



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 219 OF 2015

CHARO LEWA1ST PLAINTIFF

KAHINDI CHARO LEWA2ND PLAINTIFF

NICHOLAS LEWA 3RD PLAINTIFF

KADII CHARO LEWA 4TH PLAINTIFF

-VERSUS-

ESTATE OF MOHAMED OMAR BAWALY 1ST DEFENDANT

JOGI MOTORS LIMITED 2ND DEFENDANT

CHAIRMAN, NATIONAL LAND COMMISSION3RD DEFENDANT

HON. ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

BACKGROUND

1. By their Complaint dated 24th November, 2015 as filed herein on 1st December, 2015, Charo Lewa, Kahindi Charo Lewa, Nicholas Lewa and Kadii Charo Lewa (*hereinafter the Plaintiffs*) pray for Judgment against the 4 Defendants jointly and severally for:

(a) *A declaration that the Plaintiffs herein are entitled to the land (suit) land by adverse possession;*

(b) *That the 1st and 2nd Defendants by themselves, their agents, servants, workers and/or employees be permanently restrained from entering, remaining in and/or removing the Plaintiffs, cutting down the Plaintiffs Mango, Coconut and Cashewnut trees and/or destroying the Plaintiffs' food crops and/or in any manner interfering with the Plaintiffs' peaceful stay and occupation of the suit property;*

(c) *Costs of the suit; and*

(d) *Any other or further orders this court may deem just and fit to grant.*

2. Those prayers arise from the Plaintiffs' contention that as members of the Tokali family, they have been in occupation and/or possession of a piece of land measuring 5 or 6 acres being part of Plot No. 139 Malindi since the year 1945. It is their case that the 1st Defendant did threaten them with eviction from the suit land in the year 2013 by which time they had already been entitled to the land by dint of adverse possession.

3. But in their joint statement of Defence dated 14th January, 2015 as filed herein on 11th February, 2015, the Estate of Mohamed Omar Bawaly and Jogi Motors Limited (*the 1st and 2nd Defendants respectively*) deny that the Plaintiffs have been in occupation of Plot No. 239 Malindi as alleged or at all and hence the issue of adverse possession does not arise.

4. The 1st and 2nd Defendants further deny that they evicted the Plaintiffs from Plot No. 139 Malindi and deny that they are the registered proprietors of the said parcel of land.
5. The Chairman, National Land Commission (*the 3rd Defendant*) neither entered appearance nor did he file a response to the Plaintiffs' claim.
6. However in his Statement of Defence dated 17th August, 2016, the Honourable the Attorney General (*the 4th Defendant*) states that the suit as framed is not a civil proceeding against the Government as contemplated under the Government Proceedings Act nor does the same disclose any reasonable cause of action against the 4th Defendant. The 4th Defendant further avers that he is a stranger to and does not admit any of the averments made by the Plaintiffs in the Plaint.

THE PLAINTIFFS' CASE

7. In the course of the trial herein, the Plaintiffs called a total of three
(3) witnesses who testified in support of their case.
8. PW1 – Kadii Charo Lewa is the 4th Defendant and a resident of Kaoyeni. She told the court that the suit land initially belonged to their grandfather Lewa Mwandenje and that she was born on the land in 1960.
9. PW1 testified that they were on the land until the time they filed this suit. However, when they were in court, some people went to the land and evicted the Plaintiffs. It was the 1st and 2nd Defendants who went to evict them telling them that some people had been compensated for the land. The Area Chief also asked the Plaintiffs to leave.
10. PW1 told the court they refused to vacate the land as they had not been compensated by anyone. The Charo Lewa family and the Kahindi Tokali Lewa family still reside on the land. PW1 told the court that the 1st Defendant was their neighbor for a long time. She further told the court it is not Mzee Bawaly who went to evict them but it was his sons. Those sons refused to obey the court order and proceeded to evict them from the land by force.
11. On cross-examination, PW1 testified that she was the daughter of the 1st Plaintiff herein – Charo Lewa. She further told the court that the 2nd and 3rd Defendants are his brothers. PW1 testified that the land belonged to her grandparents even though they had no title.
12. PW1 further told the court that the late Mzee Bawaly was their neighbour and that she was aware at one point in time the whole of Plot No. 139 was registered in Mzee Bawaly's name. She told the court her father lived on the land and that none of their family members worked for Bawaly. PW1 further told the court that she lived on the same land but on different portions from that occupied by the father.
13. PW1 conceded that Ismail Lewa Mwandenje is a brother to her father and that the said Ismail may have been compensated as he is the one who started the claim that PW1's father was paid Kshs.105,000/- as compensation.
14. PW2 – Nicholas Lewa Mwandenje is the 3rd Plaintiff herein. He told court that this father is Washuru Lewa Mwandenje who is a brother to the 1st Plaintiff herein. He told the court they were evicted from the suit property in 2009 and that he now lives in Kwa Chocha. Before their eviction, they had lost a number of relatives who to-date are still buried on the said Plot No. 139.
15. PW2 testified that Mzee Mohammed Omar Bawaly was their neighbor and that some of PW2's relatives used to help Mzee Bawaly on the land. In 2009, Mzee Bawaly's family went to the suit property with policemen and forcefully evicted those who were on the land.
16. On cross-examination, PW2 told the court his grandfather who later died in 2006 was the first person on the land. There were however no documents for the land then. PW2 told the court he was unaware that the land belonged to the Bawaly's. The Bawalys had a title issued in 1908 but they had only bought 22 acres and not the 28.76 acres comprised in the suit property.
17. PW2 further told the court he was unaware if the Bawaly's had sold the land to the 2nd Defendant. While it was true that his father Kashuru Lewa Mwandenje is alive, PW2 was unaware if his father was compensated for the land. His father had left the land many years earlier.
18. PW2 further testified that they sued the 2nd Defendant because those who had evicted them had uniform emblazoned with the logo of Jogi Motors Limited – the 2nd Defendant herein. Both the Police and Jogi Motors Limited had participated in the eviction. PW2 however had nothing to show that the land belonged to the 2nd Defendant.
19. PW3 – Kahindi Charo Lewa is the 2nd Plaintiff and a son to the 1st Plaintiff. He told the court he was one of the members of the Tokali family who have lived on the suit land for a long period of time. Sometimes in the year 2013, the family of the 1st Defendant who had purchased some portions of Plot No. 139 Malindi stated claiming the land occupied by PW3's family and threatened to evict them from the land.
20. PW3 further told the court his father and grandfathers were some of the workers of Mohamed Omar Bawaly who is now deceased. They would milk and graze the cows and pick cashew nuts for him. The two families stayed peacefully without any complaint until Mzee Bawaly's death. In 2015, the Bawalys started claiming the entire piece of land including the portion occupied by the plaintiffs' family.

21. PW3 further told the court that sometimes in October, 2015 some people went to the land and started to violently clear their crops telling them to vacate as the land had been purchased by the 2nd Defendant herein. The 1st Defendant has no colour of right to sell the land to the 2nd Defendant as the Plaintiffs' family having stayed on the land for some 38 years are entitled thereto by virtue of adverse possession.

22. On cross-examination, PW3 told the court he moved from Plot No. 139 Malindi in 2009 and that he now resides together with his family in Takaye Musolini. He also told the court that he knew Mzee Bawaly and that he was not staying on Plot No. 139 Malindi but on an adjacent parcel of land. He further told the court there was a road separating their land from that of Mzee Bawaly and that he was one of Mzee Bawaly's workers. PW3 told the court Bawaly owned 22 acres and that the balance of 6 acres belonged to the Plaintiffs. They had however never surveyed the land.

THE DEFENCE CASE

23. On their part the 1st and 2nd Defendants called two witnesses in support of their case. The 3rd and 4th Defendants did not call any witnesses.

24. DW1 – Ahmed Mohamed Bawaly is the son of Mohamed Omar Bawaly (*now deceased*) and one of the Administrators of the deceased's estate. DW1 told the court that his late father had various farms with Plot No. 139 Malindi being one of them. Upon his death, the estate was devolved to the beneficiaries vide a transfer of assets dated 19th June, 2014 as per the deceased's written will.

25. DW1 testified that from time immemorial, they have been in occupation of the land using the same for rearing cattle and dairy farming. He told the court some squatters have been trying to encroach on their land for a long time and that he Plaintiffs' father had tried to do so in the 1970's but they were reported to the Area Chief and they left. In 2016, his grandchildren came again and started claiming the land and trying to stop them from selling the same.

26. DW1 told the court they caused all those who were causing trouble to be summoned to the Area Chief's office. For purposes of maintaining peace, they gave each of the families some money. The Plaintiffs family were among the beneficiaries of the money which was taken on their behalf by one Ismail Lewa.

27. DW1 further told the court they subsequently sold the land to Joshua Gitahi Rodrot and transferred the same on 16th September, 2015. The land is 28.7 acres in size.

28. On cross-examination, DW1 denied that the Plaintiffs' fathers were their employees at any point in time. He told the court that when they paid money to some of the squatters such as Ismael Lewa Mwandjenje, they were only purchasing peace. As at the time the suit was filed on 1st December, 2015, DW1's family had sold and transferred the land to Joshua.

29. DW2 – Richard Rodrot is a director of Jogi Motors Limited. He told the court that Joshua Gitahi Rodrot is his uncle and co-director at Jogi Motors Limited. He denied that the land in question was purchased by the company as stated by the Plaintiffs. DW2 however told the court he was aware that his uncle and co-director had purchased the land from the Bawaly family.

30. In cross-examination, DW2 conceded that some of the cheques used to compensate the squatters came from the company's account. He told the court his co-director was the sole signatory to that particular account and that the 2nd Defendant Company had nothing to do with the purchase of the land.

ANALYSIS AND DETERMINATION

31. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses and the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

32. The four (4) Plaintiff herein pray for a declaration that they are entitled to the suit land – Plot No. 139 Malindi under the doctrine of adverse possession. Consequent to that finding they urge the court to restrain the 1st and 2nd Defendants from entering, remaining in and/or removing them from the suit property. They also want the court to stop the said Defendants from cutting down trees or destroying food crops which they have planted in the said parcel of land and from interfering with their peaceful occupation thereof.

33. According to the Plaintiffs, their Tokali family has been in occupation and uninterrupted possession of a portion of the said Plot No. 139 Malindi measuring some 5 to 6 acres sine the years 1945. It is their case that they have nowhere else to go having been born on and lived peacefully on the land ever since. They have buried their grandparents on the land and it is the only place they refer to as their home. They accuse the 1st Defendant of trying to take their 5 to 6 acres of land having purchased only some 22 acres of Plot No. 139 Malindi which measures approximately some 28.76 acres in total.

34. The Plaintiffs assert that by the time the 1st and 2nd Defendants tried to evict them from the suit property in the year 2013, they had been on the land for at least some 38 years and their actions had been caught up by the law on limitation of actions and they could therefore not be allowed to take back the land which the Plaintiffs had since become entitled to under the doctrine of adverse possession.

35. The 1st and 2nd Defendants however deny that the Plaintiffs have been in occupation and possession of the suit property for the stated period or at all. On the contrary, the Defendants assert that the suit property has at all times been in exclusive possession of the 1st Defendant and that whenever squatters such as the Plaintiffs herein have attempted to encroach thereon, steps were always taken through the local administration to deter such encroachment.

36. The Defendants further asserted that some three (3) months before the Plaintiffs filed this suit, the 1st Defendant had on 16th September, 2015 sold and transferred the suit land to one Joshua Gitahi Rodrot who is not a party in these proceedings and that thence the orders sought herein could not be granted.

37. In their closing submissions herein, the Defendants also fault the procedure by which the Plaintiffs approached the court and term the suit herein as incompetent. According to the two Defendants, a party who wishes to apply for adverse possession needs to file an originating summons as provided under **Section 37 of the Limitation of Actions Act**. Such an originating summons ought to be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

38. In the matter herein, the Plaintiffs chose to approach the court by way of an ordinary Plaint and no extract of the Defendants' title has been annexed. This court takes note however that the Defendants never raised that issue anywhere in their pleadings and/or in the course of the trial. The matter is being raised first in the Defendants' closing submissions. As Odunga J stated in **Agnes Nduume Kioko –vs- Alexander Njue (2019) eKLR**:

“Submissions simply concretise and focus on each side’s case with a view to win the Court’s decision that way. Submissions are not evidence on which a case is decided.”

39. Be that as it may, I did not think that the mere institution of the suit herein by way of a plaint and not through an originating summons would *ipso facto* render the suit fatally defective. As the Court of Appeal stated in **Chevron (K) Limited –vs- Harrison Charo Wa Shutu (2016) eKLR**:

“The Courts have since this decision (in Njuguna Ndatho –vs- Maasai Itumu & 2 Others C.A No. 231 of 1999), held that a claim by adverse possession can be brought by a Plaint. See Mariba Mariba Civil Appeal No. 188 of 2002, counterclaim or defence as was the case here. See Wabala –vs- Okumu (1997) LLR 609 (CAK). In Gulam Mariam Noordin –vs- Julius Charo Karisa, Civil Appeal No. 26 of 2015, where the claim was raised in the defence, this court in rejecting the objection to the procedure, stated the law as follows:

“Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of Limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of Wabala -vs- Okumu (1977) LLR 609 (CAK) which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. Similarly in Bayete Company Limited -vs- Kosgey (1998) LLR 813 where the plaint made no specific plea of adverse possession, the plea was nonetheless granted.”

40. That being the case, I was unprepared at this stage to uphold the contention that the Plaintiff's suit was fatally defective. A perusal of the list of Documents filed contemporaneously with the Plaint herein reveals that an extract of titles for the suit property was attached and the same was produced as an exhibit during the trial herein by the Plaintiffs.

41. Turning to the Plaintiffs' claim for adverse possession, it is their case that they have been in occupation and possession of the suit property for an uninterrupted period of at least 38 years and that by dint of such occupation, they have since become entitled to the portion of the suit land that they occupy.

42. As the Court of Appeal stated in **Ruth Wangari Kanyagia -vs- Josephine Muthoni Kinyanjui (2017) eKLR**:

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is peaceful, open and continuous. The possession must be adequate in continuity, in publicity, and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, and hostile and continued over the statutory period.”

43. In **Wambugu -vs- Njuguna (1983) KLR 174**, the same Court of Appeal also held that 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.

44. The Plaintiffs Strategy in the matter herein, was three-pronged. On the one hand, they argued that the 1st Defendant had only purchased 22 acres of the 28.76 acre suit land and that the portion they occupied did not therefore belong to the 1st Defendant. Other than some calculations which the Plaintiffs purported to indulge in via their pleadings, there was nothing much by way of evidence to support that contention.

45. Indeed the Certificate of Ownership of land produced by the Plaintiffs themselves was emphatic that the 1st Defendant was the registered proprietor of the entire suit land measuring 28.76 acres. The Plaintiffs themselves had no other title to the portion they describe as being 5 to 6 acres which they claim.

46. The second argument by the Plaintiffs was that their fathers and grandfathers had entered the land as workers of the original owner of the land the late Mohamed Omar Bawaly. They were full of praise for the deceased apparently for allowing them to stay on the land unlike his sons who now sought to evict them from the land.

47. While conceding that they used the suit land for rearing livestock and for dairy farming, the Defendants denied categorically that their deceased father had employed the Plaintiffs or allowed them to use a portion of the land as their residence or for other use. That argument would indeed fall on its face as to uphold the same would mean that the Plaintiffs entered the land as licencees of the 1st Defendant.

48. Ultimately the Plaintiffs argued that they have occupied the suit land for an uninterrupted period of 38 years and that therefore the Defendants had been deprived of the use and possession of the land.

49. As it were, the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land and that the adverse possessor has done acts on the land which are inconsistent with owner's enjoyment of the land.

50. In the matter herein it was not in dispute that the parties were at some point engaged in an attempt to settle the dispute between them through the local administration. The Plaintiffs did not however bring any document or call as a witness the Area Chief or someone else who could independently corroborate their claim to have stayed on the suit land for the period they claim. The photographs they relied upon do not show the presence of any structures on the suit land. All that can be gleaned therefrom are the pictures of various crops.

51. Even more significantly, virtually all the Plaintiffs admitted during cross-examination that some 4 to 5 years before they filed the suit herein, they had moved away from the suit land and were now residing elsewhere and only using the same for cultivation. In order to succeed in their claim herein the Plaintiffs needed to demonstrate actual possession and a clear intention to dispossess the registered owner of his land and to deal exclusively therewith.

52. Having agreed to make and reside elsewhere it was evident to me that any possession and/or occupation they may have had of the property had been disrupted and the period of limitation could no longer run in their favour.

53. In the result I did not find any merit in the Plaintiffs' claim herein. Their suit is dismissed with costs to the 1st and 2nd Defendants.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 16TH DAY OF DECEMBER, 2021 VIA MICROSOFT TEAMS.

In the presence of:

No appearance for the Plaintiffs

No appearance for the Defendants

Court assistant - Wario

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J. O. Olola

JUDGE