



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 48 OF 2015

THOMAS HINZANO NGONYO.....PLAINTIFF

VERSUS

WILLIAM KOMBE.....1ST DEFENDANT

PHILLIP KARISA.....2ND DEFENDANT

SAMUEL CHATIA KEA a.k.a JIMMY RASTA.....3RD DEFENDANT

JUDGMENT

BACKGROUND

1. By a Complaint dated and filed herein on 2nd April 2015, Thomas Hinzano Ngunyo (the Plaintiff) prays for Judgment against the three Defendants for:-

a) A declaration that the Defendants are not the owners of any part of the land known as LR No. Plot NO. 698 registered as CR No. 39830 and that the suit property belongs to the Plaintiff and the Defendants are mere trespassers or a licensee or otherwise a month to month tenant with regard to the portions of the suit property where their respective houses stand, liable to have their tenancy or license determined as by law prescribed;

b) In the alternative, a declaration is issued to the effect that the Defendants are liable to pay the Plaintiff ground rent for the use of the portion of the suit property on which their houses stand at the rate of Kshs 2000/- from the date of entry upon the land;

c) In the further alternative, a declaration do issue to the effect that the Defendants do forthwith pull down and remove at their own expense the structures/houses now erected on the suit property so as to restore the land in its original state as it were before the Defendants broke and entered upon the same, and thereby deliver the land to the Plaintiff;

d) A permanent injunction do issue restraining the Defendants by themselves, their servants, agents, employees and/or hirelings from erecting or continuing to erect structures or houses or in any other manner whatsoever interfere with or continue to interfere with the rights of the Plaintiff over and in the subject land;

e) Aggravated general damages for trespass or loss of use of land;

f) Costs of and incidental to this suit; and

g) Interest on (b) and (e) above at Court rates from 2008 until payment and delivery up of possession of the subject land.

2. These prayers arise from the Plaintiff's contention that he is the proprietor of the said property situated at Watamu within Kilifi County. The Plaintiff avers that sometime in the year 2008, the Defendants without any colour of right trespassed onto the suit property, occupied portions thereof and proceeded to erect structures thereon. Despite the Plaintiff's protests, the Defendants have declined to remove the structures and or to vacate the land.

3. By reasons of the Defendant said actions, the Plaintiff avers that he has been deprived the use and possession of his land as a result whereof he has suffered loss and damage. The Plaintiff is further apprehensive that unless the Defendants are restrained by this Court, they intend to remain on the land and to continue to develop the same for their own purposes on an unfounded claim of ownership thereof.

4. But in his Statement of Defence and Counterclaim dated 15th May 2015 and filed herein on 18th May 2015, Philip Karisa (the 2nd Defendant) denies that the Plaintiff is the registered proprietor of the suit property. He asserts that the transfer and subsequent registration of the property in the name of the Plaintiff was irregular and fraudulent.

5. The 2nd Defendant further avers that he has occupied and developed the suit property since 1980 and asserts that one Valentine Hinzano Ponda had vide **Malindi SRMCC No. 198 of 2009** filed a similar suit against the Defendants herein seeking similar prayers but the same was dismissed for want of prosecution.

6. The 2nd Defendant avers that this suit is res judicata and filed in abuse of the Court process since a similar one seeking the same prayers was dismissed for want of prosecution.

7. It is the 2nd Defendant's case that he has occupied and developed the suit property situated within Kirepwe 'B' Land Adjudication Section since the year 1980 and that he has since acquired rights of adverse possession thereon. Accordingly and by way of Counterclaim, the 2nd Defendant prays for Judgment against the Plaintiff for:-

a) A declaration that the 2nd Defendant is the lawful beneficial owner and occupier of the suit property;

b) Alternatively and for any reasons if the Plaintiff's title shall be recognised as the lawful owner, then the 2nd Defendant is entitled to adverse possession of the suit property;

c) Costs of this suit and interest at Court rates; and

d) Any other or further orders this Honourable Court may deem just to grant.

8. Similarly in his Statement of Defence and Counterclaim dated 20th May 2015 and filed herein on 21st May 2015, Samuel Chatia Kea (the 3rd Defendant) denies that the Plaintiff is the proprietor of the suit property. The 3rd Defendant asserts that he is the rightful owner of the suit property having lived thereon since 1985 after his father purchased the land from William Kombe (the 1st Defendant).

9. The 3rd Defendant asserts that since the 1980s, he has occupied, built his residence and cultivated the suit property continuously, openly and exclusively without any interruption from the Plaintiff and he has accordingly acquired adverse possession thereof. In this regard and by way of a Counterclaim, the 3rd Defendant prays that the Plaintiff's case be dismissed and that a declaration be issued that he has acquired adverse possession of the portion of land he occupies on Plot No. LR 698 Watamu.

10. In his Statement of Defence and Counterclaim filed much later on 21st September 2018, William Kombe (the 1st Defendant) equally denies that the suit property belongs to the Plaintiff. In line with the position taken by the 2nd and 3rd Defendants, the 1st Defendant similarly asserts that he has occupied the suit property since 1979 and that he has developed the same without any interruption from the Plaintiff or any other person.

11. By way of his Counterclaim, the 1st Defendant also prays for a declaration that he is entitled by way of adverse possession to the portion of the suit property that he occupies.

The Plaintiff's Case

12. At the trial herein the Plaintiff (PW1) testified as the sole witness in his case. Relying on his Statement as filed herein on 2nd April 2015, PW1 testified that the suit property initially belonged to one Bora Afya Omar Bora Afya but was transferred to his name on 29th March 2012. PW1 told the Court that before the transfer, one Valentine Hinzano Ponda had a power of attorney donated to him by the said Bora Afya Omar Bora Afya. Using the said power of attorney, Valentine filed a case against the Defendants in 2009 but since the case was filed in a Court without jurisdiction, the same was withdrawn and/or struck out.

13. PW1 told the Court that the Defendants constructed residential houses on the suit land without his consent and or that of the original owner thereof. He had plans to develop the suit property but could not do so due to the occupation by the Defendants. He further told the Court he was incurring a loss of Kshs 2,000/- due to the unlawful occupation. He further asserted that the Defendants could only have occupied the land when it was Government land before its registration in the name of Bora Afya in 2005 but not thereafter.

14. On cross-examination, PW1 told the Court he purchased the land on 8th March 2012. By then the Defendants were on the land having encroached thereon around the year 2008. The land was sold to him by Valentine Hinzano Ponda who is a brother to his father using the power of attorney he held from Bora Afya.

15. PW1 further told the Court that the land was first registered in Omar Bora Afya's name on 27th July 2005 but they had never taken possession thereof. He admitted that there was a previous case **No. 198 of 2009** in regard to the suit property but he was not a party to the same and had no evidence that it had been withdrawn.

The Defence Case

16. Each of the three Defendants testified in support of their respective cases at the trial.

17. DW1-William Kombe Yeri is the first Defendant. Relying on his Statement filed herein on 21st September 2018, DW1 testified that he started occupying the suit property in the year 1979. The land which was bushy and unoccupied belonged to their Wamwangari Clan and DW1 cleared a portion thereof which he proceeded to occupy.

18. DW1 further told the Court that sometime in the 1980s, the 3rd Defendant's father approached him and requested to be sold a portion of the land. DW1 agreed and sold to him the portion which is to-date still occupied by the 3rd Defendant and his family. DW1 told the Court that they remained on their portions of land peacefully until sometimes in the year 2009 when they were sued by one Valentine Hinzano Ponda claiming ownership of the land in *Malindi SRMCC No. 198 of 2009*.

19. DW1 testified that the said Valentine is a son to the Plaintiff herein and that he had sued them in exercise of a power of attorney donated by one Bora Afya Omar Bora Afya. That suit did not proceed as Valentine claimed he was sick. He later heard from the 2nd Defendant herein that they had been sued in the present case.

20. On cross-examination, DW1 told the Court that he had sold about an acre of land to the 3rd Defendant's father vide an agreement dated 14th March 1982. He further told the Court that the 2nd Defendant had been their neighbour on an adjacent plot for a period exceeding 30 years.

21. DW1 confirmed that he had stated in his defence in the previous suit that they had been on the land since 1985 and not 1979 as he had stated herein. He told the Court he was about 24 years old in 1979 and that his community had given its approval before he sold the land to the 3rd Defendant's father. He however admitted that their agreement did not indicate the plot number that he sold to the 3rd Defendant's father.

22. DW2-Philip Karisa is the 2nd Defendant herein. Relying on his Statement filed herein on 18th May 2015, he told the Court that he cleared bushes and developed the area where he now lives in the year 1980. He has since managed to put up a permanent structure thereon.

23. DW2 told the Court that in or about the year 2008, the Commissioner of Lands through the Municipal Council of Malindi had purported to allocate the land in the area to individuals and its officials without considering those who were in physical occupation on the ground. The exercise was however stopped after the area residents complained. A resolution was thereafter passed that the land be adjudicated to the squatters residing in the area.

24. On cross-examination DW2 conceded that though he had mentioned Kirepwe B Adjudication Section in his Counterclaim, the Plaintiff's title deed did not make reference to anything like that. He further admitted that his statement shows he had started living on the land in 1980 and not 1979 as he had pleaded. He further conceded that he had not shown the acreage of land he was occupying and that he had not brought an independent witness to confirm he had lived on the land for all those years.

25. DW3-Samuel Chatia Kea is the 3rd Defendant herein. Relying on his Statement filed herein on 21st July 2016, DW3 testified that he has lived on his portion of the suit land since 1985. He told the Court that his father bought the land from the 1st Defendant herein (DW1) way back in the year 1980 and that he (DW3) completed the payment of the balance of the purchase price in 1989.

26. DW3 testified that he has since 1985 built his residential house on the land and cultivated a portion thereof without any interruption from the Plaintiff. He told the Court that his occupation has been open and exclusive and he now believes that he has acquired the land by way of adverse possession.

27. On cross-examination, DW3 conceded that he only occupies a portion of the suit property. He further conceded that the agreement between his father and the 1st Defendant did not show the acreage of the land that his father had purchased. DW3 further conceded that he had no customary claim to the land as he was a Luhya and not a Giriama from the disputed area.

Analysis and Determination

28. I have perused and considered the pleadings filed herein, the oral testimonies of the witnesses and the evidence adduced at the trial herein. I have in addition considered the law and the submissions of the Learned Advocates representing the parties herein.

29. The Plaintiff before me is seeking a declaration that the Defendant are not the owners of the parcel of land known as Plot No. 698 situated at Watamu within Kilifi County (the suit property). In the alternative he prays for orders that the Defendants are liable to pay him ground rent for their use of the suit property and or an order directing them to pull down and remove at their expense the structures/houses they have built on the suit property.

30. The Plaintiff further prays for an order of injunction to restrain the Defendants from erecting or continuing to erect houses on the suit property or to interfere with it in any manner whatsoever. In addition, he prays for aggravated general damages for trespass or loss of use of the land.

31. It is the Plaintiff's case that the suit property was first registered in the name of one Bora Afya Omar Bora Afya on 27th July 2005 before it was sold to him on 29th March 2012. It is further the Plaintiff's case that sometimes in the year 2008, the Defendants herein trespassed into the suit property and without any colour of right proceeded to occupy the same and to erect their houses and other structures thereon.

32. The Plaintiff asserts that by reason of the Defendants said actions, he has been deprived of the use and possession of his property and that as a result, he has suffered and continues to suffer loss and damage. Despite his protests, the Defendants have declined to remove the houses

and structures they have erected on the land and to vacate the same.

33. In their separate pleadings filed herein, the three Defendants do not deny that they are in occupation of the suit property. It is however their case that contrary to the Plaintiff's allegations that they trespassed onto the suit property in 2008, they have occupied and been in possession of their respective portions of the property since the 1980s.

34. While the 1st and 2nd Defendants contend that the portions of land they occupy comprised their ancestral land and that they had been in quiet occupation and possession thereof for more than 30 years before a relative of the present Plaintiff sued them in the year 2009, the 3rd Defendant relies on a Sale Agreement between his father and the 1st Defendant in which the 1st Defendant sold the portion of land to the 3rd Defendant's father.

35. It is the Defendant's case that the Grant issued to the said Bora Afya Omar Bora Afya on 27th July 2005 and the subsequent transfer to the Plaintiff on 29th March 2012 are illegal, null and void for the reason that they have always been in occupation of the land and the issuance of the title did not follow the procedure required by law.

36. From the material placed before me, it was not in dispute that when the Plaintiff bought the suit property on 18th March 2012, the Defendants had long been in occupation of the land and had erected their residential houses thereon. According to the Plaintiff himself, the Defendants had moved into the land some time in the year 2008. Going by the Plaintiff's account that would be some four (4) years before the Plaintiff bought the parcel of land.

37. On cross-examination the Plaintiff indeed admitted that he was aware of the Defendants' presence on the land. He could not have failed to notice their presence, for while the property was registered in the name of the said Bora Afya Omar Bora Afya, it was transferred to the Plaintiff by a brother to his father one Valentine Hinzano Ngunyo who held a power of attorney from the said Bora Afya Omar.

38. As it turned out, that same Valentine Hinzano Ngunyo had in the year 2009 in the exercise of his power of attorney filed **Malindi PMCC No. 198 of 2009** in which he sought orders of eviction against the Defendants from the suit property. At paragraphs 4 and 5 of the Plaintiff filed in the subordinate Court the Plaintiff pleaded as follows:-

"4. The Plaintiff states that sometimes in August and/or September 2008 the Defendants jointly and separately encroached and/or trespassed into the said Plot No. 698 Watamu and are in the process of putting up structures thereon.

5. It is stated that despite requests and demands by the Plaintiff to immediately cease the said illegal encroachment and trespass the Defendants have persisted in the same and the Plaintiff further avers that the Defendants activities are causing wastage and damage to the said Plot No. 698 Malindi and are denying the Plaintiff and in effect the said Bora Afya Omar Bora Afya access and use of the said parcel of land thereby occasioning irreparable loss and damage."

39. In response to the said allegations, the Defendants denied trespassing onto the suit property as stated and asserted as they do herein that they first took possession of and occupied what is now the suit property in the 1980s. None of the parties produced the proceedings in the lower Court and while it was clear that the said suit did not proceed to conclusion, it was unclear to this Court when the suit was terminated.

40. According to the Plaintiff, the same was withdrawn after it was discovered it had been filed in a Court without jurisdiction. The Defendants however contend that the said suit was dismissed for want of prosecution and assert that this present suit is res judicata. Whatever the case, it was clear to me that the said suit had not been heard on merits and this suit cannot therefore be said to be res judicata.

41. During his cross-examination herein, the Plaintiff told the Court that due to the encroachment of the Defendants on the suit property, neither the said Bora Afya Omar Bora Afya nor himself had been able to take possession of and or to utilize the suit property ever since the title was registered in Bora Afya's name on 27th July 2005. Despite such knowledge the Plaintiff boldly had the suit transferred to his name and now accuses the Defendants of trespass into his property.

42. From the material placed before me, there was clear evidence that long before the suit property was registered in Bora Afya's name, the Defendants were in occupation thereof. That must indeed be the reason the said Bora Afya was unable to take possession thereof when the same was registered in his name as aforesaid on 27th July 2005, some seven (7) years before the Plaintiff acquired the title thereto.

43. The history of the disputed parcel of land can be discerned from a series of correspondences dating as far back as 1992 attached to the 2nd Defendant's List of Documents. In one of them, a Memorandum addressed to the area District Officer dated 13th July 1998 and signed by among others the 2nd Defendant, the area residents write as follows:-

"To Madam DO C. Omollo Malindi District

Memorandum of Land Grievance by the Residents of Kirepwe B/Watamu

We, the humble citizens and residents of Kirepwe B Watamu hereby state as follows:-

1. That we settled in this area between 1950-1970

2. That we developed this part of Watamu and at present we have our homes, coconut trees, mango trees and also keep

livestock here.

3. That we have buried our dead.

Despite these developments the Municipal Council of Malindi sitting under the Chairmanship of then District Commissioner Kilifi Mr. Harry Wamubeyi, as he then was allocated this area to strangers rendering the genuine squatters landless.

That the history of the squatter problem in this Area is well known. In October 1992 the Local Leadership including the then MP for this Area Mr. Bobi F. Tuva and Councillor Ali Didi advised us to seek an appointment with his Excellency the President.

In pursuance thereof we prepared a comprehensive Memorandum. We take the liberty to include a copy thereof.

In the premises we make the following prayers:-

1. That you be pleased to declare the allocation null and void to the extent of its irregularities.

2. That you be further pleased to order the Land Adjudication and Settlement Office to complete the adjudication exercise and issue freehold titles to the residents.”

44. The fact that there were people on the land much earlier than 2005 is further given credence by the existence of the agreement dated 14th March 1982 in which the 1st Defendant “sold” an undefined plot of land within the area described as Blue Bay Watamu to the 3rd Defendant’s father as well as a letter dated 25th August 1999 by the Commissioner of Lands addressed to Hare Mwarandu & Co. Advocates Malindi. In the said letter copied to a number of personalities, one P.N. Gathongo for the Commissioner of Lands writes to the Advocates as follows:

“RE: Irregular Allocation of Plots-Watamu Acute Squatter Problem

I refer to my copy of your letter Ref.....dated 16th April 1997 addressed to the Permanent Secretary, Ministry of Lands and Settlement and wish to inform that I have called for a comprehensive ground report on the matter and I should be grateful if you would provide the list of the squatters in your possession for comparison purposes at your earliest convenience.”

45. The said Advocates responded to this letter by their own dated 1st October 1999 in which they gave a long list of squatters including the Defendants herein. Accordingly, I was not persuaded that the Defendants had trespassed on the Plaintiff’s suit property as alleged by the Plaintiff. On the contrary, it was evident that these were people on the land long before the one he claims to have transferred the land to him gained any interest in the suitland.

46. Evidently as at the time the said Bora Afya Omar Bora Afya purported to acquire interest in the land, there were people living thereon and hence his inability to access and take possession thereof. As it were, the land in question is government land that was previously governed under the Government Lands Act, Cap 280 of the Laws of Kenya (now repealed).

47. Under Part III of the repealed Act, alienation was done by the Commissioner of Lands after an elaborate process including an application addressed to the Country Council under which the subject parcel of land was situated. That application was required to go through an allocation Committee which was required to carry out their independent investigation as to the availability of the property by preparing a ground report which should indicate whether there are persons occupying the property or not.

48. Other than the title deed issued to his predecessor, the Plaintiff did not produce any evidence that his predecessor applied to be allocated the parcel of land and that he was duly issued with a title therefor. From the Municipal Council of Malindi’s letter produced herein dated 17th March 2011, the Council admitted that the allocation of the parcels of land in the subject area did not take into account the fact that there were already people on the ground when the allocation was done.

49. Accordingly and by a resolution of the Full Council dated 24th February 2011, the Council had resolved to ask for the permission of the Ministry of Lands to pick and re-plan the area with a view to settle and resolve the problem. Having failed to take possession of the property, it was also clear that the Plaintiff and his predecessor had not complied with the conditions of allotment.

50. In the premises I was satisfied that the Plaintiff does not have a good title to the suit property and that having purchased the suit property with full notice of the Defendants occupation thereof, he was not entitled to the orders sought herein.

51. On their part, the Defendants sought by their separate Counterclaims to be declared as the rightful owners of the suit premises by dint of the doctrine of adverse possession. In *Mtana Lewa –vs- Kahindi Ngala Mwamgandi (2005) eKLR* the Court of Appeal in considering what entails adverse possession 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.”

52. In the matter before me, the purported registration of the Plaintiff’s predecessor in title took place on 27th July 2005. That was some

seven (7) years before the Plaintiff filed this suit. While the Defendants on their part claim to have occupied and been in possession for more than 30 years it was clear from the correspondence I have quoted hereinabove that they were aware that the land constituted Government land and hence their plea to the Government to be allocated the same.

53. As it were, it is trite law that adverse possession cannot accrue against land that is owned by the Government. Section 41 of the Limitation of Actions Act excludes public land from the application of the Act. Accordingly, it was also clear to me that the Defendants counterclaims were unmerited and cannot stand.

54. In the premises, I neither found merit in the Plaintiff's case nor in that of the Defence. Both the suit and the respective Counterclaims are accordingly hereby dismissed with no order as to costs.

Dated, signed and delivered at Malindi this 25th day of June, 2020.

J.O. OLOLA

JUDGE