



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 100 OF 2016

ATHMAN SAID JIRO..... PLAINTIFF

VERSUS

MBWANA MWACHALIKA MWAKISUA.....DEFENDANT

JUDGMENT

1. By a Plaint dated 10th May 2016 and filed on 12th May, 2016, the Plaintiff instituted this suit against the Defendant seeking the following reliefs:

1. ***A declaration that PLOT NUMBER KWALE/DIANI SS/89 was unprocedurally and/or illegally allocated to Hassan Rashid Mwatando***
2. ***A declaration that the transfer of PLOT NUMBER KWALE/DIANI SS/89 to the Defendant was null and void as Hassan Rashid Mwatando had no legal title to transfer to the Defendant***
3. ***A declaration that the Plaintiff is the person entitled to be issued with a title deed in respect of PLOT NUMBER KWALE/DIANI SS/89.***
4. ***An order altering of the Kwale Land Register substituting the Defendant's name with that of the Plaintiff so that the record reflect that the registered owner of PLOT NUMBER KWALE/DIANI SS/89 is the Plaintiff and not the Defendant***
5. ***An order that the Plaintiff is entitled to be registered as the owner of PLOT NUMBER KWALE/DIANI SS/89 by way of adverse possession by virtue of having being in continuous occupation and use of the suit property, with the knowledge of the said Hassan Rashid Mwatando without interruption for over twenty three (23) years***
6. ***Costs of the suit.***
7. ***An other relief that this Honourable Court may deem fit and just to grant.***

2. The Plaintiff's case is that he was born sometime in 1969 at Magutu Village in Ukunda Sub- Location, Diani Location. The Plaintiff states that sometime in 1979, his father Said Omar Mwabaijiro established a farm on a piece of unalienated land at the said village and moved his family including the Plaintiff to the said land. That the plaintiff's father cultivated the said land and planted both permanent and seasonal crops such as coconut trees, mango trees, cashewnuts, orange trees, pawpaw, Banana, maize, cassava and vegetables.

3. The plaintiff avers that sometime in 1987, the Government declared Magutu area a settlement scheme and adjudication was made and survey carried out and the Plaintiff's portion was given a number 89 but the Plaintiff's father was not given an allotment letter. The Plaintiff states that his father died sometime in 1992 and the Plaintiff inherited the said portion of land from his deceased father. The Plaintiff avers that he followed up the issue of title to the said land at the Kwale Land Registry but without success until sometime in October 2015 when he was informed by the Land Registrar, Kwale that a title deed with respect to the said portion 89 was registered as PLOT NO.KWALE/DIANI SS/89 in favour of one Hassan Rashid Mwatando on 9th December 1993 and then on 31st March 2010 was transferred to the Defendant.

4. The Plaintiff's claim is that the original title to Hassan Rashid Mwatando was unprocedurally and/or illegally obtained as at the date of issuance of the said title, the Plaintiff had been in occupation of the suit property for fourteen (14) years and that according to the Adjudication Act (now repealed) the suit property ought to have been allocated to the Plaintiff and not the said Hassan Rashid Mwatando. That consequently, the Defendant's acquisition of the suit property was itself illegal and/or improper as Hassan Rashid Mwatando had no legal title to transfer to the defendant. The Plaintiff therefore seeks a declaration that PLOT NUMBER KWALE/DIANI SS/89 was

unprocedurally and/or illegally allocated to Hassan Rashid Mwatando and a declaration that the transfer of the said plot to the defendant was null and void as Hassan Rashid Mwatando had no legal title to transfer. The Plaintiff further seeks a declaration that he is the person entitled to be issued with a title deed in respect of PLOT NUMBER KWALE/DIANI SS/89 and seeks alteration of the land register by substituting the defendant's name with that of the plaintiff. In the alternative, the plaintiff prays for an order that he is entitled to be registered as the owner of the suit land by way of adverse possession by virtue of having been in continuous occupation and use of the suit property with the knowledge of the said Hassan Mwatando without interruption for over twenty three (23) years.

5. The Defendant was duly served with the summons to enter appearance. The defendant entered appearance "under protest" on 26th May 2016 through M/s Mwaniki Gitahi & Partners Advocates but did not file defence within the time stipulated by law or at all. On 28th September, 2017, the Defendant's advocate informed the court that the defendant had passed away. The Plaintiff's advocate however stated that the Plaintiff had informed his advocate that the defendant was alive. Accordingly, the court directed the defendant's advocate to avail evidence of the alleged death of the defendant. The matter was listed for mention on several occasions to confirm that allegation. Despite being granted several opportunities to do so, there was no evidence availed to confirm that indeed the defendant had passed on. The matter then proceeded to hearing on 6th May 2019 when the Plaintiff testified and did not call any other witness. The defendant's advocate did not attend court even though he was duly served.

6. The Plaintiff testified that he lives in Magutu village, Diani Location. He relied on and adopted his witness statement dated 10th May 2016 and filed on 12th May 2016 which basically reiterated the averments in the plaint. The Plaintiff produced a copy of the Green Card in respect of PLOT NO. KWALE/DIANI SS/89 and Certificate of Official Search dated 10th December, 2013. The Plaintiff stated that he lives on the suit property together with his family. That when the plot was turned into a scheme, he was already on the land but was not given a letter of allotment. On 9th December, 1993, the land was registered in the name of Hassan Rashid Mwatando and as per the Green Card, a title deed issued to him on the same date. Entry number 4 in the Green Card shows that the land was transferred and registered in the name of the defendant on 31st March 2010 and was issued with title deed on the same date. The Green Card further indicates that the register for the suit land was opened on 10/3/1992. A caution was registered in favour of the Plaintiff on 27/12/2013. The plaintiff stated that he has lived on the land since 1993 and since then, the defendant has never come to the land. The Plaintiff urged the court to grant him the orders sought in the Plaint.

7. The Plaintiff through M/s Aboubakar Mwanakitina & Company Advocates submitted that the Plaintiff has proved his case on a balance of probability. They cited Section 26 of the Land Registration Act and relied on the case **Alice Chemutai Too –v- Nickson Kipkurui Korir & 2 Others (2015)eKLR** where Munyao, J stated:

"Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he need to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part...."

I had occasion to interpret the above provisions in the case of Elijah Makeri Nyangwara –v- Stephen Mungai Njuguna & Another, Eldoret ELC Case No.609B of 2012 where I stated as follows: -

"....it need to be appreciated that for Section 26 (1) to be operative, it is not necessary that the title holder be party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26(1)(b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factor. The purpose of Section 26 (1) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. I stand by the above words and I am unable to put it better than I did in the said dictum. "

8. The plaintiff's advocates also relied on the case **Solomon K. Songok –v- Susan Jepkosgei (2014)eKLR** where Munyao, J held inter alia:

"Thus a title issued by way of fraud or misrepresentation of which the title holder is proved to be a party, or a title issued illegally, procedurally, or through a corrupt scheme is liable to be cancelled..... In the above case, the plaintiff purported to have been allotted the land parcel Eldoret Municipality Block 15/829 measuring 0.0306 Ha (the suit land). He said that he conducted a search only to learn that a lease had been issued to the defendant. It was his position that the lease was fraudulently and/or illegally issued to the defendant. "

9. It was the submission of the plaintiff's advocate that the Plaintiff tendered evidence that Hassan Rashid Mwatando's title was unprocedurally and/or illegally obtained. This is because the Plaintiff testified that he followed up the issue of title to the said land at the Kwale Land Registry when he discovered the illegal issuance of the title to Hassan Rashid Mwatando on 9th December 1993 which was then transferred to the defendant on 31st March 2010. It was submitted that the said transfer cannot be said to have been one that was obtained legally or procedurally because Hassan Rashid Mwatando had no legal title to transfer to the defendant. It was contended that what happened was essentially an illegal and unprocedural transfer of land which had already been given a number to the Plaintiff's father in 1987. That the title obtained by the Defendant is not protected under Article 40 of the Constitution and did not confer upon him absolute and indefeasible title under Section 26 (1) of the Land Registration Act. The Plaintiff's counsel also relied on the case of **Elijah Kimutai Biwott –v- Patrick Lumumba Ombura (2019)eKLR** in which Onyango, J made reference the case of Alice Chemutai Too (supra) and held:

"Without implicating the Plaintiff in any corrupt scheme, or illegality, I am not at all persuaded that he holds a good title as the person who sold him the suit property acquired his title unprocedurally. It is therefore my finding that the plaintiff's title

is not valid ”

The Plaintiff’s counsel also relied on the case of **Godfrey N. Nyaga –v- Margaret W. Theuri & 3 Others (2015)eKLR**.

10. The Plaintiff’s counsel further submitted that the plaintiff has proved his claim on adverse possession. That the plaintiff testified that he has occupied and used the suit land since 1992, a period of over 23 years. Therefore it was submitted that the Plaintiff’s occupation of the suit property has been adverse to the defendant’s title as the registered owner. The Plaintiff’s counsel submitted that the Limitation of Actions Act gives the plaintiff the right to be declared the proprietor of the suit property under the principles of adverse possession. They relied on the case of **Chimba Mbeyo Mokunga –v- Ahmed Abdulla (2006) eKLR and Wambugu –v- Njuguna (1983) eKLR**.

11. The court has considered the evidence and the written submissions on record. In the opinion of the court, the following issues arise for determination in this suit:

i. Whether the suit property was unprocedurally and or illegally allocated to Hassan Rashid Mwatando

ii. Whether the subsequent transfer of the suit property by Hassan Rashid Mwatando to the defendant was unlawful and therefore null and void.

iii. Whether the plaintiff is entitled to the suit property by way of adverse possession.

iv. Who shall bear the costs of the suit.

12. The court has considered the evidence and written submissions on the 1st and 2nd issues. The plaintiff’s case was that the suit land was allocated to his late father in 1987 after having occupied it since 1979. The plaintiff stated that the land was given number 89 but his father was not given an allotment letter. He stated that he inherited the suit land in 1992 from his deceased father. The Plaintiff testified that he followed up the issue of title to the said land at the Kwale Land Registry but without success. That it was not until October 2015 when he was informed by the Land Registrar, Kwale that the land had been registered as parcel NUMBER KWALE/DIANI SS/89 and title deed issued in the name of one Hassan Rashid Mwatando on 9th December, 1993. Subsequently it was transferred to the defendant on 31st March, 2010.

13. The court has taken note of the plaintiff’s evidence that in 1987 the land was allocated to his late father and given a number to wit 89. However there was no evidence of any allocation to the Plaintiff’s father as alleged. Further, there was no evidence to show that the Plaintiff has been following up with the issue of title with the Land Registry at Kwale. The court has noted that the only action that the Plaintiff may have taken in the matter is to register a caution on the suit land on 27/12/2013 as shown in the Green Card. From the material on record, the court is unable to accept the plaintiff’s contention that the suit property was allocated to the Plaintiff’s father in 1987 and given number 89 but not given letter of allotment. The court is also unable to accept the plaintiff’s assertion that he has been following up the issue of title to the said land at the Kwale Land Registry without success. In my view, the Plaintiff has made vague and very general allegations that the registration of the suit property in the name of Hassan Rashid Mwatando on 9th December 1993 and the subsequent transfer on 31st March 2010 to the defendant was unprocedural and illegal. The plaintiff failed to demonstrate that the said registration and transfer were tainted with illegality or breach of statutory provisions. In the absence of any tangible evidence implicating the defendant or Hassan Rashid Mwatando in any corrupt scheme or illegality, I am not persuaded that the defendant is not holding a good title as the person who sold him the suit property acquired his title procedurally. It is therefore my finding that the defendant’s title is valid.

14. The other issue is whether the plaintiff is entitling to the suit property by virtue of adverse possession. In order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. Adverse possession means that a person is in possession, in whose favour time can run. As was stated by the Court of Appeal in the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (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, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner....”

15. In the case of **Wambugu –v- Njuguna (1983) eKLR** the Court of Appeal discussed the principles of adverse possession as follows:

i. That the general principle is that until the contrary is proved, possession in law follows the right to possess.

ii. That in order to acquire by the statute of Limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with is enjoyment of the soil for the purposes for which he intended to use it.

iii. The Limitation of Actions Act, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.

16. Section 7 of the Limitation of Actions Act cap 22 Laws of Kenya provides that “an action may not be brought by any person to recover land after the end of twelve (12) 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. ”

17. In this case, the Plaintiff testified that he came into possession of the suit property in 1992 when he inherited it from his late father. That is a period of over 23 years which is a period over 12 years. The plaintiff also stated that he lived on the suit property with this family and he has been in occupation and possession openly and continuously and without interruption for all that period. There was no evidence availed to contradict the Plaintiff's averments. The Plaintiff produced a copy of the title confirming that the property is registered in the defendant's name. The Plaintiff's evidence was not challenged at all. The Defendant having not called evidence to rebut what the plaintiff stated, the plaintiff's evidence remains uncontroverted.

18. From the pleading and evidence I conclude that the Plaintiff has been in possession and remained in physical occupation of the suit property from 1992 onwards, which is a period of over 12 years. Such possession has been open and notorious to the knowledge of the owner and therefore the plaintiff has asserted a hostile title to the owner of the property.

19. I am satisfied that the plaintiff has proved his claim on adverse possession on a balance of probabilities. In the result I find and hold that the plaintiff is, therefore, in my considered view entitled to the suit property by adverse possession. Accordingly, judgment is hereby entered for the plaintiff in terms of prayer (5) of the plaint plus costs of the suit.

DATED, SIGNED and DELIVERED at MOMBASA this 24th day of October 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Bakari for Plaintiff

No appearance for Defendants

Yumna Court Assistant

C.K. YANO

JUDGE