



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 203 OF 2014

SAADE AHMED ABDALLA.....PLAINTIFF

VERSUS

1. SAFARI KADENGE

2. MNYAZI JEFWA

3. KADZO KARISA LESO

4. MIRIAM KITSAO.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By her Complaint dated 3rd November 2014 and filed herein on 4th November 2014, Saade Ahmed Abdalla prays for Judgment against the four (4) Defendants jointly and severally for:-

a) A permanent injunction order restraining the Defendants, their family members, their servants, agents, employees and any other persons deriving interest or power from them from trespassing, constructing structures, alienating and disposing off and/or dealing with the suit land in any way whatsoever.

b) Vacant possession and demolition of the structures on the suit land and eviction thereof.

c) Costs of the suit and interest.

2. Those prayers are premised on the Plaintiff's contention that she is the registered proprietor of the said suitland described as Plot SR No. 2195 Takaungu measuring approximately 14.36 Ha and situated at Takaungu within Kilifi County. It is the Plaintiff's case that the said property was transferred to her name on 14th May 2007 from Hassanbhai Bin Nuru Bin Abdulkarim El-Bohra.

3. The Plaintiff accuses the Defendants of invading and trespassing onto the said Parcel of land, constructing temporary structures thereon and cultivating the same without her permission and to her detriment. The Plaintiff is apprehensive that unless the Defendants are stopped from the unlawful acts of trespass she stands to suffer irreparable damages and hence the institution of this suit.

4. But in a Defence and Counterclaim dated and filed herein on 3rd December 2014, Safari Kadenge, Mnyazi Jefwa, Kadzo Karisa Leso and Miriam Kitsao (the Defendants) jointly deny the averments contained in the Complaint. While they admit that the Plaintiff is the registered proprietor of the suit property, it is their case that the said registration was invalid, null and void on account of the fact that the title of the said Hassanali Bin Nuri Abdulkarim El-Bohra had by the time of the transfer of the property been extinguished by operation of the law and the conveyance made on 14th May 2007 did not therefore pass any valid title in the suit property to the Plaintiff.

5. The Defendants deny trespassing onto the property and contend that they were born thereon and have resided on their individual portions with their families for more than 30 years before the Plaintiff purported to buy the same. It is their case that they have resided on the land openly, exclusively and without any interruptions for the said period and assert that they have since acquired adverse possession of the said portions of the suit property.

6. By way of their Counterclaim, the Defendants assert that each and everyone of them occupies a portion of the suit property measuring two

acres or thereabouts and that they have each occupied their said respective portions openly, exclusively and without any interruption for a period exceeding 30 years. They accordingly seek a declaration that they have each acquired those respective portions by way of adverse possession.

7. Accordingly the Defendants urge the Court to dismiss the Plaintiff's suit and to instead enter Judgment against the Plaintiff for:-

a) A declaration that they have each acquired adverse possession of their respective two acres portions of land within(the suit property);

b) An order for the sub-division of their respective two acre portions of land within(the suit property) and an order to the Land Registrar to register each of the Defendants as the owners of their respective sub-divided portions of land; and

c) Costs of this suit and interest thereon at Court rates.

The Plaintiff's Case

8. During the trial, the Plaintiff called two (2) witnesses in support of her case.

9. Testifying as PW1, the Plaintiff told the Court that she purchased the land in dispute in May 2007 from Hassanbhai Bin Nuri (now deceased) at a consideration of Kshs 200,000/- which she paid in cash. The land was then registered in her name on 22nd May 2007.

10. PW1 told the Court that at the time she bought the land, there were about 40 temporary shelters and mud houses but the Vendor told her the owners of those shelters and mud houses had no right to the land. Subsequently, PW1 tried to remove the squatters through the office of the Assistant Chief. PW1 offered to facilitate the squatters to move out with building materials. While a majority did, the four Defendants have resisted all efforts to have them move out of the land.

11. PW1 told the Court that it was not true the Defendants had no alternative piece of land where they could reside. The Defendants have land elsewhere but have become hostile and refused to move out. PW1 testified that she cultivates the rest of the land except those areas occupied by the Defendants.

12. During cross-examination, PW1 told the Court that the Vendor used to reside in Mombasa and did not live in Takaungu. There was a Caretaker on the land. She further told the Court that she did not find out from the Vendor who is now deceased, how the squatters had come into the land. She did not also know why the Vendor never removed the squatters from the suit property.

13. PW2- Khadija Abdalla Omar is the mother of the Plaintiff. She testified that her daughter bought the land from Hassainbhai on 14th May 2007. At that time a lady by the name Bibi Hubuu was taking care of the land which had a borehole and some structures.

14. PW2 testified that they asked the owners of those structures to leave and sought the help of the Area Chief. More than 40 of the Squatters left thereafter but the four Defendants refused.

15. Upon cross-examination, PW2 told the Court that the squatters were previously all over the land but a majority left after her daughter bought the land. She told the Court that Hassanbhai who sold the land was always in Mombasa and did not have time to remove the squatters.

The Defence Case

16. On their part the Defendants called a total of four witnesses in support of their case.

17. DW1-Safari Kadenge is the 1st Defendant herein. She testified that she is the beneficial owner of a portion of two acres of the suit property. She further told the Court that she was born on the land in 1973 and that she grew up with her father thereon. She has built two houses on her portion of the land and planted coconut trees, mangoes and other fruits.

18. DW1 further told the Court that she has occupied the land openly and exclusively without interruption and that the Plaintiff has never occupied or utilised the same. She urged the Court to have the land sub-divided and for the portion she occupies to be registered in her own name.

19. On cross-examination, DW1 conceded that they were taken to the Area Chief who advised them to move out of the land. At that time they were about 40 people on the land. DW1 refused to leave as she did not have anywhere else to go. She further told the Court that the Plaintiff has been demanding that she leaves the land since 2009 but she declined to do so.

20. DW2-Mnyanzi Jefwa is the 2nd Defendant. She told the Court that she has been on the land since 1958 when she was born. She occupies two acres in which she has four houses and has developed the same by planting coconut trees and fruits.

21. On cross-examination DW2 told the Court that her father died and was buried elsewhere in Kibaoini. When his father and others left the land, DW2 declined to follow him and continued staying on the land.

22. DW3-Kadzo Katana Charo is the 3rd Defendant. It was her evidence that she was born on the land in 1955 and that she had built three

houses on her two acres portion. It was her testimony that she has occupied the land and developed it openly and exclusively over the period.

23. During cross-examination, DW3 told the Court that the land used to belong to an Asian and that she was not aware that the Plaintiff had bought the same. The Plaintiff had however taken them to the Area Chief who urged them to leave the land. Some people left but DW3 could not leave as she had nowhere else to go.

24. DW4- Miriam Kitsao Randu is the 4th Defendant. She told the Court that she was born on the disputed property in 1980 and that she had lived thereon since. She has built a house on the land and planted coconut trees and other fruits. Her occupation has been open and exclusive and she urged the Court to declare that she had acquired the land by way of adverse possession.

25. On cross-examination, DW4 stated that the land previously belonged to Hassanbhai. The Plaintiff thereafter took them to the Chief and the Chief advised them to leave the land. DW4 did not leave as she has nowhere else to go.

Analysis and Determination

26. I have perused and considered the pleadings filed herein, the oral testimony of the witnesses as well as the evidence produced at the trial. I have equally perused and considered the written submissions filed herein by the Learned Advocates for the parties as well as the authorities to which I was referred.

27. The Plaintiff filed this suit on 4th November 2014 seeking vacant possession against the Defendants herein as well as an order of injunction to restrain them from trespassing onto and or erecting any structures on the suit property.

28. The gist of the Plaintiff's claim is that she purchased the suit property on 14th May 2007 from one Hassanbhai Bin Nuru Bin Abdulkarim El-Bohra and that she was soon thereafter registered as the proprietor of the property measuring approximately 14.36 acres. Without mentioning any dates, the Plaintiff accuses the Defendants of invading the suit property and proceeding without her permission to construct various temporary structures thereon.

29. While admitting that the Plaintiff is presently the registered owner of the suit property, the Defendants deny that they have recently invaded the same as stated by the Plaintiff. It is the Defendants' case that they were born and brought up on the suit property many years back before the Plaintiff purported to purchase the same from the said Hassanbhai Bin Nuru Abdulkarim El-Bohra.

30. By way of Counterclaim the Defendants aver that each and everyone of them have occupied their respective portions of the suit property openly, exclusively and without interruption for a period in excess of 30 years and they urge the Court to declare that they have each acquired their respective portions by way of adverse possession thereof.

31. At the trial herein, the Plaintiff conceded that the Defendants were on the suit property before she bought the same. Her evidence as corroborated by that of her sole witness and mother Khalifa Abdalla Omar (PW2) was that when she purchased the property she found the Defendants amongst other squatters numbering about 40 in occupation of the suit property.

32. It was the Plaintiff's case that the squatters, including the Defendants herein were summoned by the Area Chief who then proceeded to inform them that the Plaintiff was the new owner of the suit property. The Chief then directed the squatters to vacate the land. While a majority of the squatters vacated the land as per the Chief's directions, the four Defendants herein refused to play ball and have remained on the property to-date.

33. Arising from the foregoing, it was evident to me that the Plaintiff was not granted vacant possession of the land by the previous owner thereof when she bought the same on 14th May 2007 and the imputation at paragraph 6 of her Plaint that the Defendants had recently invaded or trespassed onto the suit property was false and meant to mislead the Court.

34. While it was not clear from the material placed before me for how long the said Hassanbhai Bin Nuru had owned the land before transferring the same to the Plaintiff, the Defendants contention that they had been born and brought up on the suit property was not controverted. According to the Defendants, the 3rd Defendant was born in 1955 while the 2nd Defendant was born in 1958. It was also their evidence that the 1st Defendant was born on the land in 1973 while the 4th Defendant was born thereon in 1980.

35. From the testimony of the Plaintiff and her witness, it is evident that the original owner Hassanbhai Bin Nuru knew or was aware of the Defendant's occupation of the suit property. There was no evidence placed before me to show that the Defendants occupied the land by his permission or that he took any steps to evict them from the land. When the Plaintiff purchased the property, she did not also give them permission to continue occupying the property.

36. As it were, in a claim for adverse possession, the Claimants are required to show that they have been in continuous possession of the land for 12 years or more; that such possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property.

37. From the evidence of all the parties herein including the Plaintiff, it was not disputed that the Defendants have built their homesteads on the property and that they have planted trees and continue to cultivate portions thereof. According to the Defendants, each one of them exclusively utilized portions measuring about two acres of the suit property. In her testimony before the Court, the Plaintiff did not deny this claim. It was however her evidence that she utilized the rest of the suit property that was not occupied by the Defendants.

38. In my view, the conduct of the Defendants in building their houses, planting various trees and fruits and cultivating the land over a long

period of time constituted an unmistakable statement of assertion of their rights on the land. Their occupation and use of those portions of the suit property was not temporary in nature but was permanent, open, continuous, notorious, exclusive and inimical to the Title of the registered owner.

39. Section 7 of the Limitation of Actions Act provides that:-

“An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

40. In the matter before me, the cause of action it would appear first accrued to the said Hassanbhai Bin Nuru Abdulkarim El-Bohra. He did not take any action to recover those portions of the land. The Plaintiff purchased the land with the full knowledge that the Defendants were in occupation thereof and any rights they acquired over the property must be subject to the overriding interests of the Defendants who were already in occupation.

41. In the premises, I was not persuaded that the Plaintiff's claim for trespass as against the Defendants had any merit. On the other hand however, I was satisfied that the Defendants had proved their Counterclaim against the Plaintiff on a balance of probabilities.

42. Accordingly the Plaintiff's suit is dismissed with costs and Judgment is hereby entered in favour of the Defendants as against the Plaintiff as prayed in the Defendant's Counterclaim dated 3rd December 2014.

Dated, signed and delivered at Malindi this 23rd day of January, 2020.

J.O. OLOLA

JUDGE