



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MOMBASA

MISC. ELC CASE NO. 91 OF 2014(O.S)

TALAL OMAR ALMAS.....APPLICANT

VERSUS

KHADIJA SAID RASHID.....RESPONDENT

JUDGEMENT

1. Mr. Talal Omar Almas sued Khadija Said Rashid vide his originating summons seeking determination of the following questions.
 - (a) **Whether the applicant is entitled to the parcel of land known as plot number 34/11/MN by virtue of adverse possession.**
 - (b) **Whether the applicant is entitled to be duly registered as joint proprietor of plot number 34/11/MN.**
 - (c) **Whether the respondent has any right to the said land.**
 - (d) **Whether the applicant is entitled to costs of this summons.**
2. The summons is based on the grounds set hereunder and the supporting affidavit;
 - (a) **That the applicant has been in exclusive and uninterrupted occupation of the suit land with the defendant is the owner thereof.**
 - (b) **That the applicant has developed the land and has been staying on it thus entitled to it by virtue of adverse possession.**
3. The plaintiff presented his evidence on 1st November 2018. He said he lives on the suit plot MN/11/34 and also farms maize, cassava and mangoes on it without interruption. That he came on the land in the year 2002 and began by farming. That he built his house on the land at the beginning of 2012. He also built a greenhouse and chicken house. He produced the photographs of the structures as P ex 1. The witness also produced a search certificate as P ex 2.
4. He denied that he is a squatter on plot 667 which neighbours the suit plot. He also denied filing another suit to claim plot no 667. The witness said he did not know the defendant and she has never sued him in any court. That he is still building and farming on the land. He asked the court to declare him as the registered as owner of the land.
5. In cross-examination, the applicant said he was born in 1979 in old town, Mombasa Island. He denied he is the 1st applicant in O. S case no 178 of 2012. He also denied having a house on plot 667. He admitted that was charged with a criminal case of trespass over plot no 667 and was convicted by the magistrate's court but he appealed the decision. That his co-accused was Jefa who was applicant no 46 in criminal case no 930 of 2011. He denied that Mr Mwaniki Gitahi advocate who filed case no 178 of 2011 is his advocate. The witness said he never saw any valuer visit the suit land for preparation of a valuation report. He denied getting on to the land by force. That he built his house and waited for the owner of the land to come. This marked the close of his case.
6. Rukia Said Rashid testified on behalf of the defendant. She stated that plot 34 is one of the plots they inherited from their father Said Rashid. According to Rukia, the plots were invaded in 2008 and in 2009 and they reported the matter to the police after their workers were harassed and chased away. That the plaintiff invaded plot 667 in 2010 and started to build in 2011 upon which a report was made to Nyalali police station under OB 44/24/04/2011. That Mr. Mwaniki advocate came to Nyalali police and said the plaintiff could not be charged over plot 34 because of the existing trespass case over plot 667.
7. DW1 maintained that the plaintiff is one and the same person as the 2nd plaintiff in case no 178 of 2012. She continued that they did a valuation of the suit plot and confirmed they were the ones in possession. That their father had dug a well on plot 34, while they had a house

on plot no 24 which was brought down by the trespassers. She produced the pleadings in Case No. 178 of 2012 as D ex 1, charge sheet as D ex 2 and valuation report as D ex 3. The witness urged the court to dismiss the plaintiff's claim.

8. In cross-examination by Mr Mutubia, learned counsel for the plaintiff, the witness stated that the plaintiff has disturbed them since 2010. That they had cashew nuts, coconuts and mangoes on plot no 34 which they were harvesting until 2013 when they were attacked but the plaintiff was not among the attackers. That the valuer was accompanied by her brother called Hamisi. She confirmed plot 34 is in the name of the defendant. That the plaintiff has a house on plot no 667 that is why he was charged. The witness did not report on the state of the land as at 2002. That the valuer said the plot was owner-operated. In re-examination, DW1 states that if there was someone on the land in 2005, the valuer would have indicated so. That the plaintiff invaded the land in 2010 and was arrested in April 2011. This also marked close of defence case.

9. Parties agreed to exchange written submissions. The plaintiff gave a summary of the evidence adduced and also raised the questions set out in the body of the originating summons which he discussed. He added the question on whether the respondent has sufficiently discharged the burden to defeat the claim herein. The plaintiff argued that D ex 2 refers to Said Rashid as the complainant and not the present defendant. That the said criminal case had nothing to do with the suit land and does not amount to interruption of occupation. The plaintiff further submitted that he has proved all the ingredients for a remedy for adverse possession. He relied on the case law of **Lawrence Muiruri Njuguna –versus- Charles Mwenga Mulwa (2017) eKLR** and **Kasuve –versus- Mwaani Investments Ltd & Others (2004) 1KLR 184** and section 37(a) of the Limitation of Actions Act. Lastly the plaintiff submitted that DW1 did not show she had authority to give evidence on behalf of the defendant. That the defendant did not file any defence to the claim. That the evidence presented amounts to hearsay and should be disregarded.

10. The respondent in her submissions also raised the questions set out on the face of the originating summons. The respondent contends that the plaintiff having been convicted on acts of trespass has failed the test of being in possession uninterrupted. The defendant submitted that he had filed a defence and counter claim for vacant possession as well as a replying affidavit denying the suit. The defendant maintains that the claim has not been proved he cited several cases inter alia;

(a) Malsom Bell –versus – Daniel Moi (2013) eKLR;

(b) Samuel Nzunga & 2 Others –versus – Ali Abdalla (2013) eKLR;

(c) Bakari Shaban 7 39 others –versus- Said Bin Rashid Khamis Mombasa Civil Appeal NO. 33 of 2016.

11. The burden of proof was on the plaintiff to prove his case. According to his evidence, he went on the land in 2002 and started farming. According to the defence the plaintiff & others invaded their land in 2010. The defendant's witness stated that the suit plot was amongst the others they inherited from their late father. She listed the other plots as MN/11/667, 23, 24 & 28. That the plaintiff was amongst the persons who sued for adverse possession in civil suit no 178 of 2012 over plot 667. The defendant produced pleadings in ELC 178 of 2012 where the names of the 2nd plaintiff is listed as number 2.

12. The plaintiff denied any relationship to the 2nd plaintiff in case no 178 of 2012. The plaintiff did not however deny that he was one and the same person that was charged in criminal case no 930 of 2011. In that criminal case Mr Talal together with Mr Jonathan Jeffa were charged with three counts.

In count 1 they were charged with the offence of trespass on the plot of Khamis Said Rashid. In count 3 they were charged with the offence of forcible detainer on Plot No. L.R 667 Cr 7358/1 owned by Khamis Said Rashid between the dates of 20th December 2010 and 16th March 2011 at Junda estate within Kisumu District. The plaintiff admitted that he was convicted by the magistrate's court and sentenced to six months. The plaintiff stated that he appealed and was acquitted although he did not present the appeal proceedings in evidence. The defendant had served him with copies of the charge sheet vide the replying affidavit filed and so put him on notice that the proceedings of criminal case No. 930 of 2011 would be used against him.

13. In light of the charge and conviction of the plaintiff on the offence of trespass and forcible detainer over plot no 667, I am satisfied that it is proof that this plaintiff is indeed the same person as the 2nd plaintiff in civil case no 178 of 2012 where the defendant in the current suit was sued as the 2nd defendant. In the former suit the claim is also for adverse possession over plot 667. The said suit is said to have been dismissed.

14. Although the plaintiff denied that he does not live on plot no 667, the photographs he presented in evidence is not sufficient to support his claim. He needed to corroborate the same since his occupation of plot 34 had been denied. He could have easily done so by presenting a survey report or approved plans that would indicate plot number of the development. In the absence of corroboration and with the defendant's product of D ex 1 (pleadings in 178 of 2012), D ex 2 (charge sheet). I conclude that the plaintiff has not proved uninterrupted possession and occupation of plot 34 for over 12 years as he pleaded.

15. The plaintiff urged the court to disregard the evidence of the defendant's witness for lack of authority. In her evidence, the defence witness began by saying that the suit plot no MN/11/34 was amongst the plots they inherited from their late father Said Rashid. She therefore gave her evidence stating her stake on the suit plot. The witness proceeded to state how they were using the plot before they were chased away in 2012. She had also filed a replying affidavit to the plaintiff claim on 6th March 2017. At paragraph 1 of the replying affidavit, she deposed that she was the administrator of the estate of Said Bin Rashid. The plaintiff did not object to this affidavit neither to the witness giving her testimony. The objection being raised through the submissions is thus an afterthought not supported by legal provisions and denies the defence an opportunity to respond to such objection. I find no reason to disregard the pleadings and evidence presented by Rukia Said Rashid on behalf of the defendant.

16. In conclusion, I do agree with the principles set out in the case of **Titus Kasuve –versus- Mwaani Investments Ltd Supra** as regards

what a claimant must prove to be entitled to the grant of orders of adverse possession i.e exclusive possession and as of right without interruption for 12 years after dispossessing the owner. However I find the plaintiffs herein failed this threshold for two reasons;

It is not established on a balance of probabilities that he is in possession of plot no MN/11/34. Secondly his possession if true he has not demonstrated by supporting evidence of being there uninterrupted for a period of 12 years or more.

Consequently, I hold that plaintiff's case has not been proved. The same is dismissed with costs to the defendant. The defendant in submission stated they filed a defence and counter claim. I did not come across any so I go no further. These shall be the orders of the court.

DATED, SIGNED and DELIVERED at Mombasa this 27th day of June 2019.

A. OMOLLO

JUDGE.