



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 195 OF 2013

OCHURA BIRUNDU.....1ST PLAINTIFF

JAMES OGACHI.....2ND PLAINTIFF

VERSUS

JOHN OLARASHAR OLE NGIRU.....DEFENDANT

J U D G M E N T

1. The plaintiffs commenced the instant suit against the defendant by way of a plaint dated 23rd April 2013 filed in court on 24th April 2013 claiming ownership of land parcel **Transmara/Moita/148** which they contended the defendant had trespassed upon. The plaintiffs sought judgment against the defendants for:

a) Possession of the said land and premises.

b) Mesne profits at the rate of kshs.10,000/= an acre per annum from the said January 2006 until possession is delivered up.

c) Costs of the suit.

d) interest

2. The plaintiffs aver that the defendant unlawfully and wrongfully trespassed onto the suit land and took possession of the same in 2006 thereby depriving the plaintiffs of the use of the land parcel **Transmara/Moita/148** (“**the suit property**”) and hence the plaintiffs have suffered loss and damage.

3. The defendant for his part filed a statement of defence dated 26th August 2013 where he avers the suit property was part and parcel of Plot No. 27, Moita Adjudication Section and that it was lawfully demarcated and registered in the defendant’s name. The defendant avers that the plaintiffs acting in collusion with the land adjudication officers altered the Adjudication records when he was under incarceration in prison following conviction of a criminal offence. The defendant further pleaded that he nonetheless has occupied and possessed the suit property for a period in excess of 12 years and the plaintiffs have consequently lost any right to recover the same pursuant to the provisions of the Limitation of Actions Act, Cap 22 Laws of Kenya and accordingly the plaintiffs are non-suited. He sought the dismissal of the plaintiffs’ suit.

4. The 2nd plaintiff testified on behalf of himself and the 1st plaintiff and called one witness in support of their case. Likewise the defendant testified and called one witness (the Land Demarcation Officer) in support of the defence case.

5. PW1, James Ogachi, the 2nd plaintiff herein told the court that they purchased the suit land from Nanosokan Melompuki in 1986, took possession and started using it. That they were later issued with a title deed for the suit land in 2003 after the adjudication process was completed. He produced the title deed and certificate of search dated 26th June 2003 and 12th April 2013 as “**PEx.1** and **PEx.2**” respectively. He further contended that they used to cultivate the suit land but in 2005, they leased the suit land to a third party for Kshs. 10,000/= per acre per annum owing to distance and tribal animosity pitting the Maasai and Kisii. He stated that in 2006, the defendant entered the suit land unlawfully and forcefully and started cultivating the same after driving out the tenants whom they had leased the suit land.

6. The plaintiff further testified that the defendant had started putting up structures on the suit land which was adjacent to the defendant’s parcel of land **LR No. Transmara/Moita/66** (“**Plot No. 66**”). The plaintiff contended that the suit land did not belong to the defendant and stated the defendant’s allegation that he had occupied the suit land since 1975 as false reiterating that the defendant entered the land forcefully in 2006.

7. PW2 Daniel Arusat Korei testified that he was the son of the vendor who sold the suit land to the plaintiff. He stated that during the adjudication process his father sold the suit land to the plaintiffs with whom he had a friendship and who he previously had allowed to cultivate the suit land. He stated that during the adjudication process the portion the plaintiffs purchased was adjudicated to them as land parcel **148** and registered in the plaintiffs' names.

8. PW2 corroborated the plaintiff's evidence that the defendant used to occupy Plot No. 66 but later moved and invaded the suit land in the year 2006, after the plaintiffs vacated the suit land in the said year during tribal clashes. PW2 also confirmed that the defendant was now cultivating the suit land and also grazing his cattle on the suit land. He also stated that the defendant never claimed that his father had dispossessed him of his land even though the defendant was around when his father sold the suit land to the plaintiffs and that the defendant only lodged a claim over the suit land after the plaintiffs vacated the suit land in 2005 during the tribal clashes between Maasai's and Kisii's. According to PW2, the defendant contended that the land belonged to Kisii's hence he invaded the suit land. He also denied the defendant's contention that he (defendant) had occupied the suit land for over 30 years as alleged by the defendant.

9. DW1 John Olarashar Ole Ngiro, the defendant herein told the court that the suit land was his land and not the plaintiffs. He affirmed that the plaintiffs were registered as the owners of the suit land in 2003 and that originally the land belonged to Moita Group Ranch and he was allocated the same in 1985 by Moita Group Ranch. The defendant further stated that initially, the suit land did not extend upto the river and he raised a complaint to the Chairman of the Land Adjudication Committee but the Chairman told him to wait and the issue remained unsettled.

10. The defendant further contended that he wanted his land to reach the river but before the issue could get resolved, he was arrested for stock theft and jailed for 7 years only to be released in 1992. He stated that during his prison term, his family was residing in the suit land. However, that after he served his prison sentence, he found that his wife had moved to his brother's place but he still went back to the suit land and resumed farming.

11. The defendant testified that he constructed a home on the suit land and has resided there ever since and that sometime in 1994 one Ndisar Tiepon (his neighbour) started claiming that the suit land was his. That he then proceeded to Kilgoris Lands Office where he found out that the land had been subdivided into two portions i.e Bosire was given parcel No. **27** and plaintiffs were registered as owners of the suit land parcel No. **148**. He contended that he still resides on the suit land and that the plaintiffs do not use the land and have never chased him away from the land. He denied that he entered the suit land in 2006 and that he forcefully ejected the plaintiffs' tenants as claimed by the plaintiffs.

12. The defendant further contended that the plaintiffs' title was not genuine and accused the plaintiffs' of fraudulently acquiring the suit land. He relied on his bundle of documents listed as "**Dexh.1-12**" and contended that the plaintiffs claim had no basis and the same ought to be dismissed with costs.

13. On cross examination, the defendant acknowledged that there were tribal clashes between 2005 and 2006 but contended that the plaintiffs were not farming and neither had they built on the suit land as alleged by them. It was his evidence that during that period he was the one who was in possession of and was using the suit land.

14. DW2 James Luchiri Mayoye the demarcation officer Transmara sub-County produced a copy of the demarcation register covering land parcel No. **148** among others ("**DEx.3**"). The demarcation register indicated that the suit land was hived off from parcel No. **26**. On cross examination, he clarified that he is a demarcation officer and that the role of an adjudication officer is to allocate land pending registration, handling claims and keeping records. He explained that he did not have the register relating to parcel No. **26** and therefore he could not tell who was allocated parcel No. **26** but the register showed that the allottees of land parcel 148 (the suit land) at the time of adjudication/demarcation in 1986 were the plaintiffs. The register did not note that there was any claim arising from the allocation of the suit land to the plaintiffs.

15. The parties following the conclusion of the trial filed written submissions. The plaintiff's submissions were filed on 19th April 2018 while those for the defendant were filed on 16th April 2018. Having considered and reviewed the pleadings, the evidence adduced by the parties and their written submissions the following are the issues for determination:-

- (i) Whether the plaintiffs acquired land parcel Transmara/Moita/ 148 through the adjudication process.**
- (ii) Whether there was any fraud in the acquisition of the suit land by the plaintiffs.**
- (iii) Whether the defendant has wrongfully and unlawfully entered onto land parcel Transmara/Moita/148.**
- (iv) Whether the doctrine of adverse possession is applicable in favour of the defendant.**
- (v) What reliefs should the court grant?**

16. It is not disputed that the plaintiffs are the registered proprietors of the suit land. The copy of the title and a copy of the search were produced in evidence which clearly showed the plaintiffs were the registered proprietors of land parcel **Transmara/Moita/148** measuring 8.71Ha or thereabouts. Section 26 of the Land Registration Act No. 3 of 2012 provides thus:-

(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 the 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.

17. On the evidence it is undisputed and it is indeed admitted that the plaintiffs are the registered proprietors of the suit land and therefore prima facie they are vested with all the ownership rights and their title is indefeasible and can only be challenged under Section 26 of the Land Registration Act referred to hereinabove. The defendant in his defence and evidence before the court averred that the plaintiffs conspired and/or fraudulently colluded with the land adjudication officers to alter the adjudication records in favour of the plaintiffs to the prejudice of the defendant when he was incarcerated after being convicted of the offence of stock theft. The defendant consequently was alleging fraud on the part of the plaintiffs in the acquisition of the suit properties save that no particulars of fraud and/or the alleged conspiracy or collusion were pleaded.

Black's Law Dictionary 10th Edition defines fraud thus:-

“A knowing misrepresentation or knowing concealment of a material fact made to induce another to act his or her detriment; unconscionable dealing; especially in contract law, the unfair use of the power arising out of the parties relative positions and resulting in an unconscionable bargain.”

18. The defendant in his written statement of defence as observed earlier in this judgment did not give any particulars of fraud nor did he advance any evidence to prove fraud during viva voce evidence. In the case of **Koinange and 13 others -vs- Koinange [1968] KLR 23** it was held:-

“(i) It is a well established rule of evidence that whosoever asserts a fact is under an obligation to prove it in order to succeed. The party alleging fraud in this case the Plaintiffs had the burden of proving it and they had to discharge that burden.”

Similarly in the case of **R.G. Patel -vs- Lalji Makanji (1957) E. A 314** at 317, the court of appeal stated thus;

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required..”

19. The defendant in this case did not lead any evidence to demonstrate that the plaintiffs colluded with the land demarcation officer to register the plaintiffs as the proprietors of the suit property. If anything the evidence of DW2 the land demarcation officer clearly established that the register showed that the allottees at the time of adjudication/ demarcation in 1986 were the plaintiffs who were allocated the suit land and that there was no objection filed in regard to the allocation of the suit land to the plaintiffs.

20. The defendant has contended that the plaintiffs are barred by the Statute of Limitation from seeking to recover the suit land from the defendant and places reliance of Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya which provides thus:

“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.”

21. The defendant in his evidence contended that he has occupied the suit property since the 1990's but other than making the assertion the evidence of occupation and possession was not supported by any other evidence. He for instance did not provide any evidence to demonstrate long occupancy. There was no evidence to confirm what developments he has effected in the suit property, if any. If there were any developments, photographs would, if available have illustrated the nature of developments that were on the ground. No such evidence was available. The plaintiff for his part testified that they had been using the land for farming but in 2005/2006 when tribal clashes pitting the Maasai and Kisii's erupted they were forced to cease the farming activities and they instead opted to rent out the land to third parties at KShs. 10,000/= per acre per annum. Though no documentary evidence was tendered to prove that the plaintiffs had leased out their land, the plaintiffs' evidence that they were forced out was corroborated by PW2, Daniel Arusat Korei, the son of Narosokon Melompuki who sold the suit land to the plaintiffs before the land was adjudicated in Moita. PW2 stated as follows in his evidence:-

“...During land adjudication my father sold to them (plaintiffs) the land they used to cultivate. The land was then recorded in their names. They continued to cultivate the land. My father also gave land to one Bosire. Bosire did not buy the land. My father's parcel of land is now known as LR No. Transmara/ Moita/126, (26) the plaintiffs parcel of land is Transmara/Moita/ 148 and Bosire's parcel of land is LR No. Transmara/Moita/27. The defendant has a parcel of land known as Transmara/Moita/ 66.”

22. This evidence by PW2 is further corroborated by the survey map tendered by the plaintiff as **“PEX.4”**. PW2 testified that his father's plot is land parcel 26 and parcel 148 is shown to border parcel 26 while parcel 27 borders parcel 148 and parcel 66 said to belong to the defendant. The adjudication/demarcation register **“Dex.3”** produced by DW2 indicates land parcel 148 was a subdivision from land parcel 26 which further renders credence to the plaintiffs' evidence. The survey map shows the layout of the parcels of land and it is event that parcels Nos. 27 and 148 initially formed part of the larger parcel No. 26 said to belong to PW2's father. PW2 in his further evidence stated as follows:

“He (defendant) used to occupy Plot No. 66 but he moved and invaded the suit property in the year 2006 after the plaintiffs vacated the land in the year 2005 during the tribal clashes.”

The witness further testified as follows:

“The defendant was around when my father sold the suit property to the plaintiffs. The defendant lodged a claim over the suit property after the plaintiffs vacated the land in 2005 during the tribal clashes between Maasai and Kisii’s. He claimed that the land belonged to the Kisii’s and that is why he invaded the same. There were tribal clashes due to cattle theft and when the plaintiffs came back to the suit property they found when it had been occupied by the defendant...”

23. Under cross examination, PW2 was emphatic that the plaintiffs were using the land for cultivation and they had constructed a house thereon and only left during the tribal clashes. He maintained the defendant entered the suit land in 2006 and that before that time it is the plaintiffs who were utilizing the land.

24. On the basis of the evidence adduced by the parties, I am satisfied that the plaintiffs were lawfully registered as the owners of the suit property in 1997 and issued title in 2003. I am equally satisfied on the evidence, that indeed, the plaintiffs were utilizing the land upto and including 2005 when they were forced to flee from the suit land following the breakout of tribal clashes between the Maasai and Kisii’s. It is in the public domain that there have been outbreaks of clashes between Maasai and Kisii’s at the Kisii/Transmara border. Both the plaintiffs and the defendant have accepted there were indeed tribal clashes in 2005/2006 in their testimonies. I accept the plaintiffs’ evidence that they vacated the suit land owing to the clashes in 2005 and that the defendant entered the suit land unlawfully in 2006 and has since prevented the plaintiffs from utilizing their land without any justifiable reason.

25. Having found that the defendant entered into possession of the plaintiffs parcel of land in 2006, it follows that as at 2013 when the plaintiffs instituted the present suit to recover possession of their land the period of limitation had not expired so that they would be barred from bringing the action in terms of Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya. Likewise the doctrine of adverse possession would have no application in favour of the defendant as the mandatory period of 12 years from the time the defendant entered into possession had not expired so that the plaintiff title would be said to have expired by operation of the law. Even if the period of 12 years had expired, there would be the issue of determining whether in the circumstances the defendant would be said to have been openly and peacefully possessing the land for uninterrupted period of 12 years. Would forcible entry and resistance of the owner’s reentry constitute adverse possession? I do not think so as the ingredients of the doctrine of adverse possession are that the adverse possessor peacefully enters the land and occupies the same openly and carries on activities on the land that are inconsistent and hostile to the rights of the true owner. An adverse possessor does not need to position a guard to prevent the owner from accessing the property until the period of 12 years expires. The possession is meant to be peaceful, open, quiet and uninterrupted for the entire period of 12 years for the doctrine of adverse possession to be applicable.

26. I believe in my discussion analysis and evaluation of the evidence, I have answered the identified issues. On the first issue, the answer is in the affirmative while on the second issue the answer is in the negative. I answer the third issue in the affirmative, that the defendant has wrongfully and unlawfully entered on the plaintiffs’ parcel of land **Transmara/Moita/148** and that he is occupying the same as a trespasser. On the fourth issue, I have found and held that the doctrine of adverse possession was inapplicable in favour of the defendant in this matter.

27. The plaintiff in the plaint under prayer (4) sought an order for payment of mesne profits at the rate of kshs. 10,000/= an acre per annum from January 2006 until possession is delivered up. The plaintiff in his evidence did not provide a proper basis for an award of mesne profits. There was no proof that the plaintiffs at any time rented the land to any given person for any amount of money and therefore there would be no basis upon which mesne profits can be awarded. I have however found that the defendant is a trespasser on the plaintiffs land since 2006. The plaintiffs were deprived of the use of their land by the defendant. Trespass is actionable per se and once trespass is proved there is no requirement that damage must be proved before an award of general damages for trespass can be made.

28. I am persuaded that the plaintiffs suffered loss and damage resulting from being deprived of the use of their land and are entitled to an award of damages for trespass. I will award the plaintiffs a nominal award of damages for trespass in the sum of kshs. 100,000/=.

29. In the final result and on the basis of the foregoing analysis I am satisfied the plaintiffs have proved their case on a balance of probabilities and accordingly enter judgment in favour of the plaintiffs on the following terms;

- 1. The defendant is hereby ordered to vacate and deliver vacant possession of land parcel Transmara/Moita/148 to the plaintiffs within 30 days of being served with the decree herein.**
- 2. In the event the defendant fails to comply with (1) above the plaintiffs will be entitled to an order of eviction on application.**
- 3. The plaintiffs are awarded general damages in the sum of kshs. 100,000/= for trespass as against the defendant together with interest at court rates from the date of judgment until payment is made in full.**
- 4. The costs of the suit are awarded to the plaintiffs.**

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 27TH DAY of JULY 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the 1st and 2nd plaintiffs

Ms. Momanyi for the defendant

Ruth court assistant

J. M. MUTUNGI

JUDGE