



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL SUIT NO.10 OF 2007

CHOME MWAJOTOPLAINTIFF

VERUS

CHIDZAO MWAMBIRE (BOJO)DEFENDANT

J U D G E M E N T

Parties and Pleadings

1. The parties to this suit are not in agreement as to the ownership of the property known as Kwale Mnanasini/234 (hereinafter referred to as the suit property). In a Plaint filed on 25th January 2007, the Plaintiff who is the registered proprietor over the suit property under the system of registration provided in the Repealed Registered Land Act, seeks vacant possession thereof. In addition, the Plaintiff has requested Court for mesne profits. He also requests for a declaration that he is the “registered indefeasible owner of title” of the suit property.
2. In his defence, the Defendant alleges to be in possession of the suit property since the year 1982. It is averred that the suit property was purchased by his father Mwambire Bozo (now dead and hereinafter referred to as “Mwambire”) from the brother of the Plaintiff by the name Chimako Mwajoto (also dead and hereinafter referred to as “Chimako”). It is the Defendant’s case that the Plaintiff had given Chimako absolute ownership over the suit property. And Chimako had authority to sell it to Mwambire. It is an alternative defence that the Defendant has had continuous and uninterrupted occupation of the suit property for over twenty (20) years and has therefore acquired an interest over it by adverse possession. It being contended that the Plaintiff’s action is time-barred under the Provisions of the Limitations of Actions Act. (Chapter 22 Laws of Kenya)

Evidence of the Plaintiff

3. The Plaintiff gave evidence on his own behalf. He showed the Court the original title document to the suit property (Plaintiff’s Exhibit 1). That title was given under the hand and seal of the Kwale District Land Registry on 3rd of January 2002. The Plaintiff explained that he purchased the land about thirty (30) years ago. He thereafter resided on the land for about 4 years before leaving for Vanga. He left his land to his brother Chimako as a custodian. His brother had the authority to cultivate the land and oversee it but no more.
4. The Plaintiff later came to learn that Chimako had sold the land to a person called Bojo Bozo. That would be Mwambire’s other name. The Plaintiff maintained that his brother had no authority to sell the land. Anyhow, when he learnt of Mwambire’s claim, the Plaintiff offered to sell the land to Mwambire. This was to sanitize what he saw as an otherwise unlawful transaction. That was not to be as Mwambire refused to accept the asking price.
5. Later, the Plaintiff showed Mwambire the title as proof of his ownership over the suit property.

Then through a letter dated the 27th of June 2005 (P Exhibit 2) the Plaintiff demanded that Mwambire vacates the land within fifteen (15) days of that letter. The Advocate for the Plaintiff received a response to that demand in a letter dated the 29th of September 2005 (P Exhibit 3) authored by Gunga Mwinga Advocate on behalf of Mwambire. Mwambire refused to oblige to the demands. That refusal led to the filing of this suit.

Evidence of the Defendant

6. Four witnesses testified for the defence. The Defendant (DW1) is the son of Mwambire. He resides on the suit property and says that he has resided thereon since the year 1982. It was his evidence that through a handwritten sale agreement (D Exhibit 1) his father bought the suit property from Chimako. In that agreement the purchase price was the sum of kshs.7,000/=. That purchase price was paid in seven (7) instalments on various dates between the date of the agreement being 4th July 1982 and 31st March 1983 when the last instalment was paid. One such instalment was said to have been paid on 14th November 1982 in the presence of Madoe Kombo Muduruma(DW 4). The amount paid was ksh.100/=. D.W.4 pointed out that the name Madoe Said Mwachibeja on the sale agreement is his name. Emmanuel Nzau Mwambire (DW2) stated that he also witnessed payment of one instalment. That was ksh.4,500/= paid by the purchaser to the seller on 1st of August 1982. Nadzua (D.W.3) who is the wife of Mwambire also confirmed that she witnessed the purchase of the land.
7. It was the evidence of all the four defence witnesses that Mwambire and his family moved into the suit property immediately after the payment of the consideration. It was also the evidence of the witnesses that the family of Mwambire are still in occupation of the suit property.
8. Then there is death of the main actors to the agreement. DW1, DW2 and DW3 testified that Chimako died. DW1 and DW2 say that the death occurred in 1987. As for Mwambire he lived up to the year 2006. The fact of this death was part of the deceased's wife's testimony (DW3) and that of his son (DW1). It was also their testimony that a dispute arose after the death of Mwambire. DW1's evidence is that he learnt of the Plaintiff and his claim after the Plaintiff sued him in these proceedings. This knowledge came as an unpleasant surprise when the Plaintiff attempted to evict them from the suit property in execution of a Court decree. That decree was as a result of Ex parte proceedings herein that have since been set aside.
9. The Defendant believed that at the time Chimako sold the property to his father, no title had been issued over the property. It was also his testimony that Chimako assured the deceased that the land belonged to him.
10. In cross-examination, the Defence witnesses were asked to explain the contents of two other written agreements. One was a written agreement dated 4th July 1987 annexed to the affidavit of the Defendant sworn in these proceedings on 13th October 2009. Although my hand written proceedings refers to the affidavit as that of the Plaintiff, there is no such affidavit and the proceedings are certainly erroneous. So what was the response of DW1 when confronted with this agreement? He thought that P Exhibit 1 was an agreement in respect to Plot 235.
11. The other document was an agreement annexed to Defendants affidavit of 27th August 2009 apparently between Chaka Mwajoto Mazima and Mwambire. DW2 says he was not privy to this agreement. While DW4 told Court that Mwambire bought two parcels of land. One from Chimako and another from Chaka. And that Chimako and Chaka were brothers.

Issues for Determination and

The Courts finding

12. The issues I am asked to determine are straightforward. They are:-

- i. Did Chimako have authority to sell the suit property to Mwambire?
- ii. Is the action of the plaintiff timebarred?

13. It is common ground that the suit property is registered in the name of the Plaintiff. It is also

common ground that the Defendant has occupation of the suit property. It is not contested that the Plaintiff left the suit property to his brother Chimako many years ago. There seems some consensus that it was 30 years ago. The Plaintiff himself testified,

“I gave this land to my brother long ago, I cannot remember when this was. It is more than 30 years.”

14. Not agreed by the contestants is whether Chimako had authority to sell the land. Neither side provided strong evidence on this. Both gave oral evidence. In the absence of anything in writing, I am unable to find that Chimako had authority to deal with the Registered owners property in that way. Both Chimako and Mwambire are dead. They cannot tell any tale. The dead do not tell tales. On this I will agree with the Plaintiff that Chimako had no authority to sell the land. There is no evidence to suggest that Chimako had authority to deal with the land other than occupy and use it.
15. I find on the evidence that some Ks.7000/= was paid by Mwambire to Chimako. This was the supposed consideration. But having held that Chimako had no authority to enter a contract of sale over the land, then the agreement was void.
16. Notwithstanding the invalidity of the transaction, Mwambire and the defendant moved on to the land. The evidence puts the time of occupation at about the year 1982. The time of occupation is not contentious. In cross-examination the Plaintiff said,

“I later heard that my brother had sold the land. This is over 20 years.”

Mwambire moved into the land with his family. One of whom is his son, the Defendant.

17. Is the Defendant still in occupation? The very Nature of the action suggests that the Defendant is in occupation. One prayer of the Plaintiff is for eviction of the Defendant. This confirms the evidence of the Defence witnesses that the Defendant is currently in occupation of the suitland. There is also evidence that the first attempt to disturb the occupation was after the Plaintiffs overture to “resale” the land to the Defendants father was declined. The Plaintiff says that he thereafter made a formal demand to Mwambire to vacate the suit property. This is the Plaintiff’s Advocates letter of 27th June 2005,

“27TH JUNE 2005

MR. BOJO BOZO

MWANGUNDA

LUNGA-LUNGA

Dear Sir,

RE: CHOME MWAJOTO PLOT TITLE NO.234/KWALE MNANASINI

We are acting for our client – CHOME MWAJOTO and have instructions to write to you as hereunder:-

That our client is the Legal beneficial and registered owner of the above mentioned parcel of land upon which you are unlawfully occupying.

Our mandatory instructions are therefore to demand that you do handover vacant possession of the said parcel of land to our client and you do vacate, stop from alienating the same parcel of land, disposing it off and/or dealing with it in whatever manner.

Notice is hereby given that unless you comply with the above demands within fifteen (15) days of

the date hereof, we have mandatory instructions to issue legal proceedings against you at your own peril as to costs and consequences arising therefrom.

Yours faithfull

J.C. CHIDZIPHA & COMPANY

ADVOCATES

Signed:

JAPHETH CHIDZIPHA”

18.The response to that letter was in the negative. Mwambire’s lawyer said as follows in his reply dated 29th September 2005;

“GM/GEN/2005

29/9/2005

Our Ref:

Date:

M/S Chidzipha & Co.

Advocates

MOMBASA

Dear Sir,

RE: PLOT TITLE NO.234 KWALE MNANSINI

BOJO BOZO – OUR CLIENT

CHOME MWAJOTO – YOUR CLIENT

Your letter dated 27th June 2005 address to our above named client has been placed in our hands with firm instructions to respond thereto as hereunder:-

That our client denies in toto all the allegation sin your letter under reference.

Our client maintains that the property is family property and your client does not solely own the same.

We have instructions to call upon you to furnish us with your title documents in respect of the same parcel of land.

TAKE NOTICE that any ill-advised suit against our client shall be strenuously defendant to the hilt.

Yours faithfully,

GUNGA M.C

CC CLIENT”

In that letter, Mwambire does not acknowledge the ownership of the Plaintiff. In addition there was no

proof by the Plaintiff that Mwambire had recognized his ownership and had agreed to negotiate a resale. Mwambire's response to the letter in fact suggests the contrary. He refuses to oblige to the demands to move out and then states **“our client maintains that the property is family property and your client does not solely own the same. We have instructions to call upon you to furnish us with your title documents in respect of the same parcel of land.”**

19. The other attempt by the plaintiff to disrupt the occupation of the suit property by the family of the Defendant was when plaintiff obtained *ex parte* judgment herein. In that judgment the plaintiff was granted, *inter alia*, an order of vacant possession. The plaintiffs attempt to carry out the eviction was halted by a stay order obtained by the Defendant on 27th August 2009. That *ex parte* judgment was eventually set aside and the Defendant continues to occupy the suit property.
20. I have to find that on the evidence the stay of Mwambire and his family on the suit property from 1982 was **not** permitted by the Plaintiff. I also find that from then on, Mwambire thought himself to be the owner and when challenged about it, refused to acknowledge the Plaintiffs ownership. I also find that on the evidence of DW2 and DW3 who were well known to both Chimako and Mwambire the occupation of Mwambire was well known and open.
21. In paragraph 11 of the Defence, it is contended that the plaintiffs action is timebarred under the provisions of the Limitation of Actions Act. The provisions of section 7 of that Statute are relevant and provides:

“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.”

22. From the evidence, the Defendants occupied the Suitland alongside his father and remained there even after his fathers death. The evidence is that the occupation has been since 1982. The evidence is that it was in that year (1982) that the Plaintiff discontinued his possession of the Suitland. That is when he left for Vanga. The unauthorized sale to Mwambire was on 4th July 1982. Mwambire and his son, the Defendant, took possession immediately thereafter. In so far as their entry into the Suitland was on the basis of an unauthorized sale, the occupation of Mwambire and Defendant was not permitted by the title holder (the Plaintiff) .The date of the unpermitted occupation (1982) would be the date the plaintiffs' cause of action accrued. That is certainly more than 12 years before the date of commencement of this action. To that end the action is time barred by the clear provisions of section 7 of The Limitation Actions Act which has been properly invoked by the Defendant in his pleadings.
23. The ultimate outcome is that the suit is hereby dismissed with cost.

Judgment delivered dated and signed this 6th day of December 2013.

F. TUIYOTT

JUDGE

6/12/2013

In the presence of:

Learned Counsel for the Plaintiff N/A

Learned Counsel for the Defendant Obara for Muinde

Court clerk Beatrice Morias