



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBASA

CASE NO. 234 OF 2015

1. BENSON C MBOGO

2. FRASER JACKSON UTANJE

3. RAJAB MWADUNGULE KATUMBI.....PLAINTIFFS

- VERSUS -

1. MADONGA KENGA MASHA

2. KASSIM GUO

3. BAKARI ALIAS BEKA

4. BIDII JUMA

5. MODDY KEYA

6. KARISA

7. CHARLES MWAMUYE

8. KARISA TUNJE

9. MBARUK PANGA

10. OTIENO PIUS

11. MICHAEL OTIENO

12. KAHINDI KALUME

13. JANGOTO.....DEFENDANTS

AND

DIRECTOR OF PUBLIC PROSECUTION.....INTERESTED PARTY

J U D G M E N T

1. The Plaintiffs instituted this case against the Defendants vide the plaint dated 21st September 2015 and filed on 23rd September 2015. The Plaintiffs have brought this suit asserting their possessory rights over the land parcel known as Plot No. 422/I/MN. They seek the following orders:

i. vacant possession of the portion of all that property known as Plot No. 422/I/MN currently occupied by the plaintiffs and eviction

of the defendants and removal of the defendants' structures thereon.

ii. an injunction restraining the defendants by themselves, their agents, employees or assigns from trespassing into, remaining, settling, or in any manner whatsoever dealing with that portion of the property known as Plot No. 422/I/MN

iii. a direction of the OCS Bamburi Police Station to provide the plaintiffs with all necessary protections from the defendants and other potential invaders

iv. costs of this suit

2. It is pleaded that their late father, Ali Karisa Makoko moved and settled onto the suit property sometime in the 1940s. That the Plaintiffs have lived peacefully on the property for over 54 years. They raised their families and buried their parents thereon upon their demise and have also planted mango, citrus orange and coconut trees on the property. However, on 7th September 2015, the Defendants invaded the property and started clearing a portion of it. The Plaintiffs reported the matter to the area chief who referred them to Bamburi Police station where it was recorded in O.B No. 18/12/2015. The police could not assist as the plaintiffs do not have title documents to the suit property.

3. The plaintiffs plead further that the defendants began construction on their portion of the property over which they had no rights. They base their entitlement on possessory interest having been allowed onto the property by its registered owner, Habib Abdulla who in 1977 agreed to transfer the disputed land parcel to the plaintiffs. The said Habib had agreed to subdivide the suit property, Plot No. 422/I/MN into two parcels no. 845 and 846. No. 846 was to be transferred to the Plaintiffs for a consideration of Kshs.25,000. The purchase was however not completed. The Plaintiffs paid a deposit of Kshs.10,000 with the balance payable upon subdivision and issuance of the resultant titles but completion was frustrated by the death of the registered owner and his son, one Hussein Jan Mohamed who was assisting his father in the transaction. Their deaths hampered surrender of the mother title to Kenya Commercial Bank who the plaintiffs had approached to finance the Kshs.15,000 balance of the purchase price.

4. The Plaintiffs contend that they have both purchaser and possessory interests in the suit property which renders the defendants mere trespassers. That the defendants do not reside on thereon despite having built structures and they are aggravating the situation further by purporting to sell to unsuspecting third parties portions of the property for as low as Kshs.6,000 per an eighth of an acre. They concluded that by their illegal activity on the suit property, the defendants have committed criminal trespass and obtained money by false pretenses.

5. The Defendants filed their defence on 23rd March 2016. It consisted of blanket denials of the averments in the plaint. They pleaded that the plaintiffs lacked locus standi to entertain the suit and that they would apply for the suit to be struck out on that basis.

6. Parties proceeded with the main hearing on 20th November 2018 with the plaintiffs calling two witnesses and the defendants calling one witness. Benson Chrispus Mbogo testified as PW1. He stated that the 2nd and 3rd Plaintiffs are his brothers; Ali Makoko is his stepfather and that they have lived on Plot No. 422/I/MN from 1955. He adopted his statement dated 25th September 2015 and produced a list and bundle of documents dated 7th November 2017 as evidence which were marked as **P.Ex 1 to P.Ex 19**.

7. **PW1** while referring to the title documents at page 1-9 of the bundle gave evidence that they reside on the suit property, plot no. 846 while plot no. 845 is owned by a neighbor. That on page 6 there were entry Nos 5 and 6 to the effect that a caveat was lodged by one Hassan Musa claiming purchaser's interest. On page 18 was a letter dated 7th July 1978 with respect to plots 845 and 846 confirming that Hassan Musa had agreed to have the property* transferred to PW1. PW1 stated however that the title was not transferred. That the process was still ongoing as he had paid part of the purchase price being Kshs.15,000 leaving a balance of Kshs.10,000 which he was to settle once the title was released to him.

8. **PW1** testified further that the defendants invaded the land in August 2015. Currently both the plaintiffs' and defendants' structures were on the land; the defendants having illegally put up theirs in August 2015 in contravention of the injunctive orders issued by this Court. That there were also trees on the property which were planted by the plaintiffs' parents and PW1. He asserted that the Defendants did not plant any of the trees on the land and had no right over it. That the suit property was the only place he knows as his home with the defendants having separate homes in parcels distinct from the property.

9. In cross-examination **PW1** said that he was born on a plot adjacent to the suit property. They moved on the property upon joining their stepfather who was an employee of the owner. **PW1** denied that he attempted to purchase the suit land unsuccessfully reiterating that the delay in the transfer process was caused by the registered owner's death and **PW1** had been transferred to work outside the country. The relatives of the deceased had also relocated to other countries. Moreover, he could not recover some of his documents which were in the custody of Anjarwalla & Co. Advocates and had been archived. PW 1 asserted that he was not a squatter as he paid for the land. That they occupied the entire property which they lived on and used for farming. He admitted that he knew the 4th Defendant who is a relative; and whose father was his neighbor. That he was aware that the 4th Defendant had filed suit claiming adverse possession.

10. Rajab Mwadunguli Katumbo testified as **PW2**. He adopted his statement dated 27th July 2018. He stated that the defendants invaded the land carrying pangas, slashers and jembes, cleared bushes and marked the property. On inquiry he was told to mind his own business and he left fearing for his safety. The invaders increased in numbers and began selling portions of the land. PW 2 and his brothers then reported the matter to the area chief who referred them to Bamburi Police. The police declined to assist due to the plaintiffs' lack of title documents and a court order. Later on, the area Member of County Assembly, Member of Parliament and County Commissioner intervened. **PW2** explained to them the problem of the invaders. That they went to the property accompanied by the Deputy County Commissioner. On seeing them, the invaders ran away but they were summoned and asked to vacate. However, after the police left, they returned to the land.

11. **PW2** stated on cross-examination that the 4th Defendant lived on the neighboring plot but had also invaded their property and did not reside thereon before 2015. That the 2nd Defendant moved to live in South Coast; he had not encountered the 7th and 12th Defendants in the

recent past but the 9th Defendant had a separate plot of land. He reiterated that he sued the defendants because they invaded the suit land and put demarcations thereon. That they had permanent houses on the property but he admitted that he had not measured the portion where his home was nor did they have a title for the land. Further, the 2nd plaintiff had a house on the property but he works in Nairobi.

12. **PW2** was recalled as counsel for the defence served the plaintiffs' advocates with the 4th Defendant's statement out of time. In response to the new issues introduced in the said statement, PW 2 testified that the 4th Defendant's parents died and were buried on their land which was half a kilometer apart from the plaintiffs'. He continued that there was no relationship between the 4th Defendant's father, Juma Kadenge Tunje and his stepfather, Ali Karisa Makoko. That the 4th Defendant's mother came from the same clan as the plaintiffs but was not related to them. The said Juma was not an employee of Habib neither was the 4th Defendant's grandfather, Tunje. Consequently, Bidii had never lived on the suit land hence his claim of residing thereon for over 50 years was false. He continued that the families only shared social ceremonies and a well because they were neighbours. PW 2's parents were buried 10 metres away from their house at the family cemetery.

13. **DW1, Bidii Juma Mbogo Tunje** gave evidence that he was the 4th defendant, born in Maweni beach in Komba area. That he was a beneficial owner of plot no. 846 having been born thereon in 1983. As far as he knew, the plot belonged to Habib Abdalla and his father was one of the laborers on Habib's farm. That they lived peacefully with the Mbogo family until 2015 when some people came and told them to vacate because the land did not belong to them. He continued that Habib had promised to settle the families living on the property. That they occupied 5 acres of the land while the Mbogo family occupied 4½ acres and the rest was a swampy area. The dispute continued until they were sued as defendants.

14. **DW1** testified further that all the 13 defendants lived on the suit land with their families for over 50 years. That his parents were buried on the boundary of the property. He was categorical that his mother came from the Mbogo family as his maternal grandfather was a brother of the Mbogos. He however was unaware that the Mbogos had paid for the land. If they had known that the plaintiffs wanted to buy the land from Habib Abdalla they would also have contributed money for the purchase price. DW 1 continued that the defendants were ready to move out if they were given an alternative property for resettlement. He denied being served with any court order to demolish their houses and said that he lived in fear. DW1 urged the Court to do justice to both parties as he and the other defendants were born on the property.

15. In cross-examination DW1 admitted that he had never met Mr. Habib. He heard that Mr. Habib died in the 70s and he was born way after the fact in 1983. He stated further that he did not know what Mr. Habib and his advocate did with respect to the land between 1977 and 1979. On the plaintiffs' exhibits specifically the letters at page 15 to 33 he commented that most of them were drafted before he was born. DW1 did not have any letter between him and Mr. Habib to counter the plaintiffs' claim nor did he have any proof of his father's employment as a labourer in Mr. Habib's farm. He also admitted that he did not have any photographs of his parents grave or his house but stated that the living arrangement between the families was based on an oral agreement. DW1 asserted that the defendants were evicted and rebuilt their homes. They are still facing eviction yet most of them are related to the plaintiffs specifically the 1st, 4th, 5th, 6th and 8th defendants.

16. On conclusion of the hearing parties filed and highlighted their final submissions. The Plaintiffs' submissions were filed on 11th June 2019. It is submitted that the plaintiffs' purchasers interest is proved by correspondence and related documents presented by them proving the existence of a sale agreement between the 1st plaintiff and Hamisi Abdalla. While highlighting his submissions, counsel for the plaintiffs stated that section 3(3) of the Law of Contract Act requiring agreements involving real property to be in writing and their execution witnessed was a 2002 amendment that came into operation in 2005. Since the law does not apply retrospectively the afore-referenced section is inapplicable to the plaintiffs' case and the exhibits inferring existence of the agreement are sufficient proof of the same. Counsel contended that there was no breach of contract on the part of the 1st plaintiff. Further, the death of the registered owner did not vitiate the contract between himself and the 1st Plaintiff.

17. Counsel for the plaintiffs submitted further that defendants whose evidence was presented by a sole witness did not contain any documents or pictorial evidence to demonstrate any recognizable interest in the suit property. That there was no link between Mr. Habib and the defendants. Counsel opined that the defendants' act of filing a suit claiming adverse possession contradicted their assertion that they had been promised the land by Hamisi Abdalla. Also, the ancestral ties alleged by the 4th Defendant upon which the defendants base their entitlement to the suit land were unsubstantiated.

18. The Defendants filed their submissions on 3rd July 2019. It is submitted that neither the plaintiffs nor the defendants are registered owners of the suit property which is still registered in the name of Habib Abdulla. The plaintiffs' assertion that correspondences establish their purchasers' interest does not suffice. That the sale agreement being a crucial document was not only missing but also not referenced in any of the exhibits produced by the plaintiffs. Moreover, any purported agreement with Mr. Hussein Janmohamed over plot no. 846 is invalid in the absence of evidence that he was the legal administrator of Habib Abdulla's estate. The purported transaction was frustrated and is therefore ineffectual. Counsel cited sections 24 and 26 of the Land Registration Act; that since the plaintiffs have not acquired any title to the suit property the ownership rights guaranteed by the said sections are inapplicable to them. They have no right to seek eviction orders against the defendants.

19. I have read the parties pleadings, submissions and the applicable law. From my analysis of the case the issues to be determined are summarized as follows:

- i. Which party between the plaintiffs and defendants has demonstrated proprietary rights over the suit property?
- ii. Are the plaintiffs entitled to the whole of Plot No. 422/I/MN or to a portion thereof?
- iii. What orders this Court ought to grant?

20. It is evident that this is a case between two groups none of which is holding a title to the suit land. The question is who between the

plaintiffs and the defendants have demonstrated that their interest in the suit land is better than the other. In support of their case, the plaintiffs produced correspondences dating back to 1977 expressing their interest in the land. For instance the letter dated 7th July 1978 from Pandya & Talati advocates addressed to the 1st plaintiff stated thus;

“Re: Plot no L.R 845 Mombasa – M.N

We are in receipt...

21. The letter dated 8th August 1978 drawn by Kenya Commercial Bank Limited and addressed to the 1st Plaintiff discussed the subject of subdivision L.R nos 845 and 846 Mombasa M.N. Similarly; the plaintiffs produced a valuation report made over the property on 4th August 1977 and a receipt dated 30th Aug 1977 issued to the 1st plaintiff by Wairagu & Company who did the valuation. The defendants submitted that the plaintiffs reliance on these documents are null because the transaction was not completed. This is a wrong assertion because the transaction was not between the plaintiffs and the defendants. The plaintiffs were using the documents to demonstrate that they have been on the land and are thus entitled to be awarded the same.

22. Since the interests of the two parties are competing, I shall also consider the evidence offered by the defence in contesting the plaintiffs' claim. The 4th Defendant who gave evidence as **DW1** said he was born in 1983 but added that all the defendants had lived on the suit land with their families for over 50 years. He is one of the defendants who was only 32 years old when the suit was filed. Therefore, his sweeping statement that all the defendants which includes him have lived on the suitland for over 50years is misleading unless his evidence was corroborated. The 4th Defendant also said that his mother came from the Mbogo family (relatives of the plaintiff). Is this an admission that he was aware the plaintiffs were living on the suitland? He went further to state that had they been told the plaintiffs were paying for the land he would have contributed. The challenge is that he could not contribute to a transaction done before he was born.

23. None of the other defendants testified to tell this court when they entered the suitland. As at the time the valuation report was made and correspondence exchanged towards purchasing the suitland it is only the plaintiffs who had expressed an interest to take over the land from the registered owner. Any rights that accrued other than that of the registered owner was the right of occupation/possession. In this case the plaintiffs have demonstrated that their possession was first in time and the same was notorious. The notoriety of the plaintiffs' occupation is corroborated by the evidence of **PW2**.

24. Although the plaintiffs have not acquired title to the suit land, they have demonstrated that their interests rank in priority over that of the defendants. It can easily be said that although the transaction between the registered owner and the plaintiffs did not fall through but by virtue of their use of the land, they now own the land through a constructive trust. Equity aids the vigilant and they are vigilant not to allow the defendants to disinherit them. Secondly, he who comes to equity must come with clean hands. In analyzing the evidence rendered, I find the defendants as having unclean hands because they are claiming what is already taken by the plaintiffs. The defendants after being served with pleadings in this suit said they have filed an originating summons in **MSA ELC No 40 of 2016** (*annex BJ3* in the R/Affidavit sworn on 23rd March 2016) against Habib Abdulla whom they are aware is deceased. Using that case as defence to this suit adds no value as that suit is a nullity having been brought against a deceased person.

25. In conclusion, this Court is satisfied that the plaintiffs have discharged the burden of proof on their absolute entitlement to the entire suit land to the exclusion of others; and their overriding possessory interests in the same as compared the defendants. Accordingly, I allow their case and enter judgment as prayed in the plaint. Each party shall bear their own costs of the suit.

Dated, signed and delivered at BUSIA this 12th day of May, 2020.

A. OMOLLO

JUDGE

Judgment delivered electronically through mail this 12th Day of May, 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE