



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 326 OF 2014 (OS)

SALIM SAID JUMA & 10 OTHERS.....PLAINTIFFS

VERSUS

RAFIQ MOHAMED WALI MOHAMED ANSWARI & ANOTHER.....DEFENDANTS

JUDGMENT

1. By the originating summons dated 19th December, 2014 and filed in court on the same date, the plaintiffs applied to be declared to have acquired by adverse possession 3.60 hectares of Plot No.137/I/MN. They want to be registered as owners of the said land and to be issued with a certificate of title. In support of their claim, the plaintiffs filed an affidavit sworn by Salim Said Juma on his own behalf and on behalf of the other applicants/plaintiffs.

2. The plaintiffs aver that they have occupied and/or stayed and/or resided in the suit premises for over twelve (12) years without the permission and/or consent and/or authority of the defendants. That the registered owners of the suit property are the defendants as sued. The 1st plaintiff averred that he entered the land in the year 1964 and has not known any other place as residence. That all his children were born on the suit premises with the last born being born in 1994 while the last person to enter the suit premises amongst the plaintiffs did so in the year 1992. The plaintiffs aver that their stay and/or occupation has been continuous, open, adequately uninterrupted and above all adverse to the title of the defendants. That the defendants do not have a building or structures on the suit property which to them is a clear indication that the defendants discontinued their possession of the plot in favour of the plaintiffs who they state, have developed the suit premises. That the defendants having been indolent on their rights of ownership of the plot for many years, the law cannot aid them to secure it back as the same has already been acquired by the plaintiffs by way of adverse possession. The plaintiffs state that they have stayed and/or occupied the suit property for many years without being threatened with eviction by anyone.

3. In his evidence, PW1, Salim Said Juma testified that he was in court because he was evicted from where he was staying in. He told the court that he had stayed for more than thirty (30) years before he was removed. He informed the court that the other plaintiffs in the suit were his children and grandchildren who had authorized him to file the suit. He testified that he had 9 children and 12 grandchildren. He stated that he no longer stayed on the suit premises but in a neighbouring plot and that he had built and was doing farming on the suit premises but that the coconut trees and maize and other crops that he had planted were cut down and graves that were on the suit property were destroyed. He further stated that they were arrested while in a meeting.

4. Upon cross-examination, PW1 admitted that they were removed from the suit premises in the year 2013 before they had filed the suit. He also admitted that his houses were not demolished but he had brought them down himself and went to live with his mother in a nearby plot. The mother is the 11th plaintiff and the witness stated that she was wrongly included in the case. He stated that he had not filed a previous case and did not know if his mother had filed one claiming Plot No. 397. He stated that he was not aware of HCCC NO. 123 of 2009 and constitutional petition No. 36 of 2011, but was aware of a criminal case in which he was charged alongside others, among them his brothers and children.

5. The 2nd defendant filed his response to the originating summons by way of an affidavit sworn on 30th March 2015 and filed in court on 31st March 2015. He also filed witness statements and list of documents. The 2nd defendant testified in terms of the averments in his affidavit. He stated that he bought the suit property in the year 2010 from one Dr. Lawrence Gikonyo Gathua and that at the time of purchase, the property was vacant though there was a caretaker who had planted maize. That the plaintiffs were staying in a neighbouring plot. The 2nd defendant produced a title in his name, certificate of postal search, supply contract with Kenya Power & Lighting Company, Photographs, valuation report, survey report, and demand letter issued to him by the plaintiffs advocates. His evidence was that the plaintiffs were his neighbours to the extent that he even used to store his building materials in their house when he was developing the property. He testified that all was well from the year 2010 until on 14.9.2014 when a group of rowdy people invaded the suit premises, destroyed crops and other property and subdivided the land among themselves. A report was made to the police and eight (8) people were arrested and charged. That a criminal case against some of the invaders is still pending at Shanzu Law Courts. The 2nd defendant added that the plaintiffs herein including the 9th and 11th plaintiffs herein had filed HCCC No.110 of 2006 (OS) claiming adverse possession. Other cases filed were

HCCC No.123 of 2009 and constitutional petition No.136 of 2011. The pleadings, proceedings and judgments which were produced as exhibits. The 2nd defendant maintained that the plaintiffs are his neighbours and have never been on the suit land.

6. DW2 was Erick Mosei who testified that he was a farm worker for the 2nd defendant in the suit land. He adopted his witness statement dated 27th March 2015 as his evidence. His evidence was that the plaintiffs live in land neighbouring the suit land.

7. Agnes Ndambu a valuer testified as DW3. She testified that she was instructed by the 2nd defendant in 2010 to visit his property to inspect and make a report. She testified that when she visited the suit land, the same was vacant with no graves nor developments. She produced her report as an exhibit.

8. Edward Marenye Kiguru, a licensed Land Surveyor testified as DW4. He was instructed by the 2nd defendant in 2012 to relocate the boundary beacons and prepared a report. He testified that pursuant to the 2nd defendant's instructions, he subdivided the land into ten (10) portions. He also stated that during his visit, there were no encroachments on the property. He also produced his report as an exhibit.

9. The 1st defendant never participated in the suit. Both the plaintiffs and the 2nd defendants filed written submissions through their respective advocates. It was the plaintiffs' submission that they had a legitimate and/or valid claim to the suit land, adding that the 2nd defendant regained possession unlawfully, illegally and/or unprocedurally. The plaintiffs relied on the case of **Njuguna Ndato –v- Masai Itumo & 2 Others, C.A. No.231 of 1999 (Nakuru)**. The plaintiffs submitted that they have proved their case on a balance of probabilities and their claim should be allowed with costs.

10. On his part, the 2nd defendant submitted that the plaintiffs have failed to meet the threshold required to establish and prove the elements for a case of adverse possession. That there was no evidence that the plaintiffs were in actual possession of the suit land. That the 2nd defendant, being the registered proprietor of the suit premises, is protected by Article 40 (1) & (2) of the Constitution of Kenya. That the plaintiffs have in the past filed different cases claiming adverse possession for different portions of land but they lost in all those cases. The 2nd defendant relied on the case of **Kiptanui A. Chuma –v- Kibor A. Kolil (2014)eKLR; William Kipnyor Rotich –v- Paul Kiprop Karoney (2020) eKLR and Josephat Nuhu Alikhana –v- Liyanze Roselyne Ingato (2019)eKLR**.

11. This court has carefully considered the pleadings, the evidence and submissions herein. The issues for determination are whether the plaintiffs have proved their case to the required standard and whether they are entitled to the reliefs sought.

12. In deciding whether or not the plaintiffs have proved their case to the required standard in civil cases, the plaintiffs must prove that they have been in occupation of the suit land for a period of over twelve (12) years; that such occupation was open, peaceful and continuous without interruption from the registered owner and that such occupation was adverse i.e. inconsistent with right of the registered owner. In **Wambugu –v- Njuguna (1983)KLR 173**, the Court of Appeal restated the principles for adverse possession and held as follows:

“1. The general principle is that until the contrary is proved, possession in law follows the right to possess.

2. In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of this soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years as to enable him, the respondent, to title to that land by adverse possession.

3. The Limitation of Actions Act, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession. The proper way assessing proof of adverse possession would then 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 has been in possession for the requisite number of years.”

13. In the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2015)eKLR**, the Court of Appeal (Makhandia JA) stated as follows:

“Adverse possession is essentially a situation where a person takes possession of land and 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 is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. ”

14. Are the plaintiffs entitled to the suit property by way of adverse possession? There is no doubt that the defendants are the registered proprietors of Plot Number 137/I/MN. From the title produced the transfer in favour of the 2nd defendant for ½ share was registered on 12th November, 2011. The other half was transferred to the 2nd defendant on 17th October, 2014. That is the title the plaintiffs want to have been extinguished by effluxion of time. A close consideration of the evidence on record reveals that the title held by the 2nd defendant had not exceeded twelve (12) years from the time the same was registered in his name. This suit was filed on 19th December, 2014 while the 2nd defendant became the registered owner of the suit property on 12th November, 2011 (for 1/2share) and on 17th October, 2014 (for the remaining 1/2share). This confirms that the plaintiffs cannot purport to have been in possession adverse to the defendants for the requisite period of twelve (12) years.

15. I am aware that the law is well settled that prescriptive rights are never affected by mere change of ownership. The Court of Appeal in

Githu –v- Ndeete (1984)KLR 776 held inter alia, that “the mere change of ownership of land which is occupied by another person under possession does not interrupt such person’s adverse possession”. From evidence on record, it is not undisputed that the plaintiffs are occupying a parcel of land neighbouring the suit land. There was no evidence that the plaintiffs adduced confirming that they were in actual possession of the suit land as claimed. It is a well settled principle that a party claiming adverse possession must prove that his possession is ‘*nec vi, nec clam, nec precario*’, that is peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that the possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. In this case, there was no evidence to show that the plaintiffs were ever in actual possession that was adverse to the defendants, or indeed the previous registered owners. Moreover, it is also quite clear from the material on record that the plaintiffs, together with others, filed different cases claiming adverse possession for different portions of land which cases they lost. No doubt the present suit would still be res judicata those previous cases. Those include HCCC No.110 of 2006 (OS), HCC No.123 of 2009 and Constitutional Petition No.136 of 2011. Some of the plaintiffs herein were parties in those cases. Quite clearly, the matters raised in those suits are substantially the same as those in present suit. All the suits raise the claim of alleged adverse possession. It does not matter that the current suit has been filed by a few parties, it is still the same issues. I therefore have no hesitation in finding that this matter was alive for determination in the previous suits and were settled in the rulings and judgments in those previous cases.

16. Considering the totality of the evidence availed in this case, and applying the legal principles as outlined above, I am not satisfied that the plaintiffs have proved their case on a balance of probabilities. It is my finding that the plaintiffs have failed to bring themselves within the limits of the doctrine of adverse possession. In the end, the plaintiffs’ claim fails and it is dismissed with costs to the 2nd defendant.

17. Orders accordingly.

DATED, SIGNED and DELIVERED virtually at MOMBASA this 20th day of May 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE