



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO 190 OF 2015(O.S)

1. ABDALLA MRAMBA

2. THOYA BAYA KAENGE

3. KAHINDI KABANI MWABUA

4. KAHONZI MRAMBA BAYA (Suing on their own behalf and on behalf of all members of

SAFINA COMMUNITY BASED ORGANIZATION inpossession of Plot No. 65 and 127

Section IVMN.....PLAINTIFFS

VERSUS

1. DEVJIBHAI K. HINDOCHA LTD

2. THE CHAIRMAN OF THE NATIONAL LAND COMMISSION.....RESPONDENTS

JUDGMENT

1. By an Originating Summons dated 15th October 2015 and filed herein on 19th October 2015, the four Applicants suing on their own behalf and on behalf of all members of Safina Community Based Organization pray for Orders that they be registered as the owners of Land Reference No. 7122 Plot Nos. 65 and 127 Section IV Mainland North for reasons that they have become entitled thereto by adverse possession. In addition, they urge that the National Land Commission (the 2nd Respondent) be ordered to register their names against the said title as the owners thereof.

2. The basis of their claim as contained in the Supporting Affidavit of Abdalla Mramba Baya sworn in support of the Originating Summons is their contention that they have lived on the said parcel of land since the year 1900 without any interference and have maintained a physical control thereof and exclusively developed the same.

3. The Applicants aver that they have since built their homes on the parcel and have over the last seventy years established places of worship and burial for their deceased relatives. It is their case that they have occupied the land with the full knowledge of the 1st Respondent who has been the registered owner of the suit property since 1945 and it is only fair that they be registered as the owners thereof.

4. Despite service by an advertisement in a newspaper, the 1st Respondent Devjibhai K Hindocha Ltd neither entered appearance nor filed a Defence. On its part, the 2nd Respondent filed Grounds of Opposition on 10th April 2017 objecting to the Summons on the following grounds:-

i) That the Applicants do not have any proprietary interest in Plots Nos. 65 and 127 Section IV MN and are therefore not entitled to the orders of the nature sought in this Application;

ii) That the Application is bad in law, misconceived and(an) abuse of the Court process considering that if they have any claim as alleged, then the same is a claim grounded on historical wrongs and the National Land Commission Tribunal is thus the best forum that is mandated in law to deal with such claims;

iii) That the Orders sought are ambiguous and untenable in the circumstances of the case;

iv) That the Interested Parties are guilty of laches hence do not deserve sympathy of this Court.

5. At the trial herein the Applicants called one witness while the Respondents did not call any.

6. PW1- Thoya Baya Kaenge told the Court that he was born on the suit property in 1949 and that he has lived there ever since. Together with the other residents of the area, they have been undertaking farming activities and have planted cashew nuts, coconuts and mango trees on the land. They have lived on the land and buried their dead relatives on the land.

7. PW1 further testified that all this time no one has ever gone there to stop them from using the land and they have never seen the 1st Defendant. In 1989, Kenya Power & Lighting Company went and installed electricity across the entire land and they were forced to pin notices on trees after they failed to trace the 1st Respondent.

8. PW1 told the Court that sometime in 2015, the residents of the area decided to register themselves with the Ministry of Social Services and that is how their group came to be known as Safina Community Based Organization. The organization carried out a search at the Mombasa Land Registry whereupon they discovered that the land was registered in the name of the 1st Respondent. It is their prayer that the 1st Respondent's title be revoked and that they be registered instead as the proprietors of the land.

9. I have considered the pleadings filed herein, the Applicants' testimony and the evidence placed before the Court. I have equally considered the submissions filed by the Learned Advocates for the parties herein.

10. The 263 Applicants urge the Court to find that they have acquired joint adverse possessory rights over the parcel of land known as LR No. 7122 Plot Numbers 65/IV/MN and 127/IV/MN having lived thereon and exclusively occupied the same for more than 12 years.

11. *In Mtana Lewa –vs- Kahindi Ngala Mwangandi(2005) eKLR*, the Court of Appeal stated that:-

“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action of his title for a certain period, in Kenya 12 years.”

12. It is also now well settled that a party claiming adverse possession ought to prove that such possession was peaceful, open and continuous, that is to say, that the possession was not obtained through the use of force, that it was not secret and that it was uninterrupted for the given period of 12 years.

13. The Applicants before me have stated that they have been in occupation of the suit property for a period of more than seventy years. It is their case that they have been in such occupation and possession of the land openly and continuously and that they have built their houses and cultivated the land without any interruption from the registered owner.

14. In support of their case they have produced about 51 photographs of different homesteads and farms which they aver were taken from the suit property. A perusal thereof paints a picture of people who have settled on the land and lived thereon for a considerable period of time. Such vast developments must have been undertaken over a considerable period of time and openly.

15. From an extract of the Certificate of Ownership produced by the Applicants, it is evident that the 1st Respondent became the owner of the suit property on 9th April 1945. The Respondents did not tender any evidence before me and in the absence of any evidence to contradict the Applicants claim that they have lived on the land for more than seventy years, this Court has no reason to doubt them.

16. Considering the totality of the evidence availed and applying the legal principles as outlined above, I am satisfied that the Applicants have proved their case as against the 1st Respondent on a balance of probability. I did not however find any reason why the 2nd Respondent was sued herein.

17. In the result Judgment is hereby entered for the Applicants as sought at Prayer 1 of the Originating Summons.

18. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 28th day of March, 2019.

J.O. OLOLA

JUDGE