



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 166 OF 2013

1. MOHAMED ABDALLA A. SHIKELY(*on his own behalf and as duly*

constituted attorney of:-)

2. MARYAM ABDALLA ALI

3. FARID ABDULLA ALI

4. AHMED ABDULLA ALI

5. AISHA ABDULLA

6. FARIDA ABDULLA ALI

7. ZAINABU ABDALLA ALI

8. FAIZA ABDULLA ALI

9. KHADIJA ABDULLA ALI.....PLAINTIFFS

=VERSUS=

MOHAMED ABDALLA SALIM.....DEFENDANT

J U D G M E N T

Introduction

1. In their Complaint dated 24th September, 2013, the Plaintiffs have averred that they are beneficiaries, in their respective shares, to the Estate of the late Abdalla Ali Abdalla; that they became the registered proprietors of land portion number 2077 (original number 422/3) Malindi (the suit property) pursuant to mesne acts in law and that the Defendant has wrongfully refused to remove his illegal development and has wrongfully remained in possession of the suit property.

2. The Plaintiffs have averred that in the year 1985, the Defendant sought and obtained permission of the Plaintiff's predecessor in title to erect on a section of the suit land a temporary workshop for developing handcraft; that the said consent was conditional upon the Defendant obtaining the approval of the local authority and that after the approval was granted, the Defendant unlawfully converted the development

into a residence.

3. The Plaintiffs are claiming for a permanent prohibitory injunction and a mandatory injunction, vacant possession of the suit property and for damages for trespass and unlawful detainer.

4. In his Defence, the Defendant averred that the deceased was a fish trader who owned a fleet of fishing boats; that the deceased depended on the Defendant's expertise in boat making and repairs and that consequently, the deceased set aside and offered him a portion of the suit land to settle there with his family.

5. It is the Defendant's case that he sought and obtained approval to put up a workshop on the suit property and that he has been in occupation of the suit property on invitation by the deceased since 1982.

6. In his counterclaim, the Defendant averred that from the actions of the Plaintiffs' father, it is clear that he willed and intended to assign a portion of his land to him and that in the alternative, he is entitled to the land having been in its possession adversely for more than 12 years.

The Plaintiffs' case:

7. The 1st Plaintiff, PW1, informed the court that the Plaintiffs are all beneficiaries of the estate of the late Abdalla Ali Abdalla (the deceased).

8. PW1 informed the court that in 1985, his late father allowed the Defendant to erect on the suit property, which was registered in their father's name, a temporary workshop for developing handcraft.

9. According to PW1, the consent that was given by the deceased was conditional upon the Defendant obtaining the approval of the local authority and that the changes to the use of the premises was to be subject to the express approval of their late father.

10. PW1 informed the court that unknown to them, and without their permission, the Defendant converted the structure on the suit property into a residence and started living there with his family.

11. PW1 stated that the conversion of the suit property by the Defendant into a residential area was unlawful because their consent or that of their late father was never sought and that the Defendant did not bother to obtain the approval of the then Municipal Council of Malindi.

12. According to PW1, the Defendant's actions amount to unlawful retainer and trespass and that in spite of the numerous requests to him to cease the trespass, the Defendant has persistent in his unlawful acts.

13. It was the evidence of PW1 that they want their land back.

The Defendant's case:

14. The Defendant, DW1, informed the court that he was a friend of the Plaintiff's late father and that he used to fix his boats.

15. DW1 informed the court that the Plaintiffs father allowed him to put a showroom on his plot which was temporary in nature.

16. According to DW1, he obtained the approval of the Council and put up a permanent house on the suit property with the consent of the Plaintiffs' father where he stayed with his family while repairing the deceased's boats.

17. According to DW1, he did not have any dispute with the Plaintiffs or their father since 1982 when he started living on the suit property.

18. In cross-examination, DW1 stated that the land belonged to the Plaintiffs' late father and that it is the deceased who allowed him on the land.

19. DW1 stated that after he put up a house on the suit property, he used one side as a workshop while the other side was used as his residence.

20. DW1 admitted that he never obtained the approval of the then Municipal council of Malindi to put a residential house on the suit property.

21. DW1 informed the court that although the Plaintiffs have informed him to vacate the suit property, he does not have any other land to move to.

Submissions:

22. The Plaintiffs' counsel submitted that the Defendant was invited on the suit property by the Plaintiffs' late father; that the leave to remain on the premises created a tenancy at will terminable at the instance of either party and that the Defendant was given adequate notice to remove his structure from the suit premises.

23. Having refused to vacate the suit premises, it was submitted, the Defendant became a trespasser.

24. Counsel submitted that there is no memorandum of sale required under Section 3(3) of the law of Contract Act; that there is no proof of payment of any consideration and that there is no evidence that the Defendant was given the land by the Plaintiffs' father in lieu of the services rendered by him.

25. The Plaintiffs' counsel finally submitted that the Defendant cannot rely on the doctrine of adverse possession because of the consensual nature of the entry into the land by the Defendant.

26. The Defendant's counsel submitted that the Plaintiffs' father, who granted the suit property to the Defendant, did not object to the construction of the permanent structure by the Defendant while he was alive.

27. Counsel submitted that the Defendant was granted permission by the Plaintiffs' father to occupy the suit property permanently as an owner.

28. The Defendant's advocate submitted that the Defendant's possession of the suit property was uninterrupted and adverse and that as heirs of their father's estate, the Plaintiffs were dispossessed of the suit land in 1997 when their father died.

29. Counsel submitted that the licence that the Defendant had was determined by the death of the Plaintiffs' father and or when the Plaintiffs requested the Defendant to vacate the land in 1997.

Analysis and findings:

30. It is not in dispute that land portion number 2077 (original number 422/3) Malindi (the suit property) was previously registered in favour of the Plaintiffs' father, Abdalla Ali Abdalla Mohamed, also known as Abdalla Bin Ali Shikely, before the same was transferred by transmission to his heirs (the Plaintiffs) on 22nd February, 2013.

31. According to the Plaintiff's evidence, their late father allowed the Defendant to erect on a section of the suit property a temporary workshop for developing handcrafts sometimes in the year 1985.

32. It is the Plaintiffs' case that the Defendant only obtained their father's permission, and the permission of the Malindi Municipal Council to put up a temporary workshop and not a permanent residential house.

33. According to the Plaintiffs, the conversion of the temporary workshop into a residential house is

unlawful and that by a letter dated 4th August, 2009, their advocate directed the Defendant to remove the illegal developments and give to them vacant possession.

34. The Defendant has stated in his Defence that the Plaintiffs' father set aside and offered to him a portion of the suit land to settle there with his family.

35. According to the Defendant's testimony and Defence, the Plaintiffs' father allowed him to settle on the property so that he could build and repair the deceased's fleet of canoes.

36. The Plaintiffs, through PW1, produced in evidence the "Assent" dated 11th December, 2012 showing that the suit property was transferred to them by way of transmission.

37. PW1 also produced in evidence the Application that the Defendant made to the then Municipal Council of Malindi for the approval of plans of the structure that he intended to put up on the suit property.

38. The Defendant's plan was approved by the Council vide the "Building Permit NO. 50/85" on 8th July 1985.

39. Before the 1985 plans were approved, the Defendant had submitted other plans for approval in the year 1982.

40. In the said approval, the Council stated as follows:-

"Provided that the workshop is used for only handcraft...."

41. It is therefore obvious that the plan that was approved in 1982 and 1985 was for a workshop and the building permit that was to be granted to the Defendant was for five (5) years with the following comments by the Town Planner:

"To avoid demolishing the structure the applicant will have to apply after this period."

42. Indeed, the application that was made by the Defendant on 27th October 1982 was for "the proposed temporary workshop".

43. In their advocate's letter dated 4th August, 2009, the Plaintiffs informed the Defendant to demolish the structure on the suit property and hand to them vacant possession. The demand letter was followed up by another letter dated 22nd August, 2013.

44. It will appear that after erecting the structure on the suit property, the Defendant converted it into a residential house, an act that the Municipal Council objected to.

45. In its letter dated 15th October 2010, the Municipal Council of Malindi informed the Defendant as follows:-

"Despite having obtained an approval for the erection of a temporary furniture shop on the above plot vide plan reg no.78/85, you went ahead and transformed the whole structure to a permanent one without a prior approval neither from the council nor the landlord's consent, which is absolutely contrary to the provisions of the approved plan."

46. The Council went ahead and served the Defendant with an enforcement notice dated 4th November 2010.

47. The Defendant has not produced any document to show that he put up a residential building on the suit property after obtaining the consent of the Council or the Plaintiffs' father.

48. Consequently, the Plaintiffs deposition that the Defendant did put up a residential house on the suit property without the consent of the Council or their father has not been challenged.

49. Save for the fact that the Plaintiffs' late father allowed the Defendant to put up a temporary workshop on the suit property, there is no evidence that the Plaintiffs' father had any intention of transferring his proprietorship rights to the Defendant. The Defendant has not proved that he met the requirements of Section 3(3) of the Law of Contracts Act prior to the amendments that were done in the year 2003 to enable this court to hold that there was "a sale" transaction between himself and the late Mr. Abdalla.

50. The arrangement that existed between the Defendant and the Plaintiffs' late father is that of a lease.

51. The suit property is governed by the repealed ITPA. Section 106 of the ITPA (repealed) provides for the duration of leases in the absence of a written contract or local usage.

52. Under the said section, a lease of land for any other purpose (other than agricultural or manufacturing) like in this case shall be deemed to be a lease from month to month, terminable on the part of either the lessor or lessee, by fifteen days notice expiring with the end of a month of tenancy.

53. The Defendant in this matter occupied the suit property and rendered certain services to the Plaintiff's father. He was obliged to vacate the same upon being served with a fifteen days notice by the Plaintiffs' father and on his demise, by the administrators' of the estate of the deceased.

54. The Plaintiffs did not issue to the Defendant with such a notice until 4th August, 2009.

55. The Defendant's counsel submitted that the Plaintiffs were dispossessed of the suit property in 1997 when they asked the Defendant to vacate the land and the Defendant refused to do so.

56. Indeed, where a claimant is in exclusive possession of the land with leave and licence of the owner in pursuance of a valid agreement, possession becomes adverse and time begins to run at the time the licence or lease is determined. Prior to that, the occupation is not adverse but with permission.

57. It is not true, as submitted by the Defendant's counsel, that the Defendant's licence was determined by the death of the Plaintiffs' father in 1997.

58. The Defendant's licence, or lease, was determined when he was given a formal notice to leave the suit property pursuant to the provisions of Section 106 of the ITPA. The fifteen days' notice, as I have already stated, was given to the Defendant on 4th August, 2009. That is when time, for the purposes of Section 7 of the Limitation of Actions Act, started running and not when the Plaintiffs' father died.

59. In any event, time would not have started running as against the Plaintiffs until when they had the legal capacity to issue the statutory notice to the Defendant and to institute a suit as against the Defendant for recovery of the land, and not immediately after the death of their late father.

60. Considering that the Plaintiffs' father allowed the Defendant to put up a temporary workshop on the suit property with no intention of transferring the land to him, time as against the Plaintiffs father could not run.

61. Time only started running for the purposes of the doctrine of adverse possession after the Plaintiffs served the Defendant with the notice terminating the unwritten lease or licence. in the year 2009. The Defence of adverse possession is therefore not available to the Defendant.

62. Although the Plaintiffs have prayed for damages for trespass, I shall not grant that prayer considering that no evidence was led to show the approximate payable rent of the land that the Defendant is in occupation. That evidence should have been captured in the valuation report that was produced in court.

63. For the reasons I have given above, I shall, which I hereby do, dismiss the Defendant's counterclaim

with costs and allow the Plaintiffs' Complaint dated 24th September, 2015 in the following terms:

(a) A permanent injunction be and is hereby issued restraining the Defendant, his servants, agents and or any one of them from trespassing into or remaining on the Plaintiffs' portion of land known as Land portion number 2077 (original number 422/3) Malindi.

(b) An order of mandatory injunction be and is hereby issued requiring the defendant, his servants and or agents to demolish the house and any other developments made by the defendant on the Plaintiffs' piece of land known as Land Portion Number 2077 (original NO. 422/3) Malindi and remove the debris resulting from the said demolition forthwith and in any event within 45 days of service of this Order and failure of which the Plaintiffs be at liberty to engage the services of a contractor who will demolish the said fence and any other developments made by the defendant on the said land and remove the debris resulting therefrom and the costs incurred thereby be paid by the Defendant after 45 days from today's date.

(c) Vacant possession of the Plaintiffs' piece of land be granted by the Defendant within 45 days.

d) The Defendant to pay the cost of the suit.

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

O. A. Angote

Judge