REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 108 OF 2011 (O.S.)

IN THE MATTER OF: LAND TITLE NO. KILIFI/ROKA/374

IN THE MATTER OF: AN APPLICATION THAT THE PLAINTIFF HAS OBTAINED

LAND TITLE NO. KILIFI/ROKA/374 BY WAY OF ADVERSE POSSESSION

BETWEEN

KAHINDI NGALA MWAGANDI.....PLAINTIFF

VERSUS

DR MTANA LEWA.....DEFENDANT

JUDGMENT

BACKGROUND

1. By an Originating Summons dated 1st April 2011 but filed herein on 11th August 2011, Kahindi Ngala Mwagandi (the Applicant) instituted this claim seeking Orders that: -

> ***(1) The Honourable court do declare that the Applicant has been in occupation of all those portions of land situated within all that parcel of land described as Tezo/Roka/374 peacefully, openly, continuously and without interruption for a period exceeding 12 years;***
>
> ***(2) The Plaintiff be declared as the absolute owner of all that occupied suit land by virtue of adverse possession;***
>
> ***(3) The Registrar of Lands be directed to survey and ascertain the occupied portion for the Plaintiff and excise the same from the Respondent's title and issue title to the Applicant;***

2. The Summons which is supported by an Affidavit sworn by the Applicant is premised on the grounds that: -

> ***a) The Applicant has been in occupation of the suitland for a period exceeding 12 years*** *nec vic, nec clam, nec precario* ***having come upon the same from the year 1992 at the time the suit land was vacant and virgin forest;***
>
> ***b) The Respondent was allotted the suitland described above in 1990 according to the records at the Land Adjudication/Settlement Office Kilifi;***
>
> ***c) The Respondent has never appeared on the same from the time of allotment to date;***
>
> ***d) It is therefore in the interest of justice that the Order of Adverse Possession sought is granted in favour of the Applicant herein; and***
>
> ***e) This Honourable Court has jurisdiction to grant the orders sought.***

3. Dr. Mtana Lewa, the Respondent is however opposed to the grant of the orders sought in the Originating Summons. In a Replying

Affidavit sworn on 9th November 2013 and filed herein on 11th November 2013, the Respondent avers that he is the legal bona fide owner of the suit property. He asserts that on 13th January 1995, he charged the aforesaid property to Kenya Commercial Bank Ltd to secure a credit facility advanced to himself whereupon the title documents were placed in the custody of the Bank.

4. The Respondent avers that the Bank has since misplaced the title documents but the charge thereon remains undischarged to-date. The Respondent asserts that the contention by the Applicant that he has had continuous, open and uninterrupted possession of the property for over 12 years since 1992 is therefore untrue as the Applicant has not adduced any documentary evidence to that effect.

The Applicant's Case

5. At the trial herein Kahindi Ngala Mwagandi- (PW1) testified as the sole witness in his case. He told the Court he is a farmer in Mtondia Tezo Roka. PW1 recalls that sometime in the 1990s, he went to the Area Chief one Dickson Mae looking for land to settle. The Chief then asked him to go and bring his identify card upon production of which he was shown land that was then unoccupied by the Land Adjudication and Settlement Officer.

6. PW1 testified that immediately thereafter, he began developing the property which he came to discover was Parcel No. 374 Tezo/Roka Settlement Scheme registered in the name of one Mtana Lewa (the Defendant). PW1 dug up a borehole, planted coconut trees and constructed permanent houses where he lives with his family and parents. He told the Court that ever since he took possession of the land, he has never seen the registered owner.

7. On cross –examination, PW1 told the Court he was not aware the land had been allocated to the Defendant in 1980 and told the Court he moved therein in 1998. He told the Court he obtained a letter from the Area Chief which he took to the Lands Office before he was given the land.

The Defence Case

8. Similarly, Timothy Mtana Lewa- the Respondent(DW1) testified as the sole defence witness at the trial. He told the Court he is a retired Pharmacist and a resident of Tsisoni in Marereni, Kilifi County.

9. DW1 testified that he knew the Plaintiff as the person who had intruded into the suit property which is registered in his (DW1's) name. DW1 told the Court the land was allocated to him by the Settlement Fund Trustees (SFT) in the 1980s and that he was issued with a title thereto in the 1990s.

10. DW1 told the Court it was not true that the Applicant has been on the land since the 1990s and termed the claim a big joke. He told the Court he learnt of the Applicant's presence in the suitland in the year 2004 when the Applicant purported to enter into an agreement with an Italian purporting to allow the Italian to extract stones from the land. DW1 stopped the transaction.

11. DW1 further told the Court that Plot No. 375 which borders the suit property also belongs to him and that his son lives thereon. The Applicant had however put some structures on the suit property between 2013 and 2014. DW1 told the Court the Applicant had no right whatsoever to occupy the land.

12. On cross- examination, DW1 conceded that the suit was filed about eleven years after he was issued with title to the suit property. He also conceded he does not reside on the land.

Analysis and Determination

13. I have perused and considered the pleadings filed by both the Applicant and the Respondent, their respective oral testimonies as well as the evidence adduced at the trial. I have equally given full consideration to the rival submissions and authorities as placed before me by the Learned Advocates for the parties.

14. It was the Applicant's case that he settled on the suit property sometime in the year 1998 when the same was still bushy and unoccupied. He told the Court that he had since remained in the property to-date and that his occupation thereof was open, notorious and continuous and without the permission of the Defendant who is registered as the proprietor of the suit property.

15. In support of his case, the Applicant produced a Copy of a Certificate of Postal Search dated 19th January 2011 which indicates that the Defendant was issued with a title deed to the suit property sometimes on 20th March 1990. He also produced in support of his case a letter from the Kilifi District Land Adjudication and Settlement Officer, one Linus Mworia dated 28th February 2007 as confirmation of his occupation of the suit property. The said letter addressed to the Director of Land Adjudication and Settlement in Nairobi reads in the relevant portion as follows: -

> ***"Re: Ground and Record Status Plot No. Tezo/Roka Settlement Scheme***
>
> ***According to records held in our nominal roll, the Plot mentioned above is vacant.***
>
> ***However, the file show(s) that the Plot was allocated to Mtana Lewa. A ground visit to ascertain the Plot occupant, it was established that the Plot is occupied by Kahindi Ngala Mwagandi of ID No……..since 1992.***

On the Plot the occupant has done the following development: -

Has two semi-permanent houses with family size of ten members

8 coconut trees

20 Banana stools

1 bore hole

10 goats and 4 Cattle.

Since the occupant has done the above stated development and our mission is to settle squatters, the office recommend(s) him for the Plot as (he) is also willing to meet Settlement Funds Trustees conditions."

16. Laying a background to the letter at paragraphs 4, 5, 6 and 7 of the Supporting Affidavit to the Originating Summons, the Applicant avers as follows: -

"4. That I visited the land offices on several occasions in a bid to have the suit land be registered in my name and the District Land Adjudication/Settlement Department Kilifi by their ground report dated 28th February 2007 to the Director of Land Adjudication and Settlement confirmed I was in actual possession of the same. Annexed is a letter from the Land Adjudication/Settlement officer to the Director of Land Adjudication/Settlement Nairobi marked "KNM 1" attesting the same.

5. That the said letter revealed to me that the Respondent was allotted the suitland.

6. That the Respondent has never at any time appeared on the suitland nor made any claim on the same from the time of allotment to date and remains a stranger to me.

7. That it is therefore in the interest of justice that the order of adverse possession sought is granted in my favour."

17. The purpose and relevance of the said letter was nevertheless not very clear to me. I say so because while the writer states that the parcel of land in question was vacant, he goes ahead to state that the same was occupied by the Applicant since 1992 and that the Applicant had since developed the same. From the Applicant's own Originating Summons, he asserts as ground "b" in support of the Summons that the Respondent was allotted the suitland in 1990 according to the records at the Land Adjudication and Settlement Office Kilifi.

18. That being the case, it was evident that as at the time the Land Adjudication and Settlement Office wrote the letter dated 28th February 2007, they knew that the suit property was nolonger available for allocation the title therefor having been issued to the Respondent in 1992.

19. While the said letter was admitted as an exhibit in these proceedings it was apparent to me that the Applicant ought to have called the maker thereof to authenticate the contents thereof. Otherwise and as the Court of Appeal stated in ***Kenneth Nyaga Mwige –vs- Austin Kiguta & 2 Other (2015) eKLR:***

"The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the Court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the Court applies its judicial mind to determine the relevance and veracity of the contents- that is at the final hearing of the case. When the Court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved, disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.…

Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay a foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the Court to have the document produced as an exhibit and be part of the Court record…."

20. Guided by the above decision, I did not think that the mere production of the letter as Plaintiff Exhibit 1 made the contents thereof admissible as evidence in the absence of the maker thereof being called to testify as to the contents thereof. Once the letter was produced, the Applicant ought to have endeavored to ensure that it meets the test of admissibility once it is produced otherwise the same would amount to hearsay and hence inadmissible evidence.

21. In considering the duty of Courts to rely on direct evidence in adjudicating disputes as required under Section 63 of the Evidence Act, (Cap 80), Visram J., (as he then was) observed as follows in ***Prime Bank Ltd –vs- Josephat Ogora Esige (2005) e KLR: -***

"Is the evidence tendered to establish the truth or falsity of a fact or only for some other purpose? If the evidence is tendered to

establish the truth or falsity of a certain fact and it is not direct, then it is hearsay and inadmissible. However, evidence may be "hearsay" that is to say, not direct but admissible if it is tendered for some other purpose quite apart from establishing the truth or falsity of any fact. The position was summarized in the following words in ***Subramanian –vs- Public Prosecutor (1956) 1 WLR 965 (PC) at page 969***.

"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what it contained in the Statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."

22. In the matter before me, the Applicant sought to establish the truth of his alleged occupation of the Respondent's property through the production of the letter whose author he did not call to testify. This court is unable to rely on the same as proof that the Applicant had been on the land since 1992 as stated.

23. Indeed, as the Court of Appeal stated in ***Wambugu –vs- Njuguna (1983) KLR (174): -***

"*In order for a person to acquire title by the operation of the statute of limitation to land which has a known owner, the 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 the suit property for purposes for which he intended to use it. The Plaintiff is required to prove that he has dispossessed the defendant of the suitland or that the Defendant had discontinued possession of the suitland for a continuous period of 12 years so as to entitle the Plaintiff to the suitland by adverse possession."*

24. In the matter before me it was not contested that the Respondent had in 1995 charged the suit property to Messrs Kenya Commercial Bank Ltd. The Respondent cannot therefore be said to have lost his right to the land as he had secured a Bank Charge over the same in the period the Applicant purports to have taken possession thereof.

25. In any event, if the purpose of the letter from the Land Adjudication and Settlement Office dated 28th February 2007, was to help the Applicant to acquire the suit property, it did not achieve its objective. As it were, land adjudication in Kenya is done pursuant to the Land Adjudication Act, Cap 284 of the Laws of Kenya. The adjudication process under the Act commences with the establishment of the Adjudication Section and the placing of a notice requiring persons claiming any interest in the land in the Section to make their claim with the recording officer as provided under Section 5 (2) of the Act.

26. There is an Adjudication Committee appointed under Section 6 of the Act whose function is to adjudicate upon and decide upon questions referred to it. Any person affected by a decision of the Committee is allowed under Section 21 of the Act to lodge an appeal with the Executive Officer of the Committee who is then required to refer the matter to the Arbitration Board under Act. Once the adjudication records are prepared, parties are allowed to make objections thereto under Section 26 failure to which the adjudication register is completed.

27. It is apparent from the material presented before me that the Respondent obtained his title following an adjudication process conducted in the area. Even after he learnt through the Report dated 28th February 2007 that the Respondent had been allocated the suit property, there is no evidence that the Applicant lodged any objection as required under Section 26 of the Land Adjudication Act. That can only mean that the Applicant accepted the Respondent as the rightful owner of the suit property.

28. In the premises, I did not find any merit in the Originating Summons dated 11th April 2011. The same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF JUNE, 2021.

J.O. OLOLA

JUDGE