



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CASE NO. 97 OF 2017(O.S)

RUTH NEKESA KAI.....APPLICANT

PATRICK JUMA WANYONYI.....APPLICANT

VERSUS

SOSPETER NYAGWANSA GWARO ARASA.....RESPONDENT

JUDGMENT

1. By an Originating Summons dated and filed herein on 28th April 2017, Ruth Nekesa Kai and Patrick Juma Wanyonyi(the Applicants) prays for orders against Sospeter Nyagwansa Gwaro Arasa (the Respondent) as follows:-

- 1. That the Respondent's interest on Plots known as Kilifi/Mtwapa/1440 and Kilifi/Mtwapa/1271 have been extinguished;***
- 2. That the Applicants herein be registered as the proprietors in common of all the parcels of land known as Kilifi/Mtwapa/1440 and Kilifi/Mtwapa/1271 in place of the Respondent Sospeter Nyagwansa Gwaro Arasa by reason of the fact that the Applicants have become entitled to the said parcels by adverse possession;***
- 3. That the District Land Registrar Kilifi do issue Certificate of Title for the parcels of land known as Kilifi/Mtwapa/1440 and Kilifi/Mtwapa/1271 in the names of the Applicants;***
- 4. That the Order referred to in paragraphs 2, 3 and 4 above be registered against the Titles to Plots known as Kilifi/Mtwapa/1440 and Kilifi/Mtwapa/1271 in terms of Section 38(2) of the Limitation of Actions Act, Cap 22 of the Laws of Kenya.***
- 5. That the costs of the Originating Summons be provided for.***

2. The Originating Summons is anchored on an Affidavit sworn by the 1st Applicant Ruth Nekesa Kai and is based on the grounds that:-

- i) The Applicants have been in uninterrupted exclusive physical possession of the two parcels of land for a continuous period of more than twelve years;***

ii) The Respondents rights and/or interests in the said parcels of land have been extinguished; and

iii) It is fair and just that the Applicants are registered as the owners in common of the said parcels of land.

3. Following an application for substituted service made by the Applicants, the Respondent was served vide an advertisement placed on the People Daily of 21st November 2017. The said advertisement required the Respondent to enter appearance and/or file a response to the Originating Summons within 21 days of the Publication. The Respondent however neither entered appearance nor filed a response. Accordingly this matter proceeded by way of formal proof.

4. At the trial herein, the 1st Applicant who testified as the sole witness told the Court that she had lived on the suit properties with her family since 1995. It was her case that they have built permanent and temporary structures on the two parcels of land in which she lives with the 2nd Applicant who is her brother.

5. The 1st Applicant further told the Court that she does not know the Respondent although there is a time the Respondent had gone to the land claiming it belonged to him. She told the Court that they have however lived peacefully on the property without interruption from any person whatsoever. It was her case that having lived on the land for so many years, they have since acquired legal interest over the same by way of adverse possession and urged the Court to issue orders in their favour as prayed in the Originating Summons.

6. I have considered the pleadings filed by the Applicants, the testimony of the sole witness who testified herein and the exhibits submitted at the trial. I have also perused and considered the submissions filed herein by Mr. Shimakha, Learned Counsel for the Applicants.

7. The circumstances leading to the Claim for adverse possession herein are rather interesting. According to the two Applicants, their father Jason Juma Khasolo was the original proprietor of the two parcels of land measuring 2 ½ acres comprising the suit premises. Sometime in 1995, the said father to the Applicants sold two acres thereof to the Respondent. It is the Applicants case that the Respondent then requested for permission to also farm on the remaining ½ acre which permission was granted.

8. According to the Applicants, when the Respondent proceeded to process his title he did so for the entire 2 ½ acres and not just the two acres that had been sold to him. However, after purchasing the land and processing the title in his name, the Respondent never took possession thereof but went back to his home in Naivasha.

9. It is the Applicants case that they grew up on the suit properties where they used to help their father plant fruit trees, coconut, cashew nuts and other crops with the help of a lady known as Joyce Siti Kenga who had been brought in by their father to take care of the farm and who still lives on the land. It is the Applicants case that they have cultivated and utilised the suit properties in the absence of the owner for a period exceeding twelve years and hence the prayers made herein.

10. In my view, for adverse possession to mature into an entitlement to the land in question, the following conditions ought to be fulfilled:-

i) The trespasser needs to demonstrate that he/she has been in continuous and uninterrupted possession of the land without the consent of the owner of the land.

ii) The trespasser's interests have to be inconsistent to the interests of the true owner of the land.

iii) The possession has to be open and notorious, to enable the owner be on notice that there is trespass on his land.

iv) The possession has to be actual to enable the owner to have a cause of action which if he fails to act on within a time period, he will be estopped by law from claiming the land back.

v) The possession has to be exclusive to avoid confusion on who is entitled to the title to the land.

11. In the circumstances before me, the Applicants' father one Jason Juma Khasolo is said to have sold two acres of the land to the Respondent. Neither the Sale Agreement nor the date when the sale occurred was given to Court. The Applicants accuse the Respondent of proceeding to register the entire parcel of land measuring 2 ½ acres into his name.

12. From a perusal of the Respondent's titles produced by the Applicants, he was issued with a Title Deed for Kilifi/Mtwapa/1271 on 13th August 1995 while that for Kilifi/Mtwapa/1440 was issued on 13th June 1997. That would mean that as at 2017 when this suit was filed, the Respondent had had title for the suit properties for at least twenty years.

13. It was however not clear to me when, if at all, the Applicants title became hostile and/or adverse to that of the Respondent. I say so because the Respondents is said to have purchased the suit properties from the Applicant's father. The said father was neither a witness in these proceedings nor were his whereabouts disclosed.

14. According to the Applicants, the Respondent requested their father to use the remaining ½ acre of land which had not been sold to him for farming before going ahead to annex the same to his two titles. It is their case that as at the time the land was sold, their father had invited one Joyce Siti Kenga to take care of the land and the children of the Applicants' father.

15. According to the Applicants, they have been assisting the said Joyce Siti Kenga in taking care of the land. The said Joyce Siti Kenga is said to be still residing on the suit properties and, apparently taking care of the same. She was neither joined in these proceedings nor called as a witness herein.

16. From the material placed before me, if the Applicants were to be believed, they already had access to the suit property when the Respondent purchased the same from their father. Nothing was placed before me to show that thereafter, they had done anything inconsistent with the fact that they are the children of the vendor of the land and that was hostile to the interests of the Respondent. Indeed while at paragraph 16 of the Supporting Affidavit they purport to have constructed permanent and other structures on the land, nothing was produced in evidence to demonstrate the existence of such structures.

17. In the circumstances of this case and even though this was an undefended claim, I was not satisfied that the Applicants case had met the threshold required in proof of a claim for adverse possession. The same is accordingly dismissed with no order as to costs.

Dated, signed and delivered at Malindi this 11th day of July, 2019

J.O. OLOLA

JUDGE