



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 282 OF 2008

KHAIRUNISSA HUSSEIN HAJI LADHA & ANOR.....APPLICANTS

VERSUS

SULEIMAN ABDULREHMAN & OTHERS.....RESPONDENTS

JUDGMENT

1. The applicants came to this court by way of originating summons dated 4th July, 2008 and which was amended on 28th June, 2016 seeking *inter alia*:

a. Whether the applicants are entitled to the property known as PLOT NO.MOMBASA/BLOCK XII/155.

b. Whether the applicants are entitled to be duly registered as the proprietors of the suit property.

2. The originating summons was supported by the affidavit sworn by the applicants and on further grounds that they have lived on the suit property for a period exceeding twelve (12) years ranging between 1953 to 2008 preceding the taking out of this summons and that they have therefore acquired prescriptive rights over the property. The applicants averred that they have lived in the suit premises together with their families and that the 2nd applicant was born in the suit premises.

3. Shenaz Hussein Haji Ladha, the 2nd applicant testified as PW1 and adopted the supporting affidavit and stated that the applicants are daughters of Hussein Haji Ladha (deceased). That the deceased bought the suit property and registered it in the names of his brothers and also business partners, Suleiman Abdulrehman (the 1st respondent), Ismael Haji Ladha (father of 3rd Respondent) and Ali Mohamed Ladha (father of the 2nd respondent). That the deceased was a partner to a family business together with his siblings. It was stated that the partnership was dissolved in 1981 and the property of the partnership was distributed and the deceased retained the suit property. That the deceased instructed the firm of Anjarwalla & Company Advocates to effect transfer of the property to his name but the transfer was not done despite payment of legal fees. A copy of the fee note was produced as an exhibit.

4. It was the testimony of PW1 that upon distribution of the property under the deed of partition, the applicants and their late father adversely took possession of the property and have since enjoyed quiet possession of the same without any interruption and have been paying the rates to the defunct Municipal Council of Mombasa. PW1 produced the receipts and further added that they had full control of the property since 1983 and have never had any form of interruption either verbally or in written. It was further her testimony that the 3rd respondent without any colour of right sold the property to First Burton Development Limited who then sold the property to the 4th and 5th respondents during the pendency of this suit and wanted the applicants to vacate and that the 1st, 2nd and 3rd respondents were forced to make arrangements to repay the amount. Letters in support were also produced as exhibits. PW1 stated that they could not vacate from the suit property because the same belonged to their deceased father. She stated that the notice to vacate was given to the applicants in 2008. It was her testimony that the property is currently registered in the names of Bilgis Salim Suleiman and Salim Haji Suleiman, the 4th and 5th respondents. She produced the official search which showed that the property was transferred to them on 2nd September, 2015. The witness testified that she was born in 1960 in the suit property and has lived there since then.

5. The 1st -3rd respondents opposed the originating summons and filed replying affidavits sworn by Suleiman Abdul Rehman Ladha and Ismail Gulamali on 7th April 2011. It is their case that the suit property was purchased in 1953 by five brothers who ran a partnership by the name of Haji Suleiman Hanji Ladha & Sons. That they purchased and developed various plots over a long period of time. That when the suit property was purchased in 1953, it was registered in the names of Abdulrehman Haji Ladha, Ali Mohammed Haji Ladha and Ismail Haji Ladha and it remained in those names until it was sold and transferred to the 4th Respondent in 2008. It is their case that the suit property was family property and that when the family expanded and the house could not accommodate all of them, three brothers decided to move out to other properties which they owned, leaving two brothers and their families to continue staying in the suit property. Later one of the brothers also moved out, leaving the applicants' father who passed on before moving to his own house in Tudor. That the suit property was put up for

sale and the applicants were given priority to buy, but instead they filed suit claiming the property. The 1st – 3rd respondents stated that the applicants have not stayed in the house for more than 12 years on grounds of adverse possession and that they have not proved the grounds for grant of the orders sought and prayed for dismissal of the suit. The 4th and 5th respondents also opposed the applicants suit and claimed that they bought the property and the same was duly transferred to them as lawful purchasers and issued with title. They too prayed for dismissal of the applicants' suit with costs.

6. Salim Haji Essak testified as DW1 and stated that he acquired the suit property from First Burton Development Limited. That the property was transferred into his name jointly with his wife, Bilgis Salim Issak. He produced copy of the title deed, Memorandum of Registration, Certificate of Search and Land Rates Certificates as exhibits. When cross-examined by Mr. Khatib for the applicants he stated that they bought the property in the year 2015, adding that he did not know that there was a case in court, though First Burton Development Limited knew the existence of the case in court. He further testified that he was aware when First Burton Development Limited acquired the property since he was a family friend. He confirmed that they are related with the 1st to 3rd respondents and that all the family were staying in that house. He stated that his family moved out in the 1972, leaving his uncles, the applicants' father and Suleiman. He was also aware that Suleiman Abdulrehman, Hussein Haji Suleiman, Haji Suleiman Haji, Esmael Haji Suleiman, Haji Issak Haji and NurMohamed were trading as partners in Haji Suleiman Haji Leather & Sons and that in the course of their business acquired several properties. That in 1984, there was a Deed of Partition in which the suit property was given to the family of Hussein, even though the title was not in his name. He stated that his father died in 1999 while Hussein died in 2004, adding that from 1984 upto 1999, there was no complaint raised over the suit property.

7. DW2 was Bilgis Salim Suleiman, wife to DW1 and who is jointly registered together with her husband as owner of the suit property. She adopted her witness statement filed herein and produced the documents filed as exhibits.

8. DW3 was Mohamed Ali Esmail, son of the late Esmail Haji Suleiman who was one of the brothers who ran a partnership and acquired properties, including the suit property. He confirmed that the applicants and the respondents are cousins. He stated that the partnership was dissolved in the early 1980s and three of the partners got their shares while three remained together. That after sometime, one of the partners wanted to have his share also and he decided to sell one of the properties. His testimony was that the applicants were informed about the intended sale and were asked if they had interest in purchasing the property since they were residing on it, but that the applicants did not respond, instead claimed that the property belonged to their deceased father. That when their attempt to include the property as part of the deceased's estate was unsuccessful, the applicants filed the current suit, claiming the property by way of adverse possession. He produced the documents filed as exhibits.

9. Nizar Ali Mohamed the 2nd respondent testified as DW4. He adopted his witness statement dated 24th January 2020 as his evidence –in – chief. He stated that the people named in the title deed in respect of the suit property were the late Abdulrehman Suleiman, the late Ali Mohamed Haji Suleiman and the late Ismail Haji Suleiman. That Suleiman Abdulrehman sold the property to First Burton Development Ltd who in turn sold it to the 4th and 5th respondents.

10. After the close of the respondents' case, the parties were directed to file written submission. However, only the applicants' advocates filed submissions on 9th December, 2020.

11. Having considered the pleadings, the evidence on record and submissions, the issues for determination are whether the 1st – 3rd respondents rights to the property known as PLOT. NO.MOMBASA/BLOCK XXII/155 were extinguished by limitation of time and whether the applicants have acquired prescriptive rights over the said property by way of adverse possession. Adverse possession is a common law doctrine under which a person in possession of land owned by someone else may acquire valid title to it. In Kenya, this doctrine is alive in Section 7 of the Limitations of Actions Act Cap 22 Laws of Kenya that provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it accrued to some person through whom he claims, to that person.”

12. In the case of **Kweyu –v- Omuto (1999)KLR 709**, the Court of Appeal stated *inter alia* that:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor..... In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use, done publicly and notoriously.”

13. Section 17 of the Limitation of Action Act provides as follows:

“Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action, to recover land (including a redemption action) the title of that person to land is extinguished.”

14. The period of twelve years starts to run from the moment the trespasser takes adverse possession of the land and the registered proprietor is regarded as having been dispossessed or having discontinued his possession. In the case of **Wambugu-v- Njuguna (1983)KLR 173**, the Court of Appeal held *inter alia* that:

“In order to acquire by the statute of limitation 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 the soil for the purpose for which he intended to use it.... ”

15. The ingredients were recently discussed by the Court of Appeal in the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2015) eKLR**, where it was stated:

“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 neglect 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.....”

16. The applicants have to prove that they have used the suit premises as of right: *nec vi, nec clam, nec precario*. It must be shown that the registered owner of the land had knowledge (or means of knowing, actual or constructive) of the possession or occupation. Further, the possession must be continuous.

17. In the instant case, it is not disputed that six brothers, Abdulrehman Haji Suleiman Ladha, Hussein Haji Suleiman, Ali Mohamed Haji Suleiman, Ismail Haji Suleiman, Essak Haji Suleiman and Nurmohamed Haji Suleiman ran a partnership by the name Haji Suleiman Haji Ladha & Sons. The six brothers, who are now deceased, and fathers to the applicants and the 1st-3rd Respondents acquired and developed various properties over a period of time. That they acquired the suit property in 1953 and had it registered in the names of Abdulrehman Haji Ladha, Ali Mohamed Haji Ladha and Ismail Haji Ladha. It is also not in dispute that the suit property was developed by the six brothers (partners) and when the building was completed, they all moved into the suit premises together with their families. Over time and with families expanding, some of the brothers moved out into other properties, eventually leaving only the applicants family in the suit premises.

18. From the material on record, it is also quite clear that the partnership was dissolved in 1981 and the partners or their successors executed a Deed of Partition on 26th March, 1984 in which they divided the properties acquired during the partnership. From the evidence on record, it is also clear that upon distribution of the properties under the Deed of Partition, the Applicants and their late father continued occupying the suit properties and have since enjoyed quiet possession and occupation without any interference. What has also emerged from the material on record is that the suit property was registered in the name of three brothers, Abdulrehman Haji Suleiman, Ali Mohamed Haji Suleiman and Esmail Haji Suleiman who occupied the premises and moved out one after another the last one moving out in 1984, leaving only the applicants’ father who continued to remain in occupation with his family until his demise in 2003.

19. From the evidence on record, it is not contested that the applicants and their late father were not registered owners of the suit property. The applicants and their deceased father enjoyed quiet and uninterrupted occupation and possession of the property since 1981 when the partnership was dissolved and the properties distributed through the Deed of Partition. The registered owners did not take any steps to evict the applicants or their father from the suit premises for over twelve (12) years. There is no dispute that the registered owners of the suit property had knowledge that the applicants were not the registered owners and were in occupation of the suit property. No doubt the applicants exercised notorious occupation and were even paying land rates to the Municipal Council of Mombasa as well as developing and renovating the property without permission from the respondents or any interruption whatsoever. Whereas the property was allegedly sold and transferred from Suleiman Abdulrehman to First Burton Development Limited, the 4th respondent herein in 2008, in my view the said transfer and the subsequent transfer to the 4th and 5th respondents was of no legal effect since the respondents titles over the said property had already been extinguished and they had no good title to pass. It is trite that a person who has no title cannot pass title to another. In the instant case therefore, Suleiman Abdulrehman had not title to pass to First Burton Development Limited and therefore First Burton Development Limited had no title that they could pass to the 4th and 5th respondents. As a result, the said transfers are null and void ab initio. The evidence that the respondents presented confirms that they were aware of the possession and occupation of the suit property but did not take action to evict the applicants. As the true owners of the property, they were on notice that the applicants had no right, and therefore as trespassers were in possession of the property, but neglected, ignored and/or refused to take action against the applicants.

20. From the material presented before this court, I find that the applicants have on the balance of probabilities proved that they adversely remained in possession and occupation of the suit property for more than twenty years to the exclusion of the registered owners. The registered owners have certainly lost their rights over the property and the applicants have now acquired prescriptive rights over the property by way of adverse possession.

21. The upshot is that I find the amended originating summons dated 28th June 2016 and filed on 13th July 2016 has merit and the same is hereby allowed. The applicants are entitled to and should be registered as proprietors of the property known as PLOT NO.MOMBASA/BLOK XXII/155 by virtue of adverse possession. Considering the relationship of the parties who are cousins, I order that parties bear their own costs.

22. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 3RD DAY OF JUNE, 2021

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE