



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 205 OF 2014(O.S)

KADZO ANGORE KAZUNGU

SAFARI KAZUNGU CHOME.....PLAINTIFFS/APPLICANTS

VERSUS

ABDALLA SALIM OMAR.....DEFENDANT/RESPONDENT

JUDGMENT

1. By this Originating Summons dated 3rd November 2014, Kadzo Angore Kazungu and Safari Kazungu Chome (the Applicants) urge the Court to grant orders that: -

1. The Respondent's interest in the Portion of land occupied by the Applicants of sub-division No. 2348 (Original No. 1854/1) Section II MN comprised in a Certificate of Title dated the 16th January 1998 registered in the Land Title Registry at Mombasa as CR No. 30925 and delineated, demarcated and described on the land Survey Plan No. 201691 has been extinguished.

2. The Applicant be registered as proprietors of a Portion of land by measurement 589 ft by 260 ft by 150 ft by 144 ft by 30 ft in place of Abdalla Salim Omar by reason of the fact that the Applicant (has) become entitled to the said Portion of land by adverse possession.

3. That the Registrar of Titles, Mombasa, do issue a Certificate of Title for the Portion of land measuring 589 ft by 260 ft by 150 ft by 144 ft by 30 ft or thereabouts of Sub-division No. 2348 (Original No. 1854/Section II MN, situate at Shariani, Kilifi County in the names of Kadzo Angore Kazungu and Safari Kazungu Chome the Applicants herein.

4. The Order referred in paragraph 2 and 3 above be registered against all that parcel of land containing by measurement 2.010 Ha or thereabout and being sub-division No. 2348(No 1854/1) Section II MN at Shariani Kilifi in terms of Section 38(2) of the Limitation of Actions Act, Cap 22 Laws of Kenya.

5. The costs of the Originating Summons be provided for.

2. The Summons which is supported by two Affidavits sworn respectively by the Applicants is premised on the grounds that: -

a) The Applicants have both been in uninterrupted and exclusive physical possession of the said portion of land for a continuous period of over 40 and 30 years respectively.

b) The Applicants have developed the portion of the suitland that they occupy.

c) The Respondents rights or interest on the Portion of the suitland vis-à-vis those of the Applicants have been extinguished.

d) That it is fair and just that the Applicants be registered as the owners of the portion of the land so that they may stop living in fear that they may wake up to an eviction one day; and

e) That the portion of the suit property is the only home known to the Applicants.

3. In a Replying Affidavit filed herein on 2nd March 2015, the Respondent Abdalla Salim Omar however avers that the Applicants are not entitled to the orders sought for a number of reasons. He denies that the Applicants have resided on his parcel of land or any portion thereof

for a continuous period of 30 to 40 years as claimed.

4. While admitting that there are coconut trees within the suit property, the Respondent denies that the same belong to the Applicants. It is the Respondents case that when he purchased the land from one Shaban Swedi on 21st June 2008 the Applicants did not reside therein and that squatters invaded the land much later in the year 2011.

5. The Respondent further asserts that he did file Malindi ELC No. 2 of 2011 against the said Squatters including one Charo Kazungu Chome who was the relative or representative of the Applicants and that there is already an existing Judgment against the Applicants through their representative.

6. On 17th March 2016 directions were given that the Originating Summons would proceed by way of Affidavit evidence and cross-examination of the deponents thereof. At the trial herein however, the Applicants called three witnesses who testified orally afresh in addition to the Affidavits and were cross-examined on both. The Respondent also called one witness who testified and was cross-examined.

7. Testifying as PW1, the 1st Applicant Kadzo Angore Kazungu told the Court that the 2nd Applicant was her stepson. She told the Court that there was no title deed in the Respondent's name. PW1 testified that her husband Kazungu Chome passed away in 2006 and that they obtained Letters of Administration for his estate.

8. PW1 told the Court that before his death, her husband had entered into an Agreement with one Mohamed Baadi over the suitland. She testified that they have lived on the land ever since she was married and that her first child now has a grand-child.

9. PW2- Safari Kazungu Chome is the 2nd Applicant herein. He told the Court that his father Kazungu Chome died sometime back and was buried in the same parcel of land in which they continue to live in Shariani. He further told the Court that he had always lived on the land ever since he was born in 1983.

10. PW2 recalled that his brother Charo Kazungu had once been sued by some people over the parcel of land but he did not recall the outcome of the Court case.

11. PW3-Katana Kitsao Fondo was a neighbour of the Applicants. He relied on his statement as recorded and filed herein on 15th November 2016. In the said Statement he states that he has always known the Applicant as the owners of the disputed parcel of land ever since he was a child.

12. The Respondent-Abdalla Salim Omar (DW1) testified as the sole witness in his case. He relied on his affidavit in reply to the Originating Summons and told the Court that he had previously filed ELC No. 2 of 2011 in which he obtained Judgment against the Applicants relative one Charo Kazungu on 11th July 2014.

13. I have perused and considered the Originating Summons and the response thereto. I have equally considered the oral testimonies of the witnesses who testified herein as well as the submissions lodged herein by the Learned Advocates for the parties.

14. The essential requirements that one has to meet in order to succeed in an application for acquisition of ownership of land by way of adverse possession have been the subject of considerable Judicial dicta. As was stated by the Court of Appeal in ***Mtana Lewa –vs- Kahindi Ngala Mwamgandi (2005) eKLR:***

“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.”

15. Accordingly, this being a claim for adverse possession, the Applicants must demonstrate that they have been in continuous possession of the land for 12 years or more, that such possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property who is the Respondent herein.

16. The Applicants are a Mother and her son. According to the 1st Applicant ever since she was married in Shariani Village, they have cohabited with her husband the late Kazungu Chome on the disputed parcel of land. The 2nd Applicant is said to have been born on the same parcel of land sometime in 1983. It is their joint case that the said Kazungu Chome died in the year 2006 and left them residing on the same parcel of land. It is accordingly their case that they have lived continuously on the disputed portion of the land for a period in excess of 12 years and that they are therefore entitled thereto under the doctrine of adverse possession.

17. According to the Respondent however, he bought the suit property from one Shaban Swedi on 21st June 2008 and he was duly registered as the owner thereon on 27th June 2008. It is his case that as at the time he bought the suit property the Applicants did not reside thereon and that the Applicants only invaded it in the year 2011 when he moved to Court vide ELC Case No. 2 of 2011 seeking for their eviction. The Respondent further asserts that Judgment was granted in his favour against amongst others, one Charo Kazungu Chome who the 2nd Applicant herein conceded was his elder brother.

18. A perusal of the Certificate of Title produced in evidence herein reveals that the suit property is a sub-division of Land Portion No. 1854/1 Section III MN. The Deed Plan annexed to the Certificate reveals that the suit property was upon sub-division created on 14th December 1995 and was initially registered in the name of one Mishi Juma Karanja, who according to the second entry transferred it to Shaban Swedi on 25th February 1998. It is the said Shaban Swedi who later on 27th June 2008 transferred the said Portion to the Respondent herein.

19. According to the Applicants, the suit property was owned by one Mohammed Ahmed Kassim to whom they used to pay some ground rent. I was however unable to find any evidence of the ownership by the said Mohammed Ahmed Kassim or indeed any evidence of payments made to him as ground rent by the Applicants in regard to the suit property.

20. Testifying before me, the Applicants asserted that they did not know the Respondent and that they had never seen him on the suit property until a few years ago when he sued the said Charo Kazungu Chome and sought to evict them from the property. They had also never heard of or seen Mishi Juma Karanja who owned the land before the Respondent herein acquired the same. They had also not heard of Shaban Swedi. If that is true, it would then appear to me that all the previous owners of the land were unaware of the alleged possession of the suit property by the Applicants.

21. I think I agree with the submissions of the Respondent that the registered owner of the land is deemed to be in possession of his property as long as there is no invasion thereof by a third party. The mere fact that the actual owner of the land has not used the land or any portion thereof for a period of 12 years or more does not of its own and without more affect title to the land.

22. In order for a claim of adverse possession to mature, the hostile takeover of the property by a third party must be notorious and adverse to the extent that the owner can be assumed to have had knowledge thereof actual or otherwise. Where the registered owner of the land is unaware of the occupation of his land by a third party, the limitation period does not run against him.

23. In the matter before me, there was no proof of knowledge either actual or constructive of the presence of the Applicants on the suit property by any of the owners registered in the Certificate of Title since 1995. From the material placed before me, the Respondent acquired ownership of the suit property on 27th June 2008. If the Applicants were in occupation at that time as they allege, then that is in my view the period when the time for adverse possession began to run as against the Respondent and not earlier.

24. As it were, this suit was filed some six years later on 4th November 2014 and by then adverse possession of the suit property had not crystalized as against the Respondent. Indeed, the Applicants admit that the Respondent had tried to evict their family when he filed ELC Case No. 2 of 2011 against a member of their family one Charo Kazungu Chome.

25. In the said matter, Judgment was obtained for the eviction of the said Charo Kazungu Chome on 11th July 2014. No attempt was made by the Applicants to distinguish the portion of land from which the said Charo Kazungu Chome was to be evicted pursuant to the said Judgment from the portion being claimed as family land by the Applicants herein and there is a whiff of possibility that this present suit was filed in abuse of the Court process to circumvent the said Judgment in Malindi ELC Case No. 2 of 2011.

26. That being the case, I think I have said enough to demonstrate that I did not find any merit in the Applicants' Originating Summons. The same is dismissed with costs to the Respondent.

Dated, signed and delivered at Malindi this 20th day of September, 2019.

J.O. OLOLA

JUDGE