



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC. NO. 375 of 2010 (O.S.)

IDD SAID MWAKAUTU & 31 OTHERS.....PLAINTIFFS

VERSUS

ALI SAID MOHAMED & 3 OTHERS.....DEFENDANTS

JUDGMENT

1. By an originating summons dated 27th October 2010 and filed on 28th October 2010, the plaintiffs sued the defendants claiming adverse possession of all that piece of land known as **PLOT NO.11/MN/1 CR 1135** measuring approximately 48 acres.
2. The defendants opposed the plaintiffs' suit and filed defence and counter-claim dated 25th February 2011 and filed on 29th March 2011.
3. Vide a notice of withdrawal dated 27th April 2015 and filed on even date, the plaintiffs withdrew their entire suit against the defendants. During the course of the matter, the plaintiffs' counsel intimated to the court on several occasions that they will be making an application to reinstate their suit. However, they did not do so.
4. In their counter-claim the defendants state that they have at all material times been in possession of **PLOT NO.1 SECTION 11 MN** and that prior to the year 2005, the plot was unoccupied. The defendants further state the in 2007, the 1st, 2nd, 3rd and 9th plaintiffs started selling portions of the land to members of the public in the belief that the land would be allocated to squatters and that they have further threatened force on the defendants should they step on the suit land. It was the defendants' case that the 1st, 2nd, 3rd and 9th plaintiffs are still selling portions of the land to members of the land to members of the public.
5. The defendants claim against the plaintiffs is for an order of vacant possession and general damages plus costs of the suit.
6. There was no defence to the counter-claim filed by the plaintiffs. The defendants claim by way of counter-claim against the plaintiffs was therefore not opposed.
7. In his evidence, DW1, Ali Said Mohamed testified that he is the registered owner of **PLOT NO.1/II/MN**. He clarified that although the title is in two names, his co-owner and brother, Soud Said Mohamed is deceased. That the property is registered in their joint names. He produced the provisional certificate of title as D. exhibit 1. DW1 produced the Letters of Administration and Certificate of Confirmation of a Grant issued to him and Soud Said Mohamed in **Mombasa HC Succession Cause no. 39 of – Estate of Nassir Bin Said Rashid (deceased)** as D.exhibit 2 and 3 respectively.
8. DW1 adopted his witness statement filed on 14th March 2012 and stated that sometime in 2005, the plaintiffs invaded the suit land and started cutting down trees, harvested sand, sold portions of the public and built illegal structures thereon without the defendants' consent and authority. He stated that he made numerous reports to the police, the Assistant Chief, Kisauni and the District Officer and the plaintiffs were eventually stopped from harvesting sand. He produced a letter dated 25th April 2005 written by the Assistant Chief (D. Exhibit 4). He added that the plaintiffs had even employed youth to harass and threaten the defendants with violence making it difficult for the defendants to visit the suit land without the assistance of the police.
9. It was the evidence of DW1 that sometime in 2009, the Plaintiffs built a mosque on the boundary of the parcel of land without the defendants' permission.
10. It was further the evidence of DW1 that the plaintiffs trespassed on the suit land in 2005 and despite demand to vacate, the plaintiffs have continued with occupations and building illegal structures thereon. That the 1st, 2nd, 3rd and 9th Plaintiffs are still selling portions of the suit land to members of the public. It is the evidence of DW1 that the said activities have subjected the defendants to loss and damage. He denied that the plaintiffs have been in occupation of the suit land for period of 12 years.

11. DW1 further stated that they have always paid rates in full and produced the receipts as D.exhibit.6. He stated that in 2003 and 2005 they took some satellite photographs of the suit land which showed there was nothing on the land, adding that photographs taken in 2007 and 2009 showed commencement of constructions which increased gradually. He urged the court to grant the orders sought in the counter-claim.

12. When cross-examined by Mr. Okanga, counsel for the plaintiffs DW1 stated that the plaintiffs invaded the suit land harvested sand and constructed buildings thereon. He stated that they did not file a case against them. DW1 further stated that he used to go to the land severally but it reached a time he could not go because of security reasons. He stated that the land measures about 48 acres, adding that they had planned to carry out development on it. He further stated that there were many people he did not know occupying most of the land. He reiterated that the plaintiffs were not in occupation from the beginning as shown by the satellite photographs, adding that they are living on the land without the defendants consent.

13. When re-examined by Ms. Wamabani, counsel for the defendants, the witness stated that they tried through the police and the administration to remove the plaintiffs and that after the invasion, they would only visit with police escort due to threats from the occupants.

14. DW2, Bartholomew Mwanyungu is a registered licensed land surveyor. He stated that he received instructions to determine the progressive development on **PLOT MN/II/I** since 2003, and to note the increment of development. He stated that he used **FR NUMBER 14/99 AND 36/204** and also imagery of Google earth for the years 2003, 2005, 2009, 2011 and 2017. The methodology he used was to geo-reference the survey plan coordinates so that it was on the same coordination system with the Google earth. He stated that they overlay the survey plan over the Google earth image so that the boundaries of the parcel they were interested in can be known in relation to the satellite image. He stated that he did not visit the suit property.

15. In his findings, DW2 found that in 2003, there were only two houses. The images showed increased, progressive developments until the land was full. It was his conclusion that between 2005 and 2009, the pace of development had increased so that by 2017 the entire parcel was filled up with settlements. He produced the report he prepared as D.exhibit 6. From his observation, the witness stated that most houses appeared from 2009. He produced the photographs as D.exhibits 5 (a)-(f).

16. On being cross-examined, the witness stated that in the image, he was not able to pinpoint a makuti house and could not tell what was inside the vegetation. He added that in the imagery of 25/12/17, there were houses which have filled the plot apart from roads and few open spaces. He stated that from the imagery, one cannot tell when the houses were built or the type of houses, he clarified during re-examination that his scope was to establish the developments not the type of house.

17. After the close of the defendants' case, parties agreed to file written submissions. The defendants' advocates filed their submissions on 17th September 2018. However, the plaintiffs' advocates failed to file their submissions despite being granted several opportunities to do so.

18. I have considered the pleadings on record, the evidence and the submissions made. In any view, the only issues for determination are whether the defendants are the registered owners of the suit property and whether they are entitled to vacant possession as well as general damages for trespass.

19. This is a case of registered proprietors of a suit land by transmission against squatters who claim adverse possession. It is not in doubt that the defendants are the registered owners of the suit parcel of land. It is further not in dispute that the defendants got registered as the owners of the suit parcel of land vide transmission after getting grant of letters of administration of the estate of their late father.

20. Since it is not in doubt that the defendants are the registered owners of the suit land and there is no evidence to the effect that the land was registered fraudulently or with misrepresentation as per Section 24, 25, and 26 of the Land Registration Act, 2012, I find that the defendants have proved that they are rightfully registered as such. The defendants produced a copy of the provisional title in their names and there was no evidence of any encumbrance or a caution or restriction on the said title.

21. The other issue for determination that the court must deal with is whether the defendants claim for vacant possession is time barred by virtue of the Limitation of Actions Act. In their suit which was later withdrawn, the plaintiffs had claimed that they are entitled to the suit land by adverse possession. There was evidence that the plaintiffs started invading the land in the year 2005. There was no evidence called to contradict the evidence produced by the defendants. The defendants' evidence remain uncontroverted. The period from 2005 and 2010 when the plaintiffs filed suit is less than 12 years.

22. Having considered the evidence on record together with the submissions filed, I find that the plaintiffs have not acquired the suit land by adverse possession and therefore the defendants claim is not time barred by virtue of the Limitation of Actions Act. The plaintiffs are trespassers on the defendants land.

23. The plaintiffs withdrew the suit against the defendants and did not file a defence to the defendants' counter-claim. I find that the defendants have proved their case against the plaintiffs on balance of probabilities.

24. The court therefore makes the following orders.

a) That the plaintiffs do give vacant possession of the suit land PLOT NO. 1 SECTION II/MN within 60 days from the date of this judgment or decree failure of which an order of eviction to issue against the plaintiffs.

b) General damages of Kshs.500,000/=

c) An order of a permanent injunction restraining the plaintiffs their agents or servants from trespassing, interfering and/or in any way adversely dealing with the suit parcel of land.

d) **The plaintiffs to pay costs of the suit.**

DATED, SIGNED and DELIVERED at MOMBASA this 28th day of January, 2019.

C. YANO

JUDGE

IN THE PRESENCE OF:

Akanga for plaintiffs

Mwandenje holding brief for Ms. Wambani for Defendants

Yumna Court Assistant

C.K. YANO

JUDGE

28/1/19