



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC. CASE NO. 174 OF 2012 (O.S)

JULIUS NDUNDI THE THE.....PLAINTIFF

VERSUS

NAJMUDIN NOORALI MOHMMEDALI (as legal representative of the Estate of

MOHAMMEDALI ESSAJEE BHAJEE and the

Estate of NOORALI M.E. BHAJEE)

THE ESTATE OF MANIKLAL PALATHBHAI DALA.....DEFENDANTS

AND

JONATHAN KENYA THE THE.....1ST PLAINTIFF

CHANGAWA KABARUKU NDUNDI.....2ND PLAINTIFF

AND

NAJMUDIN NOORALI MOHAMMEDALI (as legal representative of the Estate

of MOHAMMEDALI ESSAJEE BHAJEE and the

Estate of NOORALI M.E. BHAJEE

THE ESTATE OF MANIKLAL PALATHBHAI DALA.....DEFENDANTS

JUDGMENT

1. On 25th February, 2014, this court directed that the two suits proceed together. This Judgment is therefore in respect of Malindi ELC. No. 174 of 2012 (O.S) and Malindi ELC. No. 204 of 2013(O.S).

Pleadings in Malindi ELC. No. 174 of 2012 (O.S)

2. In the Originating Summons dated 15th November, 2012, the Plaintiff, Julius Kabaruku Ndundi, has prayed for the determination of the following issues:

a. Has the family of Kabaruku Ndundi Thethe (deceased) become entitled to plot 78 Mambui, CR 5485 measuring 72 acres or thereabout by adverse possession after being in uninterrupted and open possession of the land since 1975; under an Agreement for Sale of land between the said Kabaruku Ndundi Thethe (as Purchaser) and Noorali M.E. Bhaijee as legal representative of Mohamed Essajee Bhaijee (deceased) and Maniklal Palathbhai Dala (as Vendors) made on 10th March, 1975 coupled with the said possession?

b. Has the title of the Estates of Mohamed Essajee Bhaijee and Maniklal Palathbhai Dala over plot number 78, Mambui CR 5485 measuring 72 acres or thereabout been extinguished under the performance of the said Agreement for Sale of land coupled with the talking of possession?

c. Are the registered owners holding plot 78 Mambrui, CR 5485 as mere Trustees for the Estate of Kabaruku Ndundi Thethe, which is the legal fee simple/freehold owner of the land?

d. Does plot 78 Mambrui, CR 5485 measuring 72 acres form part of the Estate of Kabaruku Ndundi Thethe?

e. Is plot 78 Mambrui, CR 5485 measuring 72 acres to be registered in the name of Julius Kabaruku Ndundi as legal representative and administrator of the Estate of Kabaruku Ndundi Thethe for the benefit of the beneficiaries of the said Kabaruku Ndundi Thethe?

f. Should the register be rectified accordingly, and the Registrar of the High Court signs any papers to facilitate the making of the entry and rectification of title?

g. Who is to bear the costs of this Summons?

3. The Originating Summons is supported by the Affidavit of the Plaintiff who deponed that he is the son of the late Kabaruku Ndundi Thethe and the appointed administrator of the Estate of the said Mr. Thethe; that his parents and siblings have always resided on plot number 78 Mambrui measuring approximately 72 acres (*the suit land*) and that his father purchased the suit land on 10th March, 1975.

4. According to the Plaintiff, his father took possession of the suit land immediately upon purchase and established his homesteads there; that his father had two wives whom he settled on the land and that his father's 14 children and over 80 grandchildren occupy the entire parcel of land. The Applicant deponed that the family is living on the land and that they make a living by working on the land.

5. The Plaintiff deponed that around March, 2011, a man by the name Najmudin Noorali Mohammedali visited the suit land in the company of a Mr. Mwaniki and claimed that he was the son of the Vendors, a Mr. Noorali M.E. Bhaijee; that he engaged their family with a view of being compensated for the land and that no Agreement was reached because his father purchased the suit land.

6. The Plaintiff finally deponed that his late father became the owner of the suit land having taken possession of the same immediately upon paying the full purchase price and that the Vendors became Trustees holding the title for the benefit of the Purchaser. According to the Plaintiff, by operation of law, the registered owners of the suit land hold the title as Trustees for the family of the late Kabaruku Ndundi Thethe.

7. Although the Defendants were served with the Summons, and entered appearance through their advocate, they never filed a Replying Affidavit opposing the Originating Summons. The Originating Summons proceeded for hearing as undefended. The Applicant called two witnesses (*PW2 and PW3*) who testified in support of his case.

Pleadings in Malindi ELC. No. 204 of 2013 (O.S)

8. In the Originating Summons dated 12th November, 2013, the Plaintiffs are seeking for the following reliefs:

a. Have the Applicants, namely Jonathan Kenga Thethe, Changawa Kabaruku Ndundi and Julius Kabaruku Ndundi, been in adverse possession of the land known as plot number 78 Mambrui measuring 72 acres, from the 25th of September, 1989 when the Purchaser of the land (who was their father) died, thereby involuntarily relinquishing possession to the Applicants?

b. Has the period of such adverse possession by the above named Applicants been more than twelve (12) years, as against the title owner of the said land as to entitle them to be registered as owners in place of the paper owners?

c. Has the title of the paper owners in respect of plot number 78 Mambrui been extinguished by operation of law and the act of adverse possession vested in the Applicants since 1989?

d. Are the registered owners of plot number 78 Mambrui, or the legal representatives of their Estates holding the land in trust for the persons in whose favour time has been running.

e. Should the register for plot number 78 Mambrui be rectified accordingly, and the Deputy Registrar of this court sign any papers to facilitate the making of the entry and rectification of the title?

f. Who should bear the costs of this action?

9. The Originating Summons is supported by the joint Affidavit of the Applicants who have deponed that they are the sons of the late Kabaruku Ndundi Thethe and that since the death of their father, they have all settled on separate and distinct portions of the land known as portion 78 Mambrui where they have established their homesteads with their children.

10. The Plaintiffs deponed that the possession of plot 78 Mambrui has exclusively vested in Kabaruku Ndundi or his children since the time of purchase in 1975 until now; that the said possession is adverse to the paper owners and that upon the death of their father, they have continued in adverse possession of the land to the exclusion of the title owners, or any other person.

11. The Plaintiffs finally deponed that in total, they have adversely occupied the suit land for twenty four (24) years; that their father evicted the squatters who were living on the land after purchasing the suit land and that nobody has interrupted their possession since then.

12. Despite entering appearance upon being served with the Originating Summons, the Defendants did not file a Replying Affidavit. The suit proceeded as undefended by way of Affidavit and oral evidence.

The Plaintiffs' case:

13. The 1st Plaintiff in both suits, PW1, relied on the two Affidavits in support of the two Originating Summons, which I have already summarized above. PW1 informed the court that he lives on the suit land which was purchased by his late father; that his late father died on 25th September, 1989 and that his mother is the only surviving wife of his late father.

14. PW1 informed the court that when his late father and first wife died, they were both buried on the suit land. It was the evidence of PW1 that his late father purchased the suit land vide an Agreement dated 10th March, 1975 and that the Land Control Board gave its consent for the Transfer of the suit land to his late father on 11th June, 1975.

15. Other than the Sale Agreement and the consent of the Land Control Board that PW1 produced in evidence, he also produced the letter from Sachdeva advocate which confirmed that indeed his late father purchased the suit land. PW1 also produced in evidence a statement of account from the said advocate dated 28th July, 1985 and the copy of the Transfer document which was to be signed by the Vendors (*deceased*).

16. PW1 stated that he was born on the land; that he has always lived on the land and that his father and step mother were buried on the suit land when they died. It was the evidence of PW1 that Defendants offered them Kshs. 3,000,000 as compensation for the suit land, less 12 acres and that they rejected the said offer. According to PW1, they have more than 48 houses on the suit land, wells and livestock and that they are not interested in the compensation that the Defendants were offering them.

17. The other sons of the late Kabaruku, PW2 and PW3, adopted that Affidavit in support of the Originating Summons in ELC. No. 204 of 2013 (OS) which I have already summarized. Indeed, they concurred with the evidence of PW1.

18. The Plaintiffs' advocate submitted that the Plaintiffs and their siblings, as well as their deceased father's surviving spouse(s), have remained on the suit land since 1975; that they have developed homesteads on the land and that they did not know about the 1st Defendant until 2011 when he approached the family of Ndundi Thethe (*deceased*) with an offer to pay compensation in exchange of the land.

19. The Plaintiffs' counsel submitted that the title that vested in the Estates of the deceased represented by the Defendant was extinguished when Ndundi Thethe was still alive; that the cause of action arising from the extinguishment of the title survived and that Judgment should be entered in favour of the Plaintiffs.

20. The undisputed facts before the court are that the Plaintiffs' late father, Kabaruku Ndundi Thethe purchased a parcel of land known as plot number 78 Mambrui measuring 72 acres (*the suit land*) from Noorali Mohammedali, Essajee Bhaijee and Maniklal P. Dala. The Sale Agreement dated 10th March, 1975 between Kabaruku Ndundi Thethe and the sellers was produced in evidence.

21. Having purchased the suit land, it was the evidence of the Plaintiffs that their father settled his entire family on the land in the same year he purchased the land. The said family has been living on the suit land since 1975 to date. Indeed, when the patriarch, Kabaruku Thethe died in 1989, he was buried on the suit land.

22. The Plaintiff in the first cause of action produced exhibits in support of his position as the appointed legal representative of the Estate of Kabaruku Ndundi Thethe (*deceased*). PW1 also produced a copy of the Certificate of Ownership of the suit land. Other documents and photographs were also produced showing the various homesteads, casuarina forests and dams, among other infrastructures, established on the land by the family of Kabaruku Ndundi Thethe.

23. The second suit by the Plaintiffs present a case of successive squatters in wrongful possession of plot 78 Mambrui. The dispossession of Kabaruku Nduthi Thethe by his wives, children and grandchildren was involuntary, on account of his death in 1989. Regardless of whether time is reckoned from 1989 when Mr. Thethe involuntarily lost possession of the suit land upon death; or from 1975 when he purchased the suit land and took possession which was adverse to the title owners, the two suits ought to be allowed because the Plaintiffs have been on the land continuously and without the permission of the title holder for a period of twelve (12) years.

24. That being so, the court finds and holds that by virtue of the provisions of Section 38 of the Limitation of Actions Act, the Plaintiffs should be registered as the proprietors of the suit land. The Plaintiffs' two suits are therefore allowed in the following terms:

a. The family of Kabaruku Ndundi Thethe (deceased) are entitled to plot 78 Mambrui, CR 5485 measuring 72 acres or thereabout by adverse possession after being in uninterrupted and open possession of the land since 1975; under an Agreement for Sale of land between the said Kabaruku Ndundi Thethe (as Purchaser) and Noorali M.E. Bhaijee as legal representative of Mohamed Essajee Bhaijee (deceased) and Maniklal Palathbhai Dala (as Vendors) made on 10th March, 1975 coupled with the said possession.

b. The title of the Estates of Mohamed Essajee Bhaijee and Maniklal Palathbhai Dala over plot number 78, Mambrui CR 5485 measuring 72 acres or thereabout has been extinguished under the performance of the said Agreement for Sale of land coupled with the talking of possession.

c. The registered owners holding plot 78 Mambrui, CR 5485 are mere Trustees for the Estate of Kabaruku Ndundi Thethe, which is the legal fee simple/freehold owner of the land.

d. Plot 78 Mambui, CR 5485 measuring 72 acres to be registered in the name of Julius Kabaruku Ndundi as legal representative and administrator of the Estate of Kabaruku Ndundi Thethe for the benefit of the beneficiaries of the said Kabaruku Ndundi Thethe.

e. The register for Plot 78 Mambui, CR 5485 to be rectified accordingly, and the Registrar of the High Court to sign any papers to facilitate the making of the entry and rectification of title.

f. Each party to bear his own costs.

DATED AND SIGNED AT MACHAKOS THIS 12TH DAY OF JUNE, 2019.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 26TH DAY OF JUNE, 2019.

J.O. OLOLA

JUDGE