



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 383 OF 2009 (OS)

KABU MUMBA MUDACHI & 11 OTHERSPLAINTIFFS

-VERSUS-

PWANI JEZOZHUM COMPANY LIMITED DEFENDANT

-AND-

OBED ELIPHAS NJIRU & 6 OTHERS ...NECESSARY PARTIES

JUDGMENT

(Suit by plaintiffs seeking title by way of adverse possession; title displayed by the plaintiffs being a title issued under the Land Titles Act; evidence showing that the title displayed by the plaintiffs was surrendered and converted into the Registered Land Act regime; the land was thereafter subdivided into several plots with registers opened for the subdivided portions under the Registered Land Act; plaintiffs thus seeking to be declared owners of a title that no longer exists; one cannot seek to be declared owner of a title that no longer exists; plaintiffs' suit dismissed with costs)

1. This suit was commenced on 5 November 2009 by way of an Originating Summons brought pursuant to the provisions of Section 37 and 38 of the Limitation of Actions Act, Cap 22, Laws of Kenya. It is a suit through which the applicants (hereinafter referred to as the plaintiffs) claim title, by way of adverse possession, to the land title CR No. 338, Subdivision No. 830/II/MN (Original No.155/II/MN) (the suit land) said to measure 350 acres or thereabouts. The plaintiffs aver that they sue on their own behalf and on behalf of the squatters/residents of Vikwatani Estate residing on the suit land. They of course contend to have been in occupation of the suit land for a peaceful and uninterrupted period of 12 years hence entitled to their prayers.

2. The supporting affidavit is sworn by Kabu Mumba Mudachi. He has deposed inter alia that through a transfer dated 1 October 1987, and registered on 30 October 1987 as Entry No. 29, the respondent (hereinafter referred to as the defendant) became registered as proprietor of the suit land. He deposed that prior to the purchase he was in occupation of the suit land since the year 1964, and that in 1978 he built a house on it, and further, that since then, he has peacefully occupied the land uninterrupted. He avers to have been informed by the other plaintiffs that they too have been staying on the suit land before the purchase by the defendant, and they have all built houses where they live, and have been in possession for over 20 years to the time of filing suit.

3. Mr. Mudachi also filed a statement where he inter alia stated that he is the Chairman of Concordia Development Group and he represents all the squatters numbering over 5,000 who are residents on the suit land. He stated that he was born on the land in the year 1964 and that he grew up on the land. He stated that his late father occupied the land in the year 1958 and acquired about 15 acres which he used to graze his cattle and to farm. There were also some white settlers living on another part of the land. In 1970, his late father and other squatters were arrested for illegally occupying the land. They were convicted and jailed for 2 years. He stated that in 1971, after his father had served one year in prison, President Kenyatta visited the coast region, and when he was informed that white settlers were harassing the locals, he ordered them to be deported. His late father and the other squatters were released from prison and settled back on the land and they continued living in it until 1985 when one Kamau Thiongo came from Nairobi and claimed to have bought the whole land. He started harassing squatters but died in 1986 and things went quiet. The squatters continued living in peace until the year 2008. On 29 and 30 September, the Municipal Council of Mombasa advertised the whole land for sale for non-payment of rates from 1985 to 2000. After seeing the advertisement, he mobilised the squatters and they filed a suit in the High Court of Mombasa to stop the auction. He stated that the court granted them the orders and they were allowed to pay the land rates of Kshs. 2.6 million. They paid a first instalment of Kshs. 600,000/= on 3 December 2008 and since they did not have enough money, they continued paying the rest in instalments for a period of one year. They thus paid another Kshs. 648,000/=. On 26 May 2009, due to slow payments, they were charged a penalty of 3% which brought the final figure to Kshs. 3,288,130/=. After completing the payment they filed this case for adverse possession.

4. The suit was opposed by the Replying Affidavit of Newton Kogi Kiburi (now deceased). He was a director of the defendant. He deposed that the defendant purchased the suit land through a loan from Agrarian Building Society and transfer was effected on 30 October 1987. On

15 December 1987 a subdivision scheme was approved under terms which included reasonable compensation to squatters, if any, for their structures. A vetting exercise for the squatters was done and they were paid. On 29 January 1988, the Mombasa Land Control Board gave consent to subdivide and this involved change of user from agricultural to residential/commercial/ educational/religious/ and health centre purposes. On 28 March 1990 the Ministry of Lands, Housing and Physical Planning, gave approval for the subdivision scheme. The original title was then surrendered in March 1990 and the title was converted to the Registered Land Act, CAP 300 (now repealed), vide Kenya Gazette Notice No. 173 of 5 April 1990. Upon surrender of the title, the land was demarcated into six blocks for registration, being Blocks A,B,C,D, E and F. Survey was done and titles issued to several people and registered under the description Kisauni/Kisauni 1 and 2. In the subdivision scheme, several titles were to be surrendered to the Government for markets, shopping areas, schools, religious institutions, septic tanks, road reserves, open spaces, and a creek area was delineated as wet land. Agrarian Building Society was placed under receivership in 1996 by the Registrar of Building Societies, who laid a claim on the land upto the year 2007, and forbade the company from taking possession of it which created an impasse for several years. He believed that it is within this period that squatters and settlers encroached on the land. While they were planning the subdivision, several people, about 1,200 of them, took interest and purchased some plots. Some took possession and developed their portions. Some people also have titles issued under Kisauni/Kisauni Block. It was denied that the plaintiffs were prior to the purchase in 1987 in occupation of the land. He added that on 27 April 1989, a charge by Agricultural Finance Corporation was placed for Kshs. 17,000,000/= which charge still subsists.

5. In the course of the proceedings, some 7 persons were added as necessary parties. These are persons who bought land from the subdivision scheme of the defendant. They were issued with certificates of ownership awaiting subdivision, transfer and registration. Some settled and developed on their portions.

6. Parties gave their evidence more or less along the lines in their pleadings. I invited counsel to file submissions which they did and I have taken note of these.

7. I need not make a lengthy judgment in this matter because it is obvious to me that the suit by the plaintiffs is a non-starter. The plaintiffs seek adverse possession of the title CR No. 338, Subdivision No. 830/II/MN (Original No.155/II/MN) said to measure about 350 acres. It however emerged in evidence that this title, issued under the Land Titles Act (repealed) no longer exists. DW-2 was Samuel Kariuki Mwangi, a Principal Land Registrar, stationed at the Mombasa registry. He testified that the title to the suit land was converted to the Registered Land Act regime through Gazette Notice No. 173 of 5 April 1990. The register was then closed and the original title surrendered for cancellation. He testified that this title does not now exist having been closed upon conversion. He had with him, when he testified in court, the original title that was surrendered. He testified that a new register under the Registered Land Act was opened with the land being registered as Kisauni/Kisauni/Block 1. There was approval of subdivision which gave rise to the titles Kisauni/Kisauni/Block 1-159 and titles to these parcels were issued. He testified that some of the properties have already been transferred to third parties. He had with him some copies of titles in names of different individuals. He also had with him the collection of green cards opened for the subdivided titles. He was categorical that the titles he has shown resulted after the original title was converted and subdivided. He testified that by 2009, which is the time that this suit was filed, titles had already issued to the owners of the subdivisions.

8. The plaintiffs had called Mr. Edward Kiguru, a licenced surveyor as PW-2. He provided evidence that the area is densely populated. When cross-examined about the existence of the title CR No. 338, Subdivision No. 830/II/MN (Original No.155/II/MN), he stated that he did not know before, that this title had been closed. He stated that he is now aware that it changed to Kisauni/Kisauni/1-159.

9. In his submissions, Mr. Hayanga, learned counsel for the plaintiffs submitted that if the land was subdivided it would not be attracting rates and would not have been put up for sale and auction. He thought that the certificates of ownership issued were fake documents not competent to show any ownership. He also submitted that the title deeds displayed are not authentic. He referred me to the postal search done by the plaintiffs on 9 October 2008. I am afraid that these submissions do not shake the evidence tendered by DW-2. The postal search that the plaintiffs conducted on 9 October 2008 is clear that the title CR No. 338, Subdivision No. 830/II/MN (Original No.155/II/MN) has been converted to the regime of the Registered Land Act. What the plaintiffs needed to do was to conduct a further inquiry with the register of the Registered Land Act to find out what has happened to this title upon conversion. They do not appear to have done that. I do not see how the plaintiffs can hinge on a demand for rates, in the circumstances of this case, to assert that title exists. The existence of a title is found in the register kept by the Land Registrars, not in the rates register. The rates register cannot override the register in the Lands office, otherwise all someone will need to do is go to the rates register, change it, and now claim to own the land in question. I have absolutely no evidence that the green cards that were displayed by DW-2 are not authentic. The plaintiffs themselves did not tender any evidence to traverse these green cards and the subdivided titles. Their own surveyor acknowledged that he has now become aware that the original title has changed to Kisauni/Kisauni/1-159.

10. On a balance of probabilities, the evidence before me shows that the plaintiffs have filed suit seeking orders on a title that no longer exists. On a balance of probabilities, the evidence tendered shows that this title was surrendered and it has been subdivided into many plots with titles issued under the regime of the Registered Land Act. The registers (green cards) to these titles have indeed been displayed. It is apparent that the plaintiffs are seeking adverse possession to a title that no longer exists. It is trite that you cannot claim a title that is no longer in existence. On that ground alone, this suit must fail. It is thus not necessary for me to go deep into the evidence to analyse whether or not the evidence tendered demonstrates a peaceful, open and uninterrupted possession of at least 12 years before the suit was filed. There is really no point of saying more.

11. For the reasons given above, this suit is hereby dismissed with costs.

12. Judgment accordingly.

DATED AND DELIVERED THIS 10TH DAY OF NOVEMBER, 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA