



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 134 OF 2015

DOMINIQUE LEWA MRABU.....PLAINTIFF

VERSUS

AGNES SHAKO MULAGUI.....DEFENDANT

JUDGMENT

BACKGROUND

1. By a Complaint dated and filed herein on 6th August, 2015, Dominique Lewa M'Rabu (the Plaintiff) prays for vacant possession and a permanent order of injunction to restrain the Defendant from interfering or dealing with all that parcel of land known as Kilifi/Roka/172.
2. Those prayers arise from the Plaintiff's contention that he is the lawful and beneficial owner of the said parcel of land having bought the same from one Emmanuel Nyoka Jonathan in the year 1997. The Plaintiff avers that after taking possession of the land upon purchase, he put it under the care of one Nathan Nzai who with the Plaintiff's authority, allowed the Defendant's mother to conditionally cultivate the land.
3. It is the Plaintiff's case that the Defendant has since following the death of her mother and the said Nathan Nzai forcefully taken over the land and has started excavating coral blocks thereon for commercial purposes. Despite demand made and notice of intention to sue, the Defendant has refused, neglected and/or declined to vacate the suit premises.
4. Despite filing a Memorandum of Appearance herein dated 23rd September, 2015, the Defendant - Agnes Shako Mulagui did not file any Statement of Defence or any other response to the Plaintiff's claim. She did not also testify at the trial herein.

THE PLAINTIFF'S CASE

5. The Plaintiff called 3 witnesses at the trial herein in support of his case.
6. Testifying as PW1, the Plaintiff told the court that he is the proprietor of the parcel of land known as Kilifi/Roka/173. While the said parcel of land is still registered in the name of the previous owner one Emmanuel Roka, PW1 purchased the same from him on 8th June, 1997 for a sum of Kshs.265,000/-.
7. PW1 told the court that when he wanted to develop the land, he found the Defendant therein. PW1 testified that the Defendant's parents had come to the area earlier and requested for a piece of land to cultivate in 1997. Those parents however died and left the Defendant on the land. The seller of the land told PW1 that he had allowed the Defendant to use the land solely for purposes of cultivation.
8. PW1 told the court that sometime in the year 2013, the Defendant became hostile and he was forced to seek help from the Area Chief. The Chief was however unable to solve the dispute and PW1 was referred to the Area D.O. The D.O. then advised PW1 to file this suit in court.
9. PW2 – Zablon Kazungu Nathan on his part testified that he is the proprietor of Plot No. Kilifi/Roka/172. The said land neighbours the Plaintiff's Plot No. 173. PW2 recalled that the Plaintiff's parcel of land was sold to him by one Emmanuel Nyoka. PW2 was a witness in the transaction.
10. PW2 further testified that he knew the Defendant. Her mother was allowed to use the land by PW2's father one Nathan Nzai. The said mother used to take care of the land. She is now deceased. PW2 further told the court that the Defendant has a mud-walled house on the land.

11. PW2 testified that the Plaintiff left the land under his care after buying the same. The Plaintiff did not allow the Defendant to do anything on the land. She was asked to vacate the land when it changed hands but she refused.

12. PW3 – Emmanuel Jonathan Nyoka testified that he is the one who had sold the land to the Plaintiff. He told the court he sold the land for Kshs.265,000/= but did not do a transfer because he was yet to get the land discharged by the SFT. The transfer was done subsequently and title was issued in PW3's name on 22nd May, 2018.

ANALYSIS AND DETERMINATION

13. I have perused and considered the pleadings filed by the Plaintiff, the oral testimonies of his witnesses and the evidence produced herein. The Defendant participated in these proceedings through Mr. Mwarandu who is her Advocate on record. She did not however file any defence or witness statements. I have also perused and considered the written submissions by the Learned Advocates for the parties.

14. It was the Plaintiff's case that on or about 8th June, 1997, he purchased the suit property known as Kilifi/Roka/173 measuring approximately 14.4 acres from one Emmanuel Nyoka Jonathan for a sum of Kshs.265,000/=. In support of that position he produced the Sale Agreement signed between himself and the said Emmanuel Nyoka Jonathan who also testified herein as PW3.

15. A perusal of the Agreement (Pexh 1) and a letter dated 29th July, 2015 from the Kilifi District Land Adjudication and Settlement Officer to the Settlement Fund Trustees (Pexh 3) reveals that the vendor was the original allottee of the said parcel of land from the Settlement Fund Trustees. Zablon Kazungu Nathan (PW2) was a witness to the Sale Agreement.

16. From the Plaintiff's testimony and that of his witnesses before the court, it was apparent that the Defendant was already occupying a portion of the suit property at the time it was sold. In her Advocates submissions before the court, the Defendant asserts that she has had uninterrupted user of the said premises since 1997 with the knowledge of the owners of the land and that the lapse of time grants her rights of adverse possession over the portion of land she occupies.

17. As it were, despite participating in this matter through her Advocates who cross-examined the Plaintiff and his witnesses, the Defendant did not file a Statement of Defence, a Witness Statement and/or documents from which such an inference of a claim for adverse possession could be made. Having failed to file a Defence and/or to testify in these proceedings, the only inference that this court can make is that she had nothing to say in rebuttal of the Plaintiff's claim and the attempt to claim an unspecified portion of the land by way of adverse possession through closing submissions must fail.

18. While admitting that the Defendant was on the land at the time he purchased the suit property, the Plaintiff and his witnesses testified that the Defendant's parents were allowed to use a portion of the land by PW3 for cultivation purposes only. Those parents are now deceased. Given those circumstances, the Defendant's parents were licensees and they had no rights over the land which they could extend to the Defendant. Having failed to respond to the Plaintiff's suit, this court can only presume that that indeed is how the Defendant came into the land.

19. In the circumstances of this case, I was satisfied that the Plaintiff has proved his case on a balance of probabilities. Accordingly I hereby allow the Plaintiff's suit as prayed.

20. The Order on Vacant Possession shall not however take effect until after the expiry of 45 days from today.

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

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF NOVEMBER, 2019

J.O. OLOLA

JUDGE