



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 11 OF 2017

SARLA DEVI

GORAVE AMARNATH

VAIBHAV ARNATH (Suing as administratrix and Administrators of
the estate of the late AMAR NATH GUPTA).....**PLAINTIFF**

-VS-

OMAR SHARRIF ALL.....**DEFENDANT**

JUDGMENT

PLAINTIFF'S CASE

1. The plaintiffs are suing as administrators for the Estate of the late Amar Nath Gupta, the plaintiffs' father. In the plaint dated and filed on 23rd January 2017, the plaintiffs state that their deceased father owned PLOT NO. KAWALA "B" 1221 in Kilifi County which was subdivided after a dispute arose and a hearing was done by the land arbitration committee where a decision was reached by the board. The plaintiffs state that the defendant filed an appeal against the plaintiffs in relation to the suit property at the Land Control Board Committee. The plaintiffs aver that the decision of the Land Board Committee was quashed by the Judicial Review proceedings in Misc. Application No. 61 of 2015 filed by the plaintiffs against the defendant and 4 others.

2. The plaintiffs aver that the defendant has trespassed on the said PLOT NO. KAWALA "B" 1221 and has constructed a wall around it and has completely refused to move out. The plaintiffs further aver that the defendant has no legal document and/or title in respect of the said parcel of land and his occupation is illegal, null and void. The plaintiffs aver that when they attempted to access the said plot which has a market value of around Kshs.53 million, and can be leased out at Kshs.150,000 per month, the defendant denied them entry by mobilizing youths to prevent the plaintiffs from entering the said parcel of land and is now threatening to trespass on the said property claiming ownership. The plaintiffs state that no work and/or activity can be done on the said parcel of land until the defendant is evicted from the said plot. The plaintiffs aver that there is no other suit pending in court touching on the same subject matter and same issues between the plaintiffs and the defendant save the Misc. Application No. 61 of 2015 in Mombasa High Court. The plaintiffs pray for judgment against the defendant for:

- a. A declaration that the parcel of land NO. PLOT NO. KAWALA "B" 1221 belongs to the estate of Amar Nath Gupta**
- b. A vacant possession and eviction from Plot No. Kawala "B" 1221.**
- c. Mesne profit at Kshs.150,000 per month from 14th October, 2016 until the matter is heard and determined.**
- d. Costs and interest of this suit.**
- e. Any other relief that this Honourable Court may deem fit and expedient to grant.**

3. Gorave Amarnath the 2nd plaintiff testified on behalf of the plaintiffs. He relied on and adopted his witness statement dated 23rd January, 2017 as his evidence in chief. He basically reiterated the contents in the plaint and produced as exhibits copies of the Grant; authority to sue; title for plot no. Mariakani/Kawala "B"/1221; Order dated 6th September, 2016 in Misc. Application No. 61 of 2015 – JR; letter dated 9th September, 2016; valuation report dated 3rd September, 2016; and photographs. The plaintiffs evidence was that the last time they were in

possession of the suit property was in the year 2015 when the defendant built a boundary wall and evicted them and thereafter denied them access.

DEFENDANT'S CASE

4. In the amended defence and counter-claim dated 11th April, 2018, the defendant avers that he is entitled to be registered as owner of the suit property by virtue of long and uninterrupted possession since 1988. That there was Civil Appeal No.112 of 2016 pending against the High Court decision. The defendant avers that he has been in occupation of the suit property since 1988 having bought the same from its previous owners. The defendant avers that the plaintiffs suit to recover the suit premises is statute barred and in the counter-claim prays for:

i. Plaintiffs suit against him be dismissed.

ii. A declaration that the defendant is the rightful owner of PLOT NO. KAWALA "B" 1221.

iii. A permanent injunction do issue restraining the plaintiff, her servants or agents from taking over possession, occupying, alienating, trespassing/interfering, selling or disposing of or dealing in any way whatsoever with all that property identified as PLOT NO. KAWALA "B" 1221.

iv. The title held by the plaintiff over the subject land be declared null and void.

v. The plaintiffs be condemned to pay the costs of this suit.

5. The defendant testified that he bought the suit plot in 1998 from two brothers, namely Bora Nyawa Mwangale and Mdogo Kadumo. That when he purchased the plot, titles had not been issued in the area. That he entered into an agreement for sale at the chief's office Mariakani in the presence of the area chief and elders. He produced the sale agreement as D-exhibit 1. He stated that upon purchasing the plot, he fenced it with barbed wire which were later stolen. That he later put up a perimeter wall. The defendant stated that he knew the plaintiffs but maintained that the suit plot was his which he bought from the said two brothers. He stated that the sellers even showed him the graves of their relatives on the land. That since 1988, nobody interfered with his possession of the property. That he is the owner of the property and has developed it and uses it for his business. That he has also purchased adjacent plots. He testified that before purchasing the plot, he confirmed that the sellers were the rightful owners and that he even confirmed the same from the village elders.

6. When cross-examined, the defendant stated that he bought the land in 1988 and that was 2.5 acres. He stated that after 1988, the land was adjudicated through the adjudication process and that he was present. He stated that there was a committee which received complaints. He stated that he was allocated plot no 31. He also confirmed that there was a dispute before the adjudication committee which was lodged by the late Armanath Gupta. That the committee decided that the land belonged to the defendant and the late Armanath Gupta appealed against that decision, and the appeal ruled that the land be subdivided into two, that is between the late Gupta and the defendant. The defendant stated that he retained title number 31, which gave rise to PLOT NO. 1221. The defendant stated that he was not satisfied and he appealed to the District Adjudication Officer who confirmed the committee's decision that the land be divided into two. The defendant stated that he again appealed to the Minister who ruled that PLOT NO. 1221 be cancelled and the entire plot No. 31 be given to the defendant. That the plaintiffs were not satisfied and filed judicial review proceedings (Misc. Application No. 61 of 2015) and in its ruling, the High Court quashed the minister's decision. The defendant stated that his plot was subdivided into plot no. 31 and 1221 and that he has title for plot no. 31 and is claiming PLOT NO. 1221 by virtue of adverse possession. He confirmed that the suit plot is within the perimeter fence put up by the defendant.

SUBMISSIONS

7. The plaintiffs submitted that their late father was the first owner and enjoyed proprietorship rights as provided for under Section 26 of the Land Registration Act. That the plaintiffs title was procured through first registration which was subjected to the dispute resolution mechanism under the Land Adjudication Act, Cap 284 Laws of Kenya and therefore acquired an impeccable title. It was submitted that the defendant was accorded an opportunity to challenge the plaintiffs' title but failed and therefore his action of unilaterally moving into the plaintiffs' land and fencing it off is belligerent and should be discouraged. That the rights of a first registered owner by virtue of Section 26 of the Land Registration Act is absolute and can only be impeached in special circumstances as provided for under the Act. That the defendant has not challenged the plaintiffs' title on account of fraud or misrepresentation, neither is his claim based on allegation that the title was acquired illegally, unprocedurally and through a corrupt scheme. It is further submitted that the ownership of this property has been subject of litigation up to the Court of Appeal, and the defendant cannot therefore lay a claim for adverse possession or at all. The plaintiffs urged court to allow the suit in terms of the prayers sought in the plaint with costs and dismiss the defendant's counter-claim with costs. The plaintiffs relied on the case of **Mohammed Baffiq Investments Limited –v- Shelly Holiday Inn & 9 Others (2020) eKLR and Civil Appeal No. 112 of 2016.**

8. On his part, the defendant submitted that he took possession of the suit property on 22nd November, 1988 when he purchased it and has been enjoying possession ever since. That the said possession was hostile, open, continuous and notorious. The defendant submitted that he has satisfied the ingredients for adverse possession and prayed for the plaintiff's suit to be dismissed with costs and the counter-claim allowed with costs. The defendant relied on the case of **Wilson Muthoka Mutunga –v- Tito Ndiku & Another (2018)eKLR; Ann Itumbi Kiseli –v- James Muriuki Murithi (2013)eKLR; Celina Muthoni Kithinji –v- Safiya Binti Swaleh & 8 Others (2018)eKLR; Mbira –v- Gachuhi (2002) 1 EALR 137; Jandu –v- Kirplal & Another (1975) EA 225; and Mtana Lewa –v- Kahindi Ngala Mwangandi (2015)eKLR.**

DETERMINATION

9. I have considered the pleadings, the evidence tendered and the authorities cited. The issues for determination are whether the plaintiffs are

entitled to the prayers sought in the plaint; whether the plaintiffs' proprietary rights to the suit property has been extinguished and whether the defendant is entitled to the suit land by way of adverse possession and therefore entitled to the orders sought in the counter-claim.

10. The central issue featuring in the dispute herein is ownership of the suit property known as PLOT NO. KAWALA "B"/1221. It is not in dispute that the suit property is registered in the name of Amarnath Gupta, the plaintiffs' late father. According to the title deed that was produced as an exhibit, the deceased was registered and issued with a title deed as a first owner on 28th January, 2014. From the material on record, it is apparent that the suit property was the subject of a dispute under the Land Adjudication Act, Cap 284 Laws of Kenya. The dispute was filed before the Arbitration Board and the matter finally ended up before the Minister. It is also apparent that whereas the Arbitration Board and Adjudication committee ruled in favour of the plaintiffs and the defendants lodged an appeal with the Minister pursuant to Section 29 of Cap 284 and the appeal to the ministers' panel decided in favour of the defendant. The plaintiffs were aggrieved by the decision of the Minister and filed for judicial review proceedings in Mombasa High Court Misc. Civil Application No. 61 of 2015. In the ruling dated 25th August, 2016, the Court (Emukule J) issued an order of certiorari and quashed the decision of the Minister that was made through the Deputy County Commissioner Kaloleni Sub County, County of Kilifi. Undeterred, the defendant filed Civil Appeal No. 112 of 2016 before the Court of Appeal. By its judgment dated 28th April 2018, Court of Appeal dismissed the appeal. In the meantime, the defendant had fenced the suit property completely blocking the plaintiffs from accessing it, hence the filing of this suit.

11. Section 26 of the Land Registration Act provides as follows:

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all court as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrance, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

- a. On grounds of fraud or misrepresentation to which the person is proved to be a party; or**
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

12. Sections 24 and 25 of the same Act provide as follows:

“24. Subject to this act

- a. The registration of a person as the proprietor of land shall vest in that person the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto; and**
- b. The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.**

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

- a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**
- b) to such liabilities, rights and interests as affected the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.**

(2) nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

13. From the evidence on record, it is clear that the plaintiffs' late father procured registration in his name on first registration. It is also quite clear that the dispute over the suit property was subjected to the resolution mechanism under Cap 284, and the defendant was accorded an opportunity to assert his claim but he failed to do so. The defendant's action of forcefully moving into the plaintiffs' land and fencing it off no doubt was unlawful. In this case, the defendant has not tendered sufficient evidence to impugn the plaintiffs' title. Moreover, the defendant's claim is not founded on fraud or misrepresentation where the plaintiffs or their late father have been found to be parties. The court further did not find the defendants' claim to be based on the claim that the plaintiff's title was acquired illegally, unprocedurally and through a corrupt scheme. If anything, it is clear from the material on record that the plaintiffs' title was acquired through a lawful process, including being subjected to dispute resolution mechanism under Cap 284 and later through judicial process. It is quite evident that the ownership of the suit property has been subject of litigation, up to the Court of Appeal. The defendant cannot therefore lay a claim for adverse possession or at all. Even the claim for adverse possession cannot succeed because going by the title the plaintiffs only acquired title to the suit property on 28th January, 2014. Before that, there was no interest or right recognized under the law. Therefore, even if the defendant was in occupation since 1988 as he claims, that occupation in my view was not adverse to the plaintiffs' title which was only issued in 2014.

14. Having considered and reviewed all the evidence and material placed before the court, I find and hold that the plaintiffs have proved their case against the defendant on a balance of probabilities. The defendant has however, not proved his counter-claim against the plaintiffs.

15. Accordingly, and in light of the above findings, I hereby enter judgment as follows:

- a. A declaration be and is hereby made that PLOT NO. KAWALA "B" 1221 belongs to the estate of Amarnath Gupta.
- b. The defendant to give vacant possession to the plaintiffs within 60 days of the delivery of this judgment, in default the plaintiffs shall be at liberty to evict the defendant from PLOT NO. KAWALA "B" 1221.
- c. Mesne profits at Kshs. 150,000 per month from 14th October, 2016 until vacant possession is given.
- d. The defendant's counter-claim is dismissed with costs to the plaintiffs.
- e. Costs of the suit together with interest thereon are awarded to the plaintiffs against the defendant.

16. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE