



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

CIVIL SUIT NO. 45 OF 2018(OS)

IN THE MATTER OF: AN APPLICATION UNDER GOVERNMENT LANDS ACT CHAPTER 280 LAWS OF KENYA & LIMITATIONS OF ACTIONS ACT CHAPTER 22 LAWS OF KENYA

AND

IN THE MATTER OF: PLOT NO. 12 WITHIN ORIG, KILIFI/KIBOKONI BLOCK M13 D MALINDI

SAMUEL WALE NDORO.....PLAINTIFF

VERSUS

1. ZEINAB KATANA ALI

2. ELISHA KAZUNGU

3. LAND REGISTRAR-KILIFI.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By an Originating Summons dated and filed herein on 15th February 2018, Samuel Wale Ndoro (the Plaintiff) claims adverse possession of Plot No. 12 within ORG Title Kilifi/Kibokoni Block M13D Malindi and urges the Court to determine some nine questions and thereafter to issue:

1. A declaration that the 1st and 2nd Defendant acquired the suit property known as Plot No. 12 ORG Kilifi/Kibokoni Block M13D Malindi by fraudulent means against the will of the Plaintiff herein;

2. A declaration that the Plaintiff is entitled to be registered as the proprietor of the land known as Plot No. 12 ORG Kilifi/Kibokoni Block M13D Malindi by way of adverse possession;

3. A permanent injunction restraining the Defendants (their) authorized servants, assignees, successors and/or agents from transferring, selling, alienating and/or in any other manner transferring the said land known as Plot No. 12 ORG Kilifi/Kibokoni Block M13D Malindi to any other person other than the Plaintiff;

4. An order for specific performance directed to the 1st Defendant to transfer the suit property to the Plaintiff and in default the Registrar of this Honourable Court and or any other authorized person to sign all the necessary transfer documents; and (An order)

5. That the costs of this application be borne by the 1st and 2nd Defendant.

2. Those prayers arise from the Plaintiff's contention that Zeinab Katana Ali (the 1st Defendant) has been registered by the Land Registrar Kilifi (the 3rd Defendant) as the owner of the suit premises having purchased the same from Elisha Kazungu (the 2nd Defendant).

3. The Plaintiff avers that he has been in open, quiet, peaceful and uninterrupted possession of the suit property since 1985 and that he is entitled to be registered as the proprietor of the same. It is his case that the 1st Defendant's title has been acquired through fraud as the 2nd

Defendant was not a genuine allottee thereof and that in any event the said title has been extinguished under the doctrine of adverse possession.

4. But in her Statement of Defence and Replying Affidavit filed herein on 27th March 2018 Zeinab Katana Ali (the 1st Defendant) asserts that the Originating Summons is incompetent, bad in law and made in violation of the mandatory provisions of the Limitation of Actions Act as read with Order 37 Rules 7 (1) and (2) of the Civil Procedure Rules.

5. The 1st Defendant avers that she is the registered owner of Title No. Kilifi/Kibokoni Block M13D/12 measuring approximately 0.21 Ha having acquired the same in 1997 by way of sale and transfer from the 2nd Defendant. The 1st Defendant states that she left for Italy shortly after purchasing the property and that in her absence and unknown to herself, the Plaintiff and his relatives trespassed onto the suit property and started erecting houses thereon. On her return, the Plaintiff contended that the property had been wrongly allocated to the 2nd Defendant during adjudication.

6. The 1st Defendant denies that the Plaintiff and his family have been in occupation of the suit property without interruption for the statutory period provided under the Limitation of Actions Act, Cap 22 of the Laws of Kenya.

7. The 1st Defendant asserts that the Plaintiff and his relatives are trespassers on her parcel of land and counterclaims for their eviction therefrom and for a permanent injunction restraining them from dealing in any manner whatsoever with the suit property.

8. Similarly, Elisha Kazungu (the 2nd Defendant) denies the Plaintiffs claim to the suit property. In his Replying Affidavit sworn on 20th March 2018, he asserts that he was the original proprietor of the parcel of land known as Kilifi/Kibokoni Block M13D/12 measuring 0.21 Ha after the same was allocated to himself by the Government.

9. The 2nd Defendant asserts that he sold the said property to the 1st Defendant in 1997 after which the 1st Defendant took possession thereof. He therefore denies that the Plaintiff and his family have lived on the land since 1985.

10. The Land Registrar Kilifi (the 3rd Defendant) neither entered appearance nor filed a response to the Originating Summons.

The Plaintiff's Case

11. At the trial herein the Plaintiff called two witnesses in support of his case.

12. PW1- Samuel Wale Ngoro is the Plaintiff and a resident of Kibokoni. He told the Court that he has lived on the land with his family since 1985 and that his parents who have since passed away were buried on the land. His father who died in 2005 had bought the land from one Pastor Yeri.

13. PW1 testified that he came to know the 2nd Defendant as their neighbor as they used to attend the same church. Later on, the family came to realise that the 1st Defendant had been issued with a title deed for the suit property in 1997. PW1 denied that the 1st Defendant had bought the land vacant. He further denied that they had invaded the same when the 1st Defendant was away in Italy.

14. On cross examination, PW1 told the Court he was not aware how much his father had paid for the land. At that time the land still belonged to the Government. He told the Court that the registration of squatters commenced in 1990 and as he was already an adult, he was allocated his own Plot No. 15 which is in his name to-date. PW1 told the Court he lives on the Plot No. 15 with his brother Elijah.

15. PW1 conceded that at the time of registration, the suit property was registered in the name of the 2nd Defendant. He told the Court that despite the registration, it was his father who lived on the land. He further told the Court that his father at first never opposed the allocation to the 2nd Defendant. The father however later made a claim to the Land Disputes Tribunal seeking to be given the land but the Tribunal was disbanded before it could complete the case and render a decision.

16. PW1 further conceded that they had a boundary dispute between Plot No. 12 (the suit property) and his Plot No. 15. He however told the Court no decision was made on the dispute. He told the Court his siblings John, Reuben, Nehemia, Hellen, Zawadi and Kupata reside on the suit property. On his part he lives on his Plot No. 15.

17. PW2- John Kalama Ngoro is a fisherman and a resident of Kibokoni. He told the Court he is an elder brother of the Plaintiff. He told the Court the 2nd Defendant was not a genuine squatter at the time of the allocation of the land in 1990 and hence some five years later, their (PW2's) family settled on the land. PW2 told the Court he learnt from the 1st Defendant sometime in 2005 that she was the registered proprietor of the land.

18. PW2 testified that during his lifetime, his father had filed ***Malindi Land Disputes Tribunal Case No. 27 of 2005***. During those proceedings, it was clear that the 1st Defendant held title to the property having purchased the same from the 2nd Defendant who had never been a genuine squatter. He told the Court the Defendants did not attend the Tribunal proceedings.

19. On cross examination, PW2 told the Court they moved from Mere area to Kibokoni in 1985 when the land was sold to them. He further told the Court he was in Kibokoni during the land adjudication process in 1990. He conceded it is the 2nd Defendant who was then registered as the proprietor of the land. He told the Court he did not know why his father was not the one registered as the owner of the land.

20. PW2 further conceded that his brother (PW1) was registered as the owner of Plot No. 15 which he said happened after their plot was subdivided. He told the Court he was unaware of any boundary dispute between themselves and the 1st Defendant.

The Defence Case

21. The 1st and 2nd Defendants both testified in support of their respective positions.

22. DW1- Zeinab Katana Ali is a nurse in the United Kingdom and the 1st Defendant herein. She told the Court she acquired the suit property in 1997 after purchasing the same from the 2nd Defendant. Before the purchase, DW1 told the Court she had carried out a search at the Lands Registry Kilifi which confirmed that the property was registered in the name of Elisha Kazungu Kaingu (the 2nd Defendant).

23. DW1 told the Court that she thereafter left for Italy and that unknown to her the Plaintiff trespassed onto the property and started constructing homes thereon on the purport that the same was their family land which was wrongly allocated to the 2nd Defendant. She told the Court she asked the Plaintiff and his relatives to vacate the land but they refused.

24. DW1 testified that in 2005, the Plaintiff filed *Malindi Land Disputes Tribunal Case No. 27/3 of 2005* against herself and the 2nd Defendant but the case had not been concluded by the time the Tribunals were disbanded following the repeal of the Land Disputes Tribunal Act, No. 8 of 1990.

25. DW1 urged the Court to decree the suit property to herself and to restrain the Plaintiff and his family members from any further trespass thereon. She told the Court she had taken possession of the land while it was vacant and even used it as collateral to acquire a loan from Barclays Bank in 2002. She then left the Country and came back in 2006. There was still no one on the land. She told the Court it appeared that the Plaintiffs family went to the land between 2011 and 2012.

26. On cross examination, DW1 told the Court she learnt about the case before the Land Disputes Tribunal from her father Derrick Katana. At that time, the dispute was about the boundary as the Plaintiff had not entered the land.

27. DW2- Elisha Kaingu Kazungu is the 2nd Defendant and a resident of Kibokoni. He told the Court he is the one who sold the suit property to DW1. He told the Court he was a genuine squatter on the land and hence his allocation of the same. At the time, DW2 testified, the Plaintiffs family lived on Plot No. 15.

28. DW2 told the Court that after the allocation, he was registered as the absolute proprietor of the property with no objection from the Plaintiffs. Later in 1997, he sold the land to the 1st Defendant and she took possession of the same. Later in 2005, the Plaintiff filed a Land Disputes Tribunal case against DW1 and himself. The case was not decided in their favour but the Plaintiff's family subsequently invaded the suit property and erected houses thereon.

29. On cross examination, DW2 told the Court he was born on the suit property and that the Plaintiffs had come to live thereon some 30 years ago. At that time, the land belonged to the Government. He told the Court there were only cashew nut trees on the land at the time he had sold it. His title had been issued in 1994.

Analysis and Determination.

30. I have perused and considered the pleadings filed by the parties herein, the oral testimonies of the witnesses and the evidence adduced at the trial. I have similarly considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

31. In his pleadings filed herein, the Plaintiff asserts that he took possession of the suit property described as Plot No. 12 Kilifi/Kibokoni Block M13D in the year 1985 having acquired the same by way of purchase from the original owner and squatter thereon one Pastor Yeri. It is his case that he has since then lived on the suit property undisturbed for a period over 33 years and has developed the same.

32. At the trial herein however, the Plaintiff and his witness slightly departed from that position and stated that the land had instead been bought from the said Pastor Yeri by his father who later passed on in the year 2005. The Plaintiff told the Court that upon the purchase of coconut trees on the land by his father, the family assumed ownership thereof and have to-date continued to occupy and develop the land. In support of his case, the Plaintiff produced various photograph showing some houses which he told the Court were owned by his brothers and other members of the family.

33. It was further the Plaintiff's case that he came to learn that the 1st Defendant had been registered as the proprietor of the suit property sometime in the year 2005 and that he thereafter filed a suit in the now defunct Land Disputes Tribunal at Malindi. That case was not however determined as the Tribunals were disbanded following the repeal of the Land Disputes Tribunals Act, No. 18 of 1990. He later instituted this case when the 1st Defendant persisted in her claim for the land.

34. On her part, the 1st Defendant told the Court that she purchased the suit property from the 2nd Defendant in the year 1997 as a vacant parcel of land. She told the Court the Plaintiff and her relatives later invaded her property when she was away in Italy and now claim that the 2nd Defendant was fraudulently registered as the proprietor of the suit property given that he was not a squatter in the area.

35. The 1st Defendant told the Court that prior to the purchase of the property, she had carried out a search at the Kilifi Land Registry from where she established that the 2nd Defendant was the registered proprietor of the suit property. In support of her case the 1st Defendant

produced a copy of the Sale Agreement dated 14th October 1997 as well as a copy of a Certificate of Official Search dated 8th February 2018. Her position was equally supported by the 2nd Defendant.

36. From the evidence placed before me, it was apparent that sometime in the year 1990 a land allocation committee was formed in the Kibokoni area with a view to allocating what was hitherto Government land to squatters. The Plaintiff and his witness conceded that during that exercise, the suit property was allocated to the 2nd Defendant. In his own testimony before the Court, the 2nd Defendant asserted that he was allocated the land as one of the squatters on the ground and he was subsequently registered and issued with a title deed around the year 1994.

37. As it turned out, the Plaintiff was allocated an adjacent parcel of land being Plot No. 15 Kilifi/Kibokoni Block M13D. While the Plaintiff testified herein that he was not aware of the fact of that allocation to the 2nd Defendant until the year 2005 when he lodged the complaint with the Land Disputes Tribunal, I did not think the Plaintiff was being candid given that he had been allocated an adjacent parcel of land to the suit property for which he was issued with a title deed in his own name in February 1996. It was inexplicable that the Plaintiff would not know the identity of the proprietor of that parcel given his claim that all his family members were in occupation thereof and that all the land had been allocated to the squatters in 1990.

38. It was also evident to me that contrary to his claim that he had been in occupation and possession of the land since 1985, the Plaintiff had neither occupied the suit property nor dispossessed the 1st and 2nd Defendant thereof for the said period. In his own testimony before this Court, the Plaintiff told the Court that during the land allocation exercise, he was allocated his own Plot No. 15 adjacent to the suitland and that he occupies and resides on the said Plot No. 15 which is now registered in his name.

39. While in his pleadings and sworn affidavits herein the Plaintiff claimed to be on the suit property, he again changed the position at the trial and appeared to claim adverse possession of the suit property on behalf of his relatives. Unfortunately, however, I did not find any evidence that any of those relatives had given him authority to institute the suit on their behalf. None of those relatives have been enjoined as Plaintiffs herein and the suit was not instituted as a representative suit. Indeed, Prayer No. 2, 3 and 4 of the Originating Summons clearly show that the Plaintiff wants this Court to declare that he has personally acquired the suit property by way of adverse possession.

40. As was stated by the Court of Appeal in *Robert Shume & 3 Others –vs- Samson Kazungu Kalama, Malindi Civil Appeal No. 32 of 2015*, for a party to succeed in a claim for adverse possession, that party must prove by evidence that he has been in exclusive possession of the land as of right and that the possession was open, peaceful, continuous and notorious throughout the statutory period with the knowledge, but without the permission, of the owner. The Plaintiff's claim on behalf of his relatives is therefore simply unsustainable.

41. The evidence before me reveals that the 1st Defendant is the registered proprietor of the suit property and that he acquired ownership thereof from the 2nd Defendant by way of purchase in 1997. It is also evident from the Certificate of Official Search that the 1st Defendant used the title deed as a collateral on 14th January 2002 to secure a loan of Kshs 200,000/- from Barclays Bank of Kenya. I did not think the Bank would register a charge over property which was then occupied by the Plaintiff and or his relatives as he purports herein and the claim that they have been on the land since the year 1985 is clearly unsupported and without any basis.

42. Section 26(1) of the Land Registration Act No. 3 of 2012 provides that a Certificate of Title issued by the Registrar to a purchaser of land upon a transfer is prima facie evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner and that such title cannot be challenged except on the ground of fraud or misrepresentation to which the person is proved to be a party. In the matter before me, there is absolutely no evidence placed before me to link the 1st Defendant to any fraud or misrepresentation.

43. In the premises, I find and declare that the Plaintiff has no valid claim over the suit property. His case is accordingly dismissed and I hereby enter Judgment for the 1st Defendant as prayed in the Counterclaim with costs.

44. The 1st and 2nd Defendants shall also have the costs of the Plaintiffs suit.

45. It is so ordered.

Dated, signed and delivered at Malindi this 13th day of November, 2020.

J.O. OLOLA

JUDGE