



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 122 OF 2015(OS)

AZIZA SOUD HAMISI.....PLAINTIFF

VERSUS

LOISE NDUTA ITOTIA....DEFENDANT

JUDGMENT

BACKGROUND

1. By an Originating Summons dated 16th July 2015 as amended on 16th October 2015, Aziza Soud Hamisi prays for the determination of the following questions:-

- a. **Whether the Applicant is entitled to the parcel of land known as Plot No. MN/III/506 and registered as CR 14011 measuring 1.616 Hectares or thereabouts by virtue of adverse possession;**
- b. **Whether the Applicant is entitled to be registered as proprietor of the property known as Sub-division No. MN/III/506 and registered as CR No. 14011 measuring 1.616 Hectares or thereabouts and(whether) an order vesting title in the Applicant for the said property should be issued by this Court in favour of the Applicant;**
- c. **Whether the Applicant should be registered as proprietor of the said Sub-division No. MN/III/506 and whether an order directed at the Registrar of Titles Mombasa District Land Registry should issue requiring him to issue a Provisional Certificate of title to the Applicant; and**
- d. **Whether the Applicant is entitled to the costs of the summons.**

2. The Originating Summons is supported by an Affidavit sworn by the Applicant and is premised on the grounds:-

- a. **That the Applicant has openly and continuously lived on the property with her family uninterrupted since the year 2000.**
- b. **That she has built permanent buildings including her residential house as well as a well-known and celebrated restaurant commonly known as Monsoon Restaurant on part of the property; and**
- c. **That the Applicant has never seen the Respondent nor has the Respondent ever made any attempt to dispossess the Applicant of the suit property.**

3. Upon being served with the Summons, the Respondent Louse Nduto Itotia entered appearance and filed her Replying Affidavit on 30th June 2016 disputing the Applicant's case. It is the Respondent's case that sometime in 2006, they had gone to the suit premises and cleared the bushes and thickets and that they did not see the Applicant on the suit premises.

4. The Respondent further avers that between 2006 and 2010, she and her family were actively engaged in developing the property and the Applicant was nowhere in sight. It is therefore the Respondent's case that the suit herein be dismissed with costs.

THE APPLICANT'S CASE

5. Three witnesses testified in support of the Plaintiff's case.

6. PW1- Aziza Soud Hamisi (the Applicant) testified that she has been occupying and doing business on Plot No. MN/III/506 since the year 2002. Her family who were fishermen had however been using the land for more than 30 years. Around the year 2000, PW1 started using the particular Plot to sell fish. But in 2002, she physically moved into the property. At the time, there was an old mud house which her family had built and used to live in.

7. PW1 told the Court that she subsequently started cultivating "Mchicha" and other vegetables as well as horticultural produce. She also kept turkey, chicken and other poultry on the land. It was PW1's testimony that she then built a semi-permanent residential house after which in the year 2008-2009, she opened a Restaurant known as the Jumba Ruins Monsoon Restaurant.

8. PW1 testified that she leased part of the neighbouring Plot No. 336/R which belongs to the National Museums to extend her Restaurant which now sits across the two plots. PW1 testified that the Restaurant is open to everyone and her business on the land has not been secret. She denied that the Respondent or her family visited the land in the year 2006.

9. PW2-Omar Salim Stajabuni is a resident of Mtwapa. He told the Court that the Plaintiff's father used to live on the suit property. He further testified that the PW1 had now developed the land and is now using it for farming. PW2 told the Court that PW1 runs a hotel in the premises. He was however not sure if PW1 built the hotel. PW2 has never seen the Respondent on the land.

10. PW3-Murshid Abdalla Mohamed is an employer of the National Museums of Kenya. He told the Court that PW1 is their neighbour at the Museum in Mtwapa. He has known her for about 16 years as she used to trade in fish and would pass by the Museum gates.

11. PW3 told the Court that PW1 moved into the land with her family and built a second house therein. The Restaurant had been built by the Museum. She rented it. She would pay electricity bills through the Museum.

THE RESPONDENT'S CASE

12. The Respondent testified in support of her case and also called two witnesses.

13. DW1- Loise Nduta Itotia (the Respondent) told the Court that the land in question was bought by her husband-Dr. James Njoroge Itotia who is now deceased. He had acquired the land in 1972. DW1 told the Court that she got Letters of Administration for her husband's estate in 1980. Sometime in 2006, her son Peter Kimachia Itotia approached her with plans on how best to develop the suit property. She gave her son the go-ahead.

14. DW1 told the Court that the son came up with project proposals in 2010 but she rejected it after it emerged that the land would have to be transferred to a third party-a company which was to co-own the land. She testified that the land remains part of the estate of her late husband and that she intends to distribute the same to the beneficiaries who stand to suffer if the same is taken away by the Applicant.

15. DW2- Peter Kimachia Itotia is a son of the Respondent. He told the Court that the suit property was purchased by his father in 1970s and they used to go there when he was young. His father passed away in 1980.

16. DW2 told the Court that sometime in the year 2006, an old friend told him that some people had an interest in their property. They proceeded there and found the place covered by bush. They only managed to access it through the beach. DW2 then went back, discussed the issue with the family and instructed his friend James Mbugua to clear the bush. The family then engaged an architect to advice on how to develop the property. He prepared a proposal dated March 2010. The project did not however take off as DW2 moved to Kigali where he stayed for more than six years.

17. DW3- George Kamau Kagiri is an Architect who developed the proposals. He told the Court that he visited the site before preparing the proposal. He visited the land a number of times in 2005. The land was later cleared and he took a series of photographs. The project however never took off.

ANALYSIS AND DETERMINATION

18. I have perused and considered the pleadings filed herein. I have also considered the testimonies of the witnesses as well as the evidence placed before me by both parties. Section 38(1) of the Limitation of Actions Act under which the Applicant has come before this Court provides as follows:-

"Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land."

19. The requirements for adverse possession have been the subject of many Judicial pronouncements. In *Mtana Lewa –vs- Kahindi Ngala Mwamgandi(2015)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 against such person in assertion of his title for a certain period, in Kenya 12 years."

20. In *Mbira –vs- Gachuhi(2002)1EALR 137*, it was held that:

“...a person who seeks to acquire title to land by the method of adverse possession for the applicable period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under him or those under whom he claims for the statutorily prescribed period without interruptions.”

21. In the matter before me, it is not disputed that the Respondent is the registered proprietor of all that property situated at Mtwapa known as sub-division No. MN/III/506 registered as CR No. 14011 and measuring 1.616 Hectares. It is the Applicant's case that she has together with her family occupied the suit property for a period in excess of 12 years having entered and taken possession thereof sometime in 2002 to-date.

22. The Respondent however denies those claims. Testifying as DW1, the Respondent told the Court that the suit property was bought by her husband the late Dr. James Njoroge Itotia in 1972. The property was later transferred to her name in 1985 after she was granted Letters of Administration for her late husband's estate on 10th March 1981.

23. It is apparent that nothing much happened on the suit property until sometime in 2006 when DW1 says that he was approached by his son Peter(DW2) with some plans on how to develop the suit property. Sometime in 2010 however, DW1 rejected the proposals developed by her son when it emerged that the land would need to be transferred to a third party- a company which was to co-own the land.

24. DW2 in his testimony largely corroborated much of her mother's testimony as regards the state of the suit property. He told the Court that they used to visit the suit property when he was young and that sometime in 2006, he visited the property after an old friend told him that some people had an interest in the property.

25. According to DW2, they then proceeded to the property which they found covered in bush. It was his testimony that they were only able to access the property through the beach after which they went back after asking a friend one James Mbugua to clear the bush. He later developed a proposal for use of the land but the same did not take off as he moved to Rwanda where he stayed for another six years.

26. As was stated by the Honourable Justice Asike-Makhandia J.A. in *Mtana Lewa –vs- Kahindi Mwamgandi(supra):-*

“...Limitations of actions mechanisms such as adverse possession play an important role in the enforcement of one of the fundamental legal principles of the Judicial system, which is that at some point, litigation must come to an end. It is in the public interest of justice that an absentee landlord should not be allowed to hang the sword of Damocles over the heads of landless squatters in such times when the commodity is so scarce. Limitation of time for land claims as with claims of any other nature exists for three main reasons which are:-

i. A plaintiff with a good cause of action ought to pursue it with reasonable diligence(equity does not aid the indolent);

ii. A defendant might have lost evidence over time to disprove a stable claim; and

iii. Long dormant claims have more cruelty than justice in them (Halbury's Laws of England, 4th Edition).

27. In the matter before me, there was no evidence whatsoever that the Respondent has even occupied or put the property in any use since its acquisition in 1972. There was however evidence that the Applicant has been using the said property for some time. The Applicant's position that she had been in continuous use and occupation of the suit property was supported by the evidence of the Area Village Elder (PW2) as well as PW3 an employee of the National Museum of Kenya which owns an adjacent piece of land.

28. In addition, a Survey Report dated 16th August 2016 prepared by one BC Mwanyungu confirmed the existence of old structures on the property together with additional permanent buildings, including a restaurant known as Jumba Ruins Monsoons Restaurant on the suit property. The Applicant also produced water and electricity bills indicating that she had been residing on and utilizing the suit property.

29. While DW2 contended that he had visited the property in 2006 and found only dense bush, there was evidence as contained in the Survey Report and the testimony of PW2 and PW3 that at the time there were structures on the land and that the Applicant was residing thereon. In any event, it was not clear from DW2's testimony how he was able to identify the exact parcel of land when as he told the Court, he had last visited the place when he was a young boy.

30. In the circumstances of this case, I am satisfied that the Applicant has been in exclusive, open, quiet and uninterrupted possession of the property for the requisite statutory period and that the Respondent was only awoken from slumber to stake a claim on the property when this suit was filed. As it were, and inspite of the evidence that the Plaintiff has been residing on their parcel of land as aforesaid, they have neither taken action to dispossess her nor given her notice to vacate the suit premises.

31. Accordingly I find and hold that the Applicant is entitled to be registered as the proprietor of the suit premises by virtue of adverse possession as prayed in the Original Summons and an order is hereby issued directing the Registrar of Titles to issue her with a Provisional Certificate of Title as sought herein.

32. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 29th day of May, 2019.

J.O. OLOLA

JUDGE