



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

MISC CIVIL APPEAL NO.36/2016

1. LUCY JUMA

2. FATUMA KIBWANA

3. NELLY NDAWIRO (AS OFFICIALS OF Maweni Women Group)

4. MAWENI WOMEN GROUP.....APPELLANTS

-VS-

PETER MBOGHO MWANGOMBE.....RESPONDENT

JUDGMENT

1. The appeal before me arises from the judgment of the Senior Principal Magistrate's Court at Voi (Hon Wahome) delivered on 2nd March 2015 allowing the respondent's claim seeking among others orders of eviction and permanent injunction against the appellants.

The facts are that the Respondent was the registered owner of **PLOT NO.1956/503** within the Municipal Council of Voi and that in March 2013 or thereabout when the Respondent moved to develop the said plot, he was blocked by the Appellants who according to the respondent are in occupation of the plot illegally and therefore are trespassers.

2. In their defence, the Appellants state that they have been in occupation of the suit property for a period in excess of 12 years even before acquisition by the respondent from the previous owners. According to the Appellants the respondent's claim was time barred by virtue of the provisions of the Limitations of Actions ACT CAP 22 Laws of Kenya.

3. The subordinate Court found in favour of the Respondent and entered judgment as aforesaid. The Appellants were dissatisfied with the said decision and filed the present appeal citing ten (10) grounds which can however be summarized into two, namely:

i. THAT the subordinate Court lacked the jurisdiction to entertain the Respondents claim.

ii. THAT the suit was statute barred.

4. The appeal was canvassed by way of written submissions which were duly filed by both parties. When the appeal came up for hearing, Mr. Waweyo learned counsel for the appellants submitted that he was relying entirely on the written submissions. He added however, that at the time the appellants filed their submissions, the Court of Appeal in **Law Society of Malindi -v- Attorney General & Others (2017) eKLR** had not made the decision which effectively gave the subordinate Court jurisdiction to deal with land matters, and therefore their reliance on **Petition No.3 of 2016, Law Society of Malindi vs- Attorney General & Others(2016) eKLR** on the issue of jurisdiction has been overtaken by events. He further submitted that even leasehold interest must be regarded as private and not public property. Finally, counsel submitted that once the period to file a case is extinguished under Section 7 of the Limitation of Actions Act, the title is extinguished by the operation of law.

5. Ms. Chala learned Counsel who was holding brief for Mr. Mwinzi for the respondent relied entirely on the submissions filed by the Respondent. It was submitted by the Respondent that the subordinate Court had jurisdiction to hear and determine the suit as the prayers sought were orders of eviction and permanent injunction, and no valuation was placed on the subject matter. The respondent submitted that the suit was not time barred as the subject plot was in the possession and use by three (3) different owners and that the appellants never had exclusive possession and use. It is further the respondent's submissions that adverse possession does not operate against the government who are the lessor of the suit property while the respondent is a lessee for 99 years with effect from 1/9/1974.

6. I have perused and considered the record of appeal, the grounds of appeal and the submissions by the parties. This being a first appeal, I am conscious of the Court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the

conclusions reached by the learned Magistrate were justified on the basis of the evidence presented and the law. The issues for determination in these appeal as I can deduce from the grounds of appeal are:

i. Whether the subordinate Court had jurisdiction to determine the respondent's claim.

ii. Whether the respondent's claim was statute barred.

7. With regard to the issued whether the subordinate Court has jurisdiction to determine the respondent's claim, the appellants submissions were that the subordinate Court lacked jurisdiction as the constitution and the Environment and Land Court Act conferred jurisdiction on land matters only in the Environment and Land Court. However, as already stated, the appellants have abandoned this submission following the decision of the Court of Appeal in the case of **Law Society of Malindi – V- Attorney General & Others (supra)**.

8. The appellants further submitted that the subordinate Court lacked pecuniary jurisdiction to entertain the claim. According to the appellants, the value of the suit property was Kshs.6,000,000.00 which was beyond the pecuniary jurisdiction of the Court.

9. In the plaint, the respondent's claim was for orders of eviction and permanent injunction. In their defence, the appellants mainly pleaded the issue of limitation. In their defence, the appellants did not raise any issue about the value of the suit property. The issue about the value of the suit property was first raised by the appellants in their submissions before the subordinate Court.

10. On the issue of pecuniary jurisdiction, it is quite clear that the learned magistrate considered all the evidence tendered in support of and against the case that was before him and concluded that the respondent has proved his case on a balance of probabilities and proceeded to enter judgment for the respondent. The complaint by the appellant is that the subordinate Court did not have pecuniary jurisdiction because entry No. 2 of the title document shows the value of the suit property was raised from Kshs.1,500,000.00 to Kshs.6,000,000.00 which according to the appellants is beyond the jurisdiction of the subordinate Court.

11. This issue, in my view was new and had not been pleaded in the defence. The respondent therefore could not and had not responded to the same either in the pleadings or in the evidence that he had tendered in support of the pleaded matters.

12. Order 2 Rule 2 of the Civil Procedure Rules on the requirement on pleadings provides that:

“(1) Every pleading shall be divided into paragraphs numbered consecutively, each allegation being so far as appropriate contained in a separate paragraph.

(2) Dates, sums and other numbers shall be expressed in figures and not words.”

Order 2 Rule 3 provides that facts and not evidence to be pleaded and provides:

(1) Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.

(2) Without prejudice to sub-rule (1), the effect of any document or the purport of any conversation referred to in the pleading shall, if material, be briefly stated, and the precise words of the document or conversation shall not be stated, except in so far as those words are themselves material.”

13. Order 2 Rule 4 provides for matters which must be specifically pleaded and sub-rule (2) provides that “ a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land.... Shall not be sufficient.”

14. A useful discussion on the importance of pleadings is to be found in **Bullen and Leake and Jacob's Precedents, 12th Editoin, London, Sweet & Maxwell**, where the learned authors declare:

“The system of pleadings operate to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the Court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the Court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the Court will have to determine at the trial.”

15. The Court of Appeal in **Independent Electoral And Boundaries Commission & Anor –V- Stephen Mutinda Mule & 3 Others, Civil Appeal No. 219 of 2013** cited with approval the decision of the Supreme Court of **Nigeria In Adetoun Oladeji (NIG) Limited – V – Nigeria Breweries PLC, SC 91/2002 where Pius Adereji, PSC** expressed himself thus on the importance and place of pleadings:

“.....it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded. ”

The judges in that case further stated:

“Infact that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

16. I am of the respectful opinion that the learned Magistrate, after holding that parties were bound by their pleadings did not err in holding that the appellant was not entitled to raise the issue of pecuniary jurisdiction based on the alleged value of Kshs.6,000,000.00 which was not pleaded by the appellants in the defence at all. The appellants were bound by their pleadings in the defence.

17. The other issue raised by the appellants is that the respondent's claim was time barred by virtue of the provisions of the Limitations of Actions Act. It is not in dispute that Kenya Breweries Limited was the initial registered owner in respect of the suit property by virtue of a 99 years lease which was to take effect from 1st September 1974. From the record, DW 2, Jimmy Lenjo Mwakisha stated that he bought the property from Kenya Breweries Limited and the transfer was made in his favour on 20th July 2010 and later sold it to the respondent. The record further shows that the suit property was transferred to the respondent on 14th November 2012.

18. The evidence on record shows that the Appellants moved into the suit property before 1990 and constructed and completed a nursery school in 1990. The appellants continued with their occupation of the suit property from 1990 until 2013 when the respondent filed the suit in the subordinate Court. It is quite obvious that the possession of the appellants since 1990 or thereabouts was open, uninterrupted and adverse to the title of the registered owners, Kenya Breweries Limited, and later Jimmy Lenjo Mwakisha and finally the respondent. No action was taken against the appellants to have them evicted from the suit property lawfully before the expiry of twelve years. The appellants pleaded that the respondents claim was time barred.

19. Section 7 of the Limitation of Actions Act Cap 22 provides as follows:

“An action may not be brought by any person to recover land after the end of twelve 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.”

20. Kenya Breweries Limited who are the original owners of the suit property never filed any suit to recover the land from the appellants. They never took any steps to have the appellants evicted before the expiry of 12 years. At the expiration of 12 years period, the proprietor's title was extinguished by operation of law. It follows therefore that by the year 2001, the title of Kenya Breweries Limited had been extinguished by operation of law. In this case it is quite obvious that the possession of the appellants since 1990 was open, uninterrupted and adverse to the proprietor, Kenya Breweries Limited, yet Kenya Breweries Limited took no active step to evict the appellants lawfully. As was stated by the Court of Appeal in ***Ndatho – v – Itumo & 2 others (2002) eKLR***, ***“mere writing of letters does not Interfere with the possession....”***

21. I agree with the appellant's submission that the respondent cannot enjoy a better title than that which was enjoyed by the previous owners. If the title of the previous owners were tainted, then the resultant title was equally tainted to the same extent.

22. Section 17 of the Limitation of Actions Act provides that:

“Subject to section 18, at the expiration of the period prescribed by this Act for a person to bring action to recover land (including redemption action), the title of that person to the land is extinguished.”

Section 17 of Cap 22 therefore expressly provides the consequences that flow from the application of Section 7 of the Act. Thus, upon the expiry of 12 years from 1990 when the respondents moved into the suit land, the title of Kenya Breweries Limited was extinguished by operation of law. Consequently Kenya Breweries Limited had no title to transfer to Jimmy Lenjo Mwakisha in the year 2010. Similarly, it follows that Jimmy Lenjo Mwakisha (DW2), had no title to pass to the respondent.

23. It was submitted by the respondent that the suit property being a lease was government land and therefore adverse possession does not operate against the government and consequently that the defence under Section 7 of Cap 22 does not help the appellants. With all due respect I do not think that submission is correct. In my view, the title or interest extinguishable through adverse possession is the remainder of the term of release but not the government's reversionary rights. The interests of an adverse possessor are protected by Section 7 until the lease ends. It is clear that the suit property was leasehold interest in favour of Kenya Breweries Limited before it was eventually sold to the respondent. The lease was for a term of 99 years from 1st September, 1974. The lease has not been extinguished and therefore the learned Magistrate misdirected himself by holding that the land was owned by the government. It could only revert back to the government at the expiry of the lease.

24. I am satisfied from the evidence on record that by constructing and running a nursery school on the suit property from 1990 without obtaining permission from Kenya Breweries Limited who were then the registered owner of the property, the appellants manifested animus possidendi, a clear mind and intention of dealing with the suit premises as if it was exclusively theirs and in a manner that was in clear conflict with the registered owner's rights.

25. The respondent acquired the property while the respondents were in occupation and possession. As was stated by the Court of Appeal in ***MWEU – V – KIU RANCHING & FARMING CO-OPERATIVE SOCIETY LTD (1985) KLR 430***,

“Adverse possession is a fact to be observed upon the land. It is not to be seen in the title under Cap 300. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12 years after he had acquired it.”

It follows therefore that when the respondent instituted the action in 2013 title to the suit premises had been extinguished.

26. In the result, I allow the appeal, set aside the judgment of the magistrate in **SRMCC NO.37 of 2013**, and substitute therefore an order dismissing the suit with costs. The respondents shall have costs of this appeal.

Judgment dated, signed and delivered at Mombasa this 14th day of May 2018.

C. YANO

JUDGE