



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 202 OF 2018

ABDULLAH MANGI MOHAMED

PROF M.S ABDALLA (Suing as Trustees of

MASJID JIBRAN MTWAPA.....PLAINTIFFS

VERSUS

KATANA CHARO KOMBE.....1ST DEFENDANT

KARISA CHARO KOMBE.....2ND DEFENDANT

JUDGMENT

By a Plaint dated 26th October 2018, the Plaintiffs herein sued the Defendants jointly and severally seeking the following prayers; -

- 1. A permanent injunction restraining the Defendants by themselves, their agents, servants, relatives, friends or anyone claiming interest through them from entering, remaining, building, alienating, selling and/or dealing with the suit property being land parcel known as Subdivision Number 915 (Original No. 539/135) CR No. 70802 in any manner whatsoever and from threatening the Plaintiffs from dealing with the suit property.**
- 2. Costs to this suit**
- 3. Interest on (2) above at court rates.**
- 4. Any other relief this Honourable Court may deem fit to grant in the circumstances.**

PLAINTIFFS' CASE

PW1 testified and stated that they are the registered owners of the suit land having purchased it from one Rehema Ali Sheikh who transferred it to them vide a transfer instrument dated 21st November 2017.

It was PW1's case that they have enjoyed quiet possession of the suit property and built a Mosque known as Masjid Jibran with the approval of NEMA. Further that they have been paying rates to the local authorities.

PW1 also produced the following documents in support of his case namely; copy of certificate of title for Plot Number 915/III/MN (Original. No. 539/135), copy of the transfer dated 21st November, 2017, copy of the Deed Plan for Plot Number 915/III/MN (Original. No. 539/135), Survey Report by the County Surveyor dated the 24th June, 2018, copy of NEMA on environment impact assessment license and a demand for rates by Kilifi County Government dated 1st December, 2017.

PW1 further stated that the Defendants started claiming ownership in 2017 of a portion which led to the dispute being referred to Kilifi County Government's department of Lands who sent surveyors to conduct a survey and establish the beacons. It was PW1's evidence that the Defendants were dissatisfied with the survey report and became violent hence interfering with the use of the suit property.

PW1 urged the court to allow the claim as prayed in the Plaint with costs

DEFENCE CASE

DW1 testified that their late father was the owner of land certificate title No. C.R. 18648 (Original No. 539/6) and C.R 31141 (Original Number 582/1) which are both Subdivisions of C.R 9087/4 (Original Number 397/7) (family land).

It was DW1's evidence that there was a fence between their property and the suit land which was the boundary of the Mosque. He confirmed that the suit property belongs to the mosque having originally been owned by one Wubana Salim whom upon her demise the suit property was inherited by her daughter Rehema Shehe Ali.

DW1 testified that they have lived on the suit property without any dispute until the death of his father in 2012. It was his testimony that they did not threaten the Plaintiffs' lives and the stalls/kiosks on the parcel of land have been there.

On cross examination by Mr. Ottara Counsel by the Plaintiffs, he stated that they have a title deed for their plot and a Deed Plan which shows the boundaries and that the suit property is not their land. He added that they have no claim over Plot No. 915 and if there is anything on Plot No. 915 that belongs to them then it is a mistake.

PLAINTIFFS' SUBMISSIONS.

Counsel listed the following issues for determination by the court: -

- 1. Whether or not the Defendants have encroached into the suit property?**
- 2. Whether or not the claim of adverse possession by the Defendants can stand?**
- 3. Whether or not the Plaintiffs are entitled to the prayers sought in their plaint?**
- 4. What orders as to costs?**

On the first issue on encroachment of the property, Counsel submitted that the Survey Report dated 24th June 2018 by the Department of Lands, Energy, Housing, Physical Planning & Urban Development established that all beacons describing the suit property were found in their correct positions hence the business stalls on the suit property are illegal thus encroachment by the Defendants. Further that the said Survey Report has not been challenged by the Defendants.

On the second issue as to whether the claim for adverse possession can stand, it was Counsel's submission that the boundary dispute arose in 2017 while the Defendants allege that they the boundaries have remained unchanged for over 40 years hence the Defendants cannot claim adverse possession.

Counsel submitted that the Plaintiffs have proved their case to the required standard and are therefore entitled to the orders sought.

DEFENDANTS' SUBMISSIONS

The Defendants reiterated the evidence on record and submitted that the suit is time barred as per Section 7 of the Limitation of Actions Act as the boundaries of the suit land have remained unchanged since 1977. They urged the Court to dismiss the Plaintiffs suit with costs.

ANALYSIS AND DETERMINATION.

The issues for determination is whether the Defendants have encroached on the suit property and whether the Plaintiffs have proved such encroachment.

The evidence on record by both the Plaintiffs and the Defendant is that there is no dispute as to the ownership of the suit land as the Defendants admits that the land originally belonged to a lady known as Kubana Sahim who died and upon her demise her daughter Rehema Shehe Ali inherited in and sold to the Plaintiffs.

It is also not in dispute that there is a Mosque on the suit land which shares a boundary with the Defendants land which they acknowledge. The Plaintiffs and the Defendants also acknowledge that there was a boundary dispute which necessitated the involvement of the County Surveyor who went to the suit land and filed a report in court. This report confirmed that all beacons were found or re-established in accordance with the Survey Act 299 and Survey Regulations. This confirms that the boundaries are in their proper places.

The Defendants also admitted in his testimony that if there are any structures on the suit property Plot No. 915 belonging to them, then the same is a mistake. The Defendants also claimed that the structures have been on the suit land for a long time and that they were not constructed recently. The fact that the Defendants have stated that there are structures, is a confirmation of the Plaintiff's case that there are illegal structures on the boundary.

The issue of adverse possession does not arise as the Defendants has also not filed a counterclaim. I will therefore not deal with it. The issue of Limitation of Actions has not been proved by the Defendants who allege the boundary dispute arose in 1978 and not 2017. There was no evidence adduced to support such proposition and therefore that line of defence must fail.

I have considered the pleadings, the evidence by parties and submissions therein and find that the Plaintiffs have proved their case on a balance of probabilities and enter judgment as prayed in the plaint.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF MARCH, 2022

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.