



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 406 OF 2016 (OS)

PATRICK TSANGARE MANGALE.....PLAINTIFF

VERSUS

MOHAMED SALEH BAWAZIR.....DEFENDANT

JUDGMENT

PLAINTIFF'S CASE

1. The plaintiff, Patrick Tsangare Mangale instituted this suit vide the Originating Summons dated 13th December, 2016 which was amended on 22nd October, 2019. The plaintiff seeks to be registered as proprietor of the land comprised in the TITLE CR. 2546 registered in the Land Registry as PARCEL NO. MN/VI/86 measuring 0.83 Hectare in the name of Mohamed Saleh Bawazir, the defendant herein. The plaintiff also seeks a permanent injunction restraining the defendant, his servants or agents from entering the suit land or demolishing the plaintiff's houses, structures and/or properties or in any manner whatsoever interfering with the plaintiff's peaceful occupation and enjoyment of the suit land.

2. The Originating Summons was supported by the affidavit of Patrick Tsangare Mangale, the plaintiff sworn on 16th December, 2016. It was the plaintiff's evidence that he and his family have been in occupation and possession of the suit property for more than twenty (20) years. The plaintiff stated that he exercised proprietary rights over the suit property without any interference. He thus claims for orders that the defendant's interest in the suit property be extinguished and that entry in the Register of Titles of the suit property in favour of the defendant be deleted and the plaintiff be registered as the proprietor of the suit property by virtue of the doctrine of adverse possession and he issued with a certificate of title.

3. The plaintiff testified that he is the Chairman of the Kenya National Private Security Workers Union. He stated that he entered the suit property in the year 1997 and found an empty house which was unoccupied. He testified that he cleaned that house and used it as his and that he has lived thereon to date. He further testified that upon entering the suit property, he started farming by planting various crops. His evidence was that he has lived on the suit property peacefully. He stated that he came to know that the land belongs to the defendant whom he claimed he has never seen. The plaintiff further stated that he has raised his family on the suit land from 1997 to date. The plaintiff vehemently denied having been an employee of the defendant.

4. When cross-examined by Mr. Omwenga, learned counsel for the defendant, the plaintiff stated that he came to know that the land belongs to the defendant in the year 2018. He further stated that he did not carry out a search and added that his advocate told him the land belongs to the defendant and advised him to file this case. He stated when he entered the land in 1997, he looked for the area village elder (now deceased) and the area chief who gave him the go-ahead to live on the suit land. The plaintiff disowned the signature in the defendant's documents indicating that he was being paid a salary, arguing that he was only paid Kshs.7,000.00 March 2018 as an inducement to withdraw the suit.

DEFENDANT'S CASE

5. The defendant filed grounds of opposition on 12th October, 2018 together with Replying Affidavit sworn by Lawrence Kagoko Nderitu, Khalid Ahmed Mbarak, Kazungu Goe Makelele and Lepatoiyi Peter. The four (4) deponents of the Replying Affidavits also tendered evidence on behalf of the defendant. The defendant also filed a counter-claim on 4th June, 2019.

6. The defendant stated that he is the registered owner of the suit property and that he has been in continuous possession and occupation of the subject property from 3rd February, 1998. The defendant further stated that the plaintiff was employed as a security guard and occupation in the suit property was by virtue of the employment. It is the defendant's contention that the plaintiff residing in the suit property was by consent, knowledge and authority of the defendant. The defendant wants the plaintiff's suit dismissed. The defendant filed a counter-claim

seeking for vacant possession and eviction of the plaintiff from the suit property.

7. To disapprove the plaintiff's case, the defendant called four (4) witnesses. DW1 was Lawrence Kagoko Nderitu who testified that he was employed by the defendant as his property manager since 2004 and that he used to visit all the defendant's properties. He testified that he visited the suit property in Port Reitz and found the plaintiff in the compound. He maintained that the plaintiff was employed as a security guard to guard the suit premises and that he used to receive a salary, the last salary being Kshs.7,000.00 for February 2018 which was paid to the plaintiff and allegedly received on 1st March, 2018 through a voucher dated 1st May 2018 which he produced as an exhibit. His evidence was that the plaintiff was employed as a guard in the year 2008 and was staying in an old house on the suit property. He also produced the other annexures in his affidavit which are copies of the plaintiff's National Identity Card and another document dated 1st March, 2018 allegedly signed by the plaintiff acknowledging receipt of his salary as a security guard and indemnifying the defendant up to January, 2018.

8. On being cross-examined by Mr. Okanga, learned counsel for the plaintiff, the witness could not produce any document confirming that he was employed by the defendant and could not produce any employment records of the plaintiff to show that the plaintiff was an employee of the defendant.

9. Khalid Ahmed Mbarak testified as DW2. It was his evidence that he works for the defendant as chief accountant and has worked since the year 2000. He produced the document headed 'casual wages sheet' that was annexed to his affidavit as an exhibit. His evidence was that the plaintiff was a security guard at the defendant's property at port Reitz since 2007 initially earning a salary of Kshs.3,500.00. He stated that he used to pay the plaintiff through Mr. Kazungu Goe Makelele (DW3) who would take money to all guards, including the plaintiff. He stated that in March 2018, they decided to write a letter asking the guards to collect their salary from the office and stated that the plaintiff went to their offices and received his salary of Kshs. 7000.00. On cross-examination by Mr. Okanga, the witness stated that they used not to pay NHIF and NSSF contributions.

10. DW3 was Kazungu Goe Makelele who testified that he has been the defendant's employee for over 47 years as a security guard. It was also his evidence that the plaintiff used to work for the defendant as a guard at Port Reitz. It was further the evidence of DW3 that he was the one who used to take salary to the plaintiff and other guards until 2018 when the guards were asked to collect their salaries from the office. He stated that he was present when the plaintiff was paid Kshs.7,000.00 which he acknowledged by signing the documents.

11. DW4 was Lapatoiye Peter who also testified that he was employed by the defendant as a guard. He stated that he knew the plaintiff as a guard in Port Reitz area. It was his evidence that they were being paid salary by DW3 which they acknowledged by signing before they were later asked to collect it from the office. It was his evidence, that the plaintiff was given a house on the suit property to live in as he guarded the plot, and therefore has no right over the suit property.

12. The plaintiff filed a defence to counter-claim on 16th July 2019 in which he denied the defendant's averments and maintained that he has acquired the suit property by adverse possession.

SUBMISSIONS OF COUNSEL

13. Mr. Okanga submitted that the plaintiff has proved his case on a balance of probability. That the plaintiff has been in peaceful, uninterrupted continuous and open possession and occupation of the suit land without the consent and/or authority of the defendant as the registered owner. The plaintiff's counsel submitted that the defendant's witnesses have admitted that the plaintiff was in occupation of the suit land for a period of over 20 years without interference from anybody. Counsel submitted that no documentary evidence was tendered before the court to establish that the plaintiff was an employee of the defendant and that any money received by the plaintiff was an inducement for him to withdraw the current suit and not a salary. The plaintiff's counsel relied on the case of **Alfeen Mehdimohamed –v- Basil Feroz Mohamed & 223 Others, Civil Appeal No.84 of 2015.**

14. On their part, the defendant's advocates submitted that the plaintiff was employed by the defendant and that the defendant who is the registered proprietor of the suit property has been aware of the plaintiff's possession. It is the defendant's submission that possession in this matter would only become adverse after the termination of employment of the plaintiff. The defendant's counsel relied on the case of **Britestone Pte Ltd –v- Smith Associates Far East Ltd (2007) 4 SLR (R) 855; Kuria Kiarie & 2 Others –v- Sammy Magera (2018)eKLR; Kasuve –v- Mwaani Investments Limited & 4 Others (2004)1 KLR, Samuel Miki Waweru –v- Jane Richu, Civil Appeal No. 122 of 2001, (UR); Delamere Estates –v- Ndungu Njai & Others (2006)eKLR; Wellington Lusweti Barasa & 75 Other –v- Lands Limited & Another (2014)eKLR; Muchanga Investments Ltd –v- Safari Unlimited (Africa) Ltd & 2 Others (2009) eKLR.** The defendant's counsel submitted that the plaintiff did not respond to the replying affidavit of Lawrence Nderitu (DW1), in denial that the signature in the annexures is not his, hence the same remains uncontroverted. Counsel relied on the case of **Trust Bank Limited –v- Paramount Universal Bank Limited & 2 Others, Nairobi (Milimani) HCCS No. 1243 of 2001.** Relying on the case of **Mate Gitabi –v- Jane Kabubu Muga alias Jane Kaburu Muga & 3 Others,** it was submitted that there has never been dispossession nor did the defendant discontinue possession of the suit premises as he had employed guards who made patrol on the suit property. The counsel also cited the definition of dispossession in **Sisto Wambu- v- Kamau Njuguna (1983)eKLR** and submitted that the plaintiff took possession of the land by virtue of his employment hence upholding the interest of the rightful owner, i.e. the defendant and was not curtailing the defendant's enjoyment of his property.

ANALYSIS AND DETERMINATION

15. The court has carefully considered the pleadings, the evidence adduced and the rival submission. The main issues for determination are whether or not the plaintiff has acquired title of the suit property by way of adverse possession or the plaintiff was in occupation and possession by virtue of his employment with the defendant; whether or not the plaintiff is entitled to the prayers in the Amended Originating Summons and finally whether or not the defendant is entitled to the reliefs sought in the counter-claim.

16. From the evidence on record and the documents produced, it is evident that the suit land is registered in the name of the defendant. A

copy of the title shows that the suit property was transferred and registered in the name of the defendant on 3rd February, 1988. It is also common ground that the plaintiff is and has been in occupation of the property for several years. While the plaintiff's evidence is that he has been in occupation for more than twenty (20) years, that is from 1997 without the defendant's consent or permission, the evidence presented on the part of the defendant was that the plaintiff entered the land in 2007 when he was employed as a security guard. It is therefore the defendant's evidence that the plaintiff's occupation was with the licence of the defendant by the virtue of his employment.

17. The ingredient for adverse possession were discussed by the Court of Appeal in the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2015)eKLR** 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 his title for 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 or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act, which is in these terms: -

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

The Limitation of Actions Act makes further provision for adverse possession at Section 13.....

Section 37 and 38 of the Limitation of Actions Act stipulate that if the land is registered under one of the registration acts then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.”

18. It is also trite law that a person who occupies land as a licensee cannot claim the land by dint of the doctrine of adverse possession. In the case of **Delamare Estates Limited –v- Ndungu Njai & 42 Others(2006)eKLR** Musinga J (as he then was) while applying the decision in the case of **Hughes –v- Griffin (1969) ALL ER 460** where it was held that a licensee or tenant at will, does not have time running in his favour, for the purposes of a claim for adverse possession stated thus:

“If a person is an employee of another and by virtue of his employment he is allowed to reside on his employers property, his entry and occupation thereon is not adverse to his employer's rights because he entered therein with the permission of his employer.”

19. In the instant case, the plaintiff's employment is disputed. The plaintiff has denied working for the defendant while the defendant's case is that the plaintiff was employed as a security guard and therefore his occupation was by virtue of the said employment.

20. It is trite law that when a person asserts the existence of any fact, the burden of proof lies on that person. It follows then that the evidential burden is on the party who would fail if no evidence at all were given.

21. Sections 107, 108 and 109 of the Evidence Act Cap 80 Laws of Kenya clearly captures these aspects and they provide as follows:

107 Burden of proof

1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

22. In this case, it is my view that the defendant bears the evidentiary burden to prove the existence of any employment relationship between the plaintiff and the defendant. It is clear that the court's decision in this case will depend on whether the defendant has satisfied the burden and standard of proof imposed on him with regard to the existence (if any) of any employment relationship between the parties herein.

23. In this case, the defendant alleged that the plaintiff was employed by the defendant as a guard in the suit property. The plaintiff on his part has denied ever being an employee of the defendant. Since it is the defendant who has raised the defence of employment to justify the occupation of the property by the plaintiff the onus lies on the defendant to prove the existence of the said employment.

24. In a bid to prove the alleged employment of the plaintiff by the defendant, the defendant's witness produced one payment voucher and another document headed 'casual wages sheet.' The plaintiff's evidence was that the money received by him which was a single payment of Kshs.7000.00 paid on 1st March 2018 was an inducement for him to withdraw the current suit, and not salary payment.

25. I have perused the payment voucher that was produced by Lawrence Kagoko Nderitu (DW1) as an exhibit. I note that the same is dated 1st May, 2018 for payment of February 2018 wages salary which was received on 1st March, 2018. There was no explanation given as to why the document bore two different dates. Further, it is worth noting that by 2018, this case which was filed in December 2016 was already pending before court. There was no other payment voucher produced for payment made (if any) to the plaintiff before the filing of the suit. The payment voucher produced, in my view, gives credence to the plaintiff's contention that the particular payment was made as an inducement for the plaintiff to withdraw the suit herein. In addition, there was no documentary evidence tendered to establish that the plaintiff was an employee of the defendant such as Letter of Appointment, leave forms, payroll, salary slips or payslips, PAYE, NHIF, and NSSF contributions or any other bio-data details of the plaintiff. The other document produced by the defendant was a spread sheet which is not in the defendant's name and lacked any details of the persons named therein such as identify card numbers. Further, the documents were not identical. For example, while some indicated the month, most of the documents in question do not show the years. The court has also noted that most of the documents were not signed or thumb printed by the plaintiff and the other people named therein on the space marked signature. Besides, the spread sheets do not bear the name of the defendant at all. Therefore, in the absence of the relevant documents to prove the existence of any employment relationship between the plaintiff and the defendant, and in the absence of any explanation given for failure to produce the same, and considering that the single payment voucher produced was made when this case was already filed and pending before court, and considering that the spread sheets headed 'casual wages sheets' produced cannot be connected to the defendant and are also unsigned, I do find and hold that the defendant's defence of employment was not adequately substantiated. The defence made by the defendant and the counter-claim are unsubstantiated. The onus of proof lay on the defendant to prove the existence of employment relationship on a balance of probabilities. In my view, the defendant has failed to adduce sufficient evidence to prove that the plaintiff was his employee. In the circumstances, the defence and counter-claim must fail.

26. For one to sustain a claim for adverse possession, he must demonstrate possession that is nec vi, nec clam and nec precario, that is, possession which is without force, without secrecy, and without permission. Such possession must also be accompanied by the necessary animus possidendi, which is an intention to acquire the land as one's own. Such possession must have been continuous and uninterrupted for at least twelve (12) years.

27. The plaintiff has testified that he entered the land and took possession in 1997. He testified that he remained in possession of the land from 1997 to date. Although the defendant's evidence was that the plaintiff entered the land in the year 2007, and therefore from 2007 was acknowledged, there was absolutely no evidence adduced to disprove the plaintiff's occupation between the year 1997 and 2007. The defendant's did not adduce evidence as to who was in possession prior to 2007. Clearly, from the evidence tendered, I am persuaded that the plaintiff entered the land in the year 1997 and remained in possession for over twelve (12) years without interference. I am satisfied that the plaintiff has proved his case against the defendant on a balance of probabilities. The plaintiff lived on the suit land from 1997 until 2016 when this suit was filed. That is a period of nineteen (19) years. The occupation or possession was with the full knowledge of the defendant and was open, notorious and uninterrupted.

28. In the result, I enter judgment for the plaintiff against the defendant as prayed in amended originating summons dated 22nd October, 2019. The defendant's counter-claim is dismissed. Costs of the suit and the counter-claim are awarded to the plaintiff.

29. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA 21st day of September 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE