



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 187B OF 2015(O.S)

IN THE MATTER OF: PORTION NO. 121 MALINDI TITLE NO. LT. 27 FOLIO 362/5 FILE 3519

AND

IN THE MATTER OF: SUBDIVISIONS 10585, 10586 AND 10587

AND

IN THE MATTER OF: LIMITATION OF ACTIONS ACT CAP 22, LAWS OF KENYA

AND

IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT THE PLAINTIFFS HAVE OBTAINED TITLE OVER THE SAID PARCEL OF LAND BY ADVERSE POSSESSION

BETWEEN

- 1. MANDO DZOMBO MANGI**
- 2. JAPHET GARAMA SULUBU**
- 3. KATANA SULUBU**
- 4. JONATHAN C. NYUNDO.**
- 5. WILLIAM GARAMA KAZUNGU**
- 6. FRANCIS KITSAO DZOMBO**
- 7. DICSKON MWARUME THOYA**
- 8. SHAURI SULUBU**
- 9. CHARO DZOMBO**
- 10. GARI DZOMBO**
- 11. SULUBU DZOMBO**
- 12. GARAMA KATANA**
- 13. CHARO KARISA CHIVATISI**
- 14. SIDI NZARO**

15. KAZUNGU KAHINDI

16. SAMMY KATANA KAHINDI

17. PENDO KIRAO

18. KAHINDI KAZUNGU NGUMZA

19. ALEX MUTUKE MSASYA

20. KAHINDI GARI

21. FRANCIS KAZUNGU

22. CHARLES MANDO

23. KARISA CHARO DZOMBO.....PLAINTIFFS

VERSUS

1. SALIM ABDALLA BAKSHWEIN

2. AHMED ABDALLA BAKSHUWEIN.....RESPONDENTS

JUDGMENT

BACKGROUND

1. By an Originating Summons dated 16th December 2008 and filed herein on 17th December 2008, the 23 Plaintiffs/Applicants urge the Court to make a determination against the two Respondents as follows:

1. That the Plaintiff are entitled to be declared as proprietors of their respective plots within Portion No. 121 Malindi Title No. LT.27 Folio 362/5 File 3519 with the respective sub divisions 10585, 10586 and 10587 which they have acquired by adverse possession, having lived and worked on the same for over 12 years since late 1950s and used it peacefully and without any interference from the Defendants and their predecessors.

2. That the Plaintiffs are entitled to be registered and issued with certificate of title over the same in the place of the Defendants/Respondents.

3. That the Plaintiffs are entitled to the costs of this suit.

2. The summons which is supported by an Affidavit sworn by Dzombo Mangi (the 1st Plaintiff) is premised on the grounds that the Plaintiffs grandparents occupied the land many years back and that the Plaintiffs were born and brought on the suitland without any interruption and or interference from any quarter.

3. But in their Statement of Defence and Counterclaim dated 28th January 2009 as filed herein on 16th February 2009, Salim Abdalla Bakshwein and Ahmed Abdalla Bakshwein (the Defendants/Respondents) deny that the Plaintiff/Applicants have occupied the suitland uninterrupted for more than 12 years. The Respondents assert that the Applicants had filed similar suits in respect of Plot Nos. 120 and 123 Malindi and aver that the Applicants could not have been occupying three different parcels of land at the same time.

4. The Respondents aver that they have filed a number of criminal complaints against a number of the Applicants and assert that the Applicants have persistently defied the Respondents as well as the Provincial Administration and have sold portions of the suit property to some third parties.

5. The Respondents accuse the Applicants of illegally entering into their land and proceeding to erect illegal structures thereon. By way of their Counterclaim, the Respondents urge the Court to dismiss the Applicants' suit and instead enter Judgment in their favour for: -

(i) Vacant possession; and

(ii) Costs of the suit.

6. In the course of time, the 2nd Respondent passed away and by an order made herein on 16th May 2019, the suit against the 2nd Respondent was formally withdrawn upon which the trial proceeded as between the Applicants and the 1st Respondent.

The Applicants' Case.

7. In support of their case the Plaintiffs/Applicants called two witnesses at the trial which commenced before the Honourable Justice Meoli on 1st March 2012. The Defendants/Respondents did not call any witnesses in support of their case.

8. PW1 – William Garama Kazungu is the 5th Plaintiff and a farmer in Malindi. He told the Court he is 43 years old and that he is married with children. PW1 testified that he resides on land Portion No. 121 Malindi and that his father Kazungu Tsuma (now deceased) entered the land when he was born 43 years ago. PW1 told the Court he built his own house on the land some 18 years earlier.

9. PW1 further told the Court that the 2nd Respondent who claims the land neither stopped him from building nor interfered with his occupation. He farms on the land and keeps animals. He told the Court the 2nd Respondent had never held a meeting with those who occupy the land and that there is a road passing through the land which is also used by the 2nd Respondent.

10. PW1 testified that he occupies eight acres of the suit property which in itself is 85.85 acres. The Respondents have no development on the land which has no fencing. Having lived on the land for long, they went to Mombasa to process titles. That is when they were shown title deeds and came to learn that the land is owned by the Bakshuwein family. They did not understand how the family had acquired the titles. Nobody had ever asked them to vacate the land.

11. PW1 further told the Court that his brother Katana Kazungu who died about 15 years ago was buried on the land. And so was his sister Kadzo Kazungu. They were buried in broad daylight as per Giriama customs. No one tried to stop the burial and no one had asked them to remove the graves. He therefore asked the Court to declare that they had acquired the land through adverse possession.

12. On cross- examination, PW1 told the Court they gave authority to Mando Dzombo Mangi to represent them. He insisted he was born on the land and lives in Kalia Papo. PW1 denied that the land belongs to the Defendants. There was no evidence to prove this as the land records show the owner as one Nasoro Nerali. He told the Court they sued the Defendants because they claim the land belongs to them.

13. PW1 further testified that Surveyors went to the land some six years earlier and forcefully sub-divided the land. He was subsequently charged three times, in 2008 and 2009 with the offence of forcible detainer. He had also been charged with contempt of Court and trespass to land. The 2nd Respondent was the complainant. PW1 told the Court the 1st Plaintiff is his neighbor and that they had been charged together.

14. PW2- Kahindi Gari Mazonga is the 20th Plaintiff and a peasant farmer in Malindi. He told the Court he is 45 years old and that he was born on Plot No. 121- where his father lived. He further told the Court he has ten children some of whom had since established their own homes. PW2 further told the Court that he uses about six acres of Plot No. 121 carrying on farming.

15. PW2 further testified that he does not know the Bakshuwein family. While their suit was against Ahmed Backshuwein, he had never seen him on the land. He had also never seen any notices from the family urging them to vacate the land. PW2 further testified that his grandfather Mazonga Kalama died and was buried on Plot 121. Nobody has ever asked them to remove the remains. His grandmother Kadzo Kiti is equally buried on the land.

16. On cross- examination, PW2 testified that his father also resides on the suit property and that his father has never been sued or charged in any Criminal Case. His father is not one of the Plaintiffs. He told the Court he measured the area he occupies himself and insisted it is six acres. PW2 denied that he had ever lived on Plot No. 144 and told the Court he did not know if his father claimed Plot No. 144.

17. PW2 further denied knowledge of the sub-division of Plot No. 121. He has never seen a Surveyor on the land. He further told the Court he was not aware that his father Gari Mazonga had been charged in 2004 for staying on the land.

Analysis and Determination.

18. I have perused and considered the pleadings filed herein, the testimony of the Plaintiffs witnesses and the evidence adduced at the trial. I have also considered the rival submissions filed herein by both the Plaintiffs and the Defendant who did not call any witnesses at the trial.

19. The 23 Plaintiffs/Applicants herein pray for a declaration that they have become entitled to all that parcel of land known as Portion No. 121 by way of adverse possession. While he did not call any evidence in support of the Counterclaim, the Defendant/Respondent on the other hand accused the Plaintiffs of trespass and sought orders of vacant possession against them.

20. Adverse possession is a doctrine premised on the principles of limitation of actions and the equitable doctrine of laches. At the lapse of twelve years, the registered proprietor of a parcel of land is barred from instituting an action and has no legal means of exerting his title over the property as against an adverse possessor. Thus, and as was stated by the Court of Appeal in ***Mtana Lewa –vs- Kahindi Ngala Mwangandi (2005) eKLR***: -

“Adverse possession is essentially a Statement where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years.”

21. In ***Wambugu –vs- Njuguna (1993) KLR, 173***, it was stated that adverse possession contemplates two concepts: possession and discontinuance of possession. The Court further held that the proper way of assessing proof of adverse possession would be whether or not the title holder had been dispossessed or has discontinued his possession for the statutory period, and not whether or not the Claimant has proved that he or she has been in possession for the requisite number of years.

22. Similarly, in ***Mbira –vs- Gachuhi (2002) EA 137***, it was held that:

“.....a person seeking to acquire title to land by the method of adverse possession for applicable period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory period without interruption.”

23. In the matter before me, the Applicants have asserted that they are the second generation on the suit property, the pioneers thereon being their grandfathers who had taken possession of the suit property way back in the 1950s and had enjoyed quiet possession and use of the land peacefully without any interference from any quarter.

24. In support of their claim, the Applicants called two witnesses. PW1- William Garama Kazungu –testified that he was born on the suit property some 43 years back and that he had built his own house thereon without any opposition from the Defendant. It was his case that having lived on the land for long, they went to Mombasa to process titles therefor and that it was then they learnt that the suit property was being claimed by the Defendant’s family.

25. PW1 denied that the land belongs to the Defendant or his family as an extract of the title they were shown was dated 1908 and was in the name of one Nasoro Marara Nerali. He did not indicate when they went to Mombasa to process their titles but told the Court that some six years before his testimony, the Defendant had taken surveyors who did sub-divisions to the land without their involvement.

26. On cross- examination, PW1 told the Court that they tried to stop the Surveyors but they used force and proceeded to sub-divide the land. PW1 further told the Court that he had been charged three times with the offence of forcible detainer to the land on the instigation of the Defendant’s family.

27. The Applicants’ second witness- Kahindi Gari Mazonga (PW2) on his part told the Court he was also born on the land some 45 years back. He told the Court he had never known or seen the Defendant and was unaware of any notices asking them to vacate the land. On his part, PW2 denied any knowledge of sub-divisions of the suit property and told the Court that he had never seen any surveyors on the suitland.

28. As it were, there was very little placed before the Court by way of evidence from which the Court could draw an inference that the Applicants had been on the land since the 1950s. Other than their testimonies before the Court, I could find nothing placing the Applicants on the suit property prior to the year 2008 when they instituted this suit.

29. As conceded by PW1, a number of the Plaintiffs were charged in Court with the offence of Forcible Detainer contrary to Section 91 of the Penal Code. While it was not clear what became of the cases, a perusal of the Charge Sheet attached to the 1st Plaintiff’s Supporting Affidavit filed herein on 6th March 2009 indicates that, they were found on the land on 20th November 2008.

30. It was interesting to note that while they sued the Respondent for adverse possession, the Applicants were themselves casting doubt as to the validity of the Respondent’s title. Indeed, while the Applicants were required under the Rules to exhibit a Copy of the Respondent’s title, they did not do so and instead appeared to imply that the titles had been unprocedurally procured.

31. While they refer to the suit property in their pleadings as Portion No. 121 Malindi, it was evident that the said parcel of land had been sub-divided into Land Portion No. 10585, 10586 and 10587 and registered in the Defendants name and that of his family as can be seen from the Certificate of Postal Searches dated 22nd January 2009 and 23rd March 2009 annexed to the Respondent’s Supporting Affidavit filed herein on 24th March 2009.

32. In their testimony before this Court, the Applicants stated that the total acreage of the suit property was 85.5 acres. It was however unclear to me where they got that figure from. While PW1 and PW2 told the Court they occupied eight and six acres respectively of the suitland, it was obvious that they had never engaged a surveyor and those figures were just but their own estimations. The two witnesses did not also tell the Court the measurements of the portions occupied by their 21 other co-Plaintiffs.

33. From the record, it was clear to me that the Applicants had only occupied a small portion of the suitland. Following an application dated 22nd September 2010 by the Defendant seeking to commit the Plaintiffs to civil jail for contempt of Court, the Plaintiffs filed a Replying Affidavit in which they state as follows at paragraphs 7, 12 and 13 hereof: -

“7. That in the month of September 2010, the vacant portions in the suit premises was invaded by people unknown to us, a fact that we informed our advocates who did co-operate with the applicant’s Advocates and proceeded to ask the Court to visit the scene and make orders accordingly.

12. That Plot No. 121 is so big and occupied by so many other people including churches; we occupy a very small portion of the suit property. We attach photographs of our homesteads and have the same marked as Exhibit MDM- 1.

13. That I verily state that a larger portion of the suit property is occupied by people who are not parties to this suit. This is a part where permanent buildings are concentrated. Annexed herewith is photographs of the buildings or houses which are not ours but in the suit premises and marked as Exhibit –MDM- 2.”

34. Arising from the foregoing, it was imperative that the Applicants ought to have pleaded their case with more precision and brought evidence of the exact portions of the land they occupied if any to avoid a situation where the Court would make orders leading to a scramble for the land and thereby breeding anarchy and disorder.

35. At any rate this Court was not persuaded that the Defendant had been dispossessed of the suitland or that he had discontinued possession.

That can be seen from the concession by the Applicants that they only occupy a small section of the land and the fact that the Defendant was able to survey and sub-divide the land a few years before this suit was instituted.

36. In the premises, I find and hold that the Plaintiffs/Applicants have failed to prove their case for adverse possession against the Defendant. I dismiss the same. As the Defendant's Counterclaim was not prosecuted, I make no orders in regard thereto.

37. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 29th day of January, 2021.

J.O. OLOLA

JUDGE