



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 168 OF 2014

FRED GACHIE KARIUKI.....1ST PLAINTIFF

JOSEPH ANTONY OBADO ADERA.....2ND PLAINTIFF

VERSUS

STANLEY MAZIA MKONGO.....DEFENDANT

BACKGROUND

JUDGMENT

1. By an Originating Summons dated and filed on 5th May 2014 in Malindi ELC No. 84 of 2014, Stanley Mazia Mkongo sued Fred Gachie Kariuki and JA Obado Adera and urged the Court to determine that he is entitled to the ownership of all that parcel of land known as Kilifi/Kijipwa/287 by virtue of adverse possession. The said Originating Summons is premised on the grounds:-

- i. That the Applicant has been in physical possess/occupation of the said parcel of land for over 12 years;**
- ii. That the Applicant's occupation has been open and continuous and has been uninterrupted by the Respondents and/or their agents; and**
- iii. That the Applicant is thus duly and legally entitled to the said land by virtue of adverse possession and should be so registered.**

2. In a Replying Affidavit filed on 14th July 2017, the Respondents denied that the Applicant had lived on the said parcel of land for more than 12 years and/or that he was entitled to the orders sought in the Originating Summons.

3. In addition to that response, the Respondents separately moved to Court on 9th September 2014 and filed Malindi ELC No. 168 of 2014 against the Applicant in the Originating Summons seeking orders as follows:-

- i. A declaration that the Defendant is a trespasser and illegal occupant on the suit property-LR No. Kilifi/Kijipwa/287;**
- ii. An order that the Defendant do pull down his structures built on the suit property and cede vacant possession of the same within 30 days from the date of Judgment failing to which the Plaintiff be at liberty to evict him with the assistance of the OCS Mtwapa Police Station;**
- iii. General damages for trespass and/or conversion of the suit property.**
- iv. Permanent injunction to prevent the defendant by himself and/or his agents/servants/employees/family from further wasting, excavating, converting, pledging/charging, transferring, carrying out burials therein or howsoever endangering the suit property and interfering with the Plaintiffs' ownership thereof;**
- v. Costs and interest at Court rates.**

4. By an order made herein on 6th February 2015 by the Honourable Justice Angote, the two suits were consolidated with the result that the Applicant in the Originating Summons was re-designated as the Defendant in the consolidated suit.

THE PLAINTIFFS' CASE

5. In support of their case, the Plaintiffs called five witnesses who testified as below.

6. PW1-Joseph Anthony Obado Adera(the 2nd Plaintiff) testified that they purchased the suit property together with the 1st Plaintiff on 3rd August 1993 from M/s Valley Investment Company Ltd, for a consideration of Kshs 175,000/-.

7. PW1 told the Court that as the property was situated within Kijipwa Settlement Scheme, they had to pay an outstanding loan which was due to the Settlement Fund Trustees on the property together with other related conveyancing charges. Both Plaintiffs were staying in Nairobi and they would regularly visit and inspect the property. On 2nd July 2012, PW1 visited the property in the company of his wife and a surveyor Mr. Benjamin Muli. The surveyor later visited the property on 14th August 2012 and carried out a survey of the property.

8. Sometime in August 2013, PW1 visited the property in the company of a friend only to encounter the Defendant therein in a newly constructed and temporary dwelling structure. PW1 informed the Defendant that he was illegally in their property. The Defendant pleaded that he was only transitionally there and that he would soon move out. PW1 was therefore surprised when the Defendant turned round to sue them claiming he had been on the land for more than 12 years.

9. PW2- Alphonse Mwandigi Mwadime was a private investigator. He told the Court that he visited the land and prepared a report dated 5th July 2015.

10. PW3- Benjamin Meilu Muli is a Government Surveyor. He told the Court that he was requested by Mr. Alando Advocate to visit a plot in Kijipwa Settlement Scheme to enable them fence the same. He visited the ground two times in the company of Mr. Alando. The first time they visited the plot, they were also with one of the owners and who was accompanied by his wife. At the time, the plot was vacant and undeveloped. That was before August 2014. He prepared a report which he produced in Court.

11. PW4-Edward Mburu was a para-legal with Kituo cha Sheria. He told the Court that he was introduced to one Mr. Kahela by his grandfather who is a member of the Kilifi District Land Board. The said Kahela needed to be assisted to acquire a piece of land by adverse possession. PW4's grandfather instructed him on 23rd June 2013 to find out the real registered owner of the land. Sometime in 2014, PW4 learnt from his grandfather that the said Kahela had passed away.

12. PW5-Bakari Hamisi Omar was a resident of Kikambala. He told the Court that he knew a lady by the name Sidi Kadzo Churembo who was residing on a plot he later came to learn was the suit property herein. The said Sidi had a Makuti house on the land from around the year 2000. Sidi later died and the plot was left vacant.

13. PW5 told the Court that sometime in 2013, he saw one Mzee Kahela and his family move into the land. Mzee Kahela later died.

14. PW5 further told the Court that he knows the Defendant herein. He told the Court that the Defendant resides in Gorofani in Kikambala where he has a large farm. PW5 told the Court that he came to know more about the land after he met PW2 who was making enquiries about the land.

THE DEFENCE CASE

15. On his part, the Defendant called two witnesses in support of his case.

16. DW1- Stanley Mazia Mkongo (the Defendant) told the Court that the land in dispute previously belonged to a lady by the name Kiyuge Cholimo Mwaduna. Sometime in 1992, DW1 entered into a Sale Agreement with the lady who promised to transfer the land to his name. The purchase price was Kshs 125,000/- but DW1 was only able to pay a deposit of Kshs 20,000/-.

17. DW1 further testified that he took possession of the land immediately upon payment of the deposit. The said Kiyuge kept on telling DW1 to move out of the property but DW1 stayed put. DW1 built a residential house on the land and he later allowed his uncle Johnson Mwamuye to come and reside on the land.

18. DW2- Baraka Mwamuye Kiti is a cousin of the Defendant. He told the Court that he is the second born son of the late Johnson Kiti Mwamuye who was commonly known as "Kahela". He testified that sometime in 2013, the Defendant gave his father permission to reside on the suit property. The defendant has been visiting them severally. They had been farming the land since 1996 with the Defendant's permission.

ANALYSIS AND DETERMINATION

19. I have carefully considered the pleadings, the oral testimony of the witnesses called herein and the evidence adduced before this Court. I have also perused and considered the submissions and authorities cited by the Learned Advocates for the parties.

20. The two suits herein arose out of the occupation of the suit property LR No. Kilifi/Kijipwa/287 by the Defendant. It was common ground that the said property is registered in the names of the two plaintiffs herein.

21. In the Originating Summons filed by the Defendant herein he asserted that he had been in an uninterrupted physical possession and occupation of the suit property for a period exceeding 12 years and that he was hence entitled to the ownership thereof under the doctrine of adverse possession. The Plaintiffs denied the claim and asserted that the Defendant was but a recent trespasser to the property who ought to

be ejected therefrom.

22. As it were, adverse possession is a process by which a person can acquire title to someone else's land after continuously occupying the said land, for at least a period of 12 years, in a manner that is not consistent with rights of the registered owner. As was stated in *Maweu – vs- Liu Ranching and Farming Co-operative Society(1985) KLR 430:-*

“.....to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that the possession claimed was adequate in continuity, in public and in extent and that it was adverse to the registered owner.”

23. In the matter before me, the Defendant testified that the land in dispute previously belonged to one Kiyunge Chaulimo Mwaduna. Sometime in 1992, he entered into a Sale Agreement for the sum of Kshs 125,000/-. The Defendant asserted that he immediately took possession even though he was only able to pay a deposit of Kshs 20,000/- and despite the fact that the said owner constantly urged him to move out of the land.

24. During his cross-examination herein, the defendant told the Court that the Vendor who also went by the name Sidi Chaurembo was his relative and that she continued to occupy part of the suit property until her death sometime before the year 2013. It was the Defendant's testimony that the said Sidi resided in a small house which collapsed shortly before Sidi's death.

25. If the Defendant was to be believed, it would then mean that the defendant had not taken exclusive control of the entire suit property which is said to measure approximately 2 ½ acres. The said Sidi must have used part of the land for her own subsistence.

26. At any rate, if the circumstances as described by the defendant were correct, it would mean that the Defendant entered into the said parcel of land with the permission of the owner thereof. As the Court of Appeal stated in *Mistry Valji –vs- Janendra Raichand & 2 others(2016) eKLR:-*

i. Adverse possession is not available to a party who is on the registered owner's land with his consent or where the entry and occupation was lawful and based on some agreement. In other words where the title of the owner is admitted there can be no claim for adverse possession. See Samuel Miki Jane –vs- Jane Njeri Richu Civil Appeal No. 122 of 2011.

ii. The occupation of the land must be nec vi, nec claim, nec precario. See Mtana Lewa –vs- Kahindi Ngala, Civil Appeal No. 96 of 2014.

iii. The adverse possessor must prove that through his occupation, the true owner has been dispossessed or his possession discontinued. See Wambugu –vs- Njuguna (1983) KLR 172.

27. As it turned out however, the said Sidi Chaurembo was not the registered owner of the land. The Defendant knew this fact hence the institution of the Originating Summons not against the said Sidi but against the Plaintiffs herein.

28. In support of his claim for adverse possession, the Defendant contended that he has been in occupation and possession of the suit property from the time he purportedly bought it from Sidi in 1992. Other than the Defendant's assertions however, I did not find any evidence to back the claim. From the evidence of DW2, a cousin to the Defendant, it was quite clear that the Defendant does not physically reside in the suit premises, but has only been visiting them since he “allowed” them to stay in the property in 2013.

29. During cross-examination herein, DW2 stated that when they went to the land, they found one house which the Defendant allowed them to occupy. That statement contrasts sharply with the Defendant's contention herein that it is only him and his family who reside on the land.

30. The position of DW2 is indeed corroborated by the evidence of both PW4 and PW5. According to the two witnesses, the land in question was previously occupied by the lady Sidi Chaurembo who had built a makuti house thereon. When Sidi died the family of Mzee Kahela (DW2's father) moved into the land in 2013. Mzee Kahela would later die leaving DW2 and the rest of the family on the land.

31. According to PW5, the defendant herein resides and farms in Gorofani at Kikambala with his family members. Indeed, during his cross-examination herein, the Defendant conceded that he has a house in Gorofani “and other places”. He told the Court that his first wife resides in Gorofani.

32. Arising from the foregoing, I was not satisfied that the defendant had established any ground to entitle him to the suit property by virtue of the doctrine of adverse possession.

33. On the other hand, there was clear evidence that the Plaintiffs had acquired the suit property vide a Sale Agreement dated 3rd August 1993 and that a Title Deed was issued in their joint names on 11th February 1994. There was evidence that they visited the property a number of times leading to the compiling of the Survey Report by PW3 which is dated 16th August 2012.

34. In the circumstances, I am satisfied that the Plaintiffs have proved their case on a balance of probabilities and I hereby enter Judgment in their favour and make the following orders:-

i. The Originating Summons filed by the Defendant herein is hereby dismissed.

ii. A declaration is hereby made that the Defendant is a trespasser and an illegal occupant of the suit property known as LR

No. Kilifi/Kijipwa/287.

iii. The Defendant to pay General Damages assessed at Kshs 200,000/= to the Plaintiffs.

iv. Upon expiry of 30 days hereof a Permanent injunction to issue against the Defendant, his agents and/or servants from trespassing upon and/or howsoever interfering with the suit property.

v. The Plaintiffs will have the costs of this suit and the Originating Summons.

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

J.O. OLOLA

JUDGE