively.
36. According to the evidence of the Defendant, Dw 1, portion number 1 Takaungu which is registered in his name falls between parcels of land known as Kilifi/Vipingo/ 1 and Kilifi/Vipingo/ 6.
37. The Defendant produced a survey plan FR/No.103/68 dated 12<sup>th</sup> January, 1965. According to the said survey plan, land known as Group No-1/1A/2 measuring 4.71 acres lies on both side of the Malindi-Mombasa road. The plan shows the fixed boundaries of the said land as happens in all parcels of land registered under the repealed Registered Titles Act or the Land Titles Act.
38. According to the letter of then Kilifi District Land Adjudication and Settlement Officer dated 1<sup>st</sup> November, 2000 and addressed to the District Commissioner, Plot number NAI/IA/2 located at Takaungu in Kilifi District is within the boundaries of Vipingo Settlement Scheme.
39. The letter goes further to state that the settlement scheme was created in 1978 and that although NAI/IA/2 was within the scheme, the said land was not allocated and was left in the name of the original allottee of 1913, a Mr. Ibrahim s/o Adanyi. The penultimate paragraph of the said letter states as follows:-

**“During the exercise, land bordering the above private property (NAI/IA/2) was surveyed as follows;**

**Plot No.1-James Baya**

**Plot No.6-Ismael Ibrahim**

**Due to the absence of Suleiman Bin Ali from the plot the first two neighbours took advantage to encroach into his plot.....We kindly ask your good office in conjunction with the OCPD to facilitate the District Surveyor to re-identify the boundary on the ground.”**

40. Although the Defendant stated that he took the surveyor on the ground who re-established the boundaries of his land, the said surveyor was not called to testify in this court. A survey report was not produced to enable the court establish the extent of encroachment by the Plaintiff and Ismail Ibrahim onto the Defendant's land if indeed the Defendant's land fell in between the land belonging to the Plaintiff and Ismael Ibrahim.
41. The Plaintiff is in possession of a title deed for land measuring 1.8ha. This title, according to the letter by the Kilifi District Land Adjudication and settlement officer, is valid and so is the title deed of Ismail Ibrahim for Plot No .6.
42. If the letter by the District Land Adjudication and Settlement Officer dated 1<sup>st</sup> November 2000 is to be believed, that is, that the piece of land number NAI/1A/2 was left out during the creation of the Vipingo Settlement Scheme, the question that arise is this, where is that land in the sub-division scheme/ plan?
43. As I have stated above, the sub-division plan for the Vipingo Settlement Scheme which was

produced in this court as PEXB 6 shows that plot no. 1 abuts plot no. 6. It is therefore misleading for the District Land Adjudication and Settlement Officer to state that the Defendant's land was left out during the creation of the scheme and that Plaintiff and Ismael Ibrahim encroached on the Defendant's land when that position is not supported by the sub-division scheme.

44.Indeed, a settlement scheme can only be created over unalienated Government land and not private property. However the Defendant did not call evidence to show that land known as Group 1 Takaungu or NAI/1A/2 forms part and parcel of the land represented in Plaintiff's title deed, which land, as I have stated abuts parcel of land number 6.

45.There is no evidence before me to show that the Plaintiff has encroached on the Defendant's piece of land to enable me order for the cancellation of the Plaintiff's title as prayed by the Defendant in the Counter claim. Indeed, it is the Defendant who should give the Plaintiff vacant possession of the land he is claiming in view of the fact that the sub-division scheme produced in this court does not show where the Defendant's land is viz-a-viz the Plaintiff's land.

46.In the circumstances, and the for the reasons I have given above, I dismiss the Defendant's Counter claim and allow the Plaintiff's Plaintiff in the following terms;-

- a. **The Defendant be and is hereby evicted from land parcel number Kilifi /Vipingo 1.**
- b. **A permanent injunction be and is hereby issued restraining the Defendant from interfering with the Plaintiff's occupation of Kilifi /Vipingo 1.**
- c. **The Defendant to pay the costs of Plaintiff and the Counter-claim.**

Dated and delivered in Malindi this 11<sup>th</sup> day of July, 2014.

**O. A. Angote**

**Judge**