



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 183 OF 2013(OS)

KESI KAHINDI & 23 OTHERS..... PLAINTIFFS

VERSUS

PHILIP KIMEU & ANOR..... DEFENDANTS

JUDGMENT

(Suit for adverse possession; applicants claiming to have been residing on the suit land for more than 40 years to the time the suit was filed; evidence emerging that some of the applicants were children at the time the 12 year period of occupation is to commence; evidence also showing that the area has not been lived in and that the houses on site were hastily put up before a court site visit; applicants failing to prove the case; suit dismissed with costs)

1. Through an Originating Summons filed on 20 August 2013, the applicants have sought to be declared the owners of the land parcel Plot No.1/MN/190 situated in Bombolulu, Mombasa (the suit land), through the doctrine of adverse possession. They commenced the suit after being served with a notice to remove illegal structures from the suit land. The supporting affidavit to the Originating Summons was sworn by one Ngema Tsuma, who inter alia deposed that the original title was issued and transferred to the respondents while they were on the suit land. He stated that he had been on the suit land for over 50 years. The respondents resisted the suit and directions were taken for the matter to be heard by way of viva voce evidence. Before the commencement of the hearing of the matter, the Court did direct the Deputy Registrar to conduct a site visit. This was done and a report prepared and the same forms part of the record.

2. PW-1 was Mr. James Loponi who testified inter alia that he entered the suit land in the year 1995 after completing his Primary Education. He came to live with his brother who was residing in the suit land and had a shop in it. He stated that the land was waterlogged and he and the other applicants filled it with soil and made it habitable. He testified that it was in the year 2015 that they were given notice to vacate and their houses started being demolished after which they filed suit. He testified that nobody came to claim this land before the year 2013. Cross-examined, he testified that he was born in Bungoma and not on the suit land. He affirmed that not all applicants were born on the suit land.

3. PW-2 was Onesmus Nzioka. He stated that he came to the suit land in the year 1995 after being invited by the brother of PW-1, one Mr. Kituyi, who used to work with Telkom Limited and was residing in Telkom quarters near the suit land. He stated that he built a “kibanda” made of “mabati” and moved into it in the year 1998. He later developed a mud walled house. He stated that in the year 2007, they were given a notice to vacate by a person who claimed to own the land but he later allowed them to continue living in it. He stated that one month after the 2007 notice there was some demolition of their houses at night. Cross-examined, he affirmed that all the claimants moved into the land at different times.

4. PW-3 was Fatuma Ngumbao Yaa. She complained about the general land problem in Mombasa where people reside in land without having title. She stated that she moved into the suit land in the year 1998 when it was still a swamp and nobody was interested in it. She gave birth to her first born in the same year while resident on the land. At the moment, she is 33 years old. She did mention that in the year 2013 some houses were destroyed at night. She was cross-examined on her age and asked to produce her ID card which showed that she was born on 17 March 1988 though she asserted that she was born in the year 1986. She was cross-examined on the fact that the report of the Deputy Registrar shows newly built houses and her explanation was that when it floods their houses are destroyed and they have to build new ones.

5. PW-4 was Daniel Owuor Wao. He stated that he moved into the land in the year 2000 after being showed a portion by PW-1. He lived on the land peacefully until the year 2013 when some houses were destroyed. When he moved into the land all the other claimants had already settled in it.

6. PW-5 was Teresia Koki Munyao. She stated that she moved into the land in the year 1995 after relocating from her home in Kangundo, and she and others filled up the swamp on the land without disturbance.

7. PW-6 was one Benson Kenga who testified that he came into the land in the year 1999 from Kilifi after being employed by Mr. Kesi Kahindi, one of the plaintiffs. Mr. Kahindi encouraged him to get a place of his own which he did by filling up a swampy area on the land. He completed his house in the year 2000.

8. PW-7 was Kesi Kahindi Hamisi. He stated that he started living on this land in the year 1970. He testified that his father used to sell charcoal on this land. He vacated and left for him the land. He lived on the land but he suffered attacks by thugs and he thought it wise to get neighbours for security. The place was later settled. He testified that he does not know the defendants and he has never been disturbed while on the land. He was cross-examined on his age and he produced his ID which showed that he was born in the year 1967 in Kilifi. He has one brother, Kazungu Kahindi, also living on the land, whereas the others live elsewhere. He was shown some photographs of people which were taken during the court site visit but he could not name any of them apart from his brother.

9. PW-8 was Rama Ali who complained of their houses being demolished one night. He showed his ID which revealed that he was born in the year 1986. He stated that he came to the land in the year 1998 to live with his uncle Kesi Kahindi. He lived with him for about 7 years.

10. PW-9 was Kazungu Kahindi. He did not have anything to add to the evidence already presented. He did not have any identity card save for a waiting card that did not have any of his particulars. He however stated that he is 23 years old. He stated that he came to the land to live with his brother, Kesi Kahindi. Previously, he was living in Bamba, Kilifi.

11. PW-10 was Gabriel Weka. He also did not say much in chief and relied on the earlier evidence. He was born in the year 1981 in Makueni. He stated that he came to the land in the year 2000 and was employed as a watchman in the Posta/Telkom houses. He stated that he built his house in the year 2000.

12. PW-11 was Omar Suleiman Kishenga. He was born in Kilifi in the year 1980. He admitted that his house was newly built when the court visited the site but he explained that they build new houses when an old one falls. His family lives in Kanamai. He mentioned that he was invited to live on the land by Kesi Kahindi.

13. The applicants' case was marked close with the above evidence.

14. The first respondent testified on his behalf and on behalf of the 2nd respondent. He lives in Tudor. He stated that they are the registered proprietors of the suit land. They purchased this property from the previous owner on 17 December 2007. Before purchasing the land, he stated that they visited it and it was open ground. There were however "vibandas" (temporary stalls) on one side where the land bordered the road. These are mostly used by vegetable grocers. In the year 2013, he received a letter written by one Mr. Muasya, the Chairman of Bombolulu Development Committee, and he was advised that there are some unknown people getting into their property and were putting up structures. This letter was written to him owing to security concerns around the estate. Upon receipt of the letter, he reported the issue to Nyalali Police Station and to the area Member of County Assembly (MCA), Hon. Ngala. Hon. Ngala wrote a letter to the Deputy Commissioner, Kisauni alerting him of an invasion of the land and that there was thus a threat to the neighbouring public land. No action was however taken. They (respondents) then issued a notice to the occupants to vacate. He visited the site and took photographs which he produced. He demonstrated that at this time the land was basically bare. He testified that some very temporary and inhabitable mud structures were then being put up. He referred to the Deputy Registrar's report, on the site visit, which was conducted in the year 2015 and stated that the same shows that most of the houses were freshly built with new iron sheets. He pointed out that the status of the site had changed from the time he took his photographs in 2013 and the time the visit was done in 2015 as more structures had been put up. He testified that the 7th applicant used to work for Telkom and he had his NSSF report. He testified that PW-5 was his wife. He further testified that the 2nd applicant was working with Kenya Bixa Limited as at 2011 and he had his NSSF card as well. He denied that the applicants have been on the land for 12 years to the time of filing suit. He refuted that they have no other place to go to. He asserted that the applicants were not in occupation when they bought the land.

15. With that evidence, the respondents closed their case.

16. I invited the applicants (acting in person) and counsel for the respondents to file submissions which they did and I have taken these into account before arriving at my decision.

17. This is a case for adverse possession. It is trite law, and I need not cite any authority, that to succeed in such a claim, one needs to prove peaceful, quiet, open, possession of the land for a continuous and uninterrupted period of at least 12 years. I have assessed both the affidavit evidence filed with the Originating Summons, the oral evidence, and the report of the Deputy Registrar, and I am not persuaded that the applicants have proved their case to the required standard. Starting with the affidavit which was sworn by Mr. Ngema Tsuma, in support of the Originating Summons, specifically at paragraph 5 thereof, he did mention that he was born on the suit land in the year 1956, and that the other applicants have been living as squatters in the suit land for a period of over 40 years. This statement is clearly not true. If you trace 40 years to the time that the suit was filed, you will get the year 1973. From the oral evidence, that I heard, none of those who testified, could possibly have been having residences on this land in the year 1973. In fact, many of them were born way after this date. This suit having been filed in the year 2013, 12 years back, being the minimum period of commencement of possession would be the year 2001. It means that at the year 2001, at the minimum, all claimants ought to have taken possession of the suit land and able to claim it as their own. My assessment of the evidence would bring one to serious doubt whether the claimants were actually in possession in the year 2001, as some of them were barely teenagers, and in my view, incapable of having fully settled on the land. Indeed, PW-11 was 23 years when he testified in the year 2019, meaning that he was born in the year 1996. He was thus only 5 years in the year 2001. How can he now assert to have been in full occupation of the land with the requisite animus possidendi, in the year 2001, when he was just about 5 years? This is just but one example. If you assess the evidence of PW-3 and PW-8, you will see that they were just about 13 years and 15 years respectively, in the year 2001. I doubt if they can be said to have fully settled on the land at that fairly young age and doubt their animus possidendi.

18. What such revelations do, is to dent the credibility of the whole case. If the affidavit that initiated the suit was full of so much untruthfulness on facts that are so critical, a red flag must be raised and the court must question what else is not being honestly disclosed to the court by the applicants. The fact of the matter is that they all certainly could not have been in occupation of the suit land as at the year

2001 as they have claimed. With regard to the time of their occupation, I am more inclined to believe the evidence of the respondents. The 1st respondent testified that when they purchased the land in the year 2007, the same was bare. He produced photographs that he took in the year 2013 and I have no reason to doubt the same. They show very minimal development on the land.

19. I have also seen the report of the Deputy Registrar, who visited the site on 28 May 2015, which is just under two years to the filing of the suit. This is how she described the site:-

“The suit property was extremely bushy with grass and shrubs everywhere. The grass was about waist length in most of the areas. There was a lot of debris, building stones, cement bags, sang (sic) (probably meant “sand”), concrete, etc and freshly dug earth dotting the place inside the bushy parcel.”

The debris (building debris) and the earth were near sites where the houses stood. The general feeling or view one got when looking at the place, was a bush or an undeveloped land which had been left fallow for a long time, and houses had been hastily put up in the bush without bothering to clear it. There were bushes up to the doorsteps of some of the houses. There were no paths in the bush from one house to the other or from the houses to the main road, and one had to wade through the bushes and the debris to move from one place to the other.”

20. Is this really the description of a place that has been lived continuously by 23 people, with families, for a period of more than 12 years? Is this really a depiction of what the claimants called a “village”? Certainly not. It is apparent from the report that the land was only freshly habited, given the fact that there were no clear paths, and the fact that grass was overgrown upto the doorsteps. The Deputy Registrar also observed that there were no children in the area despite the applicants’ allegations that they were married and their claim that they live on the land with their families. The Deputy Registrar in her report stated that she saw no evidence of the area being lived in, such as clothes hanging on lines, toilets, paths, gardens, garbage place, water, cleared bushes or children. Her assessment of the houses were that they were new. The Deputy Registrar’s conclusion was that the structures were hastily built. This was probably to give some semblance that the applicants were actually living on the land.

21. From the above report, which I have absolutely no reason to doubt, it is apparent that the suit land is not one that has continuously been lived in. If that was the case, the situation on the ground would be totally different from that demonstrated in the report.

22. The only conclusion I can reach, from the assessment of the evidence and the report, is that the applicants have not been in occupation of the suit land for a continuous, uninterrupted period of at least 12 years before filing this suit.

23. That being the case, the applicants have failed to prove their case on a balance of probabilities and I have no option but to dismiss this suit with costs. Since the applicants have failed to prove their case, and it is not said that they have any other right on the land, the respondents are at liberty to apply for their eviction.

24. Judgment accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 11th day of March, 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

4th applicant and 3 others acting in person.

Mrs Umara for the respondents.

Court Assistant; David Koitamet.