



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
ENVIRONMENT AND LAND COURT
CIVIL CASE NO. 85 OF 2012

GULAM MARIAM NOORDIN.....PLAINTIFF

=VERSUS=

JULIUS CHARO KARISA.....DEFENDANT

J U D G M E N T

1. The Plaintiff moved the court by way of a Plaint dated 6th June 2012 and filed on the same day.

The Plaintiff's case:

2. In the Plaint, the Plaintiff is praying that the Defendant, his servants, employees, agents or any other person acting at his behest be evicted from land portion number 7729 (LTXVIII) (Original number 302/42) Malindi measuring 0.947 ha.
3. The Plaintiff has averred in her Plaint that at all material times to this suit, she was the sole proprietor of land known as portion number 7729 (LTXVII) and that the Defendant trespassed on the said portion of land on or about January 2012.
4. The Plaintiff reported the dispute to the District Officer, Malindi who subsequently summoned the Defendant but the Defendant refused to recognize the Plaintiff as the owner of the suit property.
5. The Plaintiff testified on 12th March 2013.
6. According to the Plaintiff, Julius Charo Karisa, the Defendant, has occupied her land. The Plaintiff testified that the suit land situated along Mombasa Road whose number is portion number 7729 (LT X11) and Deed Plan number 175265 whose original number was 302/42 measures 2 ½ acres.
7. The Plaintiff produced in evidence the original indenture as exhibit 1 and the Deed Plan as Plaintiff exhibit number 2. It was the Plaintiff's testimony that she bought the land from Mudaris Salim Suleiman. She produced in evidence the agreement dated 25th November 1988 as Plaintiff exhibit 3.
8. PW 1 also produced as Plaintiff's exhibit number 4a the receipts showing the payments of the land rates were. The clearance certificate dated 6th March, 2013 was produced as Plaintiff's exhibit number 4b. The property rates payment requests were produced as Plaintiff's exhibits 5a, 5b and 5c.
9. According to the Plaintiff, she saw a house which was being constructed on the suit property in the year 2011. She reported to the chief and D.O about the construction and took a photograph which she produced Plaintiff's exhibit 6.
10. The Plaintiff testified that the person who was constructing the house on her land (the Defendant) was summoned by the D.O. The Defendant informed the D.O. that he had never met the Plaintiff

- before.
11. It was the Plaintiff's testimony that she subsequently hired an advocate who wrote a demand letter dated 14th May 2012 to the Defendant. She produced the demand letter as Plaintiff's exhibit number 7.
 12. The Plaintiff further testified that she has been threatened and she no longer goes to the suit property; that the land abuts the road and on the reserve road, there is an old house which is occupied by one Julius (the defendant); that when she bought the land, nobody was staying on it and that the first house to be constructed on the suit property is as per the photograph that she produced in evidence.
 13. The Plaintiff finally testified that she obtained her title from the Government offices; that there was no fraud on her part; that the person who sold the land to her has never demanded for it and that the Defendant is neither the son of the seller nor her son.
 14. The Plaintiff asked the court to allow her to take possession of her land and to allow the Defendant to continue occupying the house on the road reserve road. However, the house which had been constructed on her land should be removed. The Plaintiff produced the receipt for the official search dated 8th December, 2011 as exhibit 8a, the application for a postal search as exhibit 8b and the certificate of postal search as exhibit 8c.

The Defendant's case:

15. The Defendant, on his part, filed his defence on 11th September, 2012. The Defendant averred in his Defence that the title in possession of the Plaintiff was obtained fraudulently; that the Plaintiff is not the owner of the suit premises as the same belongs to the Defendant and his family as ancestral land and that he has been in occupation of the suit property for over 50 years.
16. The Defendant finally averred in his defence that he cannot be a trespasser in his own land; that he has built a permanent home on the land, planted coconut trees, cashew nuts and mango trees and that the temporary structures alluded to by the Plaintiff in her Complaint is an extension of the members of his family.
17. Joseph Daniel Kenga, DW 1, informed the court that he stays in Kijiwetanga in Malindi and he is the Defendant's elder brother. According to the witness, he was born on the suit property together with the Defendant. It was his testimony that he has been staying on the property since 1956 and that the land belongs to their clan.
18. The witness informed the court that he has always farmed the land and he had been doing so since the days of his forefathers; that the Defendant also has a homestead on the suit property and that they had never seen the Plaintiff before.
19. The Defendant, **DW2** stated that he stays at Kijiwetanga, Malindi and that he was born in 1960 on the suit property which is, the family land. He testified that he is married and that he has never moved from the suit land even for one day. According to him, he is not aware that his house is on the road reserve in which he has been staying in since 1986. He has since built two more houses on the suit property.
20. DW 2, testified that he is the one who planted the coconut trees and mango trees seen in the photographs taken by the Plaintiff. His two grandfathers and his father were buried on the suit property.
21. He testified that the first time he saw the Plaintiff was in the year 2011 when she went to the chief to report that the Defendant was on his land. That is when she said she had bought the land. According to the Defendant, the Plaintiff did not buy the suit land from her father and nobody else had ever claimed the land. The Defendant finally deposed that the suit property has always belonged to the family since time immemorial.
22. The court, accompanied by the village elder and the sub-chief, together with the Plaintiff's and the Defendant's counsel visited the site on 3rd May 2013. According to Karisa Baya Maitha, the sub-chief who showed the court the land in dispute and the Defendant's three houses, he saw the Plaintiff for the first time when she went to his offices with her title documents. The Sub-Chief informed the court that the Defendant's house which was next to the road had been in existence since he (the sub-chief) was born. He went to the same school with the Defendant's younger brother and completed his Primary education in 1986.
23. The Sub-chief showed the court the Defendant's parents' homestead which was about 500 meters

- from the suit property. The suit property, according to the sub-chief, belonged to one Bwana Mtumwa who had allowed squatters to stay on it. On cross examination by both the Plaintiff's and the Defendant's counsel, the sub-chief stated that the trees on the suit property were planted by the Defendant and that the second house had been built on the suit property in 1990.
24. The parties agreed to file written submission. The Plaintiff's advocate filed his written submissions on 8th May, 2013 while the Defendant's advocate filed his submissions on 20th May, 2013.
 25. The Plaintiff's Advocate submitted that the Assistant Chief and the village elder had confirmed to the court that the original land where the dispute property is situated is within plot number 302 owned by one Bwana Mtumwa (Arab), an absentee landlord.
 26. When the said Bwana Mtumwa left, it was submitted, the villagers occupied the land, and it was Mudaris Salim, as confirmed by the Assistant chief, who was in charge of settling squatters.
 27. According to the submissions of the Plaintiff's Advocate, it is this Mr. Mudaris Salim Suleiman who sold the land to the Plaintiff.
 28. The Plaintiff's Advocate finally submitted that the Defendant has not proved his claim of adverse possession and that he has not instituted a counter claim for adverse possession.
 29. The Defendant's advocate submitted that the Defendant and his family have been occupying the suit property for over 50 years and that their occupation has been continuous, open, exclusive and uninterrupted since that time. The occupation has been inconsistent with the use of the title owner's interest in the land.
 30. The Defendant's advocate submitted that the Plaintiff's claim is time barred pursuant to the provisions of Section 7 of the Limitation of Actions Act.

Analysis

31. The only prayer in the Plaintiff's is for the eviction of the Defendant from the suit property.
32. The Plaintiff produced in evidence a conveyance made on 8th June, 2011 between Mudaris Salim Suleiman and Gulam Mariam Noordin, the Plaintiff, for a consideration of Kshs.200,000/- for the suit property.
33. The Plaintiff also produced exhibit number 3 which is an agreement of sale between Mudaris Salim Suleiman and herself dated 25th November 1988 for the purchase of a portion of plot number 302/42 measuring 2.5 acres. This is the same plot in respect of which a conveyance was prepared in the name of the Plaintiff.
34. It would appear from the Agreement that plot number 302/42 is a big parcel of land measuring 251.1 acres which once belonged to Mr. Mudaris Salim Suleiman. The suit property is a small portion of it.
35. Though the Plaintiff bought the property in 1988, she did not take possession. When she was purchasing the land, she was aware of the Defendant's house which, according to her, is on the road reserve. According to her Plaintiff, it was not until 2012 when she saw the Defendant building another house inside her plot that she reported the matter to the District Officer.
36. When the court visited the site, it observed that indeed the house, which was 29 meters from the middle of the Mombasa Malindi road was an old house and it had been there for the length of time that the sub-chief started schooling until 1986 when he finished his primary education. The Plaintiff confirmed in her testimony that indeed the house was there before 1988 when he bought the land.
37. The court also observed the Defendant's second house which was behind the house that the Plaintiff claimed to be on the road reserve. The house equally looked old and in dire state of disrepair. The sub-chief informed the court that the house had been built in 1990, which, as observed by the court, was the position.
38. Behind the 2nd house was a third house also constructed by the Defendant. The house looked fairly new.
39. The court observed that the Defendant occupying was less than 2 acres and he was surrounded by his brothers who had their own homesteads. The court was shown the homestead where the

Defendants parents had been buried. The Defendant's parents homestead was approximately 200 meters from the defendant's homestead. Nobody was staying in the homestead.

40. Having visited the site, and having been shown the Defendant's parents homestead which was approximately 200 meters away from the suit property, I have no doubt in mind that the Defendant indeed was born within the suit property and he had two old houses in which he was staying with his family. The two houses had been there for more than twelve years. Defendant could not have had any other home other than the suit property. Indeed, the Defendants siblings have also put up their own homes which are a few meters from the defendant's homestead.
41. The Plaintiff did not inform the court how she was utilizing the property since 1988 when she purchased it from Mudaris Salim Suleiman. It is obvious that even if the Defendant was staying in the house which according to the Plaintiff is on the road, he was utilizing the land before and after 1988. Had the Plaintiff inquired before purchasing the suit property as she claims, it would have been obvious to her that other than the 2.5 acres she was purchasing, the entire plot number 302/42 measuring 251 acres was occupied by the Defendant, the Defendants brothers, the Defendants parents and many other families.
42. Section 7 of the Limitation of Actions Act, cap 22 provides that an action to recover land cannot be brought after the end of twelve years from the date on which the right of action accrued to a person or, if it first accrued to some person through whom he claims, to that person.
43. I am in agreement with the Defendant's advocate submissions that the Defendant has demonstrated that he has lived on the suit premises for more than twelve years and that his occupation has been continuous, open, uninterrupted and adverse to the rights of the Plaintiff and Mudaris Salim Suleiman, the vendor.
44. By the time the Plaintiff bought the premises, the title of the original owner, be it Bwana Mtumwa or Mudaris Salim Suleiman had already been extinguished by way of adverse possession in favour of the Defendant, considering that the Defendant was born on the suit property. The Defendant rightfully benefitted from the previous possession of the suit property by his kinsmen.
45. On the issue of successive squatters, Megarry and Wade in the "Law of Real Property 6th Edition, at paragraph 21-021 states as follow:

"As already explained, a squatter has a title based on his own possession and this title is good against everyone except the true owner. Accordingly, if a squatter who has not barred the true owner sells the land, he can give the purchaser a right to the land which is as good as his own.... In each case the person taking the squatters' interest can add the squatter's period of possession to his own".

46. It is a settled principle of law that the change of ownership of land which is occupied by another person under adverse possession does not interrupt such a person's adverse possession. It therefore does not matter that the Plaintiff purchased the suit property in 1988. Such a purchase did not interrupt the number of years that a squatter had been staying on the parcel of land.
47. The Plaintiff's advocate submitted that there is no counter-claim by the Defendant and consequently the defence of adverse possession does not arise.
48. It is true that one may claim for land by way of adverse possession pursuant to the provisions of section 38 of the Limitation of Action Act. However, it is also true that one may defeat a Plaintiff's suit by raising the defence of adverse possession pursuant to the provisions of section 7 of the Limitation of Actions Act.
49. Section 7 of the Limitation of Actions Act requires the Defendant to furnish evidence that he has been in adverse possession of land for 12 years in order to bar the Plaintiff from claiming against him. The Defendant has done that. That defence cannot be taken away just because he has not filed a counter-claim. It is upon the Plaintiff to show that the Defendant's possession of the suit property has not been adverse or inconsistent with his title. That burden has not been discharged by the Plaintiff in the instant case.
50. In the circumstance, and for the reasons I have given above, I dismiss the Plaintiffs suit with costs.

Dated and delivered in Malindi this 12th day of July, 2013

O. A. Angote
Judge