



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 253 OF 2015

IN THE MATTER OF: THE PARCEL OF LAND KNOWN AS PLOT NO. 2380/V/MN, MIRITINI WITHIN THE MUNICIPALITY OF MOMBASA

AND

IN THE MATTER OF: LIMITATIONS OF ACTIONS ACT, CAP 22 LAWS OF KENYA

BETWEEN

JAMES KAMAU & 42 OTHERS.....PLAINTIFFS

VERSUS

LEONID LTD.....DEFENDANT

J U D G E M E N T

1. The Plaintiffs instituted this case against the Defendant vide an Originating Summons dated 17th June 2008 and filed on the same date. The Respondent filed an application dated 17th July 2009 seeking to have the Originating Summons admitted as plaint and the Replying affidavit as defence. The application was unopposed and was therefore allowed on 2nd September, 2009. The Plaintiffs have brought this suit seeking the courts declaration of their adverse possession rights over the land parcel known as Plot No. 2380/V/MN and determination of the following questions:

- i. Whether the Plaintiff/Applicants are entitled to Plot No. 2380/V/MN Miritini by virtue of adverse possession.
- ii. Whether the Plaintiff/Applicants are entitled to a survey of Plot No. 2380/V/MN Miritini, partitioning and allocation of the same to all the occupants in respect of the areas where they occupy and/or reside.
- iii. Whether pursuant to the said partitioning the Plaintiff/Applicants are entitled to be duly registered as the proprietors of the allocated portions
- iv. Whether the Plaintiff/Applicant are entitled to costs of the suit.

2. The Originating Summons was opposed by the Respondent's Director, Arafat Vaiani's replying affidavit sworn on 20th February 2009 and filed on 5th March 2009. Subject to the application of 2nd September, 2009 the Respondent raised a counter claim for Orders that;

- i. The Plaintiffs/Applicants vacate the suit property and the Defendant/Respondent be entitled to vacant possession thereof and to demolish all structures thereon if not removed by the Plaintiffs/Applicants.
- ii. The Defendant/ Respondent be entitled to costs of this claim and counterclaim.

Plaintiffs/Applicant's Case;

3. From the record Fourteen (14) out of the Forty-Three (43) Plaintiffs/Applicants testified. These include;

PW1- James Kamau testified that he is a businessman and has been living in Miritini for over 25 years. It was his testimony that he came to the land in 1982 and found other people, mostly with business, on that land and structures made of Makuti mud house. He further testified that he put up a food kiosk which he later extended and built a residential and commercial building without any approval from by the Municipal Council. It was PW1 testimony that he only got to know of the Defendant/Respondent in 2008 when the Municipal Council demolished houses. PW1 produced land search dated 12/6/2008 as **P.exh. No. 1** and a hawker licence as **P.exh No.2 (a), (b), (c), (d)** dated **20/05/1994, 22/06/1995, 13/05/96, 27/05/1997** respectively.

4. On Cross-examination, PW1 stated in contradiction to his exam in chief that he occupied the land in 1995. He further confirms that he was given permission and welcomed by people already on the land. He also confirms attending a meeting about ½ kilometers away from his home in 2005 however the defendant's name was never mentioned.

5. **PW2 - Mzuri Malau** testified that he is a businessman living in Miritini for more than 36 years. That he lives with his wife and 10 children in Miritini. He further testified that it was only in 2008, that he was told that the land belongs to the defendant/respondent. On cross-examination, he stated that his house has eight rooms but he does not know the size of the plot that he occupies. He further testified that he knew the land to be government land. He confirms that he went to the meeting called by the Chief and the D.O on 7/4/2005 but that it related to another land. He also stated that he had a hawking licence from 1980 but the same was produced in court.

6. **PW3- Chiphogo M. Kamisi** testified that he is a carpenter and has lived in Miritini since 1986 with his family. That he built a kiosk in 1986 and later a bigger house on 25' by 30' plot after which the Railway claimed the land he had occupied and started charging him rent. He admitted that he did not seek the defendant's/respondent's permission to occupy the land and that in 2008, he received letters demanding he vacates the land. He seeks to the court to give him the land or the defendant allow him to pay for his portion.

7. On cross-examination, he confirmed attending a meeting on 7.4.2005 as an elder. He also confirmed that he occupies 25' by 30' which is about 2 acres. He further said that some of his neighbours were paid in 1989 but they did not leave. However, in 2008, the D.O removed them, relocated them and built houses in an alternative land. He states that he did not get a building licence from the Municipality and that his business licence was lost during the demolition.

8. **PW4 - Herbert Mwakibua** testified that he lives in Miritini where he had a carpentry workshop which was demolished by the Defendant/Respondent. PW4 testified that he first came to the land in 1999 but later changes to 1990. He testifies that when he first came, the land was bushy and he had to clear the bush first before putting up the Workshop. That he occupies 40' by 70' and got a Hawker Licence dated 06.07.1999 which he produced as **P.ex 3**. On cross examination, he confirms attending the meeting held on 7.5.2005 but states that it involved another plot. He also confirmed that he did not get permission from the defendant to enter the plot and that he did not have any proof that he occupies a size measuring 40' by 70'.

9. **PW5 - Khalid Said Abeid** testified that he has a hardware shop at Miritini on a plot owned by Kenya Railways. He further testifies that he got into the plot on 14.04.1997 and later sought to extend his business. It is his testimony that Kenya Railways sent a surveyor who measured his plot and he got permits. He produced a bundle of correspondence with Kenya Railways dated 14.04.1997, 16.07.1999, 27.07.1999, 28.03.2000, 31.03.2000, 19.07.2002 and 16.08.2002 as **P ex. 4 (a), (b), (c), (d), (e), (f), (g)** respectively and a Temporary Occupational Licence undated as **Pex. 5**. He further testifies that he never knew that the land belonged to the Defendant who has never been on the land. He claims to have been on the land for 16 years. On cross examination, PW5 confirmed that at the time of filing the present suit, he had stayed on the land for 11 years. He maintains that the land belongs to the Kenya Railways and that he entered the land as a tenant.

10. **PW6 - Charo Nzai Tsuma** testified that he lives with his family of 16 and conducts his business at Miritini. That he knows the defendant who was his friend. It was his testimony that the defendant evicted people on another plot, however, they refused to be paid to move out. The defendant then built them houses and bought the building materials from his shop. He further testifies that it is the Kenya Railways that showed him where to settle when he first moved in and only knew that the land belonged to the Defendant when the Municipal demolished his house.

11. On cross examination, he confirmed that he entered the land in 1997 and that at the time no one else had settled on the land. That it was later that PW5 also entered the land however the other Plaintiffs who say that they were on the land before 1997 had settled on the other side of the sea. PW6 further testified that he got a licence from the Municipality to build and that it was the Kenya Railways that allocated him to settle. He further confirms that if the land belongs to the defendant, he will ask for a portion but that he will vacate if he is not given.

12. **PW7 - Solomon Mungai Gicheha** testified that he is a driver and lives in Miritini with his family from 1995. That he occupies 25 by 100 plot as his residential home. That he was allowed to settle on the land by the village elders. On cross examination, PW7 stated further that he built his house in 1995, his house was demolished but he had rebuilt. He confirms that he did not get a licence to build. PW7 also testified that there were also other people on the land but he remembers Charo who was a village elder.

13. **PW8 - Shuffa Ali Abdalla** testified that she started her business in Miritini in 1979 until March 2009 when her Swahili house was demolished. It was her testimony that she sought Mzee Charo's permission to settle on the land and that she only got to know the defendant when her structure was demolished. PW7 refuted the claim that the defendant bought the land in 1989 and only found 5 people on the land. On cross examination, PW7 confirms that the demolition was in 2009 and not in 2008. She further testified that all the plaintiffs were on the land at Miritini in 1979 and that she did not get a licence to build her structure.

14. **PW9- Elisha Karisa** testified that he lives in Miritini and has been on the land since 1995. It was his testimony that it was only after his permanent structure was demolished in March 2009, when he knew about the defendant's claim on the land. He further testified that he occupies a 50 by 100 plot where he lived and rented out since 1997. On cross- examination, PW9 stated that he did not have any evidence that he entered the land in 1995, however, he disputed PW8 testimony that all the plaintiffs were on the land when she entered the land. He also confirms that he did not get building permits and that he had put up an illegal structure.

15. **PW10 - David Njeru Njue** testified that he lives on Plot 6, size 100 x 50 in Miritini since 1993 where he does Jua Kali business. He

further testified that he found other people on the land when he moved there. It is his testimony that he never attended the meeting which was held 100 or 200 meters from where he lives. He produced a Hawkers Licence as **P.ex.6**. On cross examination, PW10 testified that he was allowed to settle on the land by the people already on the land and was told that the land was crown land. PW10 further states that he found other people already on the land.

16. PW11 - Ramla Abdalla Sudi testified that she has lived in Miritini since 1985 with her family where she runs a hotel. It is her testimony that she attended the meeting and were informed that their side was not going to be demolished. She further testified that when she moved to Miritini, the place was bushy and that they were only 6 people. She produced a photograph of her hotel as **P.Ex. 7** which photograph was not dated. On cross examination, she confirmed that they sued the owner of the land however when they did first enter the land they did not seek anyone's permission. She further confirms that she used to make monthly payments to Kenya Railways but then stopped. PW11 refutes claims that there were only 5 people when the defendant bought the land. She further admitted that she can identify where she occupies but not its actual size.

17. PW12 - Phestus Mwaburi testified that he lives with his family and carries on business in Miritini and that he has lived on the land for more than 8 years. He testifies that he went into the land in 1983 but later changes his testimony and states that he started living on the land in 1991. He further confirms that his kiosk was demolished in March, 2009. He also produced an Advertising Permit dated 26/2/2008 as **P ex. 8**, a photograph of his business as **P. exh. 9**, a receipt dated 17/10/2008 from Kenya Dairy Board as **P.exh. 10** and Municipal Council business permit stamped on 26/02/2008 as **P. ex.11**. It is his testimony that the undated photograph was taken when they were suing the defendant. On cross examination, he testified that he moved into Miritini in 1991 however he had been visiting prior to moving into the land. He also maintained that he was never invited for any meeting with the defendant.

18. PW13 - Harris Makliaso Simiyu testified that he lives on and had 3 stores at Miritini. It was his testimony that he moved to Miritini in 1995 when he started video show business. He further testified that he was introduced to the suit land by "Kamau" and "Mabox" who were the elders and that he occupied 30 by 30. He produced photo of his business premises as **P.exh. 12**, an aerial view of the business premises before demolition as **P.exh.13**, Multichoice payment statement dated 18/06/2004 marked **P.exh. 14**, Municipal Council Permit dated 12/04/2013 marked as **P.exh. 15**, electricity bill dated 16/01/2014 marked as **P.exh. 16**, water bill dated 02/12/2014 marked as **P.exh. 17**.

19. On cross examination, he confirmed that he had given up two of his stores to other people. He also confirmed that he thought the land belonged to "Mabox" and that he never paid rent. He further confirms that the pictures produced were not dated neither does it show the plot Number. It was his testimony that that he was never invited for the 7/4/2005 meeting although he was at the suit property.

20. PW14-Margaret Wangari Chege testified that she lives together with her family on the suit property. PW14 further testified that she started her business in 1984 in a kiosk and later moved on to a permanent building. She produced copies of photographs showing her business premises before and after the demolition and marked them as **P.exh. 18** and the business licence for retail shop dated 27.03.1997 marked and produced as **P. Exh. 19**. On cross examination, she confirmed that she did not take the photos herself and neither were the photographs dated. It was her testimony that in a letter dated 20/05/2005, they wrote to the Kenya Railways to inquire whether they could pay rent. She further confirmed that one of her children is living on the plot however, the same does not have a Plot No.

Defendant's/ Respondent's Case:

21. DW1 - Abdul Gafool Vayani testified that he is one of the Directors of Leonid Limited, the defendant herein. It was his testimony that they bought Plot No. 645 in 1989 from Kenya Textiles Limited and that the land was handed over in vacant possession. It was his testimony that the Kenya Textiles Limited got into a settlement agreement, marked as **D.exh No. 1**, with five (5) squatters who were living on the land at the time and they vacated. He further testified that the company fenced the Plot No. 645 which was later subdivided into 2379 & 2380. Plot 2379 was then sold and they retained plot no 2380. Titles of the two plots were produced and marked as **D.Ex.2**. DW1 contends that he visited the suit property twice a year and on school holidays and so did his brother and son and that the plot was vacant until the year 2000-2001 when he was informed of encroachment. DW1 denied the assertion that there were some people who had live on the Plot for more than 12 years or 20 years.

22. On cross examination, he confirmed that it his son who called the meeting of 7.4.2005 to deal with the squatter problem however he denied having made out any payment. He further insisted that he did due diligence as the land was in vacant possession and they fenced the whole Plot in 1989. It was his testimony that the presence of the squatters on the land has hindered their enjoying of the plot.

23. DW2 - Mohamed Arafat Bayani testified that he is also a Director of Leonid Limited and wishes to admit his affidavits of 2009 and 2011 as his evidence. It is his testimony that he became involved in 2001 after the uncle and cousins' efforts to have the squatters move out of the land failed. That through 'Chief Matano' they organized a meeting with the squatters and the minutes thereof is marked as **DW. Ex. 2**. It is his testimony that after the meeting where the chief informed the squatters that the property belonged to the defendant, most of the squatters moved out while others refused. He later approached the Municipal Council, who demolished the illegal structures. However, some of the structures have been rebuilt. In cross examination, he confirmed that there were more than 60 squatters on the land as at 2005 and that some had moved to another plot as per the minutes of 7/4/2005.

Parties Submissions:

24. On conclusion of the hearing parties filed their final submissions. The Plaintiffs' submissions were filed on 2nd November, 2019. It is submitted that the fourteen (14) plaintiffs' have been in continuous possession without the interruption of an eviction for a period of over 12 years and hence are entitled to the land by operation of the doctrine of adverse possession. The plaintiffs' further submitted that for adverse possession to ripen into legal title, the following elements has to be proved; that is actual, open and notorious, exclusive, hostile, continuous occupation. It's the plaintiffs' submissions that they have shown acts of dispossessing the Defendant through acts of nec vi, nec clam, nec precario (that is neither, by force, nor secretly and without permission). To this end, they relied on the case of **Chevron (K) Ltd Vs Harrison Charo Wa Shutu [2016] eKLR and Peter Mbiri Michuki vs Samuel Mvau Michuki (2014) eKLR**.

25. It is the Plaintiffs' case that PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8, PW10, PW11, PW12, PW13, PW14 have actual possession of their portions of land and that time never stopped running for the applicants before the filing of the case in 2008. The plaintiffs' cited the cases of *Gulam Miriam Noordin vs Julius Charo Karisa (2015) eKLR* and *Joseph Mutafari Situma vs Nicholas Makhanu Cherongo (2007) eKLR* in support of their case.

26. The defendant filed its submission dated 7th February 2019 and filed on the same date. It was the defendant's contention that the dispute before this court relates only to Plot Number 2380/V/M.N and that since the plaintiffs/applicants failed to canvass question/prayer 2 in the Originating Summons during the trial the court cannot make a finding on the same.

27. The defendant further submits that a party is bound by its pleading and that from the evidence of the fourteen (14) applicants and the court records, they do not occupy the entire Plot No. 2380/V/M.N. The defendant referred to the case of *Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR*. The defendant contends that Section 107(ii), 108 and 109 of the Evidence Act provides that he who alleges bears the burden to prove the facts he alleges and it therefore follows that the applicants/plaintiffs must prove all the essentials in a claim for adverse possession to succeed. The defendant referred to the case of *Robert Muriithi Njeru vs Diocese of Embu Salesians of Don Bosco [2015] eKLR*. Other Cases relied on by the defendant:

i. **Titus Kigoro Munyi v Peter Kimani [2015] eKLR**

ii. **Robert Muriithi Njeru v Diocese of Embu salesians of Don Bosco [2015] Eklr**

iii. **D.T.Dobie & Co. Ltd vs Wanyonyi Wafula Chebukati [2014] eKLR**

iv. **Alfeen Mehdimohammed vs Basil Feroz Mohamed & 223 Others [2016] eKLR**

v. **Joseph Mutafari Situma vs Nicholas Makhanu Cherongo (Civil Appeal 351 of 2002)**

ANALYSIS;

28. From the parties' pleadings, submissions and the applicable law, the issues to be determined are:

- a) Whether the plaintiffs have proved a case for adverse possession against the defendant?
- b) If the defendant is entitled to the prayers sought in its counter claim?
- c) Who should pay the costs of the suit?

29. It is settled that a person seeking to acquire title to land by way of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years and that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession for 12 years. See the court's decision in *Jandu vs. Kirplal & Another (1975) EA 225* and in *Wambugu vs. Njuguna [1983] KLR 173*.

30. It has been pleaded and proved by both the Plaintiffs and the Defendant that the Defendant is the registered owner of the suit property, Plot No. 2380/V/MN, which he bought from Kenya Textiles Limited in 1989. DW1 testified that after the purchase, Kenya Textiles Limited, entered into a settlement agreement with five (5) squatters who were on the land (**D.exh. No. 1**) to vacate. The Defendant stated that he fenced the Plot with poles and wire. DW1 further testified that he visited the suit property twice a year and it was around 2000-2001 when he was informed about encroachment.

31. DW2, the Defendant's Director also testified that he became involved in 2001 and through the Chief organized for a meeting with the squatters where some people were relocated while others refused to move out of the suit property. The minutes of the meeting produced was not objected to by any of the plaintiffs. The defendant also submits that the illegal occupation was objected to the Municipal Council who then issued notices to the plaintiffs to remove their illegal structures and failure to which a demolition was ordered in March 2009.

32. The plaintiffs on their part narrated to Court the different years they got into the suit land which has been contradictory at best. For example, PW1 who testified that he moved into the land in 1982 but during cross-examination, he stated that he moved into the land in 1995. PW1 proceeded to produce hawking licences issued to him in 1994 to 1997 respectively. PW2 said he started living on the suit land as a businessman and was being issued with hawking licences. He however did not know the size of the plot he occupied. PW4 also testified that he moved into the land in 1999 but later changed it to 1990. PW12 said he had lived on the land for 8 eight years before the suit was filed. The plaintiffs produced photographs of the structures erected on the suit property however the same were undated therefore, the same cannot help the court establish the actual date the plaintiffs entered the land.

33. PW5 has produced an agreement with the Kenya Railways that allowed him to enter into the land dated 14th April, 1997. This means he had only stayed on the land for 11 years as at the time this suit was filed. Secondly, PW5 said he entered the land with the belief that the same belonged to Kenya Railways and he had its permission as a tenant. PW11 also stated that he used to pay rent to Kenya Railways but later stopped. Therefore, their occupation and use of the land does not qualify for adverse possession as it was with permission. It is immaterial that the permission was not given by the land owner since at the time of entry, these two knew Kenya Railways was the land owner.

34. PW6, Charo Nzai Tsuma, testified that he moved into the land in 1997 as the first person on that land and was later joined by PW5. It

was his testimony that at the time he moved in, there was no one on the land and the other plaintiffs claiming to have settled on the land before 1997 were not being truthful and were probably settled on another land. PW6's testimony is credible as PW7 and PW8 mention PW 6 as one of the elders who allowed them to settle on the suit land. Noting that the suit was filed in 2008 via an Originating Summons dated and filed on 17th June 2008, it is evident that none of the Plaintiffs has proved to have completed an uninterrupted 12 years' period on the land.

35. Some of the witnesses testified that they had been issued with Hawking Licences for their business which they produced in court e.g. PW1, 2, 5 & 10. The inference drawn from the licences produced is that their occupation was those of licensees. As licensees, they could only sustain a claim for adverse possession after 12 years from the date of expiry of their licences. PW1 was issued with a licence upto 27/5/1997 while PW5 said he had a TOL from Kenya Railways. As licensees, their occupation was not adverse to the registered owner for the duration of the licence.

36. No testimony was led on to demonstrate that the plaintiffs were occupying the entire land. There was no survey report produced by the plaintiffs to ascertain the portions each occupied. Only some of the plaintiffs gave estimate size of plots they were in occupation of. With the contradictory evidence from the plaintiffs, identification and survey of the actual land they were in actual occupation of was necessary. In *Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Bakshwein & Another [2015] eKLR* the Court of Appeal observed thus: -

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of Githu vs. Ndeti [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them”

37. From the evidence adduced, it is not disputed that the defendant took possession of Plot No. 645 in vacant possession and even fenced it and visited the land twice a year. The state of the suit title at the time of purchase is confirmed by the agreement entered between the previous owners Kenya Textile Ltd and the squatters in occupation then dated 12th September 1989. The agreements were produced in evidence as defence exhibits thus the same controverted the evidence of PW1 who alleged entry on to the land by 1980. If PW1 was on the land by 1980, he would have protested the fencing of the land and or would have been part of the people compensated by Kenya Textile LTD. From the evidence of PW5 & PW6, I am persuaded to find that the plaintiffs entered the suit land after 1995 some as licensees thus cannot maintain a claim for adverse for possession for two reasons. First, because their occupation does not meet the 12 year threshold. Secondly, because as licensees, their entry was with permission and no evidence was led to demonstrate when their possession dispossessed the defendant from the purpose to which he intended to put the land to use.

38. Lastly, the fourteen (14) plaintiffs gave evidence in their behalf only pursuant to the consent entered into on 24th September 2019 between the advocates on record for the parties and filed on 27th September 2019. This means that the remainder of the twenty nine (29) plaintiffs never endeavored to call evidence to prove their claim. Their claim thus stands dismissed for lack of proof. Further, the evidence of the fourteen plaintiffs who testified fell below the standard of proof for a claim of adverse possession. In light of the foregoing, I conclude that the plaintiffs have failed to prove on a balance of probabilities that they are entitled to the suit property by virtue of adverse possession. Their case is hereby dismissed.

Counter claim:

39. Consequently, the Defendant/ Respondent title over the suit property remains indefeasible rendering the plaintiffs as trespassers. In the circumstances, I make a finding that the defendant is entitled to the orders it sought in its counter- claim. Consequently, I order that:

- i. The Plaintiffs/Applicants shall vacate the suit property M.N/V/2380 within ninety (90) days of delivery of this judgement. In default, Defendant/Respondent be entitled to vacant possession thereof with liberty to demolish all structures thereon using lawful means.

Costs:

40. The Defendant/ Respondent be entitled to costs of this claim and counterclaim.

Judgement dated & signed at Busia this 16th Day of September 2020

A. OMOLLO

JUDGE

And delivered electronically via email to the parties' advocates this 21stDay of September 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE