



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 232 OF 2017 (O.S)

IN THE MATTER OF LAND REFERENCE NO. 209/14042 IR NO. 87503

AND

IN THE MATTER OF AN APPLICATION UNDER SECTIONS 7, 13, 37

AND 38 OF THE LIMITATION OF ACTIONS ACT, CAP 22, LAWS OF KENYA

AND ORDER 37 RULES 7 AND 8 OF THE CIVIL PROCEDURE RULES, 2010.

JACKSON MAJINGA VILILI.....1ST PLAINTIFF

YUNES WAMBOKA MIGOSI.....2ND PLAINTIFF

THOMAS NJOROGE NG'ANG'A.....3RD PLAINTIFF

MUKUHA NJUKI KARIUKI.....4TH PLAINTIFF

PETER OMARE NYAGISERA.....5TH PLAINTIFF

VERSUS

ROYAL NAIROBI GOLF CLUB.....DEFENDANT

AND

KENYA URBAN ROADS AUTHORITY.....1ST INTERESTED PARTY

THE NATIONAL LAND COMMISSION.....2ND INTERESTED PARTY

THE HONOURABLE ATTORNEY GENERAL...3RD INTERESTED PARTY

JUDGEMENT

1. The Plaintiffs filed the Originating Summons on 5/4/2027 seeking a declaration that they were entitled to be registered as the indefeasible owners of seven acres of land ("the Suit Property") out of the land measuring 80.96 hectares registered as land reference number (L.R. No.) 209/14042 IR No. 87503 in the Defendant's name, by virtue of adverse possession pursuant to Sections 7, 13, 37 and 38 of the Limitation of Actions Act, on account of their continued and uninterrupted possession, occupation and use of this portion of land for more than 30 years from February 1981 to date.

2. The Plaintiffs also sought a declaration that the Defendant holds the Suit Property on their behalf and an order directing the Defendant to hand over and give vacant possession of the Suit Property to the Plaintiffs. Further, they sought an order directing the Defendant to survey, subdivide, execute, deliver and hand over all consents, deeds, transfer documents and the title deed in respect of the seven acres occupied by the Plaintiffs to be carved out of L.R. No. 209/14042 IR. 87503 failing which the Deputy Registrar of this Court is to execute the documents necessary to effect a transfer of the Suit Property to the Plaintiffs.

3. Additionally, the Plaintiffs sought a prohibitory injunction to restrain the Defendant from selling, transferring, charging, leasing, assigning, disposing of or otherwise dealing with the seven acres of land occupied by the Plaintiffs together with an order to restrain the Defendant from trespassing upon, evicting, developing and utilising or otherwise interfering with the Plaintiffs' occupation of the Suit Property.
4. The Plaintiffs filed an Amended Originating Summons on 8/10/2019 through which they added the Interested Parties to the suit. In the amended suit, the Plaintiffs sought to have the court take into account the portion of land taken over by the construction of the Ngong Road – Kibera – Kungu Karumba – Langata Link Road in 2018 as part of the seven acres which they claim. They added an additional prayer that the 2nd Interested Party be directed to assess the value of the portion of the land affected by the construction of the road linking Ngong Road to Langata Road including the demolished structures which formed part of the seven acres claimed by the Plaintiffs.
5. The suit was supported by the joint affidavit of the 1st, 3rd and 5th Plaintiffs. They deponed that they had been authorised by the other Plaintiffs to swear the affidavit and plead this case. They annexed a copy of the title over L.R. No. 209/14042 issued to the Defendant on 23/11/2001 for a term of 50 years from 1/11/1999. The land measures 80.96 hectares in total and the Plaintiffs averred that they had been in possession of seven acres of this land. They claimed that they entered the land in 1980 and have been in continuous occupation since then. They averred that they had constructed residential and commercial buildings, churches, schools, dispensaries and other developments on the seven acres of land. They claimed that approximately 300 people have been in continuous occupation of the suit land while the commercial and residential tenants were approximately 2000. They claimed that the Defendant fenced off the land it occupies and left out the seven acres which are exclusively occupied by the Plaintiffs.
6. The Plaintiffs attached copies of the registration certificates for Makina Self Help Primary School issued on 11/10/2012 and correspondence exchanged between Makina Self Help Primary School and the Ministry of Education dated 15/11/2013 and 31/3/2006 touching on the registration of the school. The letter dated 15/11/2013 requested that a title be issued to the school for the land it occupies. They also attached a copy of the letter dated 25/1/2012 in which the City Council of Nairobi informed the Head teacher of Makina Self Help Primary School that it had no objection to the construction of good structures to serve as classrooms in the school.
7. The Plaintiffs produced a copy of the letter 25/11/1991 written by Honourable Philip E. Leakey, Member of Parliament for Langata Constituency, requesting the District Officer for Kibera to assist the group of people who were seeking to be given a piece of land at Makina, Kibera to enable them construct a small church. They also attached a copy of the sale agreement dated 16/7/2010 entered into by Erastus Chosi Mwangui and Mashimoni PAG Church vide which the vendor sold 50 sheds to the purchaser situated at Kibera Kichinjio.
8. The Plaintiffs averred that they had been in continuous occupation of the suit land in a manner that was inconsistent with the right of the owners as illustrated by the developments they had put up on the land and their occupation of it. They claimed that the owner has never exercised its right to recover the land and that the Defendant's title had therefore been extinguished. The Plaintiffs claimed that they had used the seven acres of land openly, without force or secrecy for a continuous period of 30 years and denied that they had any form of permission or agreement from the registered owner to occupy the Suit Property.
9. They averred that in July 2018 the 1st Interested Party demolished their structures on the Suit Property and constructed the Ngong Road – Kibera – Kung'u Karumba – Langata Link Road on part of the Suit Property before their claim for adverse possession was determined by the court, without clear provisions on compensation for their land. They sought to have the 2nd Interested Party assess the value of part of the Suit Property taken up by the construction of the link road including the demolished structures so that the Plaintiffs can be compensated based on their claim for adverse possession. The Plaintiffs annexed supporting documents to the Amended Originating Summons which are similar to the ones they attached to the affidavit in support of the initial Originating Summons.
10. Jeconia Anyona Okuku swore the replying affidavit filed by the Defendant. He stated that the Defendant is a company limited by guarantee running a premier private members club in Nairobi. The Defendant is registered by way of grant number IR 87503 as lessee of the land which it holds in trust for approximately 1500 members of the club. The Defendant did not dispute the fact that approximately seven acres of the land it owns was occupied by thousands of people and families which is the section that the Plaintiffs lay claim to. However, it maintained that that section of the land is occupied by persons it has permitted to be on the land. He deponed that for the sake of peace and harmonious coexistence and to bolster security, a perimeter wall was built in the mid-90s around the Defendant's land which is well inside the seven acres the Plaintiffs claim. As a sign of good will and to stake the Defendant's ownership of the land, he stated that the Defendant provided a gate for easy access to the property and a water point for the residents at the time of building the wall.
11. He added that over the years the Defendant had been involved in a good number of corporate social responsibility activities with the area residents including supporting the local primary schools that border the Defendant, donating food stuff and clothing to the residents, building a garbage dump and incinerator for garbage disposal, lighting up the area and regularly engaging the youth and self- help groups on matters to do with garbage collection and enhance security in the area.
12. Mr. Okuku annexed a copy of the title held by the Defendant. He also annexed a copy of the beacon certificate dated 18/8/2017, the Defendant's General Manager's report for December 2013 which mentioned the corporate social responsibility activities the Defendant would undertake for the local community. He also annexed copies of documents regarding the proposal for a water and sanitation project in Kibera prepared by Savo Community Foundation and Kibera Youth CBO.
13. Abdulkadir Ibrahim Jatani, the Deputy Director in charge of surveys of the 1st Interested Party swore the Replying Affidavit in opposition to the Plaintiffs' claim. He averred that the 1st Interested Party is a State Corporation charged with the management, development, rehabilitation and maintenance of Urban National Trunk Roads in Kenya. The 1st Interested Party oversaw the construction of the Ngong Road – Kibera – Langata Link Road whose corridor was established through a lawful process pursuant to gazette notice number 11792 of 17/8/2012 and the approval under the Physical Planning Act through development plan number 42/32/2012/01.
14. He averred that the implementation of the road project began with an elaborate corridor clearance process that involved all relevant stakeholders which culminated in the preparation of a resettlement action plan for the clearance of the corridor in July 2018. He contended

that the area upon which the corridor lies is public land by reason of it being a road reserve and could not therefore be subject to adverse possession or a claim for compensation and contended that this suit was fallacious and premised on a misapprehension of the law. He annexed a copy of the gazette notice dated 17/8/2012 inviting interested parties to make representations in respect of the advisory plan being part development plan number 42/32/2012/01 for the proposed site for the Nubian Village. He annexed drawings showing the road network for the link road.

15. The 1st Plaintiff swore a supplementary affidavit which was filed in court on 16/5/2019 in which he deponed that the Plaintiffs had been in possession of seven acres of the Defendant's land without the Defendant's permission for 30 years. He stated that the Plaintiffs have been accessing water from water vendors and the Nairobi City County water points. He denied that the Defendant had been involved in any corporate social responsibility activities in the area. He stated that he had filed the authority to represent all persons who claim to have become entitled to the Suit Property through adverse possession. He denied that there was a corridor clearance process that involved the resettlement of the Plaintiffs. He annexed a copy of the surveyor's unsigned report challenging the affidavit and the maps filed in court by the 1st Interested Party.

16. Parties filed submissions which the court has considered. The Plaintiffs claimed that a claimant for adverse possession has to show that the possession has been hostile and that it was actual, open, uninterrupted, notorious, exclusive and continuous for a period of twelve years. They submitted that they had satisfied the ingredients for a claim for adverse possession. They contended that they could claim a portion of the land registered in the Defendant's name. They urged the court to direct the 2nd Interested Party to assess the value of the portion of the Suit Property which they claimed was taken up by the road constructed by the 1st Interested Party for purposes of compensating the Plaintiffs at the current market value.

17. The Defendant submitted that the Plaintiffs' occupation of the Suit Property had never been adverse to its interest in that land. It submitted that a claim for adverse possession cannot succeed if the claimant is in possession with the permission of the owner and maintained that the Plaintiffs' occupation of a portion of its land was with its permission. The Defendant contended that Sections 13 and 38 of the Limitation of Actions Act contemplated occupation of the whole land and not just a portion of it. The Defendant submitted that the Plaintiffs cannot sustain the prayer for trust as no trust can be created where a Plaintiff occupies a portion of land with the owner's permission.

18. The Defendant added that by asking the court to direct it to handover and give vacant possession of the seven acres to the Plaintiffs, the Plaintiffs were in essence admitting that they were not in possession of the Suit Property. The Defendant contended that under the Limitation of Actions Act, the court had no jurisdiction to partition or subdivide a property and contended that the court could only extinguish the title and order the issuance of a new title to the Plaintiffs. The Defendant urged that the Plaintiffs were not entitled to the orders they seek in this suit.

19. The 1st and 3rd Interested Parties submitted that the area where the Langata - Ngong Link Road passes is public land and cannot be subject to adverse possession. They relied on Article 62 of the Constitution which includes all roads and thoroughfares in the definition of public land. They also relied on Section 41 of Limitation of Actions Act which excludes public land from claims for adverse possession. The Interested Parties contended that a special grant of L.R. No. 209/14042 IR No. 87503 was made to the Defendant to use for the purposes specified in the special conditions attached to the grant. And that when the land was planned for the road corridor, its ownership reverted back to the government without the need for payment of compensation since the land was required for a public road. They added that the remainder of the land which is a road reserve is public land for which no compensation is payable and no claim for adverse possession can be made over that particular portion of land.

20. The court requested parties to file further submissions in respect of the issue whether the suit land was public land or private land. The Plaintiffs submitted that L.R. No. 209/14042 was private land based on Articles 62 and 64 of the Constitution. The Plaintiffs contended that once the government allocated the land to the Defendant through a lease, the government divested itself of any interest in the land and the Defendant therefore became the owner of the land. They claimed that the issue in dispute was the leasehold interest and not the reversionary interest in the land. They contended that Section 41 of the Limitation of Actions Act only applied to land otherwise enjoyed by the government.

21. The issue for determination is whether the court should grant the orders sought by the Plaintiffs who seek to be declared the owners of seven acres of the land leased by the Defendant from the Government of Kenya. To prove this, the Plaintiffs needed to demonstrate that they had been in open, uninterrupted, notorious, exclusive and continuous possession of the Suit Property for a period of twelve years.

22. The Defendant contended that the Plaintiffs cannot sustain a claim for adverse possession to a small portion of an owner's land. In **Johnson Kinyua v Simon Gitura Rumuri [2011] eKLR** the Court of Appeal stated that a claimant would not be entitled to more than the parcel he had exclusive control of and directed that eight acres which the claimant had established he was in control of was to be excised and registered in the Respondent's name. This means that a person can claim a portion of land registered in a Defendant's name and does not necessarily have to make an adverse claim to the whole of the Defendant's land.

23. The copy of the Defendant's title produced in court shows that the Government of Kenya leased 80.96 hectares to the Defendant on 23/11/2001 for fifty years from 1/11/1999. The Plaintiffs claimed that they had been on the suit land since 1980. In the court's view, the Plaintiffs can only lay claim to the land for the period when the Defendant was registered as the owner of the suit land and not before 1/11/1999. No evidence was adduced to show that the Defendant occupied this land prior to 1999. The inference that can be drawn is that the Suit Property was previously held by the Government of Kenya and the Plaintiffs could not have sustained a claim for adverse possession over government land.

24. On the Plaintiffs' claim for compensation for the land taken up by the Interested Parties for the construction of the Ngong Road – Kibera – Langata Link Road, the court notes that under the Land Act, compensation is paid to persons whose interest in the land sought to be compulsorily acquired have been determined. The Plaintiffs neither proved that the land they occupy was taken up by the construction of the link road, nor did they prove that their buildings were demolished by the Interested Parties.

25. It is not in dispute that the Plaintiffs and other persons occupy the seven acres of land which the Plaintiffs claim to be adversely entitled to. The Plaintiffs' evidence was that approximately 300 people have been in continuous occupation of the Suit Property while the commercial and residential tenants were approximately 2000. This means there are many other people occupying the Suit property who are not parties to this suit. The correspondence exchanged between Makina Self Help Primary School and the Ministry of Education also confirms that this School exists on the Suit Property, and at some point there was a desire to have a title issued to this school by the government.

26. The Plaintiffs did not lead evidence to prove the exact size of the portions of the Suit Property that they occupy. From the Plaintiffs' evidence, there must be at least three hundred people occupying the Suit Property, while the Defendant contended that they were at least 1000 people on this land. The Plaintiffs do not exclusive possession of the Suit Property measuring seven acres. If the court were to grant the orders sought in the suit, it would mean that many other persons occupying the suit land will have to be evicted from the Suit Property once the Plaintiffs are registered as the exclusive owners of this land.

27. The Authority to plead and act filed by the Plaintiffs on 5/4/2017 only authorised the 1st, 2nd and 4th Plaintiffs to act on behalf of all the Plaintiffs. The suit was not filed on behalf of all the occupants of the Suit Property who are more than 300.

28. The Plaintiffs failed to prove that the Defendant holds the Suit Property in trust for them. They did not prove their claim for compensation at the current market value for the portion of the Suit Property taken up by the road constructed by the 1st Interested Party.

29. The Plaintiffs have failed to prove that they exclusively occupy the seven acres of the land leased to the Defendant that they claim to be adversely entitled to. The court declines to grant the orders sought in the Amended Originating Summons filed in court on 8/10/2019.

30. Each party will bear its own costs.

Dated and delivered at Nairobi this 10th day of February 2020.

K.BOR

JUDGE

In the presence of:-

Mr. M. Mueti holding brief for Mr. Botany for the Plaintiffs

Mr. Erastus Rabut holding brief for Mr. Chacha Odera for the Defendant

Ms. Fatma holding brief for Mr. Eredi for the Interested Parties

Mr. V. Owuor- Court Assistant