



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 144 OF 2010

RAILWAY HOUSING CO-OPERATIVE SOCIETY.....PLAINTIFF

VERSUS

BALU MUNGA & 10 OTHERS.....DEFENDANTS

JUDGMENT

BACKGROUND

1. The first suit herein was initially filed at the High Court in Mombasa as **Mombasa HCCC No. 158 of 2009(O.S)**. By an Amended Originating Summons dated 24th May 2011 but filed on 4th August 2011 the eleven Plaintiffs in that suit urge the Court to make a determination of the following questions: -

- 1. Whether the Plaintiffs and members of their entire families have resided on the suit Property-Plot No. Kilifi/Kikambala/Block 285/3 and which is further sub-divided into Plot Nos. 29, 32, 33, 35 and 43 respectively;**
- 2. Whether the Plaintiffs are entitled to being declared as the proprietors of the suit property, having acquired title thereto by way of adverse possession, having stayed thereon for over 12 years;**
- 3. Whether the Defendants without any justifiable cause are alleging to be the owners of the aforesaid property; and**
- 4. Whether the Plaintiffs are entitled to the costs of this suit.**

2. The sole Defendant in the Originating Summons is Francis Kamau Kinuthia who is sued through his attorney Geoffrey Kiambuthi Kinuthia. In the Supporting Affidavit of Kaingu Bailu Munga sworn on 27th May 2009, the Plaintiffs aver that their ancestors settled on the suit property since time immemorial and that they have carried out various developments thereon. They accuse the Defendant of recently coming into the land and laying a claim thereon.

3. The second suit herein was filed on 10th May 2010. By a Plaint dated 7th May 2010, the Plaintiff-Railway Housing Co-operative Society Ltd prays for Judgment against the eleven named Defendants therein for: -

- a) A declaration that the Plaintiff is the lawful and rightful owner of the suit premises and is entitled to possession thereof to the exclusion of the Defendants; and they be declared trespassers;**
- b) Eviction orders against the Defendants thereby granting vacant possession of the suit premises to the Plaintiff;**
- c) An order of assistance of the Officer-in Charge, Kilifi/Kijipwa Police Station and the Provincial Administration Kilifi, to supervise and provide security during the eviction process;**
- d) A permanent injunction restraining the Defendants by themselves, their agents and/or servants and/or any other persons acting in their authority from entering into and/or remaining in possession of the suit premises;**
- e) Costs of and other incidentals to the suit; and**
- f) Interest on (d) above (sic) at Court rates.**

4. The suit premises in the second suit are described at paragraph 4 of the Plaintiff as Plot Nos. Kilifi/Kikambala/285/3/28; 29, 32, 33, 35 and 43. The eleven Defendants in the second suit are the eleven Plaintiffs in the Originating Summons. Accordingly, by an order made on 20th July 2011, the Honourable Lady Justice H. Okwengu (as she then was) directed that the Originating Summons filed in Mombasa be transferred to the High Court at Malindi and be consolidated and heard together with this matter filed as Malindi HCCC No. 44 of 2010.

5. It was not clear from the record what became of the Defendant in the Originating Summons upon consolidation of the two suits as the subsequent proceedings appear to have taken the shape of the second suit filed by the Railway Housing Co-operative Society Ltd against the eleven Defendants. In the trial which commenced before the Honourable Justice Angote on 4th May 2016, the said Defendant was treated as a witness of the Plaintiffs in the second suit.

THE PLAINTIFF'S CASE

6. The Plaintiff called three witnesses in support of their case when the trial commenced.

7. PW1- Geoffrey Kiambuthi Kinuthia was the Defendant in the Originating Summons. He told the Court that the land in dispute originally belonged to one Mohamed Ngala Badi Hamisi who is now deceased. PW1 told the Court that together with his brother Duncan Kamau Kinuthia, they bought the land in 1996. The land-Kilifi/Kikambala/283/3 was already sub-divided into Plot Nos. 28, 29, 32, 33, 35 and 43 and each plot had a separate title deed. It covered a total area of 4.136 Ha or 10.2 acres.

8. PW1 testified that after buying the land, they put up a perimeter barbed wire thereon and employed a caretaker who later absconded duty after he was threatened by squatters who went to the land and felled the fence. PW1 testified that they had had quiet possession from the time they bought the land until the year 2006 when it was invaded by the squatters. The eleven Defendants were the ones who invaded the property and started squatting thereon.

9. When they noticed the squatters, PW1 consulted with the Mtwapa Area Chief and the District Officer(D.O.) Kikambala. All the efforts to get them out of the land did not however bear any fruit. PW1 and his brother then filed Kilifi PMCC No. 347 of 2006. The squatters' Lawyer however raised an objection stating the Court had no pecuniary jurisdiction to handle the matter.

10. PW1 told the Court that they thereafter sold the land to the Plaintiff-Railway Housing Co-operative Society Ltd for the sum of Kshs 6,936,000/-.

11. PW2-Aggrey Oguto was the Secretary of the Railway Housing Co-operative Society Ltd. He told the Court that they entered into an agreement in December 2005 to buy the land from PW1 and his brother. The purchase price was Kshs 6.8 Million and they paid the entire sum and got the land transferred into their name. PW2 told the Court that when they visited the land in December 2005, it was free of occupation.

12. PW2 further told the Court that they got their titles for the land in April 2006. When they subsequently visited the land in May 2006, they found people squatting on the land. The Mtwapa Area Chief identified them as the eleven Defendants, and even wrote a letter indicating where each one of them had come from.

13. PW3-Patrick Ngari Njeru is a Director and Treasurer of the Railway Housing Co-operative Society. He told the Court that the Society owns the land in dispute. In support of that position, he produced six titles in their names as exhibits. PW3 testified that they tried to resolve the matter out of Court after they learnt that some structures were on the ground. They engaged the Area Chief, the D.O and the Vendor. The squatters attended the meeting but refused to leave the land.

THE DEFENCE CASE

14. On their part, the Defendants called a total of four witnesses in support of their case.

15. DW1-Kaingu Balu Munga is the 1st Defendant. He testified that his parents used to live on the disputed parcel of land. His father worked for a lady known as Sheilla Norton who initially owned the land. The lady left the land and went abroad. DW1 told the Court that they continued living on the land, put up schools and mosques. They have also buried their people on the land.

16. DW1 further testified that sometime in 1991, one Badi Hamisi Ngala went to the land looking for pasture for his animals. They had however never encountered any resistance in using the land until the year 2006 when Francis Kamau Kinuthia, a brother to PW1, showed up claiming that the land was his own. The said Francis asked those on the land to allow him to conduct a survey. The people did not know he had come to take over their land.

17. DW2- Munga Balu Munga is one of the Defendants. He told the Court that he was born in 1961 in the same area he resides in to-date. He has always lived on the land. DW2 told the Court that there used to be a white lady by the name Sheila Norton who owned the land. The Defendants have been staying on the land openly ever since and have built hospitals, schools and buried their loved ones on the land.

18. DW2 testified that he knew and used to see PW1's brother visiting the land. He never lived on the land. However, in the year 2006, PW1's brother sued them. That suit was abandoned. In the year 2009, the Defendants filed their own case for adverse possession against PW1's brother.

19. DW3-John Changawa is also a Defendant in the suit. He told the Court that he was born on the suit property in 1966 and that his mother died and was buried on the land. DW3 told the Court that they were initially sued in a Kilifi Court but the Court had no pecuniary jurisdiction. Later they heard that the land had been sold to Kenya Railways.

20. DW4-Aleck Nyinge was the Chief Njunju Location between 1987 and 2007. He told the Court that he knows Mohammed Ngala Hamisi and that he also knows and is a close neighbor of the Defendants. DW4 told the Court that the land in dispute belonged previously to Sheilla Norton. Sheilla relocated and left the land for those who were living there in 1968.

21. DW4 further told the Court that when PW1's brother went to the land, he tried to use the Provincial Administration to evict people from the land. DW4 met him in the process and the DO declined to take any action as the people were settled and had developed the land for many years.

ANALYSIS AND DETERMINATION

22. I have perused and considered the pleadings filed by the parties herein. I have also perused and considered the testimonies of the witnesses and the evidence adduced before the Court. I have equally had the benefit of going through the Written Submissions and the authorities filed herein by the Learned Advocates for the parties.

23. It was not contested that the six properties in contention are presently registered in the name of the Plaintiff in Malindi ELC No. 44 of 2010. According to the Plaintiff's three witnesses, those properties were initially registered in the name of Duncan Kamau Kinuthia, an elder brother of PW1 and the donee of a Power of Attorney to PW1. According to PW1, his brother who was said to be incapacitated and unable to attend Court, purchased the parcels of land measuring in total 10.2 acres from the original owner one Mohamed Ngala Badi Hamisi.

24. According to the witnesses for the Society, the suitland remained vacant until sometime in the year 2006 when the eleven individuals named as the Defendants in their suit invaded the same. Various efforts to remove the invaders from the land were unsuccessful and hence the institution of this suit.

25. Admittedly, the Defendants have no title to the land in dispute. In their Amended Originating Summons filed a year before the Society filed their own suit, they urge that the suitland be decreed to them by virtue of long uninterrupted occupation under the doctrine of adverse possession.

26. Their four witnesses all gave near similar evidence to the effect that the land in question was originally owned by a white lady by the name Sheila Norton. Most of the parents of the eleven Defendants are said to have worked for the said lady and when she retired and relocated abroad, she distributed the land and left it to her workers who continued living thereon to-date. According to the Defendants' piece of land that was left to them by Sheila Norton measured 38 acres.

27. I have perused and considered the Amended Originating Summons filed herein by the Defendants on 4th August 2011. While it does not state under which provision of the law the same is brought. Section 37 of the Limitation of Actions Act provides that:

37(i) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, the land or easement or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land."

28. The elaborate procedure of moving the Court where one claims land by dint of adverse possession is provided under Order 37 Rule 7 of the Civil Procedure Rules as follows: -

"7(i) An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.

(ii) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

29. In *Teresa Wachuka Gathira –vs- Joseph Mwangi Gachira (Civil Appeal No. 325 of 2003)*, the Court of Appeal emphasized the importance of following the prescribed procedure in adverse possession claims. Since this sort of claim is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the documents of title must be exhibited, for it is only through such an exhibit that the existence and ownership of the suit property can be ascertained by the Court.

30. The Amended Originating Summons herein is not supported by any affidavit. The presumption here must have been that the facts as stated in the Supporting Affidavit of Kaingu Balu Munga filed herein on 29th May 2009 had not changed and were sufficient to anchor the amended summons. While that may be so, there is nowhere in the 8-paragraph Affidavit of the said Kaingu Balu Munga wherein the Defendants have annexed a copy of the extract of the title which they seek to have registered in their name.

31. In the circumstances before me, that was indeed a grave omission by the Defendants. I say so because it was not immediately clear to me which parcel of land the Defendants herein claim. From the material placed before me the six properties in dispute measure an aggregate of 10.2 acres. The Defendants on their part have urged this Court to decree that they are the owners of 38 acres of land.

32. As the Court of Appeal stated in *Titus Mutuku Kasuve –vs- Mwaani Investment Ltd & 4 others (2004) ECLR: -*

"The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. Indeed, rule 3D (2) of Order XXXVI of the Civil Procedure Rules requires that a certified extract of the title to the land in question should be annexed to the affidavit supporting the originating summons. In this case the appellant did not annex the certified extracts of land title LR Nos 1756 and 1756 before the sub-division or even after the sub-division.

The burden was on the appellant to produce the certified extracts of title in respect of the suit properties. In the absence of the extracts of title to the affidavit evidence of George Matala Ndolo that the suitlands are encumbered and therefore not free for alienation has not been refuted...In the circumstances, there was no concrete evidence that the appellant was in exclusive adverse possession of any definite and distinct land ascertained to be 40 acres.”

33. Similarly, in the matter before me, the Defendants did not provide any evidence to contradict the Plaintiff's documents that the land is 10.2 acres and not 38 acres as claimed by the Defendants.

34. Again while the Plaintiffs assert that they bought the land in 2005 after ascertaining the vendors title, and that the land was unoccupied at the time, the Defendants did not bring any claim for adverse possession until the year 2009 when they brought their claim against PW1 and his brother. By that time, the properties had been purchased by the Plaintiffs and it could not be said that 12 years had lapsed since the Plaintiffs acquired the land.

35. Indeed, in my view, even if it were to be assumed that the Defendants had been on the land since the 1960s as their claim, their claim to adverse possession of the land had been interrupted three years back in the year 2006 when PW1 and his brother filed Kilifi PMCC No. 347 of 2006 seeking to have them vacate the suit property.

36. As it were, the Plaintiff's witnesses were consistent in their evidence that the Defendants invaded the suit property in the year 2006- shortly after they had purchased the same. Immediately thereafter, they took immediate action to remove the Defendants through the use of the Provincial Administration but the Defendants would not budge.

37. Accordingly, I did not find that the Defendants had proved their case for adverse possession. On the contrary, I was persuaded that the Plaintiffs had proved their case as against the Defendants on a balance of probabilities.

38. In the result, the Defendants Amended Originating Summons dated 24th May 2011 is dismissed. The Plaintiff's suit is allowed as prayed in the Plaint dated 7th May 2010. The eviction Orders sought under Prayer (b) to be enforced as prayed upon expiry of 60 days from the date hereof in the event the Defendants shall not have vacated the same.

39. 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