



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ELC CASE NO. E002 OF 2020

KHALIF MOHAMMED HURE.....PLAINTIFF

VERSUS

MOHAMMED ABDI KARIM.....DEFENDANT

JUDGEMENT

1. The plaintiff instituted this suit vide a plaint dated 18th November 2020 seeking the following Orders;

- a. A permanent Injunction restraining the Defendant, his servants and/or agents from entering on and/or in any way interfering with the Plaintiff use and quiet enjoyment of Plot Number R4757 Wajir Township in Wajir.**
- b. The Officer Commanding Police Station Wajir Police to ensure enforcement and compliance of the Order.**
- c. Damages for trespass and damage to property.**
- d. Interest in (c) above from the date of filing suit until payment in full.**
- e. Costs of the Suit.**

2. The plaintiff averred that on 10th February 2015, the County Lands Committee Wajir County confirmed that Plot Number R4757 Wajir Township (herein also referred to as the suit premises) belongs to **Mr. Abdi Mohameed Hura** after a complaint was launched in the Tribunal. That on 17th July 2017, the plaintiff bought the Plot through a sale agreement from Mr. Abdi Mohammed Hura. That the Defendant without permission and/or consent from the plaintiff or any legal justification trespassed upon the suit premises and illegally started to dig a well and structures on the land.

3. The Defendant filed his defence on 6th January 2021. He averred that he is the owner of Plot Number R4430 Wajir Municipality currently H1119 by virtue of the doctrine of adverse possession, having possessed and resided on the same since the year 1982. That the tribunal alleged by the plaintiff was not properly constituted and did not give him an opportunity to be heard. That had the plaintiff conducted due diligence prior to executing the sale agreement, he would have realized that the vendor, Abdi Mohamed Hura had no *locus standi* to sell the land. That the well situated on the plot has been there since the year 1998 and that the same was swept away during the *Elnino* rains and the Defendant is only currently repairing the same. That the defendant having being in possession of the suit land for over twenty(20)years without interruption continuously automatically acquired equitable rights which supersedes the plaintiff's claim over the property.

4. The Defendant filed a reply to defence denying the averments made in the defence and restating his averments in the plaint.

5. The matter proceeded for hearing on 26/7/2021.

6. **PW1 Khalifa Mohammed Hure** adopted his statement dated 18/11/2020 and restated the averment in the plaint. It was his testimony that he conducted due diligence prior to his purchase of the land. He was aware of the dispute in the year 2005 which was resolved by a Land Committee presided over by the Area Chief. That the Defendant had also set up a makeshift on the land in the year 2007. That the Defendant was issued a letter by the County Council stopping any developments on the land. That Wajir County Land Tribunal also heard the dispute and resolved that the land belonged to Abdi Mohammed Hura. That this is the time he decided to buy the land. The decision of the tribunal had not been appealed.

7. He told the court that the defendant has not lived on the land for even one hour. He only attempted to trespass on the same in July 2020 when the previous owner was sick. That the land was visited by the land tribunal in the year 2020 who confirmed that there was no structure on the land.

8. In cross examination, he testified that the plot number of his land is no. 4757/H1119. That if a search is conducted at the County Government lands office, that land will not reflect his name reason being that in 2017/2018 Wajir County Government conducted a survey of the whole area and issued new numbers, hence his plot number changed. That he was not aware that the survey was done.

9. When he was referred to Pexh1-report from the tribunal, it was his testimony that the committee members in that decision are still alive. He reiterated that no appeal has been filed from that decision. He told the court that he was issued the letter from the County Council of Wajir (**Pexh3**) by Hussein. A. Hussein, the County Council surveyor/clerk. That he also wrote a letter dated 6/8/2007 and signed for the County Clerk. He admitted that the signatures in the document are not the same but stated that he was not aware if there was an investigation concerning the same.

10. When referred to the Sale agreement. He testified that he bought the land for a sum of Kenya shillings One Million Five Hundred Thousand Only (1,500,000/=). That the same was paid in cash at the advocates offices.

11. In re-examination, he testified that prior to 2017, the County Council was issuing letters as confirmation of ownership. That in this case a latter was issued to the previous owner dated 22/2/2003. The same was issued by Hussein. A. Hussein for the clerk. That there being no appeal from the decision of the Tribunal at the time of the purchase, he bought a clean title.

12. **DW1 Mohammed Abdi Karim** testified that he has been living on the suit land from the year 1982. That he had constructed on the land and has also started a hotel on the land. He told the court that he was not privy to the decision of the county land tribunal. That he was not consulted to give his side of the ownership of the suit land. That according to the records of Wajir County Council, the land is recorded in his name.

13. That he is knew Hussein. A. Hussein. The said Hussein has never been a clerk of the County. That the letter claiming the land belongs to Abdi Mohammed Hura cannot be true.

14. In cross examination, he testified that he was the first person to reside on the plot. He stated that he has resided on the same since 1982 and he is the one who cleared the bushes. That he informed the tribunal the land belongs to him and presented his documentation. That he was not aware whether the tribunal visited the suit land. He later conceded that he was informed that they had visited his land but told the court that he did not get to see the report.

15. He told the court that he registered the land in the year 2003 but they were not required to pay land rates. He confirmed that there was a surveyor by the name Hussein. A. Hussein at the council and a chief named Mohammed James Noor who was a witness at the tribunal. He stated that he had constructed a kiosk on the land which was demolished by Mohammed Farah from Wajir County Government. That upon his receipt of a court order, he did not continue with his construction. It was his further testimony that he appealed the decision of the tribunal on 30/5/2016. He restated that his claim is based on adverse possession having being in possession of the suit premises from the year 1983.

16. In re-examination, he testified that the records at the County Government of Wajir reflect that he is the owner of the suit premises. That he used to pay rent for the suit premises. That the Court order issued did not state that his structures on the suit premises ought to be demolished.

PLAINTIFF'S SUBMISSIONS

17. The plaintiff submitted that he had produced documents i.e. Sale Agreement, County Lands Tribunal Committee, and Letters from Wajir County to prove his ownership of the suit premises. That there has been continuous litigation over the suit premises hence the Defendant cannot claim to be the owner of the suit premises on a claim of adverse possession. That the letter issued by the Defendant dated 30th May 2016 in support of his claim was clearly an afterthought as he had equally disowned it during the trial. That the defendant has also not appealed against the decision of the tribunal which was the appropriate remedy in the circumstances. He cited the following authorities in support of his submissions i.e. **Giella versus Cassman Brown & Co. ltd [1973] EA 358, Moses.C. Muhia Njoroge & 2 others vs Jane. W. Lesaloi & 5 Others High Court Elc Case No.514 of 2013, Mrao Ltd versus First American Bank of Kenya & 2 Others [2003] KLR 125, Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 Others [2018] eklr, Wambugu v Njuguna [1983] KLR 173, Mbira v Gachuhi [2002] EALR 137, Jandu v Kirplal & Another [1975] EA 225, Mtana Lewa v Kahindi Ngala Mwangandi (1975) EA 225, Jasbir Singh Rai & 3Others V Tarlochan Singh Rai & 4 Others [2014] eklr.**

DEFENDANTS SUBMISSIONS

18. The defendant on the other hand submitted that his claim arises from adverse possession. That he had stayed on the suit land from the year 1982 until 2015 (33 Years) when the complaint herein was raised. To support his claim on adverse possession, he relied on the **Mtana Lewa v Kahindi Ngala Mwangandi (1975) EA 225, Mbira v Gachuhi [2002] EALR 137, Jandu v Kirplal & Another [1975] EA 225.** That he thought best to register the land in his name hence its appearance on the data as H1119 Which is the position to date.

ANALYSIS AND DETERMINATION

19. I have considered the evidence of the parties and the submissions filed. The main issue for determination is *Who is the rightful owner of the suit premises?*

20. **Section 107(1) of the Evidence Act (Chapter 80 of the Laws of Kenya)**, provides:

107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

21. There is however the evidential burden that is cast upon any party to prove any particular fact which he desires the court to believe in its existence. **Section 109 and 112 of the Evidence Act** provides as follows;

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

22. The plaintiff herein lays his claim over the suit property on the Sale Agreement between him and Abdi Mohammed Hure dated 17/7/2021 (**Pexh2**). He claimed to be aware of the dispute between *Hure* and *Abdi Karim* (the defendant herein).

23. **Pexh4** was the resolution made on 16/3/2005. The said resolution was in respect of a dispute between *Hure and Abdi Karim* before the Area Chief. In the said dispute, *Hure* claimed that the defendant was his relative and that he had given him the plot to take care of (at the time the reference number was Plot No. 4757). The defendant did not have any Document. The Chief and his committee conducted its own investigation and resolved that the plot belonged to *Hure*. They informed the defendant as much.

24. The plaintiff also attached proceedings from the *County Lands Tribunal Committee, Wajir County Council Case Number 33 of 2015 Mohammed Abdi Hure Versus Mohamme Abdikarim*. (**Pexh1**) In the aforesaid proceedings, *Hure* witnesses claimed that the defendant herein owned land adjacent to the suit premises which he sold to his nephew Abdinoor Elmi and proceeded to grab *Hure's* Land. The then County Surveyor, Hussein. A. Hussein confirmed that the land belonged to *Hure*. In the proceedings, the defendant claimed to have owned the land since 1982 and his wife had operated a kiosk on the land and that he only gave a portion of the same to his nephew, Abdinoor Elmi. His averment was supported by the following witnesses; Salat Door Gure, Farah Abdille, & Abdi Gedi Duale.

25. The lands Tribunal Committee conducted a site visit of the land. They found out that the suit premises is next to Abdinoor's Plot. That the plot is almost 50x100ft and that there is no structure used as a kiosk. The lands committee considered the evidence of the parties and their witnesses in the course of its investigation and held that the land belonged to *Hure*.

26. The Plaintiff also produced rental payments of the suit premises by Abdi Mohammed Hure. Letter dated 6th August 2007 from the County Council of Wajir directing the defendant not to make any developments and letter dated 27/7/2020 directing the defendant to vacate the suit premises within three (3) days as he had not appealed the decision of the tribunal.

27. The Defendant produced **DExh 2** letter of proceedings which was conducted on 15/7/2020 by Wajir County Council. In the aforesaid letter, the Council advised that the matter ought to be determined at a Court of law and the status quo to be maintained. Dexh 3 & 4 being land rent receipts for Land Ref No. R4430 between the years 2003-2014. Letter dated 19/12/2003 claiming the defendant is the owner of Plot No. 4430. Letter from the Area Chief (Dexh1) dated 25/7/2020 claiming the defendant is the owner of the suit premises.

28. The defendant also filed witness statements signed by Andirazak Salat Mohammed, Abdirashid Mohammed, Adan Abdi Farah, Usnina Abdi Hussein and Abass Hussein Yussuf and an inquiry report from the director of Criminal Investigations dated 11/2/2021 on the authenticity of the records signed by Hussein. A. Hussein.

29. From the records I have highlighted above, it is clear that the case herein has been previously litigated before the area chief and the County Lands Committee. I have considered the evidence produced by both parties and the decision made by the Chief and the Lands committee.

30. The defendant herein has been present during the proceedings at the Chief's level and at the Land's Committee. *Hure* and the defendant presented their evidence. Both the chief and County Land Committee reached a decision that the land belonged to *Hure*. Of importance is *whether the Defendant was afforded a fair hearing*. The defendant had the opportunity to argue his case and called witnesses in support. I therefore find that the defendant was afforded a fair hearing.

31. *Did the Chief and Land Committee arrive at an unjust determination?* I have also looked at the proceedings at both the chief's level and the Committee stage. The committee had the opportunity to conduct a site visit and inquire into the authenticity of the documents issued by *Hure*. *Hure's* evidence was supported by the evidence of *Hussein. A. Hussein*, the then county surveyor. The defendant did not produce any document in support of his claim. Weighing the evidence produced, it is this court's finding that the County Lands Committee arrived at a just determination.

32. I have also considered the defendants evidence in these proceedings. Despite what had been restated at the Chiefs office and County level, the defendant sought to dispute the documents sworn by Hussein. A. Hussein. He filed a report from the Director of Criminal Investigations but he did not call a witness from the aforesaid department to present the report. The defendant also named five (5) witnesses to support his claim for adverse possession but the afore-named witnesses did not present evidence before this court.

33. Again, whereas the defendant's claim lies on adverse possession, he also sought to lay claim as the registered owner of the suit premises. These are distinctive claims.

34. The ingredients of Adverse possession have been set out by the court of Appeal in the case of **Mtana Lewa -v- Kahindi Ngala Mwangandi (2005) eKLR** where it was held that:

“Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12

years.”

35. The same is replicated in the case of **Jandu –v- Kirplal & Another (1975) EA 225**, where it was held:

“to prove title by Adverse Possession, it is not sufficient to show that some acts of Adverse Possession must be adequate in continuity, in publicity and in extent to show that it is Adverse to the owner. It must be actual, visible, exclusive, open and notorious.”

36. Also in the case of **Mbira –v- Gachuhi (2002) IEALR 137**, the court held as follows;

“a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”

37. Other than the defendant asserting his rights over the plaintiff’s title, he has also raised claims of fraud and misrepresentation. The same was not proved. Evidence of vigorous litigation has also been raised which interrupted the defendant’s occupation and a claim for adverse possession do not therefore arise. The lands committee, while visiting the suit premises, observed that there was no kiosk as claimed by the defendant.

38. The defendants claim is also based on the well he allegedly built. The same was countered by the plaintiff’s averment that the defendant has not stayed in the suit premises for even one (1) day and that he had encroached on the suit premises in the year 2020 by digging a well. A Site visit was not conducted/ requested by the defendant to confirm his allegations. No witness was called to corroborate the defendants evidence of occupation. The assertion that his stay was actual, visible and exclusive was therefore not proved.

39. I have also looked at the receipts attached in payment of land rent. The plaintiff relates to Parcel No. 4757 whereas the defendants relate to Parcel R4430. R4430 is clearly different from 4757. It is therefore this courts finding that on a balance of probabilities, the claim herein tilts in favour of the plaintiff.

40. As to damages for trespass of the property, I find that the plaintiff has not proved the same to the required standard.

41. The upshot of this court’s finding is that the Plaintiff has partially succeeded and do hereby enter judgment in the following terms;

(a) A permanent Injunction be and is hereby issued restraining the Defendant, his servants and/or agents from entering on and/or in any way interfering with the Plaintiff use and quiet enjoyment of Plot Number R4757 Wajir Township in Wajir county.

(b) The Officer Commanding Police Station Wajir Police to ensure enforcement and compliance of the Order.

(c) Each party to bear his own costs.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 17TH DAY DECEMBER, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Odegi for the Defendant
2. Plaintiff/Advocate: absent
3. Court Assistant: Ijabo