



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO 66 OF 2015

AMIR AHMED AND 2 OTHERS.....PLAINTIFFS

VERSUS

KATANA CHAI AND 55 OTHERS.....DEFENDANTS

JUDGMENT

BACKGROUND

1. Before me for determination are two suits which were consolidated by an order of this court issued on 31st July 2018. Both suits relate to the same subject matter and were more or less instituted around the same time.

2. On or about 10th March 2015, some 197 Applicants filed the first suit, an Originating Summons dated the same day in which they sought the determination of the following questions:-

i. Whether the Plaintiffs/Applicants have acquired the said property by reasons of adverse possession against the Defendants/Respondents (named therein as Amir Marei Ahmed, Amne Fuad Mbarak Washow and Jamila Shariff Abdurehmand;

ii. Whether the plaintiffs/Applicants should be registered as the proprietors of the land known as Land Reference No. 11883 Mambrui CR No. 13648 on the grounds that since 1960, the Plaintiffs/Applicants have been openly and peacefully enjoying occupation of the suit property for over twelve (12) years preceding the presentation of this summons;

iii. Whether the Defendants/Respondents should execute a transfer and all acts necessary to convey the said title to the Plaintiffs/Applicants as the rightful proprietors and enable it (sic) to be registered as such in default the Deputy Registrar be authorized to sign the relevant documents on behalf of the Defendants/Respondents;

iv. Whether the Plaintiffs/Applicants are entitled to costs of the suit.

3. Filed contemporaneously with the said Originating Summons was a Notice of Motion application dated the same day filed under certificate of urgency and seeking orders of injunction to restrain the named Defendants/Respondents from evicting the Applicants from the said property, transferring it and/or developing the same pending the hearing and determination of the Originating Summons.

4. The said application was placed before the Honorable Justice O. Angote on the same day in Chambers. After consideration of the same, the Learned Judge declined to certify it as urgent and directed that it be fixed for hearing in the usual manner. From the record, nothing much appears to have happened until 19th April 2016 when the Court allowed the Applicant to serve the Originating Summons upon the Respondents named therein by way of Substituted Service.

5. In the meantime, by a Plaint dated 3rd March 2015 and filed herein on 29th April 2015 being ELC No 66 of 2015, two of the named Respondents-Amir Marei Ahmed and Amine Faud Mbarak Washow sought Judgment to be entered against the Defendants (who comprise a portion of the 197 Applicants in the First Suit) as follows:-

a. An order directing the defendants to vacate and demolish any structures erected by the defendants on all those pieces or parcels of land known and described as LR 11883 Mambrui measuring 339.0 acres registered as CR No. 13648 and give the Plaintiffs vacant possession forthwith. In default, an eviction order to issue.

b. A permanent injunction restraining the defendants by themselves, their servants, agents and assigns from accessing, using, developing, selling, transferring and/or in any manner whatsoever dealing with Plot No. LR 11883 Mambrui measuring 339.0 acres registered as CR 13648.

c. Damages for trespass.

d. Costs.

e. Interest on (b) and (c) from the date of Judgment until payment in full (sic).

6. The Plaintiffs' prayers in the 2nd suit arise from their contention that at all material times, they were the legal and actual registered owners of the said parcel of land having bought the same from the previous owners. It was the Plaintiff's case that sometimes in the year 2009, the 56 defendants listed in the 2nd suit had without any colour of right, excuse or justification, and without the Plaintiffs' consent or permission, trespassed and entered into the suit premises wherein they have remained ever since despite notices served upon them to quit and/or vacate therefrom.

7. Shortly after instituting the 2nd suit and by a Notice of Motion application dated 29th May 2015 but filed herein on 8th June 2015, the Plaintiffs sought a temporary injunction order restraining the defendants from entering, trespassing, occupying, remaining thereon, selling or in any manner whatsoever interfering with the suit property pending the hearing and determination of the suit.

8. In addition the Plaintiffs sought an order directing the County Surveyor to carry out a survey of the suit property to establish the area/portion unoccupied by the Defendants and for them to be allowed to fence off the area unoccupied by the Defendants.

9. On 16th June 2015 when the said application came up for hearing before the Honourable Justice Angote, the Learned Judge granted orders as follows:

i. That the Defendants be and are hereby restrained from putting up any more structures on the suitland.

ii. That the County Surveyor to visit the suit property in the company of Police Officers to map out the area that is already occupied by the Defendants and the area that has not been occupied pending the hearing of the Application.

iii. That the Notice of Motion dated 29th May 2015 to be heard on 21st July 2015.

10. Subsequently, by an application dated 10th August 2015, the Defendants sought to have the ex-parte orders granted for the survey of the suit property to be set aside. On 7th October 2015, the Court consequently varied the orders and allowed the Defendants to appoint their own Surveyor to conduct a joint survey with the County Surveyor.

11. The process of having a joint survey of the suit property appears to have taken some considerable time. As the same was pending, the Applicants in the 1st suit fixed the same for formal proof after the Respondents named therein failed to enter appearance and/or file a defence after the suit was served by way of an advertisement carried out in the Nation Newspaper on 24th June 2016.

12. Accordingly on 10th May 2018, two witnesses were heard in support of the Originating Summons and the Applicants proceeded to close their case. However by an application dated 6th June 2018 filed as the matter was pending filing of submissions, the Respondents finally surfaced and sought orders to set aside the ex-parte proceedings and further that they be granted leave to enter appearance and file a defence or replying affidavit to the summons.

13. That application was allowed by the consent of the parties and the 1st suit was then fixed for mention on 31st July 2018 when the 2nd suit was due for hearing. On the said date, the two suits were consolidated with the 2nd suit in which the proceedings were recorded remaining as the lead file. On the realization that the 56 Defendants had not filed a defence herein, the Court granted them 21 days within which to do so. The consolidated suit was then fixed for hearing on 5th and 6th December 2018.

14. However, on 5th December 2018 when the matter came up for hearing, it turned out that the Defendants had only filed and served a defence some five days to the hearing date, that is, on 29th November 2018. That Statement of Defence was in the circumstances struck out for being an abuse of the Court process. The Defendants thereafter walked out in protest and boycotted any further proceedings herein.

THE PLAINTIFFS CASE

15. The 1st Plaintiff Amir Marei Ahmed (PW1) testified at the trial herein as the Plaintiff's sole witness. PW1 told the Court that at all times material to this suit, the 2nd Plaintiff and himself were the sole registered owners of LR NO. 11883 Mambrui measuring about 339.0 acre and registered as CR No. 13648 at the Lands Registry in Mombasa.

16. PW1 testified that they purchased the suit property from the Administrators of the Estate of the late Said Mbarak Said who were the previous owners thereof. However, sometimes in the year 2009, the Defendants invaded the land and trespassed thereon. Despite demand and notices given, the Defendants have refused to vacate the land wherein they have now built illegal structures.

17. It was PW1's further testimony that they had convened various meetings with the Defendants and the Provincial Administration with the aim of amicably agreeing on the matter but the same failed to bear fruit as the Defendants have been very hostile to the Plaintiffs and the local authorities.

ANALYSIS AND DETERMINATIONS

18. I have perused and considered the pleadings, the testimony of the Plaintiffs' sole witness and the evidence placed before the Court. I have equally considered the submissions and authorities placed before me by Mr. Okoth, Learned Counsel for the Plaintiffs

The Claim for Adverse Possession

19. In the 1st suit filed herein, the 197 Applicants aver in the Originating Summons that they have acquired title over the suit property by way of adverse possession having occupied the same uninterrupted since the 1960s. It is their case that they always believed the property to be public land until sometime in 1996 and 1997 when during the construction of the Mombasa Malindi Highway they realised that the owner of the land was being sought for purposes of compensation for the compulsory acquisition of the land.

20. The Applicants further aver that later on in the year 2001 when their community wanted to construct what came to be known as Kadzuhoni Primary School, the 3rd Respondent resurfaced and identified herself as the owner of the suit property. She however disappeared again shortly thereafter after giving consent of the construction of the Primary School. In the meantime, the 197 Applicants continued with their occupation of the suit property.

21. 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.

22. 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.”

23. Arising from the foregoing, it was incumbent upon the Applicants to demonstrate that they have been in continuous possession of the suit property for 12 years or more; that such possession has been notorious to the knowledge of the owners and that they have asserted a hostile title to the owners of the property.

24. From the material placed before me, there was no doubt that the Applicants were, at the time the consolidated suits were filed, enjoying possession of some portions of the suit property. At paragraph 8 of the Supporting Affidavit sworn jointly by Said Abeid Said and Julius Mwabonje Mrima, the Applicants have annexed pictures that show different homesteads built on what is said to be the suit property. There are also pictures of a number of cemented graves, a trading centre and what looks as a school, presumably the said Kadzuhoni Primary School.

25. While the Applicants contend that those structures have been in place since the 1960s, the Respondents aver in the Replying Affidavit sworn by Amir Marei Ahamed (the 1st Respondent) and filed on 7th June 2018 that the Applicants only invaded the land in 2009 when they began putting up the structures in certain portions thereof.

26. It is further the Respondents case that a big portion of the suit property, which is said to measure 339 acres has not been encroached upon by the Applicants but that they have been hostile and efforts to arrive at an amicable solution through the Provincial Administration have not borne fruit as a result.

27. In order to ascertain whether indeed the Applicants were on the suit property and if so, how much of it they had encroached upon, this Court ordered on 12th July 2016 that the Kilifi County Surveyor as well as a Surveyor appointed by the Applicants do visit the property in the company of Police Officers to map out both the occupied and unoccupied areas of the suit property.

28. In a Report dated 22nd August 2016 and filed herein on 11th April 2017 the Country Surveyor C.S. Kumaya established that the Applicants occupied a quarter of the 339 acres comprised in the suit property.

29. Another survey of the land carried out by Edward Kiguru Land Surveyors on the instructions of the Deputy Registrar of this Court gave a more detailed breakdown of the situation on the land. According to the Report dated 20th September, 2016 and filed in Court on 27th April 2017, the Applicants' 540 houses belonging to 150 households occupied 5.400 Ha of the total 137.19 Ha (339.0 acres). In addition, the Primary School took up 2.673 Ha while churches, mosques and water points among other utilities, occupied 1.400 Ha.

30. The Surveys also identified salt pans, fish ponds, big open unused areas (28 Ha) and an area occupied by an entity identified as Kensalt (9 Ha). While it is probable looking at the pictures annexed to the summons that the 197 Applicants had been on some of the land for a considerable period of time, none of them testified before me and it was not possible to establish the actual portion and size of the land they individually occupied and/or were entitled to.

31. I have considered the facts and circumstances of this consolidated case as presented before me. The substantive prayer in the Originating Summons is that the Applicants are entitled to be declared as proprietors of the land known as LR No. 11883 Mambui, CR No. 13648 on the basis that they have acquired the same by way of adverse possession. Those prayers were not amended even after the two survey Reports indicated that the Applicants were at most occupying only one quarter of the 339.0 acres comprised in the said parcel of land.

32. The Survey Reports clearly shows that the total acreage of the land includes the Malindi-Lamu Road main reserve (8.190 Ha), Kadzuhoni Primary School (2.673 Ha), Churches, Mosques and Water points (1.400 Ha).

33. Indeed as can be seen from the minutes of the meetings held in the year 2014 in regard to the establishment of Kadzuhoni Primary School, it would appear that a number of residents of Kadzuhoni area who were apprehensive of the impending survey of the land may have joined the suit not because they resided on the disputed property but because they were unaware of the boundaries thereof and hence anticipated wrongfully that they would be affected thereby.

34. I think in a matter of this nature, it was incumbent on the Applicants to point out with particular precision the portions of the suit premises which was in their actual possession. As Meoli J observed in *Samuel Katana Kazungu & 102 Others –vs- Salim Abdalla Bakshwein & Another (2013)eKLR:-*

“Although it is possible for the adverse possessor to successfully claim a portion of a large whole, the former must be specifically identifiable (see *Gatimu Kinguru –vs- Muya Gathangi (1976-1980) KLR 317*). From the record of the scene visit and the trial, it is not possible to accurately tell what specific portion is possessed by which Claimants and how so....Even if the Plaintiffs’ claim were found to be proved, on what basis would the entire land parcel be distributed among the claimants? A Court of law would be loath to issuing orders that are certain to cause fresh frictions between the Claimants themselves and possible breach of peace.”

35. As it were, PW1 in his testimony before me produced in their list of documents a copy of the title to the suit property which clearly shows that the two Plaintiffs in the 2nd suit are the registered proprietors of the suit property. Their names have been recorded in the title under Entry No. 10. The Defendants had annexed the same title in their Originating Summons.

36. The rights of a proprietor of land are provided under Section 24 and 25 of the Land Registration Act as follows:-

a. The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

b. The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incident of the lease.

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject:-

a. To the lease, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register, and

b. To such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

37. Arising from the foregoing, it follows that only the Plaintiffs in the 2nd suit are entitled to enjoy proprietary rights over the suit property. The Defendants and the Applicants in the 1st suit had no right to the Suitland and are mere trespassers thereon.

38. Accordingly this Court makes the following orders:-

i. The Originating Summons dated and filed on 10th March 2015 is dismissed.

ii. The Defendants in the suit and the Applicants in the Originating Summons are hereby directed to vacate and demolish any unauthorized structures erected on all that parcel of land known and described as LR No. 11883 Mambui and registered as CR No. 13648 within 45 days from the date hereof. In default, and upon expiry of the said 45 days, the Court Bailiff to proceed to effect the eviction Orders without any further reference to Court.

iii. Upon grant of vacant possession to the Plaintiffs, a permanent injunction do issue restraining the Defendants in this suit and the Applicants in the Originating Summons by themselves their servants, agents and assigns from accessing, using, developing, selling, transferring and/or in any manner whatsoever dealing with the land parcels Number LR 11883 Mambui and registered as CR No. 13648.

iv. The Plaintiffs in the 2nd Suit shall have the costs of both the Originating Summons and the suit.

Dated, signed and delivered at Malindi this 9th day of April, 2019.

J.O. OLOLA

JUDGE