



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 114 OF 2010

MIRZA ALI ABDULRAHMAN MIRZA (suing as Administrator of

Estate of **SALEH MIRZA**.....**PLAINTIFF**

VERSUS

1. REUBEN MWADAI

2. IBRAHIM MWADAI

3. MUTIE MUNG'ALA.....**DEFENDANTS**

JUDGMENT

BACKGROUND

1. By a Plaintiff dated and filed herein on 30th September 2010 the Plaintiff Saleh Ali Mirza suing as the administrator ad Litem of the estate of Aziz Mohamed Abubakar Alamoody prays for:

a) Vacant possession and/or eviction of the defendant from the Plaintiff's property; and

b) Costs of this suit and interest thereon at Court rates.

2. The said prayers are premised on the Plaintiff's averments that at all material times the Plaintiff was the administrator ad Litem of the estate of Aziz Mohammed Abubakar who is the registered owner of half undivided share of all that parcel of land known as Plot No. 223 Mambri. The Plaintiff further avers that the Defendants have jointly and severally moved onto the suit property and proceeded to unlawfully occupy it without the Plaintiff's consent. Despite demand and notice given requiring the Defendants to vacate the suit property, they have jointly and/or severally refused to do so.

3. In their Amended Defence and Counterclaim dated 5th July 2012 and filed herein on 10th July 2012, the three Defendants deny that the Plaintiff is the Administrator ad Litem of the estate of Aziz Mohamed Abubakar. They maintain that the Plaintiff has no locus standi to institute this case and describe him as a mere busy body being used by one Lennox Safari Mayego and Julius Kitsao Mayego both of whom have an on-going dispute with the 1st and 2nd Defendants in Court.

4. The Defendants contend that the dimensions and abutments of the shares of each of the owners in common of land portion No. 223 Mambri including the alleged half undivided share of Aziz Mohamed Abubakar remains undemarcated on the ground and the Plaintiff does not know where the share lies on the ground.

5. On the alternative, the 1st and 2nd Defendants maintain that they were born on the suit property and have occupied it and built their residence thereon for a period of over 40 years.

6. On his part, the 3rd Defendant avers that he has never trespassed onto the suit property nor sub-divided it and sold portions thereof to 3rd Parties as alleged by the Plaintiff.

7. Accordingly the 1st and 2nd Defendants have counter claimed against the Plaintiff for:-

a) A declaration that the 1st and 2nd Defendants have acquired adverse possession of Plot No. 223 Mambui registered at the Coast Land Registry as title No. CR 14616.

b) Costs of the suit.

c) Interest thereon at Court rates.

8. As it were the Original Plaintiff Saleh Ali Mirza passed away before the trial commenced and was substituted by Mirza Ali Abdulrahman Mirza.

9. Shortly after the commencement of the trial, the Plaintiff on or about 19th May 2016 proceeded to withdraw the suit as against Mutie Mung'ala, the 3rd Defendant. The said withdrawal was allowed by the consent of the parties with no order as to costs.

THE PLAINTIFFS CASE

10. At the trial herein which proceeded partially before the Honourable Justice Angote, the Plaintiff called two witnesses in support of their case.

11. PW1- Mirza Ali Abdulrahman Mirza told the Court that she is the administrator of the Estate of Saleh Mirza who was the administrator ad Litem of the Estate of Aziz Mohamed Abubakar who is the registered owner of half undivided share of all that parcel of land known as Plot No. 223 Mambui.

12. PW1 told the Court that the Defendants had forcefully and without authority or permission entered into the aforesaid parcel of land and are presently in occupation illegally thus rendering them trespassers on the suit property. She further told the Court that the Defendants have proceeded to sub-divide the land and have sold portions thereof to unsuspecting members of the public.

13. It was PW1's testimony that the Defendant had not been on the land for 12 years to warrant their claim for adverse possession. They were instead trespassers who had invaded the property and who should be evicted therefrom.

14. On his part, PW2- Julius Kitsao Mayego told the Court that he was born in Misuyuni and his father the late Mayego Nyambu used to be a caretaker of Plot No. 222 and 223 Misuyuni, Mambui. According to him the two plots were owned by Hussein Karim Dachi and Aziz Mohamed Aziz respectively.

15. PW2 told the Court that David Mtengo, the father of the 1st and 2nd Defendants was a squatter on Plot No. 222 where he had built a house. He was however evicted from the land in 1967 when his house was demolished. Thereafter the late David Mtengo moved to Plot No. 223 belonging to Aziz Mohamed Aziz.

16. According to PW2, the late David Mtengo thereafter started claiming that he had bought the portion of land he lived in within Plot 223 from one Ali Barbara for Kshs 550/- The said Ali Barbara had however just been allowed to live on the land by the owner Aziz and had no ownership right to the land.

17. PW2 testified that sometime in 1997, he received a letter from the Senior Chief Magarini Location claiming that the portion of land also within Plot No. 223 where he lived with his family belonged to the late David Mtengo Mawadai and that the same had been surveyed and was now known as Plot No. 107. The letter from the Chief warned PW2 to stop any further activities on the land and urged him to immediately vacate the same.

18. PW2 further told the Court that in the year 2005 the 1st and 2nd Defendants filed in Court a decision of the Land Dispute No. 18 of 1998 which awarded the property to the 1st and 2nd Defendants and ordered that he be evicted from the suit property. Thereafter in 2006, the 1st and 2nd Defendants proceeded to demolish his four houses. When he reported to the Malindi Police Station about the incident, PW2 was arrested and detained and was later charged in Malindi Criminal Case No. 31 of 2006 with the charge of forcible detainer.

19. Following a complaint PW2 made after his arrest, the 1st and 2nd Defendant as well as one Joshua Charo, a member of Magarini Land Disputes Tribunal were later charged in Malindi Criminal Case No. 1666 of 2007 with the offence of conspiracy to defeat justice. All the three were subsequently convicted and sentenced to pay a fine of Kshs 10,000/- or in default to serve six months imprisonment.

THE DEFENDANTS' CASE

20. On their part, the Defendants called four witnesses who testified in support of their case.

21. DW1-Reuben Mwadai Mtengo (1st Defendant) testified that he was born on the suit property in the year 1956 to David Mtengo from whom he and the others inherited the land which measures 20 acres. DW1 told the Court that his father passed away in 2003. Before his father's death and even thereafter, they had lived on the land and cultivated it openly, exclusively and without interruption for over 40 years.

22. DW1 testified that they have built temporary houses on the land which also has several cashew nuts and mango trees. In addition, they have buried some 11 relatives whose graves are on the suit property. He further told the Court that his family had a long running dispute with PW2's family over a boundary but the Plaintiff has never been on the land or claimed it at any time before this suit was filed.

23. On his part DW2- Ibrahim Mwadai (the 2nd Defendant) told the Court that he was also born on the suit property in 1956. His father David Mtengo passed away in 2003 and they had inherited the land in which they have since built their temporary houses.

24. DW3- Nicodemus Karisa Kaingu told the Court that he was a neighbour to the family of the Defendants. He told the Court that the land measuring 20 acres belonged to the Defendants' father David Mtengo. He also told the Court that he was born on the locality in the year 1956 and had lived there ever since.

25. DW4-Kea Jira Mgandi confirmed the testimony of DW1, DW2 and DW3. He told the Court that DW1 and DW2 were born on the suitland and that they and inherited the property which measures 20 acres from their father David Mtengo. He testified that the Defendants have built temporary houses on the land and that the land has never been owned by the Plaintiffs.

ANALYSIS AND DETERMINATION

26. I have considered the evidence placed before me by both the Plaintiffs and the Defendants. I have also taken into account the lengthy submissions and authorities placed before me by the Learned Advocates representing the parties herein.

27. In my view, a number of issues arise from the pleadings and the evidence placed before me. These are:-

(i) Whether the Plaintiff has Locus Standi to institute this suit;

(ii) Whether the Defendant have trespassed and unlawfully occupied the Plaintiff's land and/or whether they have acquired 20 acres thereof by dint of adverse possession;

(i) Whether the Plaintiff has Locus Standi to Institute this Suit.

28. As regards the first issue for determination, it was clear from the material placed before me that the disputed parcel being Land Portion No. 223 Mambrui and which measures 152.5 acres is registered in the name of Aziz Mohamed Abubakar Alamoody who owns a half(1/2) undivided share of the same vide Certificate of Ownership No. 11234(PEX 1). The said registered owner is said to have died on 19th October 1969 after which the property was apparently under the care of one Mohamed Aziz but who never took out Letters of Administration.

29. However on or about 17th April 2007, a Grant of Letters of Administration ad Litem was issued by the High Court at Mombasa in Probate & Administration Cause No. 67 of 2007 to the Original Plaintiff herein Saleh Ali Mirza. As it were, the said Saleh Ali Mirza also passed away on 19th January 2014. Following Saleh's death, the present Plaintiff Mirza Ali Abdulrahman Mirza was granted similar Letters of Administration ad Litem on 11th June 2014 in Malindi High Court Probate & Administration Cause No. 10 of 2014.

30. Pursuant to the said Letters of Administration, the Plaintiff has an obligation in law to protect and preserve the estate of the deceased Aziz Mohamed Abubakar Alamoody. That in my view includes the suit property which is clearly registered in the name of the deceased. Arising from the foregoing I am satisfied that contrary to the Defendants averments herein, the Plaintiff has the necessary standing and capacity to institute and continue with the suit as filed.

(ii) Whether the Defendants have Trespassed on the Suit Property and/or acquired it by Adverse Possession

31. The main thrust of the Plaintiff's case is that the Defendants have illegally and without any lawful justification trespassed onto the suit property and that as such this Court should proceed to grant orders of eviction. On their part the Defendants contended that they had entered the land more than 40 years ago and that accordingly they were entitled thereto by virtue of adverse possession.

32. In his testimony before the Court, PW1 testified that the Defendants trespassed onto the suit property, and proceeded to sub-divide it and sell portions thereof to unsuspecting members of the public. He did not know when the Defendants moved into the land but told the Court that he saw them on the land when he visited in 2014 shortly after being issued with letters of administration.

33. On his part, PW2 told the Court that the Defendants' father was evicted from Plot No. 222 Mambrui in 1967 after which he settled on the suit property without the consent of the owner. PW2 who seemed to be more conversant with the facts herein having had a long-running dispute with the Defendants told the Court that he stayed with his father at the said Plot No. 223 Misuyuni, Mambrui. His father was apparently appointed by the late Aziz Mohamed as the caretaker of the land.

34. PW2 confirmed that the Defendants occupy a portion of land within Plot No. 223 which land he stated is about half a kilometer from the portion (also within Plot No. 223) occupied by his family. He further confirmed that the Defendants have built their homestead on the suit property where they have several houses and have planted various trees and crops.

35. If PW2 is to be believed that the Defendant's father was evicted from Plot No. 222 in 1967 after which he built his home in Plot 223 without the owner's consent, it would follow that the Defendants have been in occupation of a portion of the land for quite some time. And if PW2's father as the caretaker knew of the presence of the Defendant's father, it can only be presumed that the true owners of the land must have also come to know of the Defendant's entry on the property around the same time.

36. The Grant of Letters of Administration issued to the Original Plaintiff herein Saleh Ali Mirza show that the late Aziz Mohamed Abubakar died on 19th October 1969. That would be some two years after the date the Defendants' father is said to have invaded the suit property. Nothing was placed before me to show that any action was taken by the original owner or his successors in title to evict the

Defendants from the said parcel of land until some time in or about 2007 when PW2 had some disputes with the Defendant.

37. On their part, the Defendants told the Court that they were born on the suit property and have lived thereon to-date. While I found the Defendants witness' testimony rather exaggerated and somewhat concocted, it was evident that their father David Mtengo and/or themselves were not invited into the suit property by the Plaintiff's predecessors in title.

38. As Angote J stated in *Angus Walker Munro –vs- Kilifi Plantations Properties Ltd & Another (Malindi ELC 173 of 2015(unreported)J*, for one to succeed in a claim for adverse possession, he must prove the following:-

- (a) He must have made physical entry and be in actual possession of the land for the statutory period of twelve(12) years;*
- (b) The entry and occupation must be with or maintained under some claim or colour of right;*
- (c) The occupation must be non-permissive;*
- (d) The occupation must evidence unmistakable animus possidendi, that is occupation with the clear intention of excluding the owners and;*
- (e) The acts of the adverse possessor must be inconsistent with the owner's enjoyment of the soil for the purpose which he intended to use it."*

39. While they did not provide any evidence that the Portion of Plot No. 223 Mambrui that they occupied was 20 acres in size, their conduct of building their houses, planting several permanent trees over the years and even burying their father on the land when he died in 2003 constituted an unmistakable statement of their right of ownership of the portion they occupied. Their occupation and use of the said portion was in my view not of a temporary nature and was clearly adverse to the interest of the registered owner of the land.

40. As it were while it is evident that the Defendants fraudulently tried to evict PW2's father from their portion of land, a perusal of the proceedings in Land Dispute Case No. 18 of 1998 that was commenced by PW2's father against the Defendants' father demonstrates that the same was not for the recovery of vacant possession of the suit property on behalf of the registered owner but was a boundary dispute between PW2's father and the father of the Defendants.

41. From the material placed before me, the said Portion No. 223 Mambrui registered as Title No. CR 14616 measures approximately 152.5 acres. The Certificate of Ownership produced as Pexh 1 shows that it was registered as such on 16th July 1974. That would therefore be the date when the time started running against the Plaintiff.

42. While the Defendants did not provide the Court with any evidence that the portion they occupied measured 20 acres, the Plaintiff himself did not contradict that assertion. Indeed during his cross-examination, he stated that he could not tell the extent of land occupied and/or in use by the Defendants.

43. Accordingly and for the foregoing reasons, it is my finding that the Plaintiff has failed to prove his case against the Defendants. The evidence before me shows that the Defendants occupation and use of the land prior to the disputes between the parties which appears to have started around the year 2007 has been adverse against the Plaintiff's title for a period exceeding 12 years.

44. I am therefore satisfied that the Defendants have proved their counter claim against the Plaintiff on a balance of probabilities. The upshot is that the Plaintiff's case is dismissed and Judgment is hereby entered in favour of the Defendants and against the Plaintiff as follows:-

a) A declaration is hereby issued that the 1st and 2nd Defendants have acquired by adverse possession of a portion of land measuring 20 acres from all that parcel of land known as Portion No. 223 Mambrui and registered at the Coast Land Registry as Title No CR 14616.

45. Each Party shall bear their own costs.

Dated, signed and delivered at Malindi this 31st day of July, 2018.

J.O. OLOLA

JUDGE