



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO 127 OF 2014(OS)

MUGERWA KATANA FUNDI & 40 OTHERS.....APPLICANTS

VERSUS

ALI SWALEH ALI

MOHAMED KHAMIS BALLETH.....RESPONDENTS

JUDGMENT

INTRODUCTION

1. By an Originating Summons brought under Section 38 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya, the Plaintiffs herein pray for Orders as follows:-

1. That the Applicants are entitled to be declared as proprietors of the Land Certificate of Title No. CR. 20905, Land Portion No. 5470 delineated to Deed Plan No. 148578 annexed Certificate of Ownership No. 111594 which they have acquired by adverse possession, having lived and worked thereon for over 24 years since late 1990s well beyond the Statutory 12 years and used it peacefully and uninterrupted without any interference from the respondents or the respondents' agents/predecessors.

2. That the Applicants are entitled to be registered and issued with Certificate of title over the same in place of the Respondents.

3. That in the interim the Respondents are restrained by injunction from alienating, subdividing, taking possession or in any manner whatsoever interfering with the said parcel of land until the suit herein is determined.

4. That the Applicants be granted the costs of this suit.

2. Upon being served with the Summons, both the 2nd Defendant and the Interested Party filed a Counterclaim herein on 21st June 2016 in which they pray:-

a) That this Court be pleased to issue a permanent injunction order restraining the Plaintiff from farming, constructing, undertaking any development, and interfering and/or dealing in any manner whatsoever with the said parcel of land LR No. 5470 Malindi;

b) That the Honourable Court be pleased to order the Plaintiffs to vacate and/or render vacant possession of parcel of land No. 5470 Malindi;

c) That the Court be pleased to order the demolition of any construction and/or developments already undertaken in LR No. 5470 Malindi by the Plaintiffs with a view to rendering vacant possession and also the uprooting of any crops planted thereon;

d) That the Court be pleased to order the officer in charge of Station(OSC) Malindi Police Station to supervise, oversee and ensure the enforcement of Orders (a), (b) and (c) herein-above;

e) That the Court be pleased to award general damages for trespass;

f) That the Plaintiffs' be condemned to pay the costs of this suit.

THE PARTIES

3. From the Court's record as at the inception of this suit, the Plaintiffs were 41 in number. It would appear however that a series of disagreements soon followed and various groups of the plaintiffs filed different applications disowning others while others filed applications to remove other co-plaintiffs from the suit.

4. As at the time this matter proceeded to hearing all other Plaintiffs save for the 1st, 3rd and 18th Plaintiffs had withdrawn from the matter. The remaining three Plaintiffs then proceeded to withdraw the suit as against the 1st Defendant/Respondent.

THE PLAINTIFFS' CASE

5. At the trial hereof the Plaintiff called five witnesses in support of their case. PW1, Mugerwa Katana Fundi told this Court that Land Portion No. 5470 is located within Malindi Sub-County in Muyeye Area. It was his testimony that prior to the registration of the property in the name of the 1st Respondent who later transferred it to the 2nd Respondent the Plaintiff/Applicants lived on the land utilizing the same for agriculture and other purpose for more than 30 years. PW1 told the Court that they had built their residential houses and planted varieties of trees on the suitland where they also graze their cattle. PW1 further told the Court that the 2nd Respondent who has never lived on the suitland was now threatening to have them evicted from the land and hence their filing of this suit.

6. PW2, Henry Muranje, is an Advocate of the High Court. He testified that he did not know the 2nd Respondent and further denied having prepared a Special Power of Attorney on the 2nd Respondent's behalf on or about 4th January 2012. It was his testimony that the Power of Attorney was neither drawn nor executed from his law firm, Henry Muranje Company Advocates.

7. On his part, PW3-Johnson Mutana Kalama, an Agricultural Officer, told the Court that he had been engaged by the Plaintiffs and he had assessed the trees on the disputed parcel of land to be about 43 years old. He produced a Report he prepared to that effect as PEX 6.

8. PW4- Alfred Kahindi Ngonyo told the Court that the land in dispute is their ancestral land in which they had lived for more than 50 years. During the said period the Applicants had enjoyed uninterrupted and continuous possession even after the Respondents became registered as the owners of the land in the 1990s.

9. Similarly PW5-Karisa Katana Fundi testified that the Applicants had occupied the land for more than 50 years having inherited the same from their grandparents. It was his testimony that no one had ever interrupted their occupation and possession of the land until the time the Respondents started threatening them. He told the Court that they were the owners of the land but one Omar Khamis had been interfering

and selling portions thereof to strangers.

THE DEFENCE CASE

10. The 2nd Defendant called two witnesses in support of his case. DW1, testifying as the Defendant Mohamed Khamis Balleth told the Court that Omar Khamis is his brother. He testified that even though title to the disputed parcel of land is in his name, he was only but a nominal owner having bought the same for his brother Omar. At the time the land was sold to him, his brother was away in Uganda and he went and inspected the land before buying it. At the time, the land only had maize and some trees but no one was living there.

11. DW1 testified that about four people had been taking care of the maize and trees and they decided to buy off the little developments on the land so that those four people could vacate the land. They agreed with the four people, paid them for the maize and coconut trees after which they vacated.

12. DW1 further told the Court that sometime in 2007 upon his return from the United States, he saw some structures that had been built on the land. When he went there, he found that some ten people had built on the land. The people were summoned to the Chief's Office.

13. It was DW1's testimony that contrary to the evidence adduced by the Plaintiff's, he executed a power of attorney which was prepared in PW2's office to enable his brother Omar Khamis take control of the land.

14. On his part, the Interested Party Omar Khamis Balleth (DW2) told the Court he is a businessman who ordinarily resides in the United States. He told the Court he is the beneficial owner of the suit property having bought the same from Ali Swaleh Ali previously (the 1st Defendant). It was his testimony that his grandfather used to graze goats on the farm and they developed an interest on the land. They then approached the said Ali Swaleh who agreed to the sale at a time when DW2 was away in Uganda for business. Accordingly, DW2 instructed his brother to pay and execute the documents on his behalf.

15. DW2 told the Court that when he later visited the land after his trip to Uganda, the land was empty and unoccupied. Later, they found some four people on the land and they took them to the Chief and District Officer (D.O) at which point the four agreed to move out of the land. DW2 told the Court that he paid the four some money as compensation for their trees. However, the 1st Plaintiff/Applicant refused to vacate even after being paid.

16. DW2 told the Court that PW4 had never stayed on the land. He told the Court that initially 43 people had sued him. When he went to them and asked them why they had not honoured the agreement to vacate the land, many of those who had sued pointed an accusing finger at the 1st Applicant (PW1).

17. DW2 further told the Court that those who had sued him were "commercial Squatters" who had land elsewhere but were always moving into other people's land citing adverse possession. He told the Court that none of the Applicant had occupied his land for the period which they purported to have done so.

ANALYSIS AND DETERMINATION

18. I have considered the testimony of the Plaintiffs and their witnesses on the one hand *vis-à-vis* those of the Defendant and the Interested Party. I have equally considered the evidence placed before me in the course of the trial as well as the oral and written submissions placed before me by the Learned Advocates for the parties herein.

19. Adverse possession 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 State Law. The period prescribed by the Limitation of Actions Act, Cap 22 of the Laws of Kenya for one to acquire legal title over land in Kenya by way of adverse possession is 12 years.

20. As stated in Halsbury'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.

21. 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".

22. Section 38(1) of the Limitation of Actions Act (Cap 22) provides that where a person claims to have become entitled by adverse possession to registered land, he may apply to the High Court for an Order that he be registered as the proprietor of the land in place of the person then registered as proprietor of the land.

23. In their testimony before the Court, the Plaintiffs averred that they have been in the suit land for a period of over 50 years during which time they have enjoyed uninterrupted occupation and quiet possession of the land. It was further their testimony that during the said period they had utilised the suitland by continuously cultivating crops such as maize among other food crops.

24. In regard to the Defence and Counterclaim filed herein, the Plaintiffs disputed the validity thereof contending that the Interested Party did not have a valid power of attorney from the 2nd Defendant to file the same and the said pleadings were therefore null and void.

25. From the material placed before me, it is evident that the Defence and Counterclaim were filed herein by the Interested Party Omar Khamis Balleth. In filing the said pleadings, the Interested Party was acting on a Special Power of Attorney dated 4th January 2012 which document was allegedly prepared at the offices of Muranje & Company Advocates and was donated to him by the 2nd Defendant. As it turned out Mr. Henry Muranje Advocate testified herein as PW2 and denied witnessing and or preparing the power of attorney.

26. I have agonized over the testimony of PW2 and the effect thereof on the Defence and Counterclaim filed herein. In this regard, I have noted that the Interested Party and the 2nd Defendant are biological brothers. The 2nd Defendant does not deny that he donated the said power of attorney to the Interested Party and/or that the signature appended thereon is his. In challenging the said power of attorney, the Plaintiffs submitted that the Interested Party had no locus to lay a claim or to defend this matter as he derived his locus standi from the impugned power of attorney.

27. It is to be noted however that the 2nd Defendant who is the registered owner of the suit premises himself testified before this Court contesting the claims made by the Plaintiffs. It is further noteworthy that regardless of its dubious origin, the power of attorney was duly registered at the Land Registry in Mombasa as by law required. That being the case, I am prepared to accept the power of attorney as having been duly executed and donated to the Interested Party by the 2nd Defendant.

28. In any event, I note that the Interested Party was enjoined into these proceedings pursuant to an application he made to this Court dated 28th July 2014. The Court then seized of the matter having considered the said application and the basis thereof did determine that the Interested Party equally had a stake in the matter and proceeded to enjoin him accordingly.

29. In support of their case, the 2nd Defendant and the Interested Party told the Court that the suit premises is registered in the 2nd Defendant's name while the Interested Party has beneficial interests thereon. It was their case that the Interested Party bought the parcel of land from Ali Swaleh

Ali(Originally the 1st Defendant herein) who then proceeded to transfer the same to his name on or about 7th October 1991 for a consideration of Kshs 145,000/-. At the time of the said purchase, the Interested Party was out of the country and the transaction was therefore carried out on his behalf by his brother the 2nd Defendant herein.

30. According to the 2nd Defendant and the Interested Party, there were about some four people who were “squatting” on the land at the time they bought the same and they proceeded to compensate them after which they left the land. The Interested Party produced in Court copies of agreements he had with the said squatters one of whom he said was the 3rd Plaintiff herein. It was the Interested Party’s case that the 3rd Plaintiff later requested him for permission to take care of the land and to use the same for planting maize. The Interested Party acceded to the 3rd Plaintiff’s request and even allowed him to put up a hut in the middle of the farm. It was however the 2nd Defendant’s and the Interested Party’s case that the 1st and 18th Plaintiffs herein must have come to the land much later as they were not there when the Defendant and the Interested Party initially signed agreements with the four squatters.

31. I have considered the facts and circumstances of this case as presented before me. The substantive prayer in the Originating Summons is that the Plaintiffs are entitled to be declared as proprietors of the Land Certificate No. CR 20905, Land Portion No. 5470 as delineated on the Deed Plan No. 148578 which they have acquired by adverse possession. It is telling that this Prayer was not amended even after the Plaintiffs numbers shrank from the original 41 to the current 3 Claimants. As it were, that would appear to suggest that the Plaintiffs are in actual sense claiming ownership of the entire parcel of land being Portion No. 5470. From the Transfer documents annexed to the Originating Summons, the said Title contains by measurements 2.935 hectares of land.

32. From the testimony adduced before me, it was however evident that the Plaintiffs were merely seeking various portions of land which they claim to occupy and use for farming activities. During cross-examination, PW1 indeed told this Court that other than the three Plaintiffs there are other family members and cousins who also occupy the land. It was his testimony that all the others who had withdrawn from the case were also entitled to the land but they had withdrawn the case because of being misled by the Interested Party.

33. I think in a matter of this nature, it was incumbent on the Plaintiffs to point out with particular precision the portions of the suit premises which was in their actual possession. As Meoli J observed in ***Samuel Katana Nzunga & 102 Others –vs- Salim Abdalla Bakshwein & Another(2013) eKLR:-***

“Although it is possible for the adverse possessor to successfully claim a portion of a larger whole, the former must be specifically identifiable (see Gatimu Kinguru –vs- Muya Gathangi (1976-1980) KLR 317). From the record of the scene visit and the trial, it is not possible to accurately tell what specific portion is possessed by which claimant(s) and how so.....Even if the Plaintiff’s claim were found to be proved, on what basis would the entire land parcel be distributed among the Claimants? A Court of law would be loath to issuing orders that are certain to cause fresh friction between the Claimants themselves and possible breach of peace.”

34. In the matter before me, the Plaintiffs conceded that other than themselves, there were other people on the same parcel of land including those to whom the Interested Party was said to have sold portions of the land to. In the absence of a survey or any other report delineating the specific portions claimed by the three remaining Plaintiffs, the general prayer sought in the suit is misconceived and inept in the circumstances.

35. In any event, while I was prepared to accept that the some of the Plaintiffs in particular the 3rd Plaintiff appeared to have lived on the suitland for more than 12 years, I did not think that their stay as such was continuous, uninterrupted and adverse to the interests of the Defendant and the Interested Party. From the minutes of a meeting held in the year 2012 annexed as Exhibit “MOB 2” in support of a Replying Affidavit filed by the Interested Party herein on 2nd September 2014, it is evident that the

meeting was called at the local District Officer's office pursuant to a complaint and an assertion of right of entry in the suit premises by the Interested Party. A perusal of the list of names would indicate that the 1st and 18th Plaintiffs herein were in attendance.

36. At any rate, the stay on the land by the 3rd Plaintiff was permitted by the 2nd Defendant and it could not be said to have been adverse to the Defendant. As it were, the Plaintiffs were hard put to deny the Defendants' contention that they were in the business of invading various private properties and thereafter proceeding to lay a claim thereon. In the course of their cross-examination, it did emerge that all the three Plaintiffs were beneficiaries of LR NO 514R Malindi which Portion of land they acquired interests in after filing Malindi HCCC No. 73 of 2008; ***Kahindi Fundi Mukamba & Others –vs- Fleet Wood Properties Ltd.*** In the said suit in which the 18th Plaintiff herein was the 5th Plaintiff, Prayer No. 1 of the Originating Summons was expressed in near similar terms as those herein as follows:-

1. That the Plaintiffs are entitled to be declared as proprietors of the Portions of plot No. 514R which they have acquired by adverse possession, having lived on and worked on the same for over 45 years used them peacefully and without any interference from the Defendants and their predecessors.”

37. A perusal of Replying Affidavit sworn on behalf of the Plaintiffs in the said HCCC No. 73 of 2008, by one Juma Sahim Mohammed on 24th October 2008 reveals that there are minutes attached of a meeting held on 8th October 2008 in which names very similar to those of the 1st, 3rd and 18th Plaintiffs are listed in attendance as Nos. 20, 21 and 17 respectively. When he was questioned about the said case during cross-examination herein, PW1 retorted that the said case was brought about by his uncle. He however admitted that he was given a portion of the suitland in the said matter even though he denied employing violence to acquire the same.

38. Arising from the foregoing I did not find the Plaintiffs sincere and honest in their testimony to the effect that they had always lived in the suitland continuously and uninterrupted for a period of more than 12 years. The right of action in adverse possession accrues when dispossession has occurred and the land falls into the hands of the adverse possessor for a period that lasts 12 years. The Plaintiffs failed to prove that that is what transpired herein.

39. On the converse, the 2nd Defendant and the Interested Party were able to prove that upon acquiring interest in the land, they remained vigilant and took appropriate action whenever they thought their interests were threatened.

40. The upshot of the foregoing is that I find no merit in the Plaintiff's case and the same is hereby dismissed.

41. I did however find merit in the Defendant's Counterclaim and hereby allow the same in terms of prayers a, b and c thereof.

42. Mindful of the period of time it has taken to determine this dispute and the fact that the Plaintiffs have remained in the disputed parcel of land, I hereby direct that the Order requiring them to give vacant possession will take effect upon the expiry of 90 days from today. This grace period will enable them to make necessary arrangements, and is conditional upon the Plaintiffs keeping the peace and refraining from putting up any new structures or dealing with the suit property in any manner prejudicial to the Defendant's title.

43. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 28th day of June, 2018.

J.O. OLOLA

JUDGE