



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 192 OF 2008(OS)

CHEMA NGOLANYA MUDZI.....PLAINTIFF

V E R S U S

JANE M. KIANO.....DEFENDANT

JUDGMENT

1. Plaintiff by his Originating Summons dated 30th July 2008 seeks determination of the following questions-

a. A declaration that the ownership of land parcel described as 1650/III/MN vests absolutely in fee simple to the Plaintiff by virtue of a vesting order issued on the 10th day of July 2008 on the strength of a court decree dated the 11th day of March 2002.

b. That in the alternative and or in addition to the prayer in paragraph '1' above a declaration that similarly the Plaintiff has acquired ownership in fee simple of land parcel described as 1650/III/MN by virtue of adverse possession due to his long stay on the said piece of land for a period over 40 years.

c. Whether the Defendant's claim to all that piece of land known as Plot No. 1650/III/MN is fraudulent, misplaced, unprocedural and hence null and void and consequently the Defendant's title in respect of sub-division Number 1650 (Original Number 427/42) Section III Mainland North as delineated on land survey plan Number 161750 be brought to court and cancelled and in its place the Plaintiff be issued with a similar one.

d. Who should bear the costs of this suit.

2. This case was heard both by affidavit and oral evidence.

3. The Plaintiff's case which was supported by evidence of two of his siblings is that Parcel No. 427/III/MN comprising of 173.9 acres was originally during the Colonial period and sometime after Independence of Kenya owned by Mrs. Sheila Norton (**formerly Macdonald**). On that land she was operating a hotel which DW2 said was called Kikabala Hotel, present day Sun and Sand. Norton left Kenya in 1968 and she decided to leave that land to her former employees. Amongst those who were beneficiaries was Plaintiff's late father, Ngolanya Mudsi. It is also important to note that another beneficiary of that allocation of land, and one who features prominently in this case is the late Kiti Kalu Ting (**Kalu**). Plaintiff and his witnesses testified that the land allocated to their late father is the land now

registered in the name of the Defendant. They allege that they did not know how the Defendant became the registered owner of Parcel No. 1650 (Original 427/42) Section III Mainland North (**Suit land**). Plaintiff further stated in evidence that he and his family members have been in occupation of that land for a long time, that is over 40 years, and that he is therefore entitled to have the land registered in his name since he had acquired the same by virtue of adverse possession.

4. Defendant by her evidence supported by her witness, Fredrick Wareri Karuri (**Karuri**) was that she purchased the suit land from Kalu for Kshs. 330,000/-. According to Karuri, when the Defendant and he purchased land from the original beneficiaries of land allocation the land was not subdivided and they purchased on the basis that those selling to them were the allocated owners. Plaintiff stated that Kalu passed away before the titles to the respective Subdivision were issued and this led the Plaintiff and others, including Karuri, to seek a vesting order in the case **Mombasa HCCC No. 163 of 1999 (O.S)**. Once the vesting order was issued the Court by the order of 26th January 2002 ordered the Registrar of Lands through the Attorney General to register the Defendant, together with others as absolute owners of their respective parcels of land. Defendant was to be registered as the owner of the suit land and indeed the title was issued to Defendant on 5th September 2005.

5. The Plaintiff's claim is two-fold-

i. Its based on another vesting order issued on 10th July 2008 and a subsequent decree dated 11th March 2002 in Mombasa HC Misc. Civil Application No. 208 of 2001 (OS)

ii. In the alternative or in addition to the above, the Plaintiff's claim is based on adverse possession on the basis that he has stayed on the suit property for a period of over 40 years.

Adverse possession

6. I wish to start with the second, that is adverse possession. A claim for adverse possession in Kenya is founded in Section 38(1) of the Limitation of Actions Act which provides as follows-

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, or land comprised in a lease registered under any of those Acts he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.” (emphasis added)

7. The said Section 38(1) talks of “**land registered under any of the Acts cited in Section 37**” or “**lease registered,**” also under the Acts cited in Section 37 of the Act. The Acts cited in Section 37 are the Government Lands Act, the Registration of Titles Act, the Land Titles Act and the Registered Land Act. For a person to make an adverse possession claim over land, that land must be registered. The person will be seeking that he or she be registered as the proprietor of the land in place of the person then registered as the proprietor of that land. Put in another way, the person making the adverse possession claim is seeking to replace a person who is already registered as the proprietor of the land in issue. In my humble view, an adverse possession claim cannot be made on land that is not registered. Perhaps that explains the requirement that a person making an adverse possession claim must attach to his application a copy of the title of the land he is seeking to adversely possess.

8. In the instant case, the Plaintiff seeks to adversely possess the suit property as against the title of the Defendant. The Defendant's title to the suit property was issued on 5th September, 2005. In my view, that is when time started running against the Defendant's title as provided for in Section 38(1) of the Limitation of Actions Act. Since this suit was filed on 31st July 2008, nearly three years after the Defendant's title was issued, the claim based on adverse possession cannot succeed because the law requires that the Plaintiff's occupation must be actual and continuous for a period of 12 years. In this regard I rely on the case **ENVIRONMENTAL AND LAND HCCC No. 163 of 2012 (O.S)** Malindi where the Judge stated-

“... an order of adverse possession can only be made against a Respondent who is registered as an owner of land. (See WASUI –Vs- MUSUMBA (2002)KLR 396.”

9. The Plaintiff claims that he and 33 others filed an Originating Summons being **Mombasa HC Misc. Civil Application No. 208 of 2008 (OS)** in which they were issued with a decree in the following terms:

“That the parcel of land measuring 173.9 acres known as Subdivision No. 427 Section III Mainland North be subdivided into portions set out in this application and each given an individual title document.”

The application and the final orders, it should be noted were after the Defendant was registered as an owner of the suit land.

10. The application was not availed for the benefit of the Court so that the Court could ascertain how the sub-divisions were to be done. Instead, the Plaintiff produced a copy of an order issued on 10th July 2008 whose authenticity is in doubt because of handwritten additions made which was *inter alia* in the following terms-

“That the Applicant herein and that is Mr. chema Ngolanya Mudzi be and is hereby granted a vesting order for Plot Sub-division Number 1650/III/MN.”

11. The Plaintiff did not explain how that sub-division was attained. This was very material because the dispute in this case seems to me to be centered on identity of the plots that ensued from the original main parcel No. 427 Section III Mainland North. I say so because both parties are in agreement that the said original piece of land was donated by one Sheila Norton to a number of people who were her employees. Although the Plaintiff and his witnesses denied that KITI KALU (from whom the Defendant claims to have bought the suit property) was among the beneficiaries of the donation by Sheilla Norton, the copy of the Decree dated 11th March 2002 produced by the Plaintiff clearly shows that the said KITI KALU was Applicant number 17 in that case (**Mombasa HC Misc. Civil Application No. 208 of 2008 (OS)**). I find the Plaintiff and his witnesses to have been dishonest in that regard, especially after PW2 totally denied that he ever knew KITI KALU.

12. It is clear from the documents before Court that KALU had a portion of land from the larger parcel No. 427 which was what he subsequently sold to the Defendant. While the Plaintiff claims that his portion after sub-division was Number 1650/III/MN, it is this very portion that the Defendant claims to have bought from the said KALU. That is why, in my view, it was very important for the Plaintiff to prove how the sub-division was done after the decree of 11th March 2002 so that it is clear who got what portion of the larger parcel. In my view Plaintiff failed to prove his case in this regard on a balance of probability.

13. The Defendant has explained that Sub-division Number 1650 was given to KALU. She produced a letter dated 6th July 1991 written by one O. M. Wainaina for Director of Survey to the Kilifi District Commissioner. The said letter was requesting the Kilifi D.C to ask the beneficiaries of the Sub-divisions listed therein to pay the survey fees so that the plans could be released. The said letter was typed but beside the fees indicated for each sub-division were names of various individuals inscribed in handwriting. The name of KALU was inscribed against sub-division number 1650. That letter, in my view is credible proof that sub-division number 1650 was for KALU.

14. However, in my view, discrepancies in the Defendant’s defence which were raised by Plaintiff do not benefit the Plaintiff. The law is that he who alleges must prove. See Section 107 Evidence Act. It is the Plaintiff who filed this case and he must therefore discharge the burden of proof on a balance of probabilities, not the Defendant to prove his defence to that standard. My view is that the fact that the Defence may leave a lot to be desired does not help the Plaintiffs case if the Plaintiff has not adduced evidence to prove his claim to the required standard.

15. The Plaintiff filed this suit after the Defendant had filed and concluded a different suit being **Mombasa HCCC No. 163 of 1999 (OS)** in which she was granted a vesting order on 21st November, 2004 over the suit property. The Plaintiff admits that he did not seek to set aside that vesting order because he was not a party. However, my view is that immediately he became aware of that suit, he should have applied to be enjoined as an interested party then seek to set aside the order. By filing the present suit to challenge the Defendant's title which was issued pursuant to a vesting order of the Court in Mombasa **HCCC NO. 163 of 1999 (OS)**, the Plaintiff is attempting to appeal against that vesting order or seek to have it set aside in these proceedings. That would be tantamount to appealing to this Court against an order of a Court with concurrent jurisdiction.

16. It is because of the above findings that the Plaintiff's case fails. The same is dismissed with costs to the Defendant. The injunction order issued hereof is automatically vacated.

DATED and DELIVERED at MOMBASA this 31ST day of JULY, 2014.

MARY KASANGO

JUDGE