



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 106 OF 2007 (OS)

HARO YONDA JUAJE.....APPLICANT

=VERSUS=

1. SADAKA DZENGO MBAURO.....1ST RESPONDENT

2. KENYA COMMERCIAL BANK LIMITED.....2ND RESPONDENT

R U L I N G

Introduction

1. 1. The Plaintiff's Application is the one dated 26th July 2013 seeking for the following orders:

(a) That the 2nd Respondent be joined to this suit as such in order for the court to be able to fairly hear and determine this suit.

(b) Pending the hearing and conclusion of this case, orders of injunction do issue restraining the Respondent from disposing of the Applicant's said property by public auction or otherwise.

2. It is the Plaintiff's case that his family accommodated the 1st Respondent on the suit property but the 1st Respondent ended up stealing their land during adjudication and registration of the titles; that he thereafter filed a suit for adverse possession and that on 20th July 2013, he received information that the suit property had been advertised for sale by way of public auction.

3. The Plaintiff finally deponed that although the 1st Respondent is the registered proprietor of the suit property, he lost the land to the Plaintiff having acquired it fraudulently and that his title is extinguished having not taken possession.

The 2nd Respondent's case

4. The 2nd Respondent's Credit Administrator filed a Replying Affidavit on 9th September 2013 in which he stated that the Applicant has not demonstrated that he has a prima facie case with

chances of success for adverse possession.

5. According to the 2nd Respondent, the Applicant's own pleadings and annexures shows that the Applicant has not had continuous and uninterrupted occupation of the suit property; that the extract annexed on the Originating Summons shows that there was a conclusive dispute resolution process that was adopted by the parties culminating in an appeal to the Minister which was determined in favour of the 1st Respondent and that the Applicant was subsequently arrested and charged.

6. It is the 2nd Respondent's case that by the time of charging the property, the 2nd Respondent carried out search on the suit property and found out that the property was free from any encumbrance, including the Applicant's claim.

Plaintiff's Further Affidavit

7. The Plaintiff filed a further affidavit on 9th October 2013 and deponed that there has been a dispute between the 1st Respondent and the Plaintiff and that the Plaintiff has never stepped on the suit property.

8. It is the Plaintiff's position that even after the Ministerial decision, the 1st Respondent never took possession of the land in respect of which he had illegally been registered as the owner.

9. The parties agreed to dispose of the Application by way of written submissions which I have considered.

Analysis and findings

10. For an injunction to issue, the Plaintiff has to show that he has a prima facie case with chances of success. The Plaintiff also has to show the irreparable damage that he is likely to suffer in the event the injunction order is not issued and if the court is in doubt, it will determine the Application on a balance of convenience.

11. The Plaintiff's claim is for adverse possession. According to the Supporting Affidavit annexed on the Originating Summons, the Plaintiff was registered as the proprietor of the land in 1981. However the 1st Defendant lodged a claim and this matter was determined by the Minister in his favour in 1985. That notwithstanding, the Plaintiff remained on the land to date.

12. The Plaintiff is categorical that the 1st Defendant has never been on the suit property. It is the Plaintiff's averments that having accommodated the 1st Respondent, the 1st Respondent ended up stealing the suit property during the adjudication process. Consequently, it was deponed, the 1st Defendant/Respondent was illegally registered as the proprietor of the suit property

13. It is important, at this stage, for the court to remind itself, and the litigants, the elements that must be proved for one to succeed in a claim of adverse possession. I say so because of the many suits that continue being filed in this registry to recover land by way of adverse possession.

14. The Limitation of Actions Act allows the bringing of actions for the recovery of land under certain conditions after the expiry of twelve years. Where a person claims to have become entitled by adverse possession to land registered under any law, he is allowed by virtue of the provisions of Section 38 of the Act to apply to the High Court for an order that he be registered as the proprietor.

15. An order made under Section 38 of the Limitation of Actions Act, directing that an adverse possessor be registered as the proprietor of land in place of the person registered as proprietor

should not be confused with the rectification of the register under Section 143 of the Registered Land Act (repealed) or cancellation of titles under the Registration of Titles Act (repealed) and the Land Titles Act (repealed) on the ground of fraud or mistake.

16. The first element that a claimant must prove on a balance of probability for a claim of adverse possession is that he has made physical entry on the land and is in actual possession or occupancy of the land for the statutory period. Adverse possession rests on the use and occupation by the claimant. It has been held in numerous decisions that possession must be actual.

17. Secondly, the occupation of the land by the claimant must be non-permissive. If one is in possession as a result of permission given to him by the owner, or if he is in possession as a licensee, he cannot claim to be in adverse possession. It has been held that any time an adverse possessor and the true owner discuss the issue of adverse possession, permissive agreement may have occurred and that act destroys the claim for adverse possession. **(See COB B Vs Lane (1952) 1 ALL ER 1199 AND Wallis Cayton Bay Holding Company Ltd Vs Shell Mex and BP Ltd (1974) 3 ALL ER 575**

18. The occupation by the claimant must be with the clear intention of excluding the owner from the property. One must therefore have the *animus possidendi* to succeed in a claim for adverse possession. One must show that he either dispossessed the owner the land or the owner of the land discontinued his possession. Dispossession is where a person comes in and drives another out of the land while discontinuance of possession is where a person in possession goes out and another person takes possession. In the case of **WAMBUGU VS NJUGUNA (1983) KLR 173**, the Court of Appeal held as follows:

“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights 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 of which he intended to use it.

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 of the requisite number of years.”

19. The position, as was held in the above case, is therefore not whether or not the claimant has proved that he has been in possession for the requisite number of years but whether he had the *animus possidendi* to acquire the land by way of adverse possession. The Claimant can only prove that he had the requisite *animus possidendi* by showing the circumstances under which he dispossessed the true owner of the land or the circumstances under which the true owner discontinued his possession.

20. Can one claim to have acquired land by adverse possession if he claims that the land he is occupying is his ancestral land and that he only learnt of the true owner a few years ago (less than 12 years)? I do not think so. I say so because as was held in the **Wambugu** case (supra), the mere fact that one has been in possession of land for more than 12 years is not enough. In fact, the assertion by a claimant that he was not aware that the land was registered in favour of some person against whom time could start running means that he did not have the *animus possidendi* to acquire the land by way of adverse possession and he can therefore not be able to succeed to defeat the title of the true owner.

21. The court must first have regard to the manner and circumstances under which the alleged dispossession or discontinuance of possession was made and whether the occupation by the adverse possessor excluded the true owner. There must therefore be a discontinuance of

possession by the owner, or he must have been eliminated from the land followed by the clear actual possession by the claimant. (See **Hassenali Mamuji Vs Alibhai Ebrahimji Dar & Sons (1935)**, 12 EACA 11 PP 113, 114 and 115.

22. The other element that needs to be proved by the claimant is that the acts done by the claimants are inconsistent with the owner's enjoyment of the soil for the purpose which he intended to use it. The fifth element requires that possession by the person seeking to prove title by adverse possession must be visible, open and notorious. It has been held that the possessing act must be substantial.

23. The other and final element that must be proved is that the possession must be continuous, uninterrupted and unbroken for the required statutory period.

24. The ascertainment of rights of individuals under the Land Adjudication Act was meant to deal with the claims that may arise later under the doctrine of adverse possession. Indeed, the elaborate procedures set out in the said Act on how the rights of people over customary land were to be ascertained to the settlement of the disputes by various bodies during the adjudication process was meant to avoid future claims under the doctrine of adverse possession, specifically where one claims that the land he is occupying is his ancestral land.

25. According to the Plaintiff's Supporting Affidavit, he has lived on the suit property since he was born. Although he was registered as the proprietor of the suit property in 1981, the said registration was cancelled when the Respondent filed a complaint with the Minister. The 1st Respondent was then registered as the proprietor of the property in 1985. That notwithstanding, the Plaintiff claims that he remained on the suit property with his family.

26. The Plaintiff's own deposition shows that he has never moved from the suit property, despite the intervention by the Minister in 1986. The Plaintiff has deponed that the 1st Respondent stole his land during the adjudication process and had it illegally registered in his name.

27. I do not think, prima facie, that the Plaintiff can succeed in a claim of adverse possession where, firstly, he does not recognise the title of the 1st Respondent because according to him, that title is a nullity and secondly when he does not show how he dispossessed the 1st Respondent of his land or discontinued the 1st Respondent's possession.

28. The land must have been in possession of the 1st Respondent in the first place. As was held in the **Wambugu** case (Supra), it is not enough for the Plaintiff to show that he has been in possession for more than 12 years. The Plaintiff has admitted that the 1st Respondent has never taken possession of the suit property and could therefore not have been dispossessed or discontinued his possession.

29. One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff's averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered Land Act and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.

30. In the circumstances and for the reasons I have given above, I find and hold that the Plaintiff/Applicant has not established a prima facie case with chances of success. I therefore dismiss his Application dated 26th July 2013 with costs. I shall however allow the joinder of the 2nd Defendant in this suit.

Dated and Delivered in Malindi this 6th day of March, 2014.

O. A. Angote

Judge