



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 60 OF 2017

CHARO THETHE KOI.....PLAINTIFF

VERSUS

1. KAHELA JEFWA KINGO

2. MUCHE KATANA MWINYI

3. ABDALLA JAMAL.....DEFENDANTS

JUDGMENT

1. By a Plaint dated 16th March 2017, Charo Thethe Koi (the Plaintiff) prays for orders against the three defendants jointly and severally for:

a) A declaration that the Plaintiff has acquired prescriptive rights of possession of five acres of land within all that parcel of land situated at Mudsongoloni Village within Kilifi County and known as Title No. Kilifi/Ngerenyi/229;

b) An order of Permanent injunction against the Defendants restraining the Defendants by themselves, their agents and or servants or any person claiming through them, from trespassing into the suit property, erecting any fence or structures thereon, from selling, alienating or dealing in the suit property in any manner whatsoever;

c) Costs of and incidental to this suit;

d) Interest thereon at Court rates; and

e) Any other or further relief this Honourable Court may deem just to grant.

2. Those prayers arise from the Plaintiff's assertion that on or about 15th June 1975, he did purchase the said parcel of land from one Cheva Kingo (now deceased) at a consideration of Kshs 6,500/-. The Plaintiff avers that at the time of the said transaction, the deceased was the allottee of the said parcel of land situated at what was then Ngerenyi Settlement Scheme although no titles had been issued therefor.

3. The Plaintiff further avers that pursuant to the said purchase, he and his family took possession of the suit property and commenced development thereon by planting several coconuts, cashew-nut and mango trees. He also built three permanent residential houses and has remained in exclusive actual possession, occupation and use thereof openly and continuously ever since.

4. The Plaintiff avers that subsequent to the purchase, the deceased was on 29th August 2006 registered as the proprietor of the entire parcel of land including the portion which he had sold to the Plaintiff in 1975. Consequently, on or about 21st November 2014, the 1st and 2nd Defendants who are the heirs and administrators of the estate of the late Cheva Kingo sought to refund the Plaintiff the purchase price paid in 1975 and have since purported to sell the land to the 3rd Defendant who on 14th February 2017 started erecting a fence around the property.

5. The Plaintiff contends that the alleged sale of the suit property is null and void and that he has since acquired prescriptive rights of possession of the five acres portion of the suitland within Title No. Kilifi/Ngerenyi/229.

6. Despite Service of Summons, Kahela Jefwa Kingo, Muche Katana Mwinyi and Abdalla Jamal (the Defendants) neither entered appearance nor filed any response to the Plaintiff's claim. The suit accordingly proceeded by way of formal proof.

7. At the trial herein, the Plaintiff called two witnesses in support of his case.

8. PW1- Charo Thethe Koi is the Plaintiff and a farmer in Kilifi. He testified that on 15th June 1975, he bought a parcel of land situated at Mdzongoloni village measuring about five acres from one Cheva Kingo for the sum of Kshs 6,500/-. As at the said time, the parcel of land had not been registered although it had been allotted to the said Cheva Kingo as part of the land then described as Ngerenyi Settlement Scheme.

9. PW1 further told the Court that upon execution of the Sale Agreement, he took possession of the land with his family and has developed the same overtime by planting fruits and building his residential houses thereon. Subsequently however, the said Cheva Kingo who is now deceased was registered as the proprietor of the entire parcel of land including the portion already sold to the Plaintiff.

10. PW1 told the Court that on 21st November 2014, the 1st and 2nd Defendants sought to refund to him the sum of Kshs 6,500/- as the heirs and administrators of the estate of the late Cheva Kingo. On 14th February 2017, the 3rd Defendant started erecting a fence over the land on the purport that he had bought the same from the 1st and 2nd Defendants.

11. PW1 testified that the said sale was wrong as the 3rd Defendant knew or ought to have known that he is in actual physical possession and occupation of the suit property. He further told the Court that the activities of the 3rd Defendant are wasting the property and causing him great loss and damage.

12. PW2- Kolani Katana Menza is a Palm-Wine tapper and a resident of Mdzongoloni Kakanjuni within Kilifi County. He told the Court he resides on the suit property and that the Plaintiff is his uncle.

13. PW1 testified that he began residing on the property in the year 2000. When he arrived, he found his uncle had already developed the land by planting coconut, cashew nut and mango trees. The Plaintiff was already living there with his family. He later saw the 3rd Defendant fencing off their residence.

14. I have perused and considered the Plaint as filed, the testimonies of the two witnesses and the evidence adduced at the trial. I have equally given consideration to the submissions and authorities placed before me by Mr. Shujaa, Learned Counsel for the Plaintiff.

15. The Plaintiff herein craves an order to the effect that he has acquired prescriptive rights of possession of some five acres of land previously belonging to one Cheva Kingo and situated at Mdzongoloni Village in Kilifi which portion of land is part of a larger title known as Kilifi/Ngerenyi/229. The Plaintiff also craves an order of permanent injunction to restrain the Defendants from erecting any fence or structures, on the said portion of land. He also urges the Court to restrain the Defendants from selling and/or alienating the same.

16. The Plaintiff's claim arises from his assertion that he did way back in 1975 enter into a Sale Agreement with the said Cheva Kingo wherein that portion of land was sold to him at a consideration of Kshs 6,500/-. The Plaintiff told the Court that despite paying the said sums of money and immediately taking possession of the land, when the land was registered on 29th August 2000, the same was solely registered in the name of the said Cheva Kingo who has since passed away.

17. The Plaintiff further told the Court that the 1st and 2nd Defendants who are the heirs and administrators of the estate of the late Cheva Kingo have since sought to evict him from the land by trying to refund the purchase price. The two have since purported to sell the land to the 3rd Defendant who then started constructing a fence over the disputed portion of land.

18. In support of his case, the Plaintiff has produced a Sale Agreement said to have been executed on 15th June 1975. The Agreement written in Kiswahili and thumb-printed by the parties reads as follows: -

“Makubaliano ya Kuuza Shamba

Mimi Cheva Wa kingo I/D No.....nikiwa na akili yangu timamu na bila kushurutishwa na mtu yeyote na baada ya kushauriana na familia yangu nimekubali kumuuzia Charo Tethe Koi ID/ No.....shamba yangu pamoja na miti iliyomo kwa bei ya Kshs 6,500/- (Elfu Sita na Mia Tano) na hivi leo tarehe 15-6-1975 nimepokea kutoka kwake Kshs 6,500/- (Elfu Sita na Mia Tano).

Kuna leo na Kesho

Signed

Muuzaji

Mununuji

19. As it were the Defendants did not contest that the late Cheva Kingo entered into the said Sale Agreement as they neither entered appearance nor filed any Statement of Defence herein. This Court was however left with no doubt that the Agreement was in reference to a portion of Title No. Kilifi/Ngerenyi/229 and that the Defendants were aware of the same. By a letter written on their behalf by their Advocates- Ombachi Moriasi & Company Advocates and dated 21st November 2014, the 1st and 2nd Defendant addressed the Plaintiff as follows: -

“Re: Refund of Kshs 6,500/- Advanced to Cheva Kingo (Deceased)

Duly instructed by our Clients Kahela Jefwa Kingo and Muche Katana Mwinyi, who are the widows of the late Cheva Kingo, we address you as hereunder.

That you entered into an oral agreement with the late Cheva Kingo in which you advanced the above captioned amount of Kshs 6,500/- (Six Thousand Five Hundred Only) to our Client's husband.

That our Clients' late husband allowed you to take possession and use his Land Parcel No. Kilifi/Ngerenyi/229 until the said amount of Kshs 6,500 was paid to you.

Unfortunately, our Clients' late husband passed away before he refunded the said amount to you and you have been using the said land for quite a long time now.

Kindly note that our Clients are and have always been ready and willing to refund to you the amount of money which you advanced to their late husband so that they can utilize the said land for the benefit of themselves and that of the beneficiaries of the estate of the late Cheva Kingo.

Our instructions are therefore to ask you to collect your refund of Kenya Shillings Six Thousand Five Hundred Only (Kshs 6,500/-) from our offices situated at Lengai Home Opposite Kenya Power and Lighting Company Ltd, Kilifi, within the next seven (7) days from date set herein.

TAKE NOTICE that unless you abide by the contents of this letter, we have mandatory instructions to institute eviction proceedings in Court at your own risk as to costs and other incidental thereto."

20. It was however clear from the material placed before me that the Agreement was not oral but in writing. Again contrary to the averments contained in their Advocates letter, the money was received by the late Cheva Kingo not as a loan but as the purchase price for land and the trees thereon. That letter indeed confirms that the Plaintiff took possession of the land and has been on it for quite a long period of time.

21. Unlike adverse possession, prescription is a non-possessory interest in land through the long, continuous use of the land. As it were, one can acquire title to land even when he has not been in possession of such land if he can show that he has used the land for a long period of time. In this respect Section 32 (1) of the Limitation of Actions Act provides that where an easement has been enjoyed, peacefully and openly as of right, and without interruption, for twenty years, the right to such access is absolute and indefeasible.

22. The Plaintiff herein has provided evidence to demonstrate that he has used the suit property since the year 1975. That would be some 40 years before the Defendants tried to take back the land from him. That is 20 years more than the period prescribed by statute.

23. In the premises, I am persuaded that there is merit in the Plaintiff's case. I allow the same as prayed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF JULY, 2021.

J.O. OLOLA

JUDGE