



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 72 OF 2012(O.S.)

KACHIMBIZA KATANA MWANDENGE & 384 OTHERS.....PLAINTIFFS

VERSUS

FORT PROPERTIES LIMITED.....DEFENDANT

JUDGMENT

BACKGROUND

1. By an Originating Summons dated and filed herein on 14th May 2012 as amended on 29th April 2016, the 385 Plaintiffs pray for orders:-
 1. *That the Plaintiffs are entitled to be declared as proprietors of specific portions of Plot No. 130 Malindi now bearing subdivisions of Plot Numbers 5810 to 6069 Malindi bearing CR Nos. 25690; 25691; 28211; 28212; 34018; 34019; 37985 to 37994; 38166 to 38170; 38525; 38526; 38939; 38940; 41240 to 41249; 45373 to 45376; 46736 to 46741 and all other subdivisions emerging from Original Plot No. 130 Malindi which they have acquired by adverse possession, having lived on and worked the same for between 12 and 70 years using it exclusively, peacefully and without any interruption from the defendant and its predecessors.*
 2. *That the Plaintiffs are entitled to be registered and issued with Certificate of title over the said portions of Plot No. 130 Malindi in place of the Defendant being the Plots listed in (1) above.*
2. The summons which is supported by an Affidavit sworn by Guni Bati Guni (the 42nd Plaintiff herein) arises from the Plaintiffs' contention that they have lived on Plot No. 130 Malindi for between 12 and 70 years. The Plaintiffs aver that when they moved into the land, it was largely vacant and they took possession without any objection from the registered proprietor who were then Bacha Noor Mohamed & Partners and Tropical Village Apartments Ltd.
3. The Plaintiffs further aver that the said proprietors who later purported to sell the land to the Respondent had already sold a substantial number of the Plots to some of the Plaintiffs who had paid in full for their respective portions. They accuse the said proprietors of failing to transfer the plots which they had already sub-divided.
4. The Plaintiffs assert that from the time they purchased the property and completed payments for the purchase price time started to run adversely against the proprietor and his successor so that 12 years had elapsed during which time they had exclusive, peaceful and uninterrupted possession. They cite as evidence of the long peaceful and uninterrupted occupation, hundred of permanent buildings and Makuti houses whose photographs are annexed to the Affidavit.
5. The Plaintiffs aver that they have buried 120 of their relatives on the suit premises and that it is unAfrican to give up land on which one's ancestors and family members are buried as neglecting the same would be considered a curse.
6. They accuse the Defendant of trying to use the provincial administration since 2011 to reassert his ownership of the suit premises. It is their case that the Defendant now holds the title in trust for the Plaintiffs as his title stands extinguished by operation of the law.
7. But in a Replying Affidavit sworn and filed herein on 7th March 2014 by its Property Manager Akil Fazalhussein Ebrahimjee, Fort Properties Ltd (the Defendant) avers t that until 8th February 1990 when it was issued with title, the suit property was Government land. The Defendant denies that the property was vacant and asserts that since it became the owner thereof, it has had a farmhouse, a caretaker and several workers including a farm manager thereon.
8. The Defendant denies that Bacha Noor Mohamed & Partners and Tropical Village Apartments Ltd were the registered proprietors of the

land. On the contrary, it asserts that the two were mere allottees who with the consent of the Land Control Board transferred their limited interest to the Defendant.

9. The Defendant asserts that it is not a party to and is therefore a stranger to the alleged sale of a substantial number of the plots to some of the Plaintiffs as stated by the Plaintiffs. It is their case that the Plaintiffs have failed to prove that they had a right to be on the suit premises.

10. While admitting that there are indeed some graves of the Plaintiffs relatives on the property, the Defendant asserts that the same were dug with its permission granted on a moral and compassionate ground

The Plaintiffs' Case

11. The Plaintiffs called three witnesses who testified in support of their case.

12. PW1-Shamshudin Mohamed Sharrif is the 338th Plaintiff. He testified that his parents are alive and reside in Mombasa. PW1 told the Court that he has a Posho Mill and a permanent house on Plot No. 130. That Posho Mill was started by his father in 1969.

13. PW1 told the Court that his father bought the one acre piece of land where the Posho Mill stands from the Defendant. His father has a Sale Agreement since 1986 but the land has never been transferred to his name.

14. PW1 testified that there are almost 10,000 people residing on the land and that the Plaintiffs were just some of the people who have structures on, and have lived on the land for a long period of time. He further told the Court that the Defendant only owns two plots at the corner of Plot 130. There are Schools, Churches and Mosques utilised by the area residents on the land.

15. PW1 denied that the squatters had only recently moved into the land citing a letter written by the Area Chief in 1992 to show that they were already on the suit property at the time. PW1 told the Court that the Plaintiffs consisted of two groups of people-those who like his parents purchased the land and others who inherited the same.

16. PW2-Harun Okinda Munyore is the 40th Plaintiff herein. He told the Court that the Defendant found him on the land in the 1980s and it was him who showed them a portion of the land wherein the Defendants proceeded to build houses which they then sold to White men.

17. PW3-Alfred Ngala Karisa is the 80th Plaintiff. He told the Court that he was born on the suit property some 46 years back. His father Joseph Karisa died and was buried on the same piece of land. One of his step-mothers by the name Raheli also died and was buried on their land which is about 2 ½ acres within Plot 130.

18. PW3 testified that their family has about 13 houses on the suit property and that nobody has ever brought an order stopping them from burying their relatives or doing anything else on the land. They only came to know the Defendant as the owner of the land in 2011.

The Defence Case

19. The Defence called two witnesses who testified in support of their case at the trial.

20. DW1-Akil Fazalhussein Rahimji is the Defendant's Property Manager. He told the Court that they purchased the property from Tropical Village Apartments vide a Sale Agreement dated 28th October 1987.

21. DW1 testified that previously they had access to the land and had even put up some apartments. When they began to develop the property, they allowed some people to graze their animals on the land. DW1 denied that the Plaintiffs had been on the land for 30 years. While admitting that they found some nine to ten people squatting on the land, DW1 told the Court that those people were compensated and were to leave the land before the Defendant took it over.

22. DW1 testified that some time in 2011, they met the Plaintiffs and agreed to survey the land in order to determine how much of it was free, how much was occupied and how much had structures. The intention was to negotiate with the Plaintiffs and to sell the Portions of the occupied land to them. However when they started the survey, the Defendant was served with a Court order stopping the same.

23. DW2-Alex Kadenge Chuo is the Defendant's Caretaker on the Suit Property. He testified that he was employed as such in 1993. At that time, he was shown seven houses which were on the property. There were also some temporary houses numbering about two hundred scattered all over the land.

24. DW2 told the Court that as at that time, there was already an on-going process to negotiate with the squatters to vacate the land. DW2 did not however know how those negotiations ended. He remains on the land as the Defendant's caretaker although the temporary houses have increased and the squatters have now taken over almost the whole property.

Analysis and Determination

25. I have perused and considered the Plaintiffs Originating Summons as well as the Defendant's response thereto. I have equally considered the submissions filed herein by the Learned Advocates for the parties.

26. The 385 Plaintiffs herein all claim to have lived on a parcel of land formerly known as Plot No. 130 Malindi for periods ranging

between 12 and 70 years. It is their case that when they moved into the said parcel of land, now registered in the name of the Defendant, it was largely vacant and they took possession without any objection from the then registered proprietors thereof.

27. In support of their case, the Plaintiffs called three witnesses. Shamshudin Mohamed Sharrif (PW1) testified that his parents ran a Posho Mill on the suit property from as far back as 1969. PW1 told the Court however that there were two groups of people on the suit property which later came to be sub-divided by the Defendant into many different plots for sale. The first group was like his parents, those who had paid for the land they occupied while the second group were those who inherited the land from their parents.

28. PW1 further told the Court that there were thousands of people occupying the land presently and that the Plaintiffs had built various structures-permanent and semi-permanent on the suit property. PW1 further testified that there were schools, churches and mosques on the property measuring 142.12 acres that were being utilised by the residents.

29. Harun Okinda Munyore (PW2) on his part told the Court that the Defendants found him on the suit property in the 1980s and it was him infact who had showed them a portion of land on which the Defendants proceeded to construct some houses which they later sold to White men.

30. On his part, Alfred Ngala Karisa (PW3) told the Court that he was born on the suit property some 46 years earlier and that his father Joseph Karisa and other relatives had died and were buried on the suit property.

31. On their part, the Defendants assert that until 8th February 1990, when they acquired it, the suit property was Government land. They deny that the land was vacant as stated by the Plaintiffs and aver that they have always had a farm house, a caretaker and several workers stationed on the property.

32. The Defendant company denies selling any portion of the suit property to the Plaintiffs and instead accuse the Plaintiffs of invading and trespassing onto the land without their permission. While admitting that there exist on the land some graves where the Plaintiffs buried some of their relatives, they asserts that they only allowed the burials on a moral and compassionate ground and decry the fact that the Plaintiffs want to take advantage of the compassion extended to them to deprive them of the land.

33. At the trial herein however and contrary to the claim that the suit property belonged to the Government until 8th February 1990 when they acquired the same, the Defendant's Property Manager Akil fazalhussein Rahimji (DW1) told the Court that the Defendant purchased the property from Tropical Village Apartment vide a Sale Agreement dated 28th October 1987. DW1 indeed produced a Copy of the Agreement of Sale as an Exhibit in these proceedings.

34. DW1 testified that previously after they bought the land, they had access thereto and even put up some apartments. It was his testimony that at the time he joined the Defendant company sometime in 1993, there were only about some nine or ten squatters on the land. Those few squatters were compensated and were urged to leave the land before the Defendant took it over. Other squatters however came in more so after this suit was filed in Court.

35. Alex Kadenge Chuo (DW2), the Defendant's Caretaker who also stated he was employed in 1993 however told the Court that as at the time he took up his position, he was shown about seven houses on the property. In addition, he told the Court there were about some two hundred temporary houses scattered all over the suit property. Those houses have since grown in number and the squatters have according to DW2 now taken over almost the entire suit property.

36. As it were, adverse possession has been described as 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 a person in assertion of his title for a certain period, which in Kenya, is 12 years. The essential prerequisites for this situation to apply is that the possession of the adverse possessor is acquired neither by force nor stealth nor under the licence or permission of the owner as normally expressed in the Latin Maxim *nec vi, nec clam, nec precario*. Such possession by law must be adequate, in continuity, in publicity and in extent.

37. The doctrine of adverse possession in Kenya is embodied in Section 7 of the Limitation of Actions Act, (Cap 22) in these terms:-

“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.”

38. In the matter before me, the Plaintiffs asserted that they have been on the land for many years ranging from 12 to 70 years. According to PW1 the plaintiffs could be categorized into two groups-those who purchased the same and those who inherited from their forefathers. If it is indeed true that the Plaintiffs or some of them purchased their portions of the suit property, their claim for adverse possession would not hold.

39. That is because in a claim for adverse possession, the trespasser's interest has to be inconsistent to the interests of the true owner of the land. Where one occupies land under licence by the owner, such licence is permissive and cannot be said to be adverse to the rights of the proprietor. However long the licence, a licensee cannot claim title only from possession. In an application for adverse possession, it must be proved that the possession was adverse to that of the proprietor of the land and that it was so held with his knowledge and acquiescence.

40. As it turned out herein, the Defendant vehemently denies having sold the Plaintiffs or any of them the portions of the land they claim to occupy. The Plaintiffs themselves did not offer much by way of evidence to prove that some of them indeed bought the parcels of land they claim.

41. From a perusal of the record, it was apparent that the Claimants herein entered the suit property at different times. In the course of time,

there emerged a group who by virtue of their occupation of the land before the new entrants would demand a token of payment for a new entrant to be shown a place to occupy or build a structure. According to PW2, he was actually paid the token they referred to as "Kanjama" by the Defendant's directors before he showed them a portion of the land where they put up their buildings for sale.

42. Such payments in my view were not made to the proprietors of the land and could not therefore be used to construe the Plaintiffs claim herein as that of a Licensee.

43. At the trial none of the Director of Defendant herein testified. According to their Property Manager (DW1), when he joined the company in or about 1993, there were only some nine to ten squatters on the land. According to him those squatters were compensated and were to vacate the suit property before the Defendant took it over. DW1 however neither identified those squatters by name nor did he provide any evidence of the alleged or any compensation paid to them.

44. As it turned out, DW1's testimony was in sharp contrast to that of the Defendant's Caretaker for the Suit Property (DW2) who told the Court that there were about two hundred houses on the suit property when he was employed in the same year 1993. DW2's testimony in this respect appeared to me to be more candid and was indeed vindicated by the material evidence placed before me.

45. From the Defendant's own Replying Affidavit as sworn on its behalf by DW1 and filed herein on 7th March 2014, it is evident that there were a number of squatters living on the suit property long before the Defendant acquired it in 1987.

46. That fact comes out clearly from a Report addressed to the Defendant's Managing Director dated 30th August 2000 found at page 20 of the Annexures to the Replying Affidavit where the Managing Director was informed by two of his staffers-Phillip Mutua and Sammy Jaka in the relevant part as follows:-

"PLOT NO. 130 MALINDI

We visited the above property on Tuesday 29th August 2000 with company of Mr. Bonface Mwangangi Legal expert in a fact finding mission before me could embark on way to solve the matter of squatters in the plot 130 Malindi and prevent further invasions.

Private property must be protected, and after careful evaluation of the matter we are drawing up a proposal guideline which is subject to Directors approval.

i) Survey should be carried out, beacons identified for the property on site.

ii) All the Squatters living within the boundary of the property be identified and listed as per their identification cards whereas

a) Original Squatters found there in the period the land was being acquired be listed separately.

b) Other Squatters who invaded thereafter be also listed separately.

iii)

47. Indeed from Annexure "AFE 2" of the said Affidavit, it was clear that as early as 1992 before DW1 and DW2 were employed by the Defendant, they were already seeking the help of the Provincial Administration to remove them from the land. In a letter addressed to the Defendant's Director V.N. Mulji by the then Chief In-Charge, Malindi Town Location, Francis F. Fondo dated 12th November 1992, the Administrator states as follows:-

"RE: PLOT NO. 130 MALINDI

As per your Letter Ref.....dated 17th August, 1992, you informed this office that you are the registered owners of the above plot and you were starting development of housing estates, the plot have squatters living there and they have complained at this office.

Please you are asked to come at this office on 19th November 1992 at 2.00 p.m. for discussion about the Squatters".

48. It was further apparent from the Defendant's annexures that at some point in time the disputants herein agreed that there was need to identify the original genuine squatters from those who invaded the land at a later date. In a letter from the same Chief's Office dated 17th February 1999 addressed to the attention of one Y.Y. Patel, the Administrator again writes as follows:-

"RE: MEETING CONCERNING PLOT 130- MTANGANI-MALINDI ON 17/2/999

We thank you very much for sending your team as planned. We sat down at exactly 9.30 a.m. and we came up with the following proposals:

(a) To set up a Committee of seven people led by the two area chiefs and councilors in order to call a barasa for the

purpose of talking to the people and give the none-genuine squatters 'NOTICES' to vacate.

(b) The barasa has been scheduled to be held on 27/2/1999 at 1.00 p.m. which you will personally be needed or a very strong delegation from you.

(c) On the said date we are sure the issue in question will be nearly be at its end. Those new comers will be needed to vacate according to the period which will be agreed.

(d)

49. What followed then was a long and protracted process. From the extracts of a meeting held at the said Plot No. 130 on 9th September 2000 by the area Provincial Administration, Local Leaders and representatives of both the squatters and the Defendant, it was agreed as follows:-

“AGENDA-List of Original Squatters

It was said that the list compiled in 1987, having 240 squatters original found in time the property was purchased was still valid, though a serious question erupted as to the exact number because it was found that previous list forwarded to the owner of the properties, M/s Fort Properties Ltd was 216 Squatters, therefore the short fall would be deliberated vetted and confirmed as per initial list and not the new one.”

50. In the subsequent and final joint meeting held on 10th September 2000, some two years before this suit would be filed, the parties agreed as follows:-

“Observations Arising From the Minutes of the Previous Meeting

-It was observed that there were two lists of original squatters with a different number, one with 216 and 240. The members maintained that the number of the original squatters was 240. The shortfall arising in the initial list forwarded to the Office of Mr. Patel was explained as some of the deceased whose houses had fallen down but contained some numbers.

-A new list of 240 squatters was compiled with identification cards numbers and a highlight of person and the next of kin.”

51. Arising from the foregoing, it was evident to me that long before the parties rushed to Court to sort out their differences, there had been a tacit admission on the part of the Defendants that a number of the Plaintiffs herein 240 of them had occupied portions of the suit property for a long period of time preceding even their own acquisition of the suitland.

52. It was also evident that the genuine group of squatters proceeded to register a group known as Mtangani Welfare Association with the Ministry of Home Affairs, Heritage and Sports on 11th September 2000 for purposes of processing titles for their respective portions of land. Having carefully examined the evidence placed before me, I had no doubt whatsoever that the list of 240 personalities reflects the correct number of persons who were on the land before the Defendant commenced the process of recovering the same.

53. There was no evidence placed before me to show those Plaintiffs had occupied the land with the permission of the previous owners and/or that those previous owners had taken any steps to evict them from the land. And when the Defendant purchased the property, it did not also give them permission to continue occupying the same.

54. As indicated earlier 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 registered owner of the property and that they have asserted a hostile title to the owner of the property.

55. From the evidence of all the parties herein including the Defendants, it was not disputed that those 240 Claimants had built their homesteads, permanent or otherwise on the property. By attending the meetings and giving approval to the committee that mapped out the number of the Claimants and the areas they occupied, the Defendant gave an unequivocal approval to their claims and they cannot be heard to turn around herein and accuse them of being recent trespassers to the land.

56. Otherwise other than for the 240 persons listed as per the Meeting held on 18th September 2000 aforesaid, I was not persuaded that the rest of the Plaintiffs had proved any case of adverse possession against the Defendants.

57. Accordingly I hereby enter Judgment for the 240 Plaintiffs (to be identified as per the said List) as prayed in the Plaint. Those Plaintiffs are accordingly entitled to be registered and issued with Certificates of titles over the portions of the land they occupied as at 18th September 2000 when the List was prepared.

58. Each Party shall bear their own costs.

Dated, signed and delivered at Malindi this 13th day of March, 2020.

J.O. OLOLA

JUDGE