



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 98 OF 2017(O.S)

IN THE MATTER OF: LAND REFERENCE NO. 20252/3 KILIFI

IN THE MATTER OF: AN APPLICATION FOR A DECLARATION THAT THE APPLICANT/PLAINTIFF HAVE OBTAINED OWNERSHIP OF 2.5 ACRES OF 0.3831 HA OF THE ABOVE SAID LAND BY WAY OF ADVERSE POSSESSION

BETWEEN

MARK KAZUNGU MRAMBA.....PLAINTIFF/APPLICANT

VERSUS

BENEDETTE MWIKALI MUGAMBI.....DEFENDANT/RESPONDENT

JUDGMENT

1. By an Originating Summons dated 3rd May 2017, Mark Kazungu Mramba (the Applicant) urges this Court to determine the following questions:

- 1. Whether the Plaintiff/Applicant has acquired 2.5 acres of all that parcel of land known as LR No. 20252/3 Kilifi CR No. 30843 by reason of adverse possession against the Respondent.***
- 2. Whether the Plaintiff/Applicant should be registered as the proprietors of the 2.5 acres of the said property on the grounds that since 1975, the Applicant has been openly and peacefully enjoying occupation thereof.***
- 3. Whether the Respondent should execute a transfer and all acts necessary to convey the said title to the Applicant as rightful proprietor of the 2.5 acres and enable him to be registered as such and in default the Deputy Registrar be authorized to sign the relevant documents on behalf of the Applicant.***
- 4. Whether the Applicant is entitled to the costs of this suit.***

2. The Originating Summons is supported by the Applicant's affidavit wherein he avers that he started occupying the land from the time he was born in the year 1975. The Applicant asserts that the suit property was initially on 22nd December 1997 registered in the name of Coast Development Company Ltd before being sold to one Richard Simon Kakwili who is the husband to Benedette Mwikali Mugambi (the Respondent herein).

3. The Applicant avers that Richard later died but even after the issuance of title to the Respondent herein, he has continued in open, continuous and uninterrupted occupation of the property. He further avers that he has never obtained permission of the Respondent to occupy the property and neither has the Respondent ever obtained orders against himself for vacant possession of the portion of land he occupies.

4. The Respondent is however opposed to the application. In a Replying Affidavit sworn and filed herein on 22nd May 2017, Benedette Mwikali Mugambi avers that her husband the late Richard Simon Kakwili was indeed the lawful owner of the said LR No. 20252/3 (Original No. 9402/4) Kilifi.

5. The Respondent avers that her husband passed away on 30th May 2014 and that she was issued with a Certificate of confirmation of Grant for his estate dated 7th July 2015 upon which she became the owner of the suit property. She asserts that the Applicant herein is a trespasser on the said property and as such the subject of two civil suits one of which ***HCCC No. 131 of 2012*** remains pending for determination.

6. The Respondent denies that the Applicant has occupied the suit property exclusively, peacefully and without interruption since 1975 as alleged. She accuses the Applicant of maliciously and without any justification or lawful cause pulling down a perimeter wall she had constructed around the property. She further accuses the Applicant of being dishonest and coming to this Court with unclean hands.

THE PLAINTIFF'S CASE.

7. At the trial herein the Applicant testified as the sole witness in his case.

8. Testifying as PW1, the Applicant told the Court that the Respondent went to him in 2016 and told him that she was the owner of the land where he lived. PW1 refused to leave asserting that he was born there in 1975. Before then, another person by the name Richard Simon Kakwili had gone to him in 2010 also claiming the land. PW1 came to hear that the said Richard was the Respondent's husband.

9. PW1 further told the Court that the Respondent once sued him in 2010 in ***Kilifi SRMCC No. 540 of 2010*** but the case was dismissed. Another case was filed in 2012 and it was also dismissed. He told the Court that he had never left the land ever since he was born and urged the Court to decree that the land be registered in his name.

10. During cross-examination, PW1 told the Court that he had three houses on the land even though the Respondent had stated in the Kilifi case that the land was vacant.

THE RESPONDENT'S CASE

11. The Respondent similarly testified as the sole witness in support of her case.

12. Testifying as DW1, the Respondent told the Court that the Applicant first came to their land in 2006. In 2010, he moved into the land. At that time DW1's husband who had just transferred the property to his name filed ***Kilifi SRMCC NO. 540 of 2010***. The case was later transferred to Malindi as ***ELC Case No. 131 of 2012***. DW1 told the Court that the case failed to proceed as her husband passed away.

13. DW1 thereafter went to the Applicant and asked him to vacate the land. He refused and instead filed this suit. She denied that the Plaintiff was born on the suit property asserting that he was not there when they first acquired the property. DW1 admitted that currently the Applicant appears to live on the land as he has a mud-walled makuti thatched house on the land.

14. During cross-examination, DW1 told the Court that when the Plaintiff first appeared on the land in 2006, they were able to remove him. She admitted that they had stated in the Kilifi case that the Plaintiff had built a semi-permanent house on the land. She also conceded that she had not been enjoined as a party in ***ELC Case No. 131 of 2012*** and told the Court that the case was probably dismissed after her husband passed away.

ANALYSIS AND DETERMINATION

15. I have perused and considered the pleadings filed by the parties, the oral testimony of the witnesses and the evidence adduced at the trial herein. I have similarly considered the submissions and authorities as filed by the Learned Advocates –Mr. Nyange for the Applicant and Mr. Kenga for the Respondent.

16. Adverse possession has been described as a method of gaining legal title to real property by the actual, open, hostile and continuous possession of it to the exclusion of its true owner for the period prescribed by the law. The period prescribed by the Limitation of Actions Act, Cap 22 of the Laws of Kenya for one to acquire legal title over land in Kenya by way of adverse possession is 12 years.

17. The law on adverse possession is now well settled and the essential requirements that one has to meet in order to succeed in an application for adverse possession have been discussed by the Courts.

18. In ***Wambugu –vs- Njuguna (1983) KLR 173***, the Court of Appeal observed that adverse possession contemplates two concepts. Possession and discontinuance of possession. Considering the ingredients thereof, the Court held that the proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the Claimant has proved that he or she has been in possession for the requisite number of years.

19. In ***Mtana Lewa –vs- Kahindi Ngala Mwamgandi (2005) eKLR*** the Court of Appeal once again observed 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.”

20. It is also a well-settled principle that a party claiming adverse possession ought to prove that his possession was “***necvi, nec clam, nec precario***”, that is to say, peaceful, open and continuous. The possession should not have been through the use of force, nor in secrecy but must be without the authority or permission of the owner.

21. In the matter before me, the Applicant asserts that he was born on the suit property sometime back in 1975 and that he has been in possession of a portion of the property measuring 2.5 acres exclusively ever since. The Respondent however refutes those claims and asserts that her parcel of land is less than an acre of land and that when her now deceased husband acquired the same in the year 2004, the Applicant did not reside thereon.

22. At the trial herein, the Applicant did not produce any documentary evidence of his own to show that he was in occupation of the suit property. He however relied on a suit filed against himself by the Respondent's husband Richard Simon Kakwili being **Kilifi SRMCC No. 540 of 2010**. A perusal of the Plaintiff filed in the said suit reveals that the Respondent's husband had averred therein that the Applicant had moved into the suit property in the year 2006 and that he and two other Co-defendants had constructed semi-permanent structures thereon.
23. From the material placed before me, it is evident that the suit property measuring 0.3831 Ha was on 1st April 1996 registered in the name of Coast Development Company Ltd. By an agreement of sale dated 2nd March 2004, the suit property was sold at a consideration of Kshs 300,000/- to the Respondent's husband Richard Simeon Kakwili.
24. A perusal of the sale agreement however reveals that the consideration was to be paid in installments and it was not until 16th October 2009 that the property was transferred to the Respondent's husband.
25. As admitted by the Applicant, the Respondent's husband subsequently in the year 2010 lodged **Kilifi SRMCC No. 540 of 2010** against the Applicant and two others accusing them of trespassing into the property in the year 2006 and seeking orders of vacant possession. The Applicant entered appearance and filed a Statement of Defence therein under the name Michael Muramba.
26. Extracts of proceedings from the said case reveal that sometime after the Respondent's husband and his witness one Rashid Abdi Makarani testified, the Applicant and his Co-Defendants raised a Preliminary Objection dated 30th August 2011 to the effect that the suit property being registered under the Registration of Titles Act Cap 281, the suit could only be heard by the High Court as was defined under Section 2 of the Act. On 19th June 2012, the Honourable R.K Ondieki SRM upheld the objection and rather than strike it out dismissed the suit.
27. Two months later, the Respondent's husband moved to the High Court at Malindi and filed **Malindi Civil Suit No. 131 of 2012** seeking a declaration that he is the registered owner of the suit property and an eviction order against the three Defendants who again included the Applicant herein. In his Statement of Defence dated 22nd October 2012, the Applicant and his Co-Defendants asserted that they had been born on the suit property some 40 years earlier and that it is the only home they had ever known. They further asserted that they had since acquired the suit property under the doctrine of adverse possession.
28. As it turned out, the Respondent's husband who was the Plaintiff in the said suit passed away on 30th May 2014 before the suit was heard and it would appear that the suit abated as the Respondent did not take any steps to continue with the same even after being granted a Certificate of Confirmation of Grant to her husband's estate on 7th July 2015.
29. Taking the totality of the facts and evidence before me, there was indeed nothing to demonstrate that the Applicant was in the suit property prior to the year 2006 as asserted in the earlier suits filed by the Respondent's husband. While the Applicant appeared to suggest that the suit property was his ancestral land, he readily admitted during cross-examination that none of his family members lived on the land and that his father had been buried elsewhere in Kaloleni.
30. There being no other evidence of his being in the suit property prior to the year 2006, it was difficult to see how the Applicant could be entitled to the suit property by virtue of adverse possession as at the time he filed the suit herein. As was admitted by the Applicant, prior to the filing of this suit, the Respondent's family had several years down the line asserted their rights to the land by filing several suits commencing with **Kilifi SRMCC No, 540 of 2010** in which they sought orders of vacant possession.
31. As the Court of Appeal stated quoting from **Cheshire's Modern Law of Real Property in Njuguna Ndatho –vs- Masai Itumo & 2 Others (2002) eKLR:-**
- “Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. Such a nominal entry, even though it was secret, entitles him to bring an action within a year afterwards, and as it was possible to make such an entry every year, in this case called continual claim, the title to land might be in doubt for longer than the period of limitation. It was therefore provided by the Real Property Limitation Act 1833, in a Section which has been repeated in the Limitation Act 1939, that a person shall not be deemed to have been in possession merely because he has made an entry on the land. He must either make a peaceable and effective entry, or sue for recovery of the land.”*
32. Arising from the foregoing, it was clear to me that time stopped running in favour of the Applicant when the Respondent's husband filed the first suit in the year 2010 and the subsequent one in 2012. The Applicant by implication had only stayed in the suit property for four years between the year 2006 and 2010 when the first suit was filed.
33. Indeed even if this Court were to disregard the interruption or stoppage of time, by the filing of the said suits, the period of occupation between 2006 and 3rd May 2017 when this Originating Summons was filed is only some 11 years and not the 12 envisaged in law.
34. In the premises, I am persuaded that the Applicant's Originating Summons is premature and without merit. The same is dismissed with costs to the Respondent.

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

J.O. OLOLA

JUDGE