



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 404 OF 2017

(FORMERLY MOMBASA HCCC NO. 74 of 2006)

LALICHANDRA DURGASHANKER PANDYA1ST PLAINTIFF

PRAVINA RAMESHCHANDRA PANDYA.....2ND PLAINTIFF

VERSUS

E.K BAYA & OTHERSDEFENDANTS

CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

CIVIL SUIT NO. 170 OF 2008 (OS)

FRANCIS KOMBE NZAI & 105 OTHERS APPLICANTS

VERSUS

LALITCHANDRA DURGASHANKER PANDYA.....1ST RESPONDENT

PRAVINA RAMESHCHANDRA PANDYA2ND RESPONDENT

JUDGMENT

(Suit by registered owners of land against various individuals seeking orders that the individuals be restrained from the suit land; countersuit by the occupants of the land seeking title to the land by way of adverse possession; proof in a case for adverse possession; court not finding that the claimants have proved the time that they commenced possession of the land thus not possible for the court to find that the claimants have accumulated the required 12 years of continuous possession to sustain a suit for adverse possession; claim for adverse possession dismissed; judgment entered in favour of the registered owner of the suit land)

A. Introduction and Pleadings

1. This judgment relates to two suits. The first to be filed was the suit Mombasa HCCC No. 74 of 2006 which is a suit commenced through a plaint filed by Lalitchandra Durgashanker Pandya and Pravina Rameshchandra Pandya against E.K Baya, Amina S. Mwinyi, F.K. Nzai and Mark Owango. In the plaint, the plaintiffs pleaded that they are the registered owners of the Plot No. 258 Section I, MN (the suit land). They pleaded that on a date unknown to them but being in the beginning of the year 2006, the defendants together with others unknown to the plaintiffs, threatened to invade and forcibly occupy the suit land without any colour of right, with the sole intention of dispossessing the plaintiffs. In the suit, the plaintiffs asked for orders of a declaration that they are the registered owners of the suit land, an injunction to restrain the defendants by themselves, their agents, servants or any person claiming under them from the suit land, and costs of the suit. Together with the plaint, the plaintiffs filed an application dated 19 April 2006, seeking orders inter alia for leave to allow the plaintiffs to sue the defendants in a representative capacity and the suit to be advertised. These prayers were allowed on 20 April 2006. The defendants entered appearance and filed defence on 8 June 2006. They denied that the plaintiffs were the registered owners of the suit land. They also pleaded that the plaintiffs' claim is time barred as it had been made over 12 years after the entry of the defendants into the suit land. They

pleaded that they are entitled to the land by way of adverse possession.

2. Subsequently, the defendants in the above suit and others, in total 106 persons, commenced the suit Mombasa HCCC No. 170 of 2008 (OS) through an Originating Summons dated 9 July 2008 where they formally sought the determination of the question whether they are entitled to be declared owners of the suit land by way of adverse possession. The supporting affidavit to the OS was sworn by Ephraim K. Baya. In it, he deposed inter alia that he himself entered the suit land in the year 1978 without the permission or authority of the registered owners, and has since his entry, been in open, uninterrupted, continuous and exclusive possession. He deposed that the other claimants had also been on the land for over 12 years and that some entered the land in the 1930s and/or were born on the land in the 1940s, whereas others entered the land in 1990. He averred that they have been in open, continuous and exclusive possession, "save for an unlawful incident that occurred in 2005 where the defendants burnt down the plaintiffs' houses but at that time, the 12 years period had already expired, and thus (their) possession of the plot was and/or is adequate in continuity and in publicity." He further deposed that prior to the unlawful demolition of their houses, the plot was fully developed and/or occupied by over 100 people with their children, and further that the respondents did not have any structure on the land, and had therefore been dispossessed. He deposed that in 1980, the respondents were granted consent to purchase the land by the Mombasa Land Control Board "with a condition that compensation be paid to squatters living on the plot, then BUT since then no payment has been made to those residing on the plot at that time and the Board knew that there were people living on the plot." He deposed that they know no other place of residence except the suit land.

3. The two suits were consolidated through the order of Ibrahim J (as he then was) made on 14 September 2012. Subsequently on 12 December 2017 directions were taken that the suit Mombasa HCCC No. 170/2008 (OS) be deemed a counterclaim to the suit Mombasa HCCC No. 74 of 2006 and the lead file be Mombasa HCCC No. 74 of 2006. The files were later transferred from the High Court to the Environment and Land Court and given the serial number Mombasa ELC No. 404 of 2016.

4. The 1st plaintiff, Lalitchandra Durgashanker Pandya, died on 3 June 2014, and his suit thus abated one year later. On 24 November 2016, an application to revive his suit was made, with the further prayer that one Kamlesh Pandya be made party to the suit, in place of the deceased 1st plaintiff. The application was however dismissed, with the court (Omollo J) observing that since the registration of the suit land was joint, then no prejudice would be caused by failure to revive the suit in respect of the deceased 1st plaintiff. There is therefore currently only one plaintiff, being Pravina Rameshchandra Pandya despite the title of the case bearing two plaintiffs.

B. Plaintiff's Evidence

5. PW-1 was Harshit Mulvantrai Rawal, a holder of a power of attorney from the surviving plaintiff. His evidence, as adopted from his witness statement, was that the plaintiffs (Lalitchandra and Pravina) purchased the suit land on 29 July 1981 from the previous proprietors Miguel Cassio, Hamilton Antao, Nicanor Silverio Antao and Antonio Emerquinho Antao, for a consideration of Kshs. 210,000/=. They paid the amount and were issued with title in May 1982. They then took vacant possession of the property using the land for horticultural farming and sometimes they planted maize and beans. He stated that sometimes in the year 2005, the land was invaded by a number of people who were strangers to the plaintiffs and they claimed compensation. However, the plaintiffs secured the land when the area security repulsed them in April 2005. Later in the year 2006, the defendants and other people threatened to invade the land and forcibly occupy it and that is when the plaintiffs filed suit. He stated that the defendants trespassed on the land and uprooted the crops of the plaintiffs and even harvested the same by force. He stated that before, the plaintiffs had been occupying the land from 1981, without any interruption, until 2005 when the defendants invaded the land, and he refuted their claim that they have been on the land for 12 years. He stated that the letter of consent (from the Land Control Board) provided for compensation to squatters, but at the time the land was purchased, there were no squatters and no squatters presented themselves for compensation. He stated that at the time of purchase, the only occupant was one caretaker, namely Mzee Tsuma Mwangombe and his family, whom they inherited from the sellers. He testified that he had a small 2-bedroomed structure. He stated that at the moment, the land is filled with structures built by the defendants after the plaintiffs had already come to court. He referred to a letter dated 10 July 2006 written by the Provincial Commissioner stating that the owners are not absentee landlords.

6. Cross-examined, he testified inter alia that when the land was purchased in 1981, he was 6 years old. The land is 11 acres. He said that he used to go there every weekend and the land was vacant. He was shown some photographs said to be of the land and he mentioned that the structures therein are new. He testified that as at 2006, the plaintiffs had a caretaker on the land and they would collect vegetables every weekend.

7. With the above evidence, the plaintiff closed her case.

C. Defence Evidence

8. The defendants called Amina Shamaweya Mwinyi as their witness. She adopted, as her evidence, a witness statement prepared by one of the claimants, Ephraim Baya (said to be deceased but who had made a statement and had sworn the affidavit in support of the Originating Summons). In that statement, Mr. Baya had stated inter alia that they (defendants) have constructed residential houses in their respective portions of land, and they, and their families, live in those houses. He stated further that the Land Control Board (LCB), gave consent (to sell) on 13 October 1980, on condition that the plaintiffs compensate the squatters living on the land, but no compensation was ever made. He stated that they have had peaceful possession, occupation and use of their respective portions of the land with the knowledge of the plaintiffs who did not permit or authorise them to enter and occupy the land. On his part, he stated that he had lived on the land since 1978 and the other defendants occupied their portions after his occupation. He stated that the plaintiffs are time barred. He added that in April 2005, the plaintiffs, with the help of the Provincial Administration, threatened to evict them from the suit land by burning their houses yet they did not have any court order.

9. DW-1 in her oral evidence, added that in 1981, she was living in Nyali (away from the suit land). She stated that in this year there were some people on the suit land but she didn't know them. In the year 1993, she asked these people to give her some land to reside and cultivate. These people, she mentioned, were old and they are now deceased. She thus stated that she came into the land in the year 1993. She stated that in a year that she could not exactly recall, their houses were demolished, but they did not leave the land. She testified that she has never seen the registered owners nor the plaintiff's witness on the land. She was not aware of any letter mentioning compensation to squatters. She

testified that they call the area “Kwa Pandya.” She stated that at the moment there are even storey houses. She produced a bundle of photographs which she said are of the land and which show some structures.

10. Cross-examined, she testified that the area is called “Kwa Pandya” because the owner of the land is one Pandya. Cross-examined on the occupation of Mr. Baya, she stated that she didn’t know if he had children as he never lived with him or his children. She stated that she has never been to the Land Control Board and has never complained about not being compensated in contravention of the LCB consent. She never heard of people being compensated. She herself was not present on the land in the year 1980. She testified that persons came to occupy the land individually. She did not know if her fellow claimants were on the land in the year 1980. She contended that the photographs they had availed were of the land though she had no certificate accompanying the photographs. She also acknowledged that the photographs have no date. She pointed out to one of the photographs as showing her structure. She was asked about the person in one of the photographs but she could not identify him. She stated that they thought that the land belonged to the Government.

11. With the above evidence, the defendants closed their case. I invited counsel to file written submissions and both Mr. Achoka, learned counsel for the plaintiff, and Mr. Odhiambo, learned counsel for the defendants, did file submissions. I have taken note of these before arriving at my decision.

D. Analysis and Decision

12. As I had earlier mentioned in the introduction, there are two cases before me. In the first suit, the registered owners of the suit land have sought orders to have the defendants restrained from the subject land. In the second case, considered a defence and counterclaim, the claimants (generally considered and referred to as the defendants in the combined suits) are seeking orders that they are entitled to the land by way of adverse possession. I opt to start with the claim for adverse possession, for the plaintiff’s success in the first suit, is hinged on whether or not the defendants have a good case for the land through the doctrine of adverse possession. If the defendants succeed in their claim for adverse possession, then the case by the registered owner of the land in the first suit will automatically fail. If the defendants fail in their quest to have the land through the doctrine of adverse possession, then I will have no reason to deny the plaintiff her prayers in the first suit and I will have to order the defendants to vacate the suit land and be permanently restrained from it.

13. It is trite, and I need not cite any authority, that to succeed in a suit for adverse possession, one must demonstrate that they have been in peaceful and open possession of land for a continuous uninterrupted period of at least 12 years without the permission of the registered owner of the land. This is explained through the latin maxim *nec vi, nec clam, nec precario* meaning without force, without secrecy and without permission.

14. The case of the defendants hinges on the affidavit in support of the Originating Summons, the statement of Mr. Baya (deceased) and the evidence of DW-1. I have had a careful look at the totality of the defendants’ evidence, and in my view, it cannot support the assertion of the defendants that they are entitled to the suit land by way of adverse possession.

15. First, we must appreciate that this claim is one made for and on behalf of 106 persons. If I put aside what Mr. Baya and DW-1 stated in respect of their own occupation, I have absolutely no evidence touching on the possession of the land by the other 104 persons. In fact, any reference to their possession of the land is very vague and unsubstantiated. In his affidavit, Mr. Baya, in respect of the possession of the other claimants, merely stated that “some of the claimants entered the plot in 1930s and/or were born thereon in 1940s and that others entered the plot in 1990.” His written statement, adopted as the evidence of the defendants, does not make any further elaboration. In so far as possession of the land by the other claimants is concerned, it merely states that the defendants have been in uninterrupted possession of the suit land for over twelve years. Now, it is not pointed out who entered the plot in 1930, who was born here in the 1940s, or who entered the land in 1990. Without there being any specifics of when each claimant came into the land, and without there being any evidence tendered by these claimants on when exactly they entered the land, this court cannot speculate as to who entered the land at which period of time. This was a burden for the defendants to discharge. They have clearly not discharged it.

16. The time of entry for a person claiming adverse possession is extremely critical, for it is from the time of occupation, that time starts running in his favour. A person claiming adverse possession cannot merely state that “I have been on the land for more than 12 years” and hope that the court is going to speculate in his favour as to the time that he actually commenced possession. That is a burden that any person claiming land through adverse possession needs to discharge and I am afraid that in the instance of this case the burden has not been discharged for at least 104 of the claimants.

17. Let me now turn to the claim by Mr. Baya and DW-1. I need not consider Mr. Baya’s case for he died more than one year ago and there has been no substitution. His case has thus abated. In respect of DW-1, her evidence is that she entered the land in the year 1993. She stated that she asked the persons in occupation to allow her some land to reside and cultivate. She does not mention who these persons who gave her land were and whether they gave her land for free or whether she paid them any money. Her statement that she entered the land in the year 1993 is also not buttressed by any further evidence. She could as well have said that she entered the land in 1990 or 2000 and it would make no difference for want of any substantiation of such statement. Given the denial by the plaintiffs, and their assertion that the entry of the defendants was in the year 2005, it behoved DW-1 (and indeed as I have mentioned, all defendants) to give sufficient evidence, that will surpass the threshold of speculation, to support her contention that she entered the land in the year 1993. I would have expected that she would be very elaborate on her occupation and nature of it. For example, if at all she developed the land, when did she develop it? If she used materials, could she be having receipts for these? Did she have a family? If she had children, where were they going to school? She had a burden to provide something more than just saying that “I entered the land in the year 1993.” I am aware that some photographs were annexed but they do not provide any evidence of the time of entry. Neither are those photographs connected directly to any of the defendants i.e it is not said that photograph No. 1 shows a house belonging to claimant No. 1 and so on. In any event, when I look at some of those photographs, which bear the date 2016, some of them show ongoing fresh construction. That does not support an entry that was 12 years before the year 2006.

18. I am aware that there was mention, in the LCB consent, of persons being on the land when the suit land was purchased. First, it is not unequivocal that there were actually squatters on the land when the suit land was purchased by the current registered owners. That LCB consent states that “*this application (for consent to sell) was approved subject to regulations set by the Board on account that the purchaser*

should pay compensation to squatters if there are any at all living on the above aforesaid piece of land.” It will be noted that the LCB mentioned compensation to squatters “*if there are any*” and that begs the question whether there were in fact any squatters on the land. Secondly, if at all there were any squatters, the defendants have not shown any evidence that they were actually the squatters being talked about in the LCB consent. DW-1 herself was clear that she was no on the land in the year 1980, and assuming that there were any squatters, she could not therefore be among any of the squatters mentioned in the LCB consent. In light of the above, I do not see how the defendants can rely on the LCB consent to support their case.

19. I am afraid that without sufficient proof of the date of entry, I am unable to speculate when exactly the defendants entered the land. Without that evidence, I am unable to calculate the duration of time that the defendants have been in possession of the land. I am not therefore able to hold that the defendants have been in possession of the suit land for a continuous duration of 12 years. Since they have been unable to prove this critical aspect of their case, their suit for adverse possession must fail and the same is hereby dismissed with costs.

20. Having dismissed the case of the defendants for adverse possession, I must hold in favour of the plaintiff/registered owner of the land. I hereby issue orders that the defendants do vacate the suit property within the next 90 days. If they do not so vacate then the plaintiff is at liberty to apply for their eviction. Within this duration of 90 days, the defendants are barred from undertaking any developments or any improvement of structures existing on the land. Upon expiry of this 90 days period, I issue orders permanently restraining the defendants from entering, being upon, utilising, or in any other way interfering with the plaintiff’s possession of the suit land. I also award the plaintiff the costs of the two consolidated cases.

21. Judgment accordingly.

DATED AND DELIVERED THIS 9TH DAY OF JUNE 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA