



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 195 OF 2012

1. MORRIS MALAGHO

2. GODFREAS OPIYO OJIAMBO

3. JONES MWADIME GARE

4. WILLIAM ODHIAMBO OYOGA & 104 OTHERS.....PLAINTIFFS

VERSUS

FORT PROPERTIES LIMITED..... DEFENDANT

JUDGMENT

1. The plaintiffs commenced this suit by way of an originating summons dated 12th September, 2012 and filed on 14th September, 2012. They seek to be declared and registered as proprietors of 7.19 acres or thereabouts of all that parcel of land known as subdivision number 761 (original No. 215/1) of Section 11 Mainland North CR 8399 in place of the defendant by reason that they have acquired the said land by adverse possession.

2. In support of their claim, the plaintiffs filed a supporting affidavit sworn by Morris Malagho, the 1st plaintiff on 12th September, 2012 and a supplementary affidavit sworn on 16th September, 2013. The plaintiffs aver that they have lived on the suit land as squatters for more than 20 years and have developed it openly and without hindrance or interruption. That for all that period, they have been and are in physical occupation and possession and have peacefully exercised proprietary rights like construction of both temporary and permanent houses, shops, schools, and undertake farming activities having cleared the land that was bushy and the land is their only homes. The plaintiffs aver that many of them were born on the suit land. It is the plaintiffs case that the defendant has shown no interest in the suit land and has never taken any steps to have the plaintiffs vacate from thereon. It is therefore the plaintiffs contention that in the circumstances the defendant's interest in the suit property has been extinguished and the plaintiffs have acquired title to it by adverse possession. The plaintiffs therefore prayed to be registered as the owners of the suit property. The plaintiffs have annexed a certified copy of the title in respect of the suit property in the defendant's name, certificate of postal search and photographs showing several structures.

3. Jones Mwadime Gare, the 3rd defendant testified on behalf of the plaintiffs and was cross-examined by Mr. Matheka, counsel for the defendants and re-examined by Mr. Shimaka for the plaintiffs. He stated that he has lived on the suit land together with his family for over 22 years. He testified that he has lived with other people numbering about 135 for over 12 years and that they have built thereon residential houses, schools, churches, a mosque and have a grave yard. He named the institutions as PAL Junior Primary School, Junta Primary School, Jesus Faith Church, Beula Sanctuary Church and one mosque. He testified that they have never seen the owner of the suit property and stated that the suit land is about 7 acres with rough terrain as it had previously been used by the owner as a quarry to excavate sand therefrom and that the place gets flooded when it rains. He produced the certificate of official search and receipt as p.exhibit 1(a) and (b), copy of title as p.exhibits 2, and photographs as p.exhibits 3 and urged the court to grant them the reliefs sought herein.

4. In the opposing the summons, the defendant filed a replying affidavit sworn by Ketan Patel, a director of the defendant on 11th November 2013 and a counter-claim dated 11th November, 2013. Mr. Patel deposed that the plaintiff's suit is bad in law and does not satisfy the requirement and the provision of the law under which it is brought. That the same is supported by a defective affidavit and therefore is incompetent and incurably defective. It is deposed that the defendant is in occupation of part of the suit property and that they have always been in full possession of the same.

5. Mr. Patel further deposed that his father who is now deceased, purchased and transferred the suit property in the company name in 1989. That the defendant company deals in real estate and development of houses for sale. That by virtue of the said business, his late father acquired numerous plots and properties in Mombasa and that before his demise in the year 2004, the deceased was in full operation of the

suit property through the defendant and that upon his demise, the squatters invaded the property. He deposed that upon the death of his father, they lost a number of vital documents, including title deeds, bank statements among others. The defendant denies that the plaintiffs have been in occupation for 20 years. It is the defendant's contention that the plaintiffs are trespassers on the said land and in its counter-claim, the defendant prays for vacant possession.

6. Yunus Haroon Hussein testified on behalf of the defendant and was cross-examined by Mr. Shimaka and stated that he has worked for the defendant for 25 years as a manager. He stated that there are people occupying the suit property in which they used to harvest sand from. It was his evidence that the defendant intended to develop the suit property by putting up some houses. He stated that they managed so many properties and that they did not know that the suit property had been invaded and developed. He further stated that he came to learn that people were on the suit land sometime in the year 2017, but they had entered much earlier. He stated that the defendant had demanded the sum of Kshs.30 million from the plaintiffs in order for the land to be transferred to them and the plaintiffs suggested that valuation of the property be carried out. The suit property was then valued at Kshs. 7 million but the plaintiffs did not pay. He stated that there were negotiations going on and produced the defendant's supplementary list of documents dated 23rd October 2017 as D.exhibit 1. He admitted that the defendant never gave the plaintiffs permission to enter into the suit land DW2 however, denied that the plaintiffs have stayed on the suit land for over 12 years. He stated if the plaintiffs paid the sum of Kshs. 7 million, the defendant will transfer the suit land to them. He asked that if the plaintiffs fail to pay, they should be evicted from the suit land.

7. The plaintiff's' advocate submitted that the plaintiffs have been in active occupation and possession of the suit property with the knowledge of the defendant for an interrupted period for over 12 years and therefore the defendant's rights to it have been extinguished. It is the plaintiffs' submission that the negotiations between the parties that resulted in valuation of the suit property was done on a without prejudice basis and after the institution of this suit, and that they have since acquired proprietary interest in the suit property and that they are entitled to the reliefs sought. The plaintiffs' counsel relied on the case of **Samuel Nyakenogo –v- Samwel Orucho Onyaru (2010)eKLR** and **Gerald Kamonde –v- Wamugunda Muriuki & Another (2010) eKLR**.

8. The defendant's advocates, on their part submitted that the suit as presented is unlawful and frivolous. That there is no obligation in law that an owner of land must develop it and the illegal invasion by the plaintiffs into the suit property cannot be said to gift them the property. The defendant's counsel submitted that in adverse possession, the claimant must have been invited into the suit property by the owner, recognized and stayed therein for a period of over 12 years. Counsel further submitted that the plaintiffs have not adduced evidence proving that they were born in the suit property or have developed the same or even buried their kin thereon. The defendant's advocate further submitted that the suit being a representative suit is incurably defective and incompetent as no leave was obtained as required under Order 1 Rule 8 of the civil procedure rules. He relied on the case of **Wanjiru –v- Standard Chartered Bank Kenya Limited and Others (2003) 2 EA 701 (CCK)**. Counsel submitted that the defendant's counter-claim is not opposed and the order for eviction should be granted.

9. Having considered the pleadings, the evidence on record and the submissions, the issues for determination are:

i. Whether or not the plaintiffs' suit is competent as a representative suit.

ii. Whether the plaintiffs are entitled to the reliefs sought.

iii. Whether the defendant is entitled to the orders sought.

iv. Who bears the costs.

10. There is no dispute that parcel of land known as subdivision No. 761 (original Number 218/1) of Section II mainland North measuring 7.19 acres is registered in the name of the defendant. The plaintiffs suing for and on behalf of 102 others claim to have acquired the suit property by adverse possession. The names of all the 106 plaintiffs are named in the originating summons. Is this a representative suit and if so what are the requirements? Order 1 Rule 8 of the Civil Procedure Rules provides:

“One person may sue or defend on behalf of all in the same interest.

(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the court otherwise orders by or against any one or more of them as representing all except one or more of them.

(2) The parties shall in such cases give a notice of the suit to all such persons either by personal service either, or where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defendant under sub-rule (1) may apply to court to be made a party to such suit.”

11. Order 1 Rule 8 is quite clear that for a representative suit there has to be notice to all those affected by either personal service or by way of a public advertisement, as the court may direct. This requirement is mandatory. In this case, no order as required in Order 1 Rule 8 was obtained and no such notice was issued. As already stated, the suit is filed by 106 named plaintiffs. However, the plaintiffs have given authority to the 1st, 2nd, 3rd and 4th plaintiffs to appear, act and plead on their behalf as provided under Order 1 Rule 13 which states as follows:

“Appearance of one of several plaintiffs or defendants for others.

1. Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

2. The authority shall be in writing signed by the party giving it and shall be filed in the case.”

12. In my view, the plaintiffs suit herein is not incompetent since it is not a representative suit. The plaintiffs complied with the provisions of Order 1 Rule 13 of the Civil Procedure Rules.

13. The next question is whether the plaintiffs are entitled to the reliefs sought. The law on adverse possession is now well settled. The essential requirements that one has to meet in order to succeed in an application for adverse possession have been discussed by the court. In the case of **Kweyu –v- Omuto (1990) KLR 709**, the Court of Appeal, (Gicheru J) stated at page 716 that:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous when such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (colour of title is that which a title in appearance, but not in reality). Adverse possession is made out by the co-existence of two distinct ingredients, the first, such a title as will afford colour; and, second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use, done publicly and notoriously.”

14. In **Wambugu –v- Njuguna (1983) KLR 173**, the Court of Appeal restated those principles when it held inter alia as follows:

1. The general principle is that until the contrary is proved, possession in law follows the right of possess.

2. In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years as to enable him, the respondent, to title to that land by adverse possession.

3. The Limitation of Actions Act, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then 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 has been in possession for the requisite number of years.”

15. The ingredients were recently discussed by the court of appeal in the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2015)eKLR** where Makhandia JA stated as follows:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of this title for a certain period, in Kenya is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

16. Are the plaintiffs entitled to the suit property by virtue of adverse possession? The plaintiffs evidence is that they have been in possession and occupation for over 20 years and have over the years undertaken various developments. PW1 testified that he entered the land in 1986. The plaintiff s’ evidence is that they entered into the suit property without the permission of the owner, that is the defendant herein. DW1 admitted that there are people in possession and occupation of the suit land. He stated that he came to learn that people were on the land in the year 2017 but they had entered earlier.

17. The plaintiffs produced photographs showing the extensive developments they state they have undertaken, including permanent buildings. The plaintiffs further stated that besides their homes, there are schools, churches and a mosque erected on the suit land. The defendant has not denied the existence of those developments. I have no doubt in my mind that such developments must have been undertaken over time and openly. In this case, there is no evidence that prior to the filing of this suit, the defendant took action to recover possession from the plaintiffs. The plaintiffs’ possession in my view has been adequate in continuity, in publicity and in extent to show that possession is adverse to the title of the defendant.

18. Considering the totality of the evidence availed in this case, and applying the legal principles as outlined above, I am satisfied that the plaintiffs have proved their case on a balance of probabilities and have brought themselves within the limits of the doctrine of adverse possession. In the circumstances, the defendant’s counter-claim is statute barred as its title has been extinguished.

19. In the result, the defendant's counter-claim is dismissed. The plaintiffs' suit by way of originating summons dated 12th September, 2012 is allowed and I enter judgment as follows:

1. That the defendant's interest in all the piece of land being subdivision 761(original No. 215/1) of Section 11 mainland North, Mombasa measuring 7.19 acres or thereabouts has been extinguished.

2. The plaintiffs are entitled and should be registered as owners of the suit property by virtue of adverse possession.

3. Costs of the suit are awarded to the plaintiffs.

DATED, SIGNED and DELIVERED at MOMBASA this 15th day of July 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE