



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC 69 OF 2011

NARRIMAN A. KHAN.....PLAINTIFF

-VERSUS-

RAMADHAN HAMISI.....1ST DEFENDANT

ALI SWALEH MWAKUSOMA.....2ND DEFENDANT

FATUMA OMAR.....3RD DEFENDANT

JUDGEMENT

1. By an amended plaint dated 24th May, 2016 and filed on 31st May, 2016 the plaintiff is seeking for judgement against the defendants for:
 - a) **A mandatory injunction ordering the defendants to handover vacant possession of the plaintiffs parcels of land numbering 59 titles situate in Ukunda, Kwale County.**
 - b) **Costs of the suit.**
 - c) **Any other order the court may deem expedient to grant.**
 - d) **An order of eviction do issue against the defendants, their agents and proxies illegally on the suit properties.**
 - e) **That the officer commanding Diani Police station and the county commissioner, Kwale County do provide security during the eviction exercise.**
2. The plaintiff's case is that she is the absolute and registered owner of the suit properties. The plaintiff avers that on or about 24th February 2009, the defendants, their agents and proxies without the knowledge and consent of the plaintiff illegally entered upon the suit properties, cleared them and put up structures thereon, thus denying the plaintiff possession and deprived her from deriving any meaningful economic benefit from the same. The plaintiff further avers that she reported the matter at Diani police Station resulting in Kwale principal Magistrate Criminal case No. 470 of 2010, against the 1st Defendant and Criminal Case No. 96 of 2011 against the 2nd and 3rd defendants in which all the defendants were convicted and sentenced on 8th October 2015 and 19th October 2015 respectively.
3. It is the plaintiffs contention that due to the extensive combined acreage of the suit properties, the defendants continue to invite other illegal trespassers to settle on the suit properties and the plaintiff's attempt to have the defendants move out have been fruitless. The plaintiff further contends that she has been seriously aggrieved and inconvenienced by the illegal actions of the defendants since her rights of quiet enjoyment of the suit properties have been manifestly interfered with.
4. The defendants filed a statement of defence and counter-claim in which they denied the plaintiff's claim and state that they have adversely occupied the suit properties since time immemorial and that the same belong to them. They aver that the plaintiff's suit is time barred. They seek to have the plaintiff's against them dismissed and the title deeds cancelled and a declaration that the defendants are the lawful owners and trustees of the Digo in respect of the suit properties.
5. On 12th June 2017, the plaintiff gave evidence as PW1 and adopted her witness statement dated 21st March 2011 in which she states that over the years since 1995, she purchased the suit properties and her titles have never been challenged. She produced the Title Deeds as P. Exhibit 1. She states that between 24th and 25th February 2011 when she went to the suit properties to fence them with the intention to develop some and sell others, she found the defendants clearing some of the properties and claiming ownership. The plaintiff states that she reported the matter to the police who arrested and charged the defendants. The proceedings in Kwale PMC Criminal Case No. 470 of 2010 and case No. 96 of 2011 were produced as P. Exhibits 2 and 3 respectively. The plaintiff stated that when she purchased the suit properties

they were vacant and that the defendants only entered thereon in the year 2010. She denied the defendants claim that they have lived in the suit properties since time immemorial or over 12 years.

6. PW1 was cross-examined by Mr. Okanga advocate for the defendants. She answered that she bought the suit properties from various individuals though she did not have the sale agreements. She added that she found the defendants having occupied plot Nos. Kwale/Diani/715 and Kwale/Diani/717. She reiterated that when she purchased the plots, there were no squatters on them.

7. In re-examination, PW1 stated that the defendants have no right to be on the suit properties and that she has sued them because they have invaded the properties and have encouraged other people to do the same. She confirmed that she bought the plots from various people who were allocated the land and no one has taken her to court to challenge her titles. With this evidence the plaintiff closed her case.

8. The matter was fixed for defence hearing on 23rd October 2017. However, when the matter came up on 23rd October 2017, the defendant's counsel told the court that he did not wish to call any witness, and the defendant's case was marked closed.

9. The parties' advocates filed written submissions. The plaintiff opened her submissions by giving a summary of the facts of her case. Based on the evidence adduced, the plaintiff through M/s Wanjugu Waweru & Associates advocates submits that she has proved her case. To support her submissions, the plaintiff cited Section 24 and 26 of the Land Registration Act 2012 and relied on the case of *Ahmed Ibrahim Suleiman & Another –vs- Noor Khamisi Surur [2013] eKLR* on the principles of granting a mandatory injunction at interlocutory stage and after finalization of a suit as stated by the court of Appeal. The plaintiff also submits that the defendants have not tendered any evidence in support of both their defences and the counter-claim and urged the court to grant the reliefs sought in the plaint and dismiss the defendants counter claim with costs to her.

10. M/s Okanga & Company Advocates for the Defendants also gave a summary of the evidence adduced by their submissions filed. The defendants submit that the plaintiff did not produce a survey report showing the boundaries of the plots which the plaintiff alleges to have been invaded by the three (3) defendants and showing their level of occupation/invasion. The defendants further submit that the plaintiff did not call the Land Registrar, Kwale and failed to produce official searches and/or Green cards from the Kwale Land Registry showing that she was the registered proprietor of the suit properties. The defendants therefore submit that the plaintiff did not give compelling evidence to prove that she is the proprietor of the suit properties. They further submit that any judgement emanating from these proceedings can only affect the three defendants and not any other party who is not a party to these proceedings. It is the defendant's submission that the plaintiff has not proved her case on a balance of probabilities and that the plaintiff did not file any response to the counter claim in which the defendants has pleaded that the plaintiff's suit is time barred.

11. Taking the pleadings and the evidence adduced together with the submissions rendered this court is tasked to determine the following questions:

a. Whether the plaintiff having proved her ownership of the title of the suit properties is entitled to orders of mandatory injunction ordering the defendants to handover vacant possession and eviction as prayed in the amended plaint; or

b. Whether the defendants have proved that their occupation of the land is adverse to the title to the plaintiff for the requisite period hence they are entitled to be declared as owners of the parcels of land as prayed in the counter-claim.

12. It is not in dispute that the plaintiff acquired registration of the suit properties between 1994 and 1997. The plaintiff produced title deeds to the suit properties which are all in her name. The plaintiff contends that the defendants who are squatters on her land have no right at all to be on the suit properties. It is the plaintiff's contention that the defendants invaded the suit properties in or about February 2009. According to the plaintiff, the defendant's illegal invasion led her to report the matter to the police who, after investigations, preferred Criminal charges against the defendants who were found guilty and convicted for the offence of trespass. The plaintiff produced the proceedings and judgments in Kwale Principal Magistrate's court Criminal case number 470 of 2010 and Criminal case number 96 of 2011 as exhibits 2 and 3 respectively.

13. Section 26 of the Land Registration Act, 2012 provides as follows:

26(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as Prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:-

a. On ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

14. The defendants questioned the validity of the plaintiff's titles. They however failed to adduce any evidence to contradict the evidence adduced by the plaintiff and neither did they adduce any evidence to support their contention that the plaintiff illegally acquired the suit titles through misrepresentation, forgery and trickery as alleged. I thus reach the finding that indeed the plaintiff is legally registered as the owner of the suit properties.

15 Further, the registration of the plaintiff is indeed admitted by all the defendants except they state that she is now a paper owner as her titles have been extinguished.

16. The defendants do not deny that they are in occupation of the suit premises and that their occupation is without the knowledge and or

consent of the plaintiff. Indeed they have been charged found guilty and convicted of trespass on the suit properties. The plaintiff has stated that the defendants invaded on the suit properties in February 2009. This is corroborated by the proceedings and judgment in the two Criminal cases referred to and produced as P. Exhibits 2 and 3.

17. In determining whether the plaintiff is entitled to vacant possession I shall do so by determining whether the defence claim to adverse possession has been proved or not. Adverse possession is a question of fact that must be proved by evidence. It is now settled law that in order to prove adverse possession, the claimant must prove that he has dispossessed the title holder for the statutory period. [see Wambugu – vs- Njuguna (1982) KLR].

18. The plaintiff stated that when she purchased the suit properties, the same were vacant. She further stated that the defendants entered the land only in about 2009/2010. This is corroborated by the evidence in the proceedings and judgement in the two criminal cases in which the defendants were charged and convicted. The defendants did not tender any evidence in support of their claim. The plaintiff's evidence remains uncontroverted.

19. In their submissions, the defendants have submitted that any judgement emanating from these proceedings can only affect the three defendants and not any other party who is not named in the suit. However, it is the plaintiff's evidence that the defendants, besides invading the suit properties, have also encouraged others to invade the suit properties. The plaintiff's evidence, as already stated, remains uncontroverted and has not been contradicted.

20. Section 24 of the Land Registration Act provides as follows:

24. Subject to this Act:-

a. The registration of a person as the absolute

Proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

Section 25(1) of the same Act provides:

That the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-

a. To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

b. To such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

21. I find the evidence on record sufficient to prove that the plaintiff is the rightful owner of the suit properties and that the defendants have jointly and severally trespassed into the plaintiff's properties and the plaintiff is therefore entitled to the orders sought in the amended plaint.

22. The upshot of this is that this court is satisfied that the plaintiff has proved her case against the defendants on a balance of probabilities. Judgement is entered for the plaintiff against the defendants jointly and severally as prayed in the amended plaint dated 24th May 2016.

23 The defendants counter-claim has not been proved and the same is dismissed with costs.

Dated signed and delivered at Mombasa this 17th April 2018.

C. YANO

JUDGE