



REPUBLIC OF KENYA

High Court at Mombasa

Civil Suit 544 of 2000

KENYA PETROLEUM REFINERIES.....PLAINTIFF

VERSUS

HASSAN NGOA & 53 OTHERS.....DEFENDANTS

JUDGMENT

The plaintiffs **KENYA PETROLEUM REFINERIES** filed in court a plaint dated 26th September, 2000. They later filed an amended plaint dated 12th July, 2010 in which they sought the following orders:

“(i) An injunction to restrain the defendants from remaining on or continuing in occupation of the suit premises.

(ii) Possession of the suit premises.

(iii) Damages

(iv) Cost of and incidental to this suit.

(v) Interest on (iii) and (iv) above at court rates.

(vi) Any further or other relief.”

The defendants on their part filed a statement of defence dated 6th March, 2001. The plaintiffs were represented by **MR. LUMATE** advocate whilst the defendants were represented by **MR. CHIDZIPHA**.

The plaintiffs called two witnesses in support of their case. **PW1 ANJEET HUSSEIN GULAM HUSSEIN** told the court that he is the Health, Safety and Environment advisor at the plaintiff company. He explained that the plaintiff company is the registered owner of plot Nos. 2586, 2587, 2504, 255/1, 1194/R, 244/1. 1211/1 section IV Mainland North Mombasa. **PW1** told the court that this suit relates to a particular parcel of land known as MN/6/255/1 which is situated in the Port Reitz area of Mombasa which parcel of land the plaintiff acquired in 1960 (hereinafter referred to as *‘the suit premises’*). The plaintiff company laid down three major pipelines which pass through that parcel of land which pipelines transport crude oil, refined oil and gas between Port Reitz to changamwe. **PW1** went on to testify that sometime in January, 1988, following the El Nino rains of 1997, officers from the plaintiff company moved into the suit premises in order to check on the pipelines and to carry out necessary repairs. They found that the defendants had wrongfully entered and taken up possession and occupation of the suit plot thereby depriving the plaintiff of its use and enjoyment of the same. Attempts to have these illegal occupiers vacate the land through the office of the District Officer changamwe were unsuccessful since the defendants demanded compensation before they would leave. As a result the plaintiffs filed this suit.

On their part the defendants called two witnesses both of who testified that they and the other defendants

had been in occupation of the suit premises since 1965. They claim to have built their homes, schools and mosques on the said plot. The defendants claim to have acquired rights to the suit premises by way of 'Adverse Possession'.

The fact that the plaintiff is the registered proprietor of the suit premises cannot be in any doubt. **PW1** did produce as an exhibit the Title Deed to the suit land **Pexb3**. The said Title Deed clearly names the registered owner of plot 255 section IV as East African Oil Refineries Limited. **Pexb2** is the certificate of incorporation for East African Oil Refineries Limited whilst **Pexb1** is the certificate of change of name of the plaintiff company from East African Oil Refineries Limited to Kenya Petroleum Refineries Limited. In addition **PW1** did also produce a map showing the location of the suit premises **Pexb4(a)** and **Pexb4(b)**. It is worth noting that the defendants do not challenge or dispute the fact that the registered owner of the suit land is the plaintiff company.

The defendants claim to have acquired rights to the suit land through the doctrine of 'Adverse Possession'. Blacks Law Dictionary 8th Edition defines adverse possession as:

"The use or enjoyment of real property with a claim of right when that use or enjoyment is continuous exclusive hostile, open and notorious." (My own emphasis)

The same dictionary gives an alternative definition of adverse possession as:

"The use or enjoyment of real property with a claim of right when that use or enjoyment is continuous, exclusive, hostile, open and notorious."

Section 7 of the limitation of Actions Act, Cap 22 Laws of Kenya provides for the statutory definition of adverse possession thus:

"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

From the above definitions, it is clear that certain key parameters must be established in order to prove a claim by adverse possession (thereby ousting the proprietary rights of the land owner). These are follows:-

- (1) That the claimant has enjoyed continuous, exclusive, hostile and notorious use of the land.
- (2) That the claimant has enjoyed all the above usage for the statutory period of twelve (12) years and above.
- (3) That there has been no interference either by the registered proprietor or any other party of the claimants' use of the land.

I now propose to deal with each of the above headings on an individual basis.

(1) Have the defendants enjoyed continuous, exclusive, hostile, open and notorious use of the suit premises?

Undoubtedly, the defendants' use of the said land was illegal, hostile and open. However, I do not think a case can be made that the defendants' occupation of the land was exclusive. **PW1** told the court that after purchasing the land in 1960 the plaintiff company proceeded to lay down various pipelines for the transportation of their products from Port Reitz to their refinery in changamwe. **PW1** did avail a sketch map as exhibits to the court to show the exact layout of the said pipelines **Pexb6**. A look at the sketch map clearly shows the route of the crude oil pipeline across the suit land. The pipeline as seen in the sketch map runs right across plot No. 255. The pipelines were in constant and continuous use by the plaintiff company who are one of the major oil refining companies in East and Central Africa providing

according to **PW1** upto 60% of all the refined oil used in this country. **PW1** told court that the pipelines and tankers have to be constantly maintained to protect against the risk of leakages and gas explosions. To that end the plaintiff company deploys regular patrol crews who carry out daily inspection runs. They do also deploy engineers who regularly inspect their pipelines as well as other installations. The evidence given by **PW1** in this regard is corroborated in all material aspects by **PW2 MARTIN NGARE** who is the projects engineering manager with the plaintiff company. With underground pipes transporting crude oil continuously and with various teams of engineers and/or patrol guards entering the suit plot to inspect and maintain the pipelines, there is no way the defendants can be said to have been enjoying exclusive and unfettered use of the land in question. As such, this first ingredient of adverse possession has not been established beyond a balance of probability.

(2) Did the defendants enjoy this use of the suit premises for the required statutory period?

Based on section 7 of the Limitation of Actions Act, the period of the claimants' use of the land must amount to twelve (12) years and above. The plaintiffs claim that they first noticed the encroachment of the defendants on their land in the year 1998. That would make a period of only two (2) years from 1998 to the year 2000 when this suit was filed. However, the defendants insist that they first entered into the suit land in the year 1965 thus claiming to have been in occupation of 35 years or there about. Let us examine each claim critically.

DW1 HASSAN NGOA testified that he has lived on the suit premises all his life having been born there in the year 1950. He claims to have built his home there in 1965. However, under cross-examination by Mr. Lumatete for the plaintiff, **DW1** admits that his National Identity Card indicates that he was born in Kilifi District and **not** in Mombasa as he claimed. He later tried to explain this anomaly by claiming that after his birth he lived with an uncle in Kaloleni which is where he obtained his identity card. I am not persuaded by this at all. Why did **DW1** not give this explanation in his evidence in chief? Further, the national identity card requires one to name his/her district of birth. There is a different entry for place of issuance of the card.

DW2 ALI HAMISI on his part claimed to have occupied the suit land in 1970 when he came to join his mother in Mombasa and claims to have built his home there in 1985. Here again under cross-examination **DW2** admits that he has listed Kwale as his home district. He later claims to have been educated in Taru and only came to Mombasa later. Once again it is curious that explanations are only being offered after counsel has challenged the evidence in chief. I am not convinced that the two witnesses were being truthful to this court.

On the other hand **PW1** has told the court that they only noticed the presence of the defendants on their land in the year 1998. He stated that in 1960 when the pipeline was being laid down there were no people living on the land. There were only a few cattle, sheep and other livestock being grazed there. This evidence is corroborated by **PW2**. He produces sketch maps of the area which were drawn in July, 1974 **Pexb9 (a&b)**. I have examined both sketch maps closely. The location of all permanent structures e.g. schools, homes, etc are clearly indicated on the maps. In plot No. 255 **no** permanent structures are shown to have existed at all. This is clear proof that by July, 1974 when these sketch maps were drawn there were **no** permanent structures in plot 255. All that existed was the pipeline. There is therefore no way that the defendants could have been in occupation of the plot from 1965 yet the maps clearly show that by July, 1974 there were no permanent structures in the land. The veracity of these two maps has not been challenged by the defendants' advocate. I therefore find the defendants' claim to have been in occupation of plot 255 from 1965 to be a barefaced falsehood. It is more likely that they only came into the plot after 1974 and in view of the fact that the plaintiffs staff were carrying out continuous maintenance on their pipeline, I find it most probable that the defendants only came into that land in the year 1998 or thereabout when their presence was detected by the plaintiffs staff who carried out routine inspections. I therefore find that the defendants **have not** been in occupation of the suit premises for the statutory 12 years and this ingredient of adverse possession has not been proved.

(3) Have the defendants enjoyed unfettered occupation of the suit plot?

One crucial ingredient of adverse possession is that the claimant has enjoyed unfettered possession, occupation and use of the suit land – that means that such possession, occupation and use must be shown to have been unrestrained and unrestricted in any way. Here again the evidence shows that this was not the case. The plaintiffs cannot be said to have in any way acquiesced to the defendants’ occupation and use of their land. **PW1** told the court that upon discovery of the presence of the encroachers on the suit plot they went to see the District Officer for Changamwe to complain about the presence of illegal squatters on their land. The District Officer did respond in writing to the complaint by this letter dated 6th October, 1998 **Pexb7**. In it the District Officer stated that the defendants were willing to vacate the land upon being paid compensation and/or being given alternative land to occupy.

Firstly, this practice of squatters invading land then turning round to **demand** compensation in order to leave cannot be sanctioned by this court. The defendants have illegally occupied the plaintiffs land, they are trespassers and have no right to make any **demands** for compensation. The issue of compensation can only arise where one is being deprived of what rightfully belongs to them. The defendants have no valid or legal claim to this land and as such they are **not** entitled to any form of compensation.

Secondly, the question of resettlement is not one which can be addressed by the plaintiff. The plaintiffs have no legal obligation to provide alternative land to persons who have illegally invaded their property. Indeed it is the provincial administration represented here by the District Officer who ought to seek alternative accommodation or land for the defendants. The District Officer cannot turn round and shift this burden to the plaintiffs.

Finally, on this point by declaring their willingness to leave the plot (albeit upon certain conditions being met) the defendants were in effect conceding that they had no legal right to be on plot 255. Why would one who has a legal right to a parcel of land express a willingness to leave the same? It is clear that the defendants were fully aware that they had no valid legal claim to the land and were only trying to derive undue benefit from their illegal action by seeking compensation. I find that the defendants did not enjoy unfettered use of plot 255 because the plaintiffs did complain to the provincial administration about their presence on the land – there was clearly no acquiescence to the defendants’ presence on the suit plot by the plaintiffs.

(4) Are the plaintiffs entitled to the orders sought?

From the foregoing, it is manifestly clear that the defendants claim to the land by way of adverse possession has no basis and I do hereby dismiss that claim. Further, public policy demands that the defendants vacate the land. The plaintiffs are a major contributor to the economy of Kenya and are providing jobs to citizens. **PW1** and **PW2** both told the court that they require vacant possession of the plot to enable the plaintiff company expand its operations and increase the capacity of their oil refinery. No expansion can take place while the defendants continue to occupy the land. In addition there are serious safety concerns which this court must uphold. **PW1** and **PW2** have both testified and it is common knowledge that the products being transported by the pipelines like crude oil, gas, etc. are highly inflammable. Any leakage or any interference of the pipeline could lead to massive destruction of catastrophic proportions. **PW1** testified that there is risk of fires and leakage of oil into the sea which would lead to an environmental disaster. Such an oil spill did in fact happen in April, 2010 following an explosion aboard a drilling rig in the Gulf of Mexico leading to the largest accidental oil spill in history. Such a spill would have very negative and far reaching effects on marine life, fishing, etc.

The defendants’ presence in the area is of great risk as by digging up the area either for cultivation or to bury their dead or to put up structures there is a real risk that they could interfere with the pipelines. Indeed it is very reckless for humans to occupy or live close to such installations. The survey report which was produced by consensus by both parties shows that the defendants have built and put up structures literally on top of the existing pipeline. Should any accident happen the devastation would be of great magnitude. This risk of such disaster is not farfetched. We have seen this happen very recently in our country in the fire disaster in Mukuru Sinai in 2011 where approximately 100 people lost their lives. This was a similar situation where squatters had moved in an occupied land close to pipelines. Despite being urged severally to vacate the area the residents of Mukuru Sinai had declined to

do so. It is also a fact that when such a fire tragedy occurs even rescue services are not able to access the area due to the houses and other structures built too close to the pipeline. It would be reckless to turn a blind eye to a risk of such magnitude. Thus even on the basis of public policy the defendants must vacate plot 255.

The plaintiffs made a prayer for damages in their plaint. However, the issue of damages was not canvassed before this court at all nor were submissions made on the same. As such I decline to make any award for damages.

Finally, I determine this suit in favour of the plaintiffs. The defendants are illegal occupants and must vacate the area forthwith. The plaintiffs are entitled to possession, use and occupation of their land. As such, I make the following orders:

(i) An injunction do and hereby issue to restrain the defendants from remaining on or continuing in occupation of the suit premises.

(ii) Vacant possession of the suit premises to be granted to the plaintiffs.

Each party to meet their own costs for this suit. It is so ordered.

Dated and delivered in Mombasa this 12th day of March, 2013.

M. ODERO

JUDGE

In the presence of:

Mr. Kisa h/b Mr. Chidzipha for Defendants

No appearance by Plaintiff

Court Clerk Mutisya