



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NUMBER 296 OF 2016 (OS)

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE LAND ACT NO. 6 OF 2012

AND

IN THE MATTER OF: THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF: THE LIMITATION OF ACTIONS ACT CAP 22

AND

IN THE MATTER OF: ORDER 37 RULES 7 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: AN APPLICATION BY CATHOLIC DIOCESE OF MALINDI

REGISTERED TRUSTEES WORKING AS KIPINI ROMAN CATHOLIC CHURCH

THAT IT HAS OBTAINED TITLE TO FOUR (4) ACRES IN ALL THAT PARCEL OF

LAND KNOWN AS PLOT NO. 272 KIPINI CR NO. 6290 REGISTER BOOK NO. 7482

BY WAY OF ADVERSE POSSESSION

BETWEEN

CATHOLIC DIOCESE OF MALINDI REGISTERED TRUSTEES O/A

KIPINI ROMAN CATHOLIC CHURCH.....PLAINTIFF

VERSUS

MOHAMED BIN ALI DHIYEBI.....DEFENDANT

ALI MOHAMED ALI.....INTERESTED PARTY

JUDGMENT

1. By an Originating Summons dated and filed herein on 7th November 2016, the Catholic Diocese of Malindi and the Registered Trustees of

Kipini Roman Catholic Church (the Plaintiff) sought the following orders against Mohamed Bin Ali Dhiyebi (the Defendant): -

1. That the Plaintiff/Applicant is entitled to be registered (as the) owners of four (4) acres being part of all that parcel of land known as Plot No. 272 CR No. 6290 by dint and virtue of adverse possession and prescription;

3. That the Defendant/Respondent's title or right to four acres of all that parcel of land known as Plot No. 272 CR 6290 Kipini, Tana River County measuring about 64 acres or thereabouts and his claim to the same was extinguished and time barred by virtue of Section 16 of the Limitation of Actions Act, Cap 22 Laws of Kenya;

4. That the Plaintiff/Applicant has acquired legal possession and ownership rights by prescription and adverse possession of all those four (4) acres of land in all that parcel of land known as Plot No. 272 Kipini CR No. 6290 measuring 64 acres or thereabouts; and

5. That the Defendant/Respondent do bear the costs of this application.

2. The summons which is supported by an affidavit sworn by one of the Trustees of the Malindi Catholic Diocese Father Anthony Mwanzia Kitema is premised on the grounds that: -

1. The subject property is registered in the name of Mohamed Bin Ali Dhiyebi (the Defendant/Respondent);

2. The Plaintiff has been in occupation and possession of Four (4) acres of the Plot No. 271 Kipini since 2001;

3. The Plaintiff has tremendously developed the four (4) acres of the suit property by erecting a church, dug two boreholes, built four houses for its priests and staff and planted trees on the land;

4. The Four acres are currently wholly occupied by the Plaintiff whose entry, occupation and use thereof was without the Defendant's permission; and

5. The Plaintiff's occupation, use, possession and stay in the Four acres has been within the Defendant's knowledge since 2001.

3. As it turned out, the Defendant passed away in the year 1982 and by an application dated 5th June 2017 as filed herein on 6th June 2017, one Ali Mohamed Ali claiming to be his legal representative sought to be made a party in this case as a Defendant and to be allowed to respond to the Originating Summons. The said application was allowed with the consent of the Plaintiffs on 12th July 2017.

4. Subsequently and by a Counterclaim dated and filed herein on 18th July 2017, the said Ali Mohamed Ali suing as the Administrator of the Estate of Mohamed Bin Ali Dhiyebi accused the Plaintiff of entering onto the suit property and proceeding to erect buildings thereon on the purport that they had purchased a portion thereof from one Jagina Mikaya Lali.

5. The Defendant further accused the Plaintiff of proceeding to lease part of the suit property to Safaricom Ltd who then unknowingly entered into a lease agreement and proceeded to erect a Base Station thereon. Upon discovery of what had happened, the Defendant took steps to regain possession and Safaricom Ltd terminated the lease with the Plaintiff and instead entered into a fresh one with the Defendant.

6. The Defendant contends that the Plaintiff has however without any colour of right continued to remain in wrongful possession of part of the suit property measuring four acres or thereabouts and has erected several buildings thereon without the permission of the Defendant. As a result, the Defendant prays for Judgment against the Plaintiffs for: -

a) Vacant possession of the portion of land illegally occupied by the Plaintiff measuring four acres or thereabouts within all that parcel of land situated to the North East of Kipini and known as Plot No. 272 Kipini and the eviction of the Plaintiff, its servants or agents and any person claiming through it from the suit property and demolition of all its illegal structures or buildings erected thereon;

b) Costs of this suit and interest thereon at Court rates.

7. In addition to his Counterclaim, the Defendant also filed a detailed Replying Affidavit sworn on 18th July 2018 in which he details the events leading to his application to be enjoined as a Defendant herein. In order to reflect the changes, the Plaintiff also filed an Amended Originating Summons dated 30th January 2019 wherein they have now sued the Defendant as the legal representative of the Estate of Mohamed Bin Ali Dhiyebi.

The Plaintiffs' Case

8. At the trial herein, the Plaintiffs called one sole witness who testified in support of their case.

9. PW1- Father Anthony Mwanzia Kitema is a priest at the Catholic Diocese of Malindi and a Trustee of the Diocese. He relied on his two affidavits filed herein in support of the summons sworn respectively on 30th January 2016 and on 24th August 2017.

10. PW1 told the Court they were seeking to be granted adverse possession of the four acres portion of the suit property which he told the Court they had occupied since the year 2001. PW1 testified that they have since developed the land and built four houses thereon for the

priests and staff.

11. PW1 further testified that in 2001 when they occupied the property, they did not know the Plot Number thereof and only came to learn that someone was laying a claim thereon in 2014.

12. On cross-examination, PW1 conceded that their entry in 2001 followed the purchase of a portion of the land measuring 100 ft by 80 ft from one Jagina on 23rd August 2001. The said Jagina never showed the church any documents but he was staying on a house which was on the land. They later demolished the house to pave way for the Church. PW1 told the Court they continued buying small portions from Jagina until they got the four acres and denied that they had grabbed the land.

13. PW1 further conceded that they later on sought a Part Development Plan from the Tana River County Government. At some point, they leased a portion of the land to Safaricom Ltd who built their Base Station thereon. PW1 further conceded that sometime in 2014, they received a letter from the Defendant's Advocates informing them the land belonged to the Defendant. It is then they did a search and confirmed the position. That is when they decided to file the suit for adverse possession.

The Defence Case

14. The Defence equally called one witness in support of their case.

15. DW1- Ali Mohamed Ali is a resident of Lamu and the Defendant herein. He told the Court he is the Administrator of the estate of his father, the late Mohamed Bin Ali Dhiyebi who was the registered owner of the suit property containing by measurement 64 acres. DW1 testified that even though his father was registered as the proprietor of the suit property on 10th September 1957, the deceased never resided on the suit property but instead lived in Milimani, Lamu until his death in 1982.

16. DW1 further testified that as at the time of his father's death, the Plaintiff had not yet trespassed onto the property. He would later on 26th May 2006 be appointed the Administrator of the estate but he did not know its physical location and boundaries until sometime in 2014 when he engaged a Surveyor to locate and ascertain the boundaries thereof. That was the time DW1 came to realise that the Plaintiffs had trespassed onto the land and leased a portion measuring 0.0376 acre to Safaricom Ltd to erect a Base Station.

17. DW1 told the Court that he immediately took steps to repossess the property including writing several letters but the Plaintiffs have refused to vacate the land.

18. On cross- examination, DW1 told the Court he was one of his father's six children although he is the only one who was issued with the Grant. So far, it had not been confirmed. He conceded that he took about 16 years after being issued with the grant to go and check on the land as he had no money for a Surveyor.

19. DW1 further conceded that other than the Church, there were a number of people living on the land. He told the Court he had also asked those other people to vacate the land. He further conceded that there was a private school on the land but told the Court the Chief's office was outside the land. They had not been using the land and were waiting for those on the land to leave.

20. DW1 denied that he was prompted to lodge his claim when he saw Safaricom Ltd had put up a mast on the land.

Analysis and Determination.

21. I have perused and considered the pleadings filed herein, the oral and written testimonies of the witnesses and the evidence adduced at the trial. I have also taken into consideration the written submissions and authorities placed before me by the Learned Advocates for the parties.

22. The doctrine of adverse possession is provided under Section 7 of the Limitation of Actions Act which provides that a registered owner of land may not bring an action to recover the 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.

23. In that respect, Section 38 of the Limitation of Actions Act entitles the person in possession of the land to claim the same 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 of this Act, 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.”

24. The essential requirements that one has to meet in order to succeed in an application for adverse possession have been the subject of several judicial pronouncements. *In Wambugu –vs- Njuguna (1983) KLR 173*, the Court of Appeal held that adverse possession contemplates two concepts: Possession and discontinuance of possession. The Court went on to state in that case that the proper way of assessing proof of adverse possession would be whether or not the title holder has 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.

25. In *Mtana Lewa –vs- Kahindi Ngala Mwamgandi (2005) eKLR*, the Court of Appeal again observed as follows: -

“Adverse possession is essentially a situation 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.”

26. It is also a well-settled principle that a party claiming adverse possession ought to prove that this possession was *nec vi, nec clam, nec precario*, that is, peaceful, open and continuous. The possession must not have been acquired through force, in secrecy and with the authority or permission of the owner.

27. The Plaintiffs' case is that they have been in occupation of some four acres within the suit property since the year 2001. This fact did not appear to me to be much in contention as the Defendant himself admitted that his father the late Mohamed Bin Ali Dhiyebi who was the registered proprietor of the suit property never took possession thereof between the time of his registration in 1957 and his death in the year 1982.

28. At the same time, the Defendant told the Court that he never knew the physical location and boundaries of the suit property from the time he was issued with a Grant for the Administration of his father's estate in the year 2006 until sometime in 2014 when he engaged the services of a Surveyor to survey the land. The Defendant in fact admitted during his cross-examination herein that there were also other squatters on other sections of the suit property and that he and his family have never used the same as they have been waiting for the occupants thereof to vacate.

29. In contrast, the Plaintiffs told the Court that they have openly and notoriously used the four acres of the suit property since their entry thereon. In this respect, they had since constructed a permanent church building thereon as well as four houses for use by their priests and staff. They had also dug a borehole and planted trees on the land. Photos of the Church and other buildings and developments on the land were produced in evidence herein and it was clear to me that the Plaintiffs' use of the land had been open and notorious.

30. As part of their open and notorious use of the land, the Plaintiff even proceeded to enter into a Lease Agreement with Mobile Phone Service Provider Safaricom who proceeded to erect a base station on a portion of the suit property. Such usage was in my view consistent with ownership of the suitland as the Plaintiffs did not seek permission from any quarter prior to their engagement with this third party.

31. The Defendant submitted that it was not enough for the Plaintiffs to show that they had been in possession of the four acres of land for the statutory period of 12 years or more. It was their case that the Plaintiffs must prove by evidence that the Defendant was either dispossessed or that he had discontinued his possession for the statutory period. While that may as well be true, there was no evidence whatsoever that the Defendant ever had possession of the land apart from the fact that they held title for the entire land measuring some 64 acres.

32. The evidence placed before me demonstrated that the Plaintiffs first entered the land when they bought a section thereof measuring 100 feet by 80 feet from one Jagina Mikaya Lali who was apparently also just a squatter on the land. The Defendant never consented to the Plaintiffs' occupation of the land neither was there evidence that the said Jagina Mikaya Lali had occupied the land with the consent and/or permission of the Defendants. By taking up the land and building permanent structures of the scale depicted in the photographs produced herein, the Plaintiffs clearly manifested their intention to possess and own the land.

33. Between 2001 when the Plaintiffs entered the land and the year 2014 when the Defendant first wrote a letter asking them to vacate, some 13 years had lapsed. There was no evidence of the Defendant asserting his title to the land in the intervening period. Indeed, other than the demand letter dated 25th August 2014, it is clear that the Defendant did nothing to take back the land until some two years later when the Plaintiffs brought him to Court.

34. It was not enough for a proprietor of the land to merely write to a trespasser asking the trespasser to vacate the land. This Court indeed found it difficult to believe that the Defendant had for a period in excess of 13 years been unaware of the Plaintiffs' occupation of their land. From his testimony before the Court, he had been aware ever since he was granted Letters of Administration intestate on 26th May 2000 that his father owned the suit property. That it took him all that time to visit the suit property in order to establish its boundaries was not only negligent but also outrightly careless.

35. As the Court of Appeal observed in *Chevron (K) Ltd –vs- Harrison Charo Wa Shutu (2016) eKLR*: -

“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”

36. In the premises, I am satisfied that the Plaintiffs have proved their entitlement to the four acres portion of the suit property by way of adverse possession. Accordingly, I hereby allow the orders sought in the Amended Originating Summons dated 30th January 2019 as prayed and dismiss the Defendant's Counterclaim.

37. Each party shall however bear their own costs.

Dated, signed and delivered at Malindi this 22nd day of January, 2021.

J.O. OLOLA

JUDGE