



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 68 OF 2010

ELIAKIM MILTON MASALE....PLAINTIFF

-VERSUS-

ILALE MOHAMED

ASHA ABDALLA

ZAINA MWACHOFI

DULU MWAMBURI

ALI ZAI.....DEFENDANTS

JUDGEMENT

1. Vide a plaint dated 9th March 2010, the plaintiff brought this claim against the defendants seeking the following reliefs:

- (a) An order that the defendants deliver up vacant possession of the suit property LR 1956/802 Voi.**
- (b) Damages for trespass**
- (c) Costs**
- (d) Any other or further relief this Honourable Court deems fit to grant.**

2. The plaintiff's claim is premised on the ground that he is the registered owner of the land known as L. R 1956/802 Voi. That the defendants without his consent or authority trespassed on to the plaintiff's land and erected illegal structures. The plaintiff is therefore seeking an order for vacant possession and damages for trespass.

3. The defendants denied the claim by filing separate statements of defence. The 2nd & 3rd defendants each filed their statements of defence on 25th March 2010 in person. Later on 30th March 2010 a joint statement of defence was filed for all the defendants by Ms Stephen Oddiaga & Co advocates. In the defences filed, the defendants have denied the plaintiff's claim. The defendants pleaded that they have lived on the suit land for 45 years without interruption and are thus entitled to the ownership by adverse possession. They also denied that they are liable to acts of trespass and nuisance as pleaded in the plaint. The defendants urged the Court to dismiss the plaintiff's case with costs to them.

4. After pleadings closed, the matter was set down for hearing. The plaintiff was a sole witness. The 1st and 4th defendants gave evidence in support of their case and also called a witness in support of their evidence. The plaintiff also filed a draft list of issues dated 28th October 2010 which summarised the issues as follows:

- 1) Is the plaintiff registered proprietor of the suit property?**
- 2) Are the defendants in occupation of the suit property and if yes, is such occupation lawful?**
- 3) Is the plaintiff entitled to the reliefs sought?**

4) What are the appropriate orders as to costs?

5. The plaintiff filed a witness statement dated 17th December 2014 and a list of documents containing 6 documents also dated 17th December 2014. The plaintiff stated that he was registered as the owner of the suit land on 1st August 1992. That sometime in the year 2002, he began having problems with one person called Mr Ilale Mohamed (1st defendant) who had entered the land. That he sought intervention from various local offices as evidenced in the letters appearing in his documents but all efforts came to nought. The plaintiff continued that in the meantime several other persons encroached on the land and were becoming aggressive. He stated that he never sanctioned the defendants presence on the suit land hence their occupation is illegal.

6. In his further evidence to the Court on 22nd February 2018, the plaintiff stated that he had wanted to build light industries so he applied to the Commissioner of Lands to be allocated a plot. He was issued with a plot via the letter of allotment dated 14th August 1991. Following the allotment, he was given a title deed. That he has always visited that area since he was a school boy in the 1950's and know it was all bush. That before getting his title, he visited the land in the company of land officers and found it free of all encumbrances. That he noticed some structures on the and when the surveyor went to place the beacons. That person was the 1st defendant who later chased away his workers and carted away his materials. He reported the matter to the police. He is asking the Court for an order to remove all the people occupying his land. That the occupants have been very hostile. He produced documents in his list as Pex 1 – 8.

7. In cross – examination, the plaintiff answered that he was present when the government surveyor was putting the beacons in 1992. That it is Ali who removed the beacons PW 1 denied being aware the land is ancestral land. That he did not ask for a specific plot in his application for allotment. He denied being aware of the defendants living on the suit land because it was all bush. In re – examination the plaintiff said when they visited the suit land initially, it was unoccupied. That marked the close of the plaintiff's case.

8. Ilale Mohamed (1st defendant) testified as DW 1. He started his testimony by denying trespassing on the suit land. That the land belonged to his grandfather and he was born on the suit land. That his father gave each of them a share before he died and he has built a house on his share. DW 1 said he only knew of the plaintiff's claim when he was served with the summons to enter appearance in this case. That the suit land falls within the Kaloleni adjudication section. The land was not adjudicated in 2013 – 2015 during the adjudication process because of this dispute. DW 1 stated that it is his right to be on the suit land.

9. In cross – examination, DW 1 said he was born in 1971 and his father died in 2007. That his father was buried in a cemetery because he was a Muslim while his mother was buried on the suit land. DW 1 was unaware the plot falls within the boundaries of Voi Municipality. That their plot neighbours the one of Bata. That they have not sued the plaintiff because they are in possession of the land as owners.

10. The 4th defendant gave evidence as DW 2. He also stated that he lives on the land previously owned by his grandfather called Rashid Lwali. That they lived peacefully until 2013 during the demarcation when they were informed the land could not be demarcated to them because somebody was claiming it. Their neighbour Ali Mwanyumba's land was demarcated. DW 2 stated further that he does not know the plaintiff. That he had photographs to show their houses on the land (6 photographs produced). He urged the Court to declare them as owners of the land.

11. Under cross – examination, DW 2 said he was born in 1978. That his grandfather did not have a title to the land because the area had not been adjudicated. That the demarcation was done from the year 2013. DW 2 denied the area is marked for industrial purposes as he has not seen any factory there. That in 2001 he was already living there since he was born on the land.

12. Rashid Mlwali Mwamburi testified as DW 3. He currently works in Makueni as a primary school teacher. He said he is the elder son of Mwamburi Mlwali and stepbrother of the 1st defendant. DW 3 stated he was born on the suit land in 1969 where they lived. That they had 3 houses on the land i.e. his grandmothers, their houses & a 3rd house. Their father died in 2007 and they knew this as their home. He confirmed that their father shared out the land between the two mothers before he died. He did not know the plaintiff and denied receiving any demand letter from him.

13. In cross – examination, DW 3 said the 3 houses collapsed after the death of his grandfather and also because his father went to work with Kenya Railways in Taveta. That his mother died in 2006 and was buried on the suit land. That they have no title because the area is not adjudicated. DW 3 states that he visits home frequently but he works in Makueni.

14. The evidence of the 2nd & 3rd defendants was not given because their counsel could not procure their attendance within the time provided. Thus the defendants' cases were closed with the evidence of the three witnesses. Parties' advocates filed written submissions.

15. From the issues drafted by the plaintiff, he has proved that he is the registered owner of the land by producing the letter of allotment dated 14.8.1991 and the certificate of title/grant No 23944 bearing his name. It is also not in dispute that the defendants are in occupation as this is the reason which made the plaintiff to bring this claim.

16. The plaintiff is claiming ownership of the suit land by virtue of his registration under the Registration of Titles Act Cap 281 (repealed). The defendants on their part from their pleadings (defence) and the evidence adduced is laying claim to the land based on two heads. First that the suit land is their ancestral land. Secondly in the alternative that they are entitled to it by virtue of adverse possession.

17. The question for the Court to determine is whether the plaintiff is entitled to the reliefs sought. In urging the Court to find in his favour, the plaintiff submitted on the provision or Order 2 rule 4 of the Civil Procedure Rules as follows:

Sub rule (1) "A party shall in any pleading subsequent to a plaint plead specifically any matter for example performance, release, payment, fraud, inevitable accident, act of God, any relevant statute of limitation or any fact showing illegality –

(a) Which he alleges makes any claim of the opposite party not maintainable;

(b) Which, if not specifically pleaded, might take the opposite party by surprise;

or

(c) Which raises issues of fact not arising out of the previous pleading

Sub rule (2) “Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient”.

18. The plaintiff reiterated the provisions of this order submitting further that mere presence on or possession of land is not sufficient defence to a claim for recovery of land. The plaintiff states further that the issue of longevity of stay on the land is not open to the defendants since when he raised his complaint with the District Land Officer (DLO) on 8th February 2001, he only had one culprit. That this position is corroborated by the letters dated 26.9.2011 (Pex 6) and 16.9.03 (Pex 8). In essence, the plaintiff contends there is no evidence adduced as would offset his right to obtain vacant possession.

19. The Court on its own analysis choose to compare the two version of evidence presented in determining who is entitled to the suit land. First, the Court noted that the plaintiff obtained his ownership pursuant to an allocation from the government. He stated in his evidence in chief that he made an application to be allotted a plot for developing light industries. He said he did not apply to be allotted the suit plot specifically. Once he was allotted the plot, vide the letter dated 14.8.1991 he got a surveyor to place beacons. The letter of allotment by itself refers to unsurveyed industrial plot in Voi.

20. For the government to allot a plot, there must be evidence demonstrated that the plot is unalienated government land and that it is available for allocation. The plaintiff states that he knew the plot was bushy as he used to see it from the 1950's when he was a school boy. In my opinion this is not sufficient proof that the plot is unalienated government land that is available for allocation in a scenario where a defence is raised that the land is ancestral.

21. In the defence filed by the 2nd & 3rd defendants, at paragraph 6, they pleaded that they entered the land in 1946 and 1930 respectively. In paragraph 4 of the joint statement of defence, the defendants pleaded that they have lived on the suit property for 45 years without any interruption and thus claim ownership by adverse possession. Further in paragraph 4 of the same defence, it is pleaded that the defendants have developed the suit parcel by building business and residential houses as well as rearing animals. This line of defence in my opinion put the plaintiff on notice of the defendants' claim to the suit land.

22. Having been put on such notice, the law of evidence imposed a burden on the plaintiff to prove that indeed at the time he was allotted the land, it was in vacant possession. How would he have done this? Either by availing to this Court correspondences from the allocating authority that confirmed such position. This could have been done either by calling a witness from or produce certified copies of documents by the office of the Commissioner of Lands (as it was then known) or availing minutes from Voi Municipality that discussed/approved the allocation of the disputed plot. In this instance, the correspondences he chose to rely on were those issued after he obtained the title in his name.

23. The plaintiff thus failed to satisfy this Court that the plot was available for allocation to him at the time it was done. Instead I am persuaded that the defendants' evidence presented the truth i.e. that the suit land was their ancestral land and that they do not have titles because the area was still unadjudicated. The plaintiff in cross – examination did not contest this position that the area was unadjudicated and that the adjudication process commenced after this suit was filed (2013 – 2015).

24. The letters dated 26.9.2001, 16.9.2003 do not give any names of the alleged squatters or date of their occupation. The plaintiff's letters dated 14th December 2001 and 19th February 2008 refer to a Mr Ibrahim Ali who was not sued as a defendant in this suit. The letter dated 17th September 2008 also refers to 3 squatters without giving names. The defendants stated that no notice had been served upon them before this suit was filed. Therefore, if the plaintiff was registered as owner of the suit property in August 1992 as shown on page 1 of the title & pleaded; then by the time of suing these defendants in 2010, 12 years had lapsed. The defendants (DW 1 & DW 2) having stated that they were born on the suit land in 1971 and 1978 it follows that the plaintiff's right if any as against them (and as against the 2nd defendant who pleaded entry in 1946 and 3rd defendant who pleaded entry in 1930) was extinguished by operation of law. Time only stopped running when the suit was filed.

25. In conclusion, I reach a finding that the plaintiff did not acquire a better title than the interest held by the defendants. In the alternative; even if his title is good, his rights to the land have been extinguished by operation of law under the provisions of section 7 of the Limitation of Actions Act. Accordingly, he is not entitled to the reliefs sought. For the reasons stated, I proceed to dismiss his suit with costs to the 1st & 4th defendants.

Dated, signed & delivered at Mombasa this 14th March 2019

A. OMOLLO

JUDGE