



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL CASE NO. 67 OF 2013

1. MOHAMED SALIM HUMEIN

2. GLADYS WANJIKU

3. CHARLES MULI KAINDI

4. JOSEPH LANG'AT.....PLAINTIFFS

=VERSUS=

EGERTON UNIVERSITY.....DEFENDANT

R U L I N G

1. The Plaintiffs moved this court by way of a Plaint on 16th April, 2013 praying for a permanent injunction against the Defendant restraining it from fencing, occupying, taking up possession or interfering with the Plaintiffs' use, possession and occupation of the part of land comprising the unsurveyed land in Lamu County.
2. Together with the Plaint, the Plaintiffs filed an Application dated 15th April, 2013 seeking for the following orders:
 - a. **THAT the Defendant either by itself, servants, agents, employees, assigns or any other person acting for or on its behalf be restrained by way of temporary injunction from fencing, trespassing, evicting, removing, demolishing or in any other manner adversely interfering with the possession and occupation of part of all that unsurveyed land situated ad Mpeketoni within Lamu County otherwise referenced as 209163/9 occupied by the Plaintiffs together with the improvements, buildings, works erected and being thereon including standing trees and crops pending the hearing and determination of this application or further orders of this Honourable Court.**
 - b. **Costs be provided for**
3. The Application is premised on the grounds that the Defendant has issued a public notice to the Plaintiffs alleging that the Plaintiffs are trespassers on its land; that the Defendant has threatened to evict the Plaintiffs; that the Plaintiffs are in occupation of the unsurveyed land, the suit property, by the consent or authority of the Government with the approval of and participation of the Defendant and that the Plaintiffs have carried out improvements, developments, constructions and put up houses on the suit property.
4. The Application is supported by the Affidavit of the 1st Plaintiff/Applicant who has deponed that

- he has lived, together with the other Plaintiffs, on all that unsurveyed land in Lamu county reference number 209163/9 since 1996 with the knowledge of the Government.
5. The Applicant has deponed that the Respondent has been sending its officers to evict them despite the fact that the issue of their occupation of the suit property is still pending in Parliament; that the Respondent has claimed that he received letters of allotment dated 30th November 2001 which are suspect because they do not reflect the name of the Respondent and that they have carried out developments on the suit property.
 6. The Applicant finally deponed that if evicted, they will lose their investments, and that they have a right to be protected by the law and that they have legitimate expectations to acquire and own property.
 7. The Respondent filed its Replying Affidavit on 21st May, 2013.
 8. The Respondent, through its Deputy Vice-Chancellor, Administration and Finance, deponed that the Plaintiffs' Application is an abuse of the court process meant to advance the Applicants acquisitive and expansionist designs and that the Applicants are dishonest, and have concealed material facts and do not deserve the exercise of the court's discretion.
 9. According to the Respondent's Vice-Chancellor, the Respondent applied to the Government for land in Lamu for research purposes and the university was offered 500 Hectares of unalienated land in 1989 for research and training.
 10. On 2nd November, 2001, the Government acknowledged the University's request and vide an allotment letter dated 30th November 2001 allotted to the Respondent land reference number 209163/D measuring approximately 170 Hectares.
 11. The Respondent's Vice-Chancellor has further deponed that the suit property was surveyed in 2007; that the university had initially been allocated 500 hectares in 1989 but ceded 330 hectares to squatters including the Plaintiffs for resettlement and that the University has secured its boundaries by fencing off its 170 hectares.
 12. The Respondent's Vice-Chancellor finally deponed that the Respondent is a public university thus a state body and its property cannot be subject to acquisition by dint of adverse possession and that there is no legitimate expectation that the Applicants can lay a claim to in respect to the suit land as no reasonable expectation may arise pursuant to an illegal encroachment on the suit land.
 13. The parties agreed to dispose of the Application by way of written submissions. The Plaintiffs filed their submissions on 4th June, 2013 while the Defendant filed its submissions on 17th June, 2013.
 14. The Plaintiff's Advocate submitted that in view of the fact that the developments by the Plaintiffs have been going on for long, the Defendant has by word and conduct represented to the Plaintiffs that it has no objection to the Plaintiffs' activities. Counsel relied on the provisions of section 120 of the Evidence Act which provides for the general principle of estoppel.
 15. Counsel submitted that even if the Plaintiffs did not have documents of title to the land, and the land being government land, the Plaintiffs cannot be said to be trespassers.
 16. Counsel finally submitted that the "harm" that the Plaintiffs will suffer if the injunctive orders are not granted is greater than the damage that the Defendant will suffer; that it is now recognised that in exercising its discretion, the court is enjoined to consider the principle of proportionality. Counsel relied on the cases of **Suleiman Vs Amboseli Resort Limited (2004) KLR 589, Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others (2003) KLR 125; Watts Vs Nduati (HCK) 1993 KLR 51 And Giella Vs Cassman Brown & Co (1973) EA 358.**
 17. The Respondent's counsel submitted that the Applicants have not asserted in their supporting affidavit the right they hold to the suit property. What they have done, it was submitted, is to ask the court to grant them a right to the land which is not permissible.
 18. On the question of adverse possession, the Respondent's counsel submitted that section 41(a) (i) of the Limitation of Actions Act, cap. 22 provides that the Act does not enable a person to acquire any title, or any easement over government. It is not possible, it was submitted, for the Applicants to maintain a claim of adverse possession over the Respondent's land, the university being a public institution.
 19. The Respondent's counsel further submitted that there can be no legitimate expectation that Applicants can lay claim to in respect to the suit land as no reasonable expectation may arise pursuant to the illegal encroachment on the suit property; that the Applicants agreed to relocate and the Respondent facilitated the relocation and that the Respondent has a letter of allotment

- while the Applicants do not have any legally cognizable interest in the suit property. Counsel relied on numerous authorities which I have considered.
20. This being an interlocutory application, all I am required to do is to satisfy myself that the Applicants have established a prima facie case with chances of success and that damages will not be an adequate remedy in the event the suit succeeds.
 21. The Plaintiffs have described the Defendant as a public university at paragraph 3 of their Plea.
 22. The Plaintiffs have also averred in their Plea and supporting Affidavit that they settled on the unsurveyed land reference number 209163/D Lamu West District in 1996. The Plaintiffs did not however state the circumstances that led them to move to the suit property in 1996.
 23. I have gone through the Plaintiffs' Plea and the Application I have not seen in the pleadings how and when the Plaintiffs' interest in the suit land crystallised. Although the Plaintiffs averred that they have been on the suit property since 1996 and that they have carried out developments and construction of houses, they have not stated that they are claiming the land by virtue of having stayed on the suit for more than 12 years, thus acquiring interests recognizable in law.
 24. And even if their claim was for adverse possession as provided for under section 38 of the Limitation of Action Act, the same cannot succeed over government land, or land otherwise enjoyed by the Government. That is the clear reading of section 41(a) (i) of the Limitation of Action Act.
 25. Even if the government allowed the Plaintiffs to use the land as the Plaintiffs have attempted to demonstrate, they cannot claim to have any interest over such land and the principle of estoppel cannot come to their aid. Such occupation can only amount to a temporary occupation licence which cannot create any other interest on such land. Mere possession or occupation of the government land cannot confer any kind of title or interest recognizable in law upon the Applicants.
 26. The Plaintiffs have not denied that the land in question is or was government land. The process of acquiring interests over government land is clearly set down in the repealed Government Lands Acts, Cap 280 and the Physical Planning Act, 1996.
 27. In view of the provisions of section 41 (a) (i) of the Limitation of Actions Act, Cap 22, one can or could only acquire interests in unalienated government land by applying to be allocated such land, whereafter a part development plan would be prepared and approved. It is only after a part development plan has been prepared and approved that a letter of allotment, which is an offer by the government, would be issued to the allottee. Upon acceptance of the letter of allotment, which is signified by the payment of the stand premium and other charges stipulated in the letter of allotment, an interest in respect to that land would be conferred on the allottee.
 28. The Respondent has shown that indeed it applied for 500 hectares but was allocated 170 hectares. A part development plan for approximately 169.9 Hectares was prepared and a letter of allotment reference number 209163/D was issued. The Respondent accepted the offer within the requisite 30 days thus acquiring the interests in the land. The land became alienated government land when the letter of offer was issued to the Respondent and was not available to alienation, be it to squatters or anybody else.
 29. The new constitutional and legal dispensation has put mechanisms in place on how the landless individuals should be settled, and it would be upon the Plaintiffs to liaise with the concerned agencies, and in particular the National Land Commission, with a view of being settled in strict compliance with the provisions of the Land Act.
 30. In the absence, prima facie, of any recognizable proprietary rights or interests in the suit land to be protected by the court, I find and hold that the Plaintiffs have not established a prima facie case with chances of success. I also find and hold that the Respondent can adequately compensate the Plaintiffs in damages in the event that they succeeded in their claim.
 31. For the reasons I have given above, I dismiss the Plaintiff's application dated 15th April, 2013 with costs.

Dated and Delivered in Malindi this 25th day of July, 2013

O. A. Angote

Judge