



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 186 OF 2016

ZAINULABDIN Y. DAR.....PLAINTIFF

VERSUS

1. MAJDA BREK KARAMA

2. MOHAMED SULEIMAN ALI.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By a Complaint dated 18th July 2016, Zainulabidin Yusuf Ali Dar (the Plaintiff) prays for Judgment against the Defendants for orders framed as follows:-

a) A declaration that any entry and/or putting up by the 1st Defendant through his servants of any and any structures on the suit property is unlawful;

b) A declaration that the erecting continued existence and/or demolition of the said or any other structures on the suit property amounts to an act of trespass by the Defendants;

c) An order that the Defendants do destroy any illegal structures and clear all the debris resulting from the demolition aforesaid;

d) An order that the Plaintiff is the true owner of the suit property (LR No. 1513/390) by virtue of adverse possession and that he should be registered as the owner thereof;

e) A permanent injunction restraining the Defendants whether by themselves or through their servants, employees, agents or through anyone deriving title through them or otherwise howsoever from entering, using occupying, leasing, transferring, charging, selling or in any manner whatsoever dealing adversely with the suit property;

f) Damages for trespass;

g) Costs of and incidental to this suit; and

h) Any other or further relief that this Honourable Court may deem appropriate to award.

2. Those prayers arise from the Plaintiff's assertion that at all times material to this suit, he was the registered proprietor of all that parcel of land situated in Takaungu Centre, Kilifi and known as LR No. 1513/389 measuring approximately 1.539 Acres. The Plaintiff asserts that he has also been in quiet possession and enjoyment of all that property known as LR No. 1513/390 neighbouring his property since the year 1961.

3. The Plaintiff avers that he has since learnt that in or around January 2016, the 1st Defendant had without his consent "threatened and/or intended to and/or entered upon" the suit property and unlawfully commenced the construction of certain structures thereon and demolition of others. The Plaintiff further asserts that the 2nd Defendant is also 'allegedly' laying claim over the suit property.

4. The Plaintiff avers that as a result of the said acts of trespass it has been deprived of the use and enjoyment of the suit property and has suffered loss and damage for which he holds the Defendants liable.

5. But in her Written Statement of Defence dated and filed herein on 2nd August 2016, Majda Brek Karama (the 1st Defendant) denies that the Plaintiff is the registered proprietor of LR No. 1513/389 and/or that he occupies LR No. 1513/390 as claimed.

6. The 1st Defendant avers that she and her husband Hamud Ali Abdulkadir have only entered upon LR No. 1513/390 as bona fide purchasers for value and that the allegations of unlawful entry are thus untrue. She asserts that the Plaintiff's claim is incompetent and bad in law in so far as it purports to assert a right founded on adverse possession.

7. In a Statement of Defence filed in person dated 24th April 2018, Mohamed Suleiman Ali (the 2nd Defendant) supports the Plaintiff's position that he has occupied both properties for a period exceeding 20 years. The 2nd Defendant avers that he is aware of the invasion of the suit property by the Defendant in January 2016.

THE PLAINTIFF'S CASE

8. At the Trial herein the Plaintiff testified as the sole witness in his case. Testifying as PW1 the Plaintiff told the Court that he is the Personal Representative of the Estate of Yusufali Adamali Dar who was the proprietor of LR No. 1513/389. He told the Court that his family has occupied that property since 1961. In or around January 2016, he discovered that the 1st Defendant had through her servants unlawfully entered on the property and commenced construction of some structures thereon while demolishing others.

9. PW1 told the Court that subsequently the 2nd Defendant approached him and showed him an alleged true copy of a Certificate of title for the said property. It then dawned on him that the two Defendants were intent on defrauding him of the same.

10. Despite demand made urging the Defendants to vacate the suit property, the Defendants ignore the same.

11. During his cross-examination, the Plaintiff conceded that the suit property is not registered in his name as stated in the Plaintiff but in the name of his late father and two other gentlemen who are his uncles.

THE DEFENCE CASE

12. The defence called four witnesses in support of their respective positions during the trial.

13. DW1-Mohamed Suleiman Ali is the 2nd Defendant. He told the Court he had known the Plaintiff's family for more than ten years and that the 1st Defendant had forcefully invaded the property where the Plaintiff resides and tried to grab almost half of it.

14. DW1 further told the Court that the Plaintiff occupied both parcels of land in dispute. At some point in time, DW1 also developed an interest in Plot No. 1513/390 and wanted to be issued with a title for it. He is still in that process.

15. During cross-examination, he stated that the house occupied by the Plaintiff is built on parcel No. 389 and that there was a barbed wire fence separating the two. The fence was however destroyed by the 1st Defendant who has now built a concrete wall thereon.

16. DW1 further told the Court that he got a "title" for the suit from Nairobi although it was never registered. He is still pursuing the registration. He told the Court that the Plaintiff was overseeing Plot No. 390 on his (DW1's) behalf. He further testified that even though the Plaintiff had asked him to sell the said Plot No. 390 to him, he was yet to make a decision. He urged the Court to have the said Plot No. 390 registered in his name.

17. DW2-Majda Brek Karama is the 1st Defendant herein. She told the Court that they bought Plot No. 390 with her husband Hamud Ali Abdulkadir from one Mohamed Abdalla Mohamed vide a Sale Agreement dated 6th December 2014. Later on they took possession of the property and put up a stone wall along the Western boundary that abuts Plot No. 1513/389.

18. It is then that the Plaintiff surfaced and started raising claims of ownership of the suit property. She testified that the Plaintiff has never occupied the portion of land that they had bought.

19. During cross-examination DW2 testified that they carried out a search on the suit property and the Vendor was shown as the owner of the land. A second search carried out thereafter shows the land is in DW2's name. She however told the Court that her Plot has no access and that the only access they have is through Plot No. 389.

20. DW3-Hamud Ali Abdulkadir is the husband to the 1st Defendant. He testified that they bought Plot No. 390 jointly. Thereafter the Plaintiff appeared. When they asked a Surveyor to establish the beacons, they realised that one of the beacons was on Plot No. 389. Thereafter DW3 built a wall to separate their Plot with that of the Plaintiff.

21. On being Cross-examined at the trial, DW3 stated that he only visited the site of the property when the Surveyor went to the land. There was a small guardhouse in the middle. He denied that the only access to the land is through Plot No. 389. They had at first to cut the fence to get access.

22. DW4-Mathias Mjomba Irina is a Land Surveyor. He carried out a survey on LR No. 1513/390 Takaungu. He told the Court that thereafter he prepared a Report dated 27th August 2017 after being instructed by the 1st Defendant. He confirmed that Plot No. 390 measures 0.206 Ha (0.5 acres).

23. During his cross-examination he told the Court that he never involved the Chief or neighbours when he carried out the survey. He told the Court that they accessed the Plot through someone's property as it had no access. He denied that his Report was biased in favour of the 1st Defendant.

ANALYSIS AND DETERMINATION

24. I have perused and considered the pleadings filed herein by the parties, the oral testimonies of the witnesses as well as the evidence adduced at the trial herein. I have also considered the written and oral submissions as adduced before me by the Learned Advocates for the parties.

25. In the pleadings filed herein the Plaintiff avers that he is the registered proprietor of all that parcel of land known as LR No. 1513/389 measuring approximately 1.539 acres and situated at Takaungu Trading Centre within Kilifi County. It was his case that by virtue of such registration, he is entitled to enjoy all the rights and privileges belonging or appurtenant thereto including but not limited to the right to possession and quiet enjoyment thereof without any hindrance or restriction.

26. In addition to the said parcel of land, the Plaintiff asserts that he has also been since 1961 in quiet possession and enjoyment of an adjacent property abutting LR No. 1513/389 and known as LR No. 1513/390. It is the Plaintiff's case that in or around January 2016, he learnt that the 1st Defendant through his servants or agents had without his consent threatened to or entered upon the said adjacent parcel of land and commenced construction of certain structure thereon while also demolishing others.

27. According to the Plaintiff the said entry is unlawful and amounts to trespass to the property and is evidence that the 1st Defendant has the intention to claim not only the said Plot No. 1513/390 but also the property registered in his name being LR No. 1513/389. The Plaintiff further avers that the 2nd Defendant has also been "allegedly" laying claim over LR No. 1513/390 on the purport that he holds documents of the title thereto.

28. As a result of the Defendants acts of trespass, the Plaintiff avers that he has been deprived of the use and enjoyment of the said LR No. 1513/390 and hence this suit in which he seeks inter alia an order that he is the true owner of the said LR No. 1513/390 by virtue of adverse possession and that he be the registered owner thereof.

29. From his testimony both in Court and the submissions of his Advocates, it was apparent that the claim of trespass onto land Parcel No. 1513/389 was abandoned and that the Plaintiff's major bone of contention is the claim in regard to LR No. 1513/390 to which he claims to be entitled to by way of adverse possession.

30. As it were the 1st Defendant in her pleadings had denied that the Plaintiff is the registered proprietor of LR No. 1513/389 and/or that the Plaintiff occupies LR No. 1513/390. From the material placed before me it was evident that the Plaintiff was indeed not the registered owner of LR No. 1513/389.

31. Those registered as the proprietors on the title are his father Yusufali Adamali Dar and four others named therein as Alibhai Adamali Dar, Amirali Adamali Dar, Itatimali Adamali Dar and Fakhrudin Adamali Dar. At the trial herein, the Plaintiff admitted this fact and told the Court that the others were his uncles and that he had their authority to institute this suit.

32. As it were, the Plaintiff at best appears to have been merely apprehensive that the 1st Defendant's takeover of the adjacent parcel of land would endanger their hold on LR No. 1513/389 and the claim for trespass thereon was neither pursued nor established at the trial herein.

33. In their submissions in support of the claim for adverse possession, the Plaintiffs submits as follows:-

"The Plaintiff owns and occupies the Plot abutting the suit property, known as Parcel No. LR 1513/389. The suit property herein, is known as parcel No. LR 1513/390 and measures approximately 1.539 acres. The Plaintiff and his family have been occupying both parcels of land and utilizing both parcels as one for a period exceeding 12 years. The time actually goes back to the 1960s. The occupation has been open and continuous, exclusively, in a manner that is open and notorious and suggestive that the Plaintiff and his family are the owners of the suit property."

34. Section 38(1) of the Limitation of Actions Act, Cap 22 of the Laws of Kenya provides as follows:-

"Where a person claims to have become entitled by adverse possession to land.....he may apply to (this) Court for an order that he be registered as Proprietor of the land or lease in place of the person then registered as proprietor of the land."

35. Adverse possession in this regard has been defined as a method of gaining legal title to real property by the actual, open, hostile and continuous possession of it to the exclusion of its true owner for the period prescribed by the law. That period prescribed under the Limitation of Actions Act, (Cap 22) is 12 years.

36. As stated in *Halbury's Laws of England, 4th Edition Vol. 28 Paragraph 768:-*

"...no right to recover land accrues unless the land is in possession of some person in whose favour the period of limitation can run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceases to be in possession of his land."

37. As Angote J. stated in *Ann Itumbi Wiseli –vs- James Muriuki (2013) eKLR:-*

“To constitute dispossession, (some) acts must have been done which are inconsistent with the enjoyment of the soil by the person entitled for the purposes for which he has a right to use it, thus the term “adverse”.

38. In his pleadings before the Court, the Plaintiff claimed to have been in possession of the disputed parcel of land since 1961. At the trial herein the Plaintiff stated that he has occupied the disputed property since 1952 and that they have a house thereon which was built in 1954. During his cross-examination however, he conceded that he was not yet born in 1952 and that he was only four years old in 1961. During that time according to him, he was residing in Old Town Mombasa.

39. Pressed further during cross-examination, the Plaintiff told the Court that they do not reside even on Plot No. 389 but that they use the same as a holiday home. He further conceded that the house he was referring to stands on Plot No. 389 and that only a portion of a Servant Quarter they built in Plot No. 389 extends by about 5 feet into Plot No. 390.

40. Indeed even the 2nd Defendant who spent his time at the trial oscillating between support for the Plaintiff’s claim and asserting his own interests in LR No. 1513/390 conceded that the Plaintiff’s house stands only on LR No. 1513/389 and not 390. It was further the 2nd Defendant’s evidence that there was a barbed wire fence separating Plot No. 1513/389 and 1513/390. He further told the Court that the 1st Defendant had now replaced the barbed wire fence with a wall.

41. In the absence of anything in particular that was done by the Plaintiff in furtherance of his alleged possession of the suit property, one cannot really say that he had acquired the land merely because the owner thereof had not used it for a long period of time.

42. As the Court of Appeal stated in *Wambugu –vs- Njuguna (1983)KLR 173:-*

“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 purposes of which he intended to use it.

The proper way of assessing proof of adverse 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.

43. In the matter before me, the Plaintiff does not even state who was the original owner of the land that he may have dispossessed of the property. The title held by the 1st Defendant herein dates only as far back as 2014. There was no evidence that the 1st Defendant owned it prior to that time and/or that a period of 12 years had lapsed as against the 1st Defendant as at July 2015 when the Plaintiff filed this suit.

44. As it were the 1st Defendant has demonstrated that he purchased the suit property from one Mohamed Abdalla Mohamed for a consideration of Kshs 2.5 Million vide a Sale Agreement dated 6th December 2014. A transfer was thereafter effected in her name on 9th December 2014. She has also produced an agreement signed before the Senior Assistant Chief Takaungu Sub-Location between her family and the Plaintiff on 31st January 2016(Dexh 5) in which the Plaintiff agreed to have the Chain link fence dividing the two properties moved back for a wall to be constructed thereon.

45. During his cross-examination herein the Plaintiff confirmed this position and stated they needed to re align the fence as the owner of the adjacent Plot did not have a road access. It was however his case that they did not carry through with the Agreement after he realised that the 1st Defendant did not have documents of title.

46. Even if it were to be assumed that the Plaintiff was in possession of the land before the 1st Defendant purchased the same, and I did not find any evidence to that effect, his claim to adverse possession was certainly interrupted by the arrival of the 1st Defendant and her subsequent occupation of the disputed parcel. The Plaintiff himself endorsed the changed position in ownership and recognized the Plaintiff’s title thereto when he executed the Agreement to re-align the boundaries.

47. Arising from the same I did not find any merit in the Plaintiff’s suit as against the 1st Defendant. And while I was equally convinced that there was nothing much against the 2nd Defendant other than collusion between himself and the Plaintiff, the fact that the 2nd Defendant conceded in his pleadings to the Plaintiff’s case militates against any orders on the contrary.

48. Accordingly the Plaintiff’s suit is hereby dismissed with costs against the 1st Defendant.

Dated, signed and delivered at Malindi this 5th day of December, 2019.

J.O. OLOLA

JUDGE