



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO 190 OF 2013 (O.S)

IN THE MATTER OF: PLOT NO. GEDE/MIJOMBONI/901

AND

IN THE MATTER OF: AN APPLICATION FOR ISSUANCE OF THE DEED BY WAY OF ADVERSE POSSESSION

AND

IN THE MATTER OF: ORDER 37 RULE 7(1) OF THE CIVIL PROCEDURE RULES AND SECTION 1A, 1B AND 3A OF THE CIVIL PROCEDURE ACT CAP 21 AND SECTION 7, 13 AND 38 OF THE LIMITATIONS OF ACTIONS ACT CAP 22 LAWS OF KENYA

BETWEEN

WILLIAM TADEUS.....PLAINTIFF

VERSUS

SWALEH JINED BAWAZIR.....DEFENDANT

JUDGMENT

BACKGROUND

1. By an Originating Summons dated 28th October 2013 and filed herein on 29th October 2013, William Tadeus (the Applicant) claims to be the owner of Plot No. Gede/Mijomboni/901(the suit property) by way of adverse possession and asks the Court to determine the following issues:-

- a) Whether the Plaintiff is the legal or beneficial owner of the suit property;***
- b) Whether the Defendant Swaleh Jired Bawazir or his predecessor in interest is entitled to any proprietary interest or possessory interest in the suit property;***
- c) Whether the title of the Defendant or his predecessors in interest have been extinguished by the possessory interest of the Plaintiff to the suit property by reason of longus usus, nec vie nec clam nec precario;***
- d) Whether the Applicant is entitled to be issued with title to the suit property; and***
- e) Who should bear the costs of this suit.***

2. The Applicant's claim is premised on his contention that sometime in 1978, he was allowed unconditionally into the suit property by one Jumaa Kombe Mwanzoya who was then the owner thereof and he immediately took possession and continued to enjoy uninterrupted quiet, peaceful and exclusive possession thereof ever since. The suit property was thereafter fraudulently transferred and registered in the name of the Defendant who is now threatening to evict the Applicant therefrom.

3. In a Replying Affidavit sworn and filed herein on 25th September 2014, the Respondent Swaleh Jired Bawazir however denies the claim of ownership made by the Applicant. The Respondent avers that he is the registered owner of the suit property of which he has been in actual possession and occupation since 1996. The Respondent asserts that there has been an on-going litigation on the suit premises since 1993 and that the Applicant has at no point in time ever occupied or possessed the suit premises.

The Applicant's Case

4. The Applicant called two witnesses in support of his case. Testifying as PW1, the Applicant told the Court that sometime in 1978, he bought the subject pieces of land from one Juma Kombe Mwazoya (hereafter Juma). After making some part payment, Juma unconditionally allowed the Applicant to occupy the land.

5. PW1 testified that he proceeded to plant bougainvillea trees around the plot. He then proceeded to construct a permanent house for his residence and put up a pit latrine and a gate. However sometime in 1992 after he had fully developed the land some people conspired with Juma to defraud him of the land. The said people brought in a Surveyor who prepared a mutation form and sub-divided the land.

6. PW1 told the Court that those who sub-divided the land thereafter instituted a civil case-Mombasa SRMCC No. 14 of 1993 against him. On 5th July 1993, Juma also instituted another case seeking PW1's eviction from the land. The two cases were later consolidated. According to PW1, on or about 10th April 2012, a gang of people led by the Respondent invaded the property armed with pangas and started cutting the fence and other trees in the compound. They then set PW1's home on fire. PW1 then filed this case to assert his rights over the land.

7. PW2-Teresiah Mushoto Mjambili told the Court that PW1 is her neighbour and that they attend the same church. She told the Court that PW1 has occupied his farm which is separated from her own by a public road since 1978. PW1 had put up a sanctuary for prayers and PW2 used to attend the same. The farm had crops such as cassava, tangerines and oranges. PW2 stopped going for prayers on the suit property when some strangers invaded it and destroyed the bougainvillea fence and the sanctuary.

The Respondent's Case

8. The Respondent called a single witness in support of his case. Testifying as DW1, he told the Court that he is the registered owner of the suit property where he has been in actual possession and occupation since the year 2009.

9. DW1 testified that the Applicant was not in occupation of the land. He told the Court that he uses the land to carry out his business of selling building materials. He further told the Court that he bought the suit property from one Dominic Mancini and fenced it off. DW1 told the Court that he does not know the Applicant but he came to learn that he had been evicted from the suit premises in 1993 following a Court case which had been filed in Mombasa.

Analysis and Determination

10. I have considered the pleadings filed herein, the testimony of all the witnesses and the evidence placed before me. I have equally perused and considered the Written Submissions and Lists of Authorities placed before me by the Learned Advocates for the parties.

11. It is the Applicant's case that he has acquired title over the suit property by way of adverse possession having occupied the same uninterrupted since 1978. According to the Applicant, he was aware that the Respondent's title was fraudulently acquired and transferred to him sometime in 2009 which is more than 31 years since the Applicant started living in the said premises.

12. The said title according to the Applicant was transferred to the Respondent by one Dominic Mancini and Jane Nyambura who had bought the parcel from the original owner Juma Kombe Mwanzoya in 1992. It is the Applicant's case that as at the time of the transfer, he had lived in the suit premises for a period of 14 years and had thereby acquired the same by dint of adverse possession.

13. In *Wambugu –vs- Njuguna (1983)KLR 173*, the Court of Appeal held that adverse possession contemplates two concepts:

Possession and discontinuance of possession. It was the Court's position that the proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has continued his possession for the Statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.

14. Discussing the ingredients more recently in *Mtana Lewa –vs- Kahindi Ngala Mwamgandi(2005)eKLR*, the Court of Appeal observed 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 against such person in assertion of the title for a certain period, in Kenya 12 years.”

15. Arising from the foregoing and this being a claim for adverse possession, it is incumbent upon the Applicants to demonstrate that he has been in continuous possession of the suit property for 12 years or more; that such possession has been notorious to the knowledge of the owner and that he has asserted a hostile title to the owner of the property.

16. In his testimony before this Court, the Applicant told the Court that he entered the suit property after he bought the same and made partial payment of the purchase price to the original owner one Juma Kombe Mwazoya. He then proceeded to establish his home thereon. It was his testimony that sometime in 1992, he had fully developed the property, some people conspired with the said Juma Kombe Mwazoya to defraud him of the land. By then, he had stayed in the land for more than 12 years and it was his position that he had by then acquired the suit premises by dint of adverse possession and the Defendant's title and that of the said Juma Kombe Mwazoya were defeated by his acquisition thereof as aforesaid.

17. I think it is now settled law that a claim for adverse possession cannot co-exist with a claim for a purchaser's interest. As was stated in **Wambo –vs- Njuguna KLR 172**

“It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement of sale or lease or otherwise.....”

18. Thus having admitted that he entered the suit property with the permission of the previous owner pursuant to an agreement of sale, it is difficult to see how the Applicant could sustain a claim for adverse possession against the said Juma Kombe Mwadzoya. It would also appear that he never completed payment of the purchase price and hence the reason that no claim is made that he had purchased the land.

19. Again, from the material placed before me, it was evident that sometime in 1993, a certain Dominic Mancini and Jane Nyambura who subsequently sold the suit property to the Respondent herein had sued both the Applicant herein and the said Juma Kombe Mwadzoya vide Mombasa SRMCC No.514 of 1993 seeking the eviction of the Applicant from the suit premises.

20. At the trial herein, the Applicant conceded during cross-examination that Judgment was entered against him and an order of eviction was issued against him. While it would appear that the eviction orders were later stayed, I am unable to see how the Applicant can use the period after 1993 to compute his claim for adverse possession after the owner of the land had clearly moved to assert his rights to the suit property. The Respondent only became the registered owner of the property in the year 2009.

21. In the circumstances of this case, I am not satisfied that the Applicant has met the ingredients necessary for proof of a claim for adverse possession. All the questions posed for determination in his Originating Summons are hereby answered in the negative and his claim dismissed accordingly.

22. The Applicant will also pay the cost of this suit to the Respondent.

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

J.O. OLOLA

JUDGE