



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL SUIT NO. 96 OF 2010

MALINDI HOLDINGS & ESTATE AGENTS.....PLAINTIFF

VERSUS

1. EVERLYN LUVANDWA MASAMBAGA

2. GIDEON MAGHARIA

3. HARRISON CHARO SHUTU

4. KIRIAO FONDO SHUTU (IN CUSTODY)

5. FRANCIS LAWRENCE KATANA FONDO

6. CHARLES MICHAEL SHUTU

7. RODGERS KARISA NYALE

8. ERICK MWALIMU KATANA.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By a Complaint dated 11th August 2010 as amended on 15th September 2011, Malindi Holdings & Estate Agents (the Plaintiff) prays for Judgment against the eight Defendants for a declaration that the Plaintiff is the registered proprietor of all those four pieces of land situated at Malindi and more particularly known as LR Nos. 9297, 9298, 9299 and 9300(hereafter the suit premises). The Plaintiff, a Limited Liability Company also prays for an order of mandatory injunction requiring the Defendants to demolish the said illegal structures, a permanent injunction restraining the Defendants from trespassing, vacant possession of the suit premises as well as general damages and costs of the suit.

2. It is the Plaintiff's case that it acquired the suit properties sometime in 1994 for the purpose of development of an animal feed production factory but due to the Defendant's activities thereon it has been prevented from doing so. The Plaintiff asserts that on diverse dates towards the end of the year 2008 and/or sometime thereafter, the Defendants, without any colour of right trespassed into the suit properties and caused to be erected structures thereon which structures the Defendants their servants and/or agents are occupying and using for their benefit.

3. It is further the Plaintiff's case that despite evidence on the contrary, the Defendants have insisted that the land belongs to them and have refused to depart therefrom. As a result, the Plaintiff avers that it has suffered loss and damage and hence the institution of this suit and the orders sought herein.

4. In their joint Statement of Defence filed herein on 15th September 2010, the Defendants deny all the averments made by the Plaintiff and proceed to invite the Plaintiff to the strict proof thereof.

5. In the alternative and without prejudice to those denials however, the eight Defendants aver and maintain that they have lived in and/or occupied and resided on the suit premises for a period exceeding 12 years and that they are thus not trespassers as stated. They assert that some of them were born on the suit premises and that they have had actual possession of the premises peacefully, openly, exclusively and

continuously for an interrupted period in a manner that is adverse to the title of the Plaintiff.

6. The Defendants further assert that they have built permanent houses on the disputed property and carried out other developments evidencing long occupation and aver that the Plaintiff's claim is time barred under Section 7 as read with Section 17 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya.

THE PLAINTIFF'S CASE

7. At the trial herein, the Plaintiff called three witnesses who testified on its behalf.

8. PW1-Prof. Abdullah Said is a director of the Plaintiff Company. He told the Court that they registered the Plaintiff as a Company with his brother Manzur Naji Saidi. Arising from his professional background, PW1 had planned with his brother to build a Livestock Feed Mill, Yards and Stores at Malindi's Industrial Area. In July 1994 he applied to the Government to be allocated land for that Project.

9. PW1 told the Court that the land they were interested in is adjacent to the Kenya Industrial Estates(KIE) Complex at Malindi. Upon enquiries, he was informed by the then KIE Manager that that particular Portion had been allocated to other people. PW1 then communicated with the other allottees who then agreed to sell the land and they accordingly bought the suit premises. Thereafter the Plaintiff was issued with title for the four parcels of land between 21st November 1994 and 21st December 1994.

10. PW1 further testified that upon acquisition of the properties, some members of a family known in the area as Shutu family started extorting money from them as they did with all the occupants of that area. In desperation, the Plaintiff paid a total of Kshs 160,000/- between 8th August 2010 and 1st February 2001.

11. Despite the payments, PW1 told the Court that sometime in late 2008 and early 2009, some members of the said Shutu family began subdividing the land after which some people started building structures on the land. When PW1 confronted those to whom they had paid the extortion money, they denied that it was them who were sub-dividing, selling or building structures on the land. Various reports to the Provincial Administration and the Local Police failed to persuade those who had invaded the land to vacate. At some point the Police arrested some of the invaders and they were charged with the offence of Forcible Detainer in **Malindi Criminal Case No. 755 of 2009**. The accused were however acquitted on 27th March 2012.

12. PW2 –PC Gabriel Kosgei is a Police Officer who was based at the CID office, Malindi. He testified that as part of his duty as a Crime Scene Investigations Officer, he visited the suit premises on 30th September 2010. He took four photographs at the scene which he attached to a Report he prepared for a case of Forcible Detainer dated 5th October 2010.

13. PW2 further told the Court that he again visited the premises on 16th March 2011 where he took five photographs of a newly constructed house. He prepared another Report dated 29th March 2011 to which he attached the photos. Again on 25th October 2011, he accompanied the OCS Malindi to the scene and took four more photographs. He made another Report dated 5th December 2012.

14. PW3- Edward Marenya Kiguru is a Licensed Surveyor. He was commissioned by the Plaintiff to conduct a survey of the suit premises and to identify the boundaries thereof and the developments thereon. He prepared a Report in 2010 and another one on 9th March 2015.

THE DEFENCE CASE

15. On their part the Defence also called three witnesses in support of their case.

16. DW1-Harrison Charo Shutu is the 3rd Defendant herein. He told the Court that he stays in Plot No. 9297 which was a sub-division from an original mother Plot previously known as Plot No. "M5". DW1 told the Court that he was born on the land in 1963 to the 3rd wife of his father Charo Shutu.

17. DW1 told the Court that the 1st Defendant is not related to him but he had come to their home in 1997 but never left thereafter. The same case applies to the 2nd and 3rd Defendants. DW1 further testified that the 4th, 5th, 6th and 8th Defendants are his brothers while the 7th Defendant is his neighbor at home. All his brothers were born on the land but the others came in 1997. It was therefore not true according to DW1 that they entered the disputed parcel of land in 2008 as claimed by the Plaintiff.

18. DW1 testified that they had buried their relatives on the land and that when some of his relatives were charged in Court for the offence of Forcible Detainer, the Court had declared that there was no need to repossess the land.

19. DW2-David Randu was a Former Town Clerk of the Municipal Council of Malindi. He told the Court that on 13th December 1989, he wrote a letter to the District Officer Malindi in regard to the Charo Shutu family. At the time, the family was residing in a place designed as an Industrial Area. It is the same place that the family resides on to-date.

20. DW3-Hamed Omar Hamed was the Assistant Chief, Shela Sub-Location of Malindi around 1994. He recalled that on 1st February 1994, he wrote a letter concerning the family of Mzee Charo Shutu. In that letter DW3 stated that the family lived on Plot No. 'M5'. They had always lived on the land since DW3 became the Area Assistant Chief in 1990.

21. DW3 told to the Court that the said Plot No. 'M5' has not been sub-divided and that the 3rd to 8th Defendants who are from the family of

Charo Shutu still live on the land.

ANALYSIS AND DETERMINATION

22. I have perused and considered the pleadings filed by the parties. I have equally considered the testimony of all the witnesses who testified in this case that was partially commenced before my brother the Honourable Justice Angote. I have as well taken into consideration the submissions filed by Mr. Ole Kina Learned Advocate for the Plaintiff. I did not find any submissions filed by the Defence.

23. The Plaintiff has instituted this suit seeking a declaration that it is the registered proprietor of the four parcels of land comprised in LR Nos. 9297, 9298, 9299 and 9300 (the suit properties). The Plaintiff accuses the Defendants herein of trespassing into the said properties and proceeding to build all manner of structures thereon. As a result, the Plaintiff also pray for an order of a mandatory injunction to compel the Defendants to remove the said structures, an order of a permanent injunction to restrain the Defendants from further trespassing into the suit properties as well as an order of vacant possession, and general damages.

24. The Defendants do not deny being on the parcel of land. It is however their case that they have lived on the land for many years even prior to the acquisition of the land by the Plaintiff and that they are entitled thereto under the doctrine of adverse possession.

25. The suit properties are located in what is referred to as the industrial area of Malindi and the Plaintiff asserts that it acquired the same for purposes of development of an animal feed production factory before the Defendant trespassed thereon and erected the structures complained of.

26. From the material placed before me, the Plaintiff was incorporated as a Limited Liability Company on 7th April 1994 with Prof Abdullah Naji Said (who testified herein as PW1) and Mansour Naji Said as the Directors thereof. By a letter dated 29th July 1994, PW1 applied to the Permanent Secretary Ministry of Lands & Settlement for allocation of land to build premises for a "Feed Mill for Small Scale Livestock Farmers in Kilifi and North Coast Districts." Attached to the said Letter was a Sketch Map identifying certain parcels of land adjacent to the Mombasa-Malindi-Road and marked as 'A' 'B' 'C' and D as the parcels of interest to PW1.

27. As it turned out, PW1 later learnt from the Manager Kenya Industrial Estates (KIE) that those parcels of land had already been allocated to private individuals. According to PW1, the Plaintiff then commenced negotiations with those allottees for purposes of acquiring the identified parcels of land. As a result, the Plaintiff purchased Plot 'A' which is land Portion No. 9297 measuring 0.5 Ha from BK Industries Limited Vide a Sale Agreement dated 15th September 1994 at a consideration of Kshs 700,000/-.

28. On the same day, the Plaintiff also purchased Plot 'B' which is land Portion No. 9298 also measuring 0.5 Ha from Ms Gatikos Ltd for a similar consideration. Plot 'C' which is Portion No 9299 was also purchased on the same date for a similar consideration from Ms Julius Holdings Ltd. Plot No. 'D' which is Land Portion No. 9300 was also purchased on the same day for a similar consideration from Ms ET Investments.

29. Thereafter the Plaintiff was registered as proprietor as a Lessee of the Government for the said parcels of land and was issued with a Certificate of Title for each of the parcels on 21st November 1994 in accordance with Section 22 of the Registration of Titles Act (now repealed).

30. It was therefore the submission of Mr. Ole Kina, Learned Counsel for the Plaintiff that the Plaintiff's title is indefeasible in accordance with Section 23(1) of the Registration of Titles Act (repealed). That Section provided that a certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all Courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easement, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

31. As it were, the Defendants claim to the suit property is hinged upon the doctrine of adverse possession. The 3rd, 4th, 5th, 6th and 8th Defendants herein are brothers and the sons of one Charo Shutu. Testifying as DW1 in those proceedings, Harrison Charo Shutu (the 3rd Defendant) told the Court that the suit premises was part of their family land in which they were born and brought up. It was further his testimony that the other Defendants had come to their home sometime in 1997 seeking treatment and that they settled on the land thereafter.

32. The Limitation of Actions Act provides for adverse possession at Section 7 as follows: -

"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

33. As the Honourable Asike –Makhandia JA summed it up in *Mtana Lewa –vs Kahindi Ngala Mwamgandi (2015) eKLR*: -

"... Adverse possession is essentially a situation where a person takes possession of land and 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, which in Kenya is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner."

34. Section 41(a) (i) of the Limitation of Actions Act however excludes public land from being acquired through adverse possession and provides thus: -

“41. This Act does not-

a) Enable a person to acquire any title to, or any easement over-

i) Government land or land otherwise enjoyed by the Government;”

35. From the material placed before me, it was notable that the Charo Shutu family or some of them had been residents of the area in dispute for quite some time. This can be gleaned from the letters the Defence produced herein dating as early as 13th December 1989 and 1st February 1994 in which reference is made to the occupation of the family of some parcel of land invariably referred to as Portion ‘M5’ situated in Malindi. From their tone, the Letters authorized by DW2 and DW3 were certainly designed to aid the Charo Shutu family to be allocated the land.

36. Those requests must have been informed by the Family’s recognition that the suit properties were Government land which after Independence in 1963 were designated for planning purposes an industrial zone within Malindi. The Charo Shutu Family therefore never acquired title for the land and in light of Section 41 (a) (i) of the Limitations of Action they could not, as long as the land remained Government land, acquire any interest therein.

37. As it turned out, the Kenya Industrial Estates(KIE) which held the land on behalf of the Government decided to allocate the same to private individuals and by various Letters of Allotment all dated 19th April 1994, the suit premises were allocated to various individuals from which the Plaintiff bought them on or about September 1994.

38. In my considered view, any claim by the Defendant for adverse possession of the suit properties can only arise from the time the same came to be registered in the name of the Plaintiff which in this case was 15th September 1994. As I have already stated above, there was evidence that the Defendants or some of them were on the land from as early as 1989 and it could therefore be inferred that the Plaintiff purchased the suit properties while some of the Defendants, in particular the 3rd, 4th, 5th, 6th and 8th were resident therein.

39. Indeed in tacit recognition of this fact, the Plaintiff in spite of being the registered owner of the land entered into various Agreements with various representatives of the Charo Shutu family in which it went ahead to “compensate’ them for their land for the period ranging from 8th August 2000 and 1st February 2001.

40. One of the said Agreements written in Kiswahili and dated 1st February 2001 reads in part as follows: -

“Mimi Zibon Charo Shutu I/D No. [.....] Nimepokea kutoka kwa Mansour Naji Said na Abdullah Naji Said cash shilingi Elfu Arubaini (Shs40,000/-) ridhaa ya ukulima wangu niliofanya katika Plot yao No. 9300, iliyoko industrial area Malindi karibu na Mkao wetu.

Eneo hili ambalo nalima mimi nimepewa na Mzee wangu Charo wa Shutu mbele ya Ndugu Zangu wote. Kwa kupokea pesa hizo sina madai zaidi katika Plot hiyo na eneo lake.

- 1. Hii sahihi yangu Zibon Charo Shutu.....**
- 2. Hii Sahihi yangu Mzee Charo Shutu.....**
- 3. Hii Sahihi ya Ndugu Yangu Harrison Charo Shutu.....**
- 4. Hii Sahihi ya Ndugu yangu John Charo Shutu.....**
- 5. Hii Sahihi ya Ndugu yangu Philip Charo Shutu.....**

Sisi (1) Mama Kache Mlewa

(2) Mama Mwenda Zungi

(3) Mama Mwenda Kalama

Tumepokea kutoka katika mzee Mansour Naji cash jumla ya shilling elfu sita thamanini ya miembe saba na mikorosho minane tulipanda katika Plot No. 9297, 9298, 9299 na Plot No. 9300 jirani ya Kenya Industrial Estates Malindi. Kwa kupokea peza hizo hatuna madai yoyote zaidi katika Plot hizo.

- 1. Hii sahihi yangu**

Mama Kadhe Mlewa.....

- 2. Hii sahihi yangu**

Mama Fatuma Zungi

3. Hii Sahihi yangu

Mama Mwenda Kalama

Shahidi(1) Philip Charo Shutu.....

(2) John Charo Shtu.....

(3) Joseph Charo Shutu.....

41. While under cross-examination during the trial herein, DW1 told the Court that his father Charo Shutu from whose lineage they claim the land herein died in the year 2002. The said Charo Shutu was therefore alive when these Agreements were entered into. DW1 further admitted that his brothers Philip Charo and John Charo Shutu each received Kshs 40,000/- from PW1 as compensation of the land.

42. As was stated by the Court of Appeal in **Joseph Gahumi Kiritu –vs- Lawrence Munyambu Kabura in Civil Appeal No. 20 of 1993: -**

“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of a right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him....He must therefore make a peaceable and effective entry, or sue for the recovery of the land.”

43. In my considered view the acceptance of the compensation by the Defendants including their father Charo Shutu from whom they purport to derive title in the year 2000 and 2001 did terminate any possession that was adverse to the Plaintiff’s interests on the land. According to the Plaintiff, the Defendants thereafter left the land and invaded the land for a second time in the year 2008 and early 2009.

44. Whether or not the Defendants left the land in the year 2001 after the compensation, the Plaintiff brought this suit in the year 2010 and a period of 12 years was yet to expire following the disruption of their possession thereon. Accordingly, I was not satisfied that the Defendants had met the threshold for a claim of adverse possession.

45. Since they did not have any title to the land, the 3rd, 4th, 5th, 6th and 8th Defendants could not therefore purport to sell and/or lease the land to any of the other Defendants.

46. In the circumstances of this case, I am satisfied that the Plaintiff has demonstrated that it duly acquired the suit properties and was thereafter registered as the owner thereof.

47. From the evidence and the photos produced by PC Gabriel Kosgei(PW2) it was clear to me that the Defendants continued to build and construct new houses on the suit properties even during the pendency of the suit herein. This was despite the fact that on 15th September 2010, this Court had issued an order that the status quo be maintained pending the hearing and determination of the suit.

48. In support of its case, the Plaintiff commissioned a Surveyor(PW3) to carry out a survey and map the boundaries of the suit properties. The Surveyors Report dated 6th March 2010 established that the Defendants were on the Plaintiffs land. A second Report by the Malindi District Surveyor dated 30th October 2012 found that there was human settlement all over the properties.

49. Those developments have evidently impeded the Plaintiff in its purpose to develop an animal feed production factory on the suit premises. I am therefore prepared to accept that the Plaintiff has suffered loss and damage. The issue which arises then is the measure of such damage.

50. As Mutungi J stated in **Park Towers Ltd –vs- John Mithamo Njika & 7 Others (2014) eKLR: -**

“... Where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The Court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case.”

51. The suit properties measure approximately 2.0 Ha and are situated within Malindi Town. The Plaintiff submits that an award of Kshs 40,000/- annually from 2001 until vacant possession is delivered should be awarded as general damages in light of the circumstances herein.

52. Given that the Plaintiff had not undertaken any developments on the land I shall award the sum of Kshs 200,000/- as general damages annually for the suit premises from the time of filing of this suit in the year 2010 until the time that vacant possession is granted to the Plaintiff.

53. For the avoidance of any doubt, Judgment is hereby entered for the Plaintiff as against the Defendants as prayed in the Plaintiff.

54. The Plaintiff is awarded General damages for trespass of Kshs 200,000/- annually from the year 2010 until the Defendants grant vacant possession.

55. The Orders of vacant possession shall take effect within 45 days from the date hereof.

56. The Plaintiff shall also have the costs of this suit.

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

J.O. OLOLA

JUDGE