



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 148 OF 2012

NAHLA FADHIL (*Suing through Daniel Mutua her*

lawful Attorney) **PLAINTIFF**

VERSUS

MUMBO DERI MOYO **DEFENDANT**

JUDGMENT

Introduction:

1. In the Plaintiff dated 7th September, 2012, the Plaintiff is seeking for a permanent injunction restraining the Defendant from interfering with parcel of land known as plot number 15 Group 1 Takaungu measuring 22.95 acres; a declaration that she is the legal owner of the suit land and for an order of eviction.
2. The Plaintiff has averred that the Defendant trespassed on the suit land in January, 2010 and started constructing illegal structures on the land; that the Defendant intends to inter the body of his late father on the suit land and that the Defendant has no claim known in law over the suit land.
3. In the Defence, the Defendant averred that the Plaintiff is incapable of acquiring a freehold title to land in Kenya; that he has been in actual occupation of the suit land for more than thirty (30) years and that the Plaintiff has never taken possession of the suit land.

The Plaintiff's case:

4. The Plaintiff's Attorney, PW1, informed the court that he is the duly appointed Attorney of the Plaintiff; that the Plaintiff purchased land in the year 2008 which comprised several portions measuring 64 acres and that amongst those parcels of land was L.R. No. 15 Group 1 Takaungu measuring approximately 21.95 acres (*the suit land*).
5. It was the evidence of PW1 that the suit land was previously owned by Shabbirhusbin Tayabali Abdulhussein (11.95acres), Amirali Sulemanji (5 acres) and Gulamabass Sulemanji Essaje (5 acres).
6. According to PW1, The Defendant was previously employed by Amirali as a farm help on his portion of 5 acres and was residing on a portion of the suit land and that Amirali had allowed him to cultivate the portion of land measuring 5 acres and to plant a few coconut trees on the land.
7. It was the evidence of PW1 that the Plaintiff's employment was terminated and was paid off for the developments he had made on the land and that he then stopped farming on the land but later on returned on the land claiming that he wanted to harvest the coconuts on the suit land.
8. PW1 informed the court that PW1 was charged in Criminal Case No. 696 of 1997 when he purported to sell a portion of the suit land to Mr. Tsuma and that when the suit land was advertised for sale, the Plaintiff purchased the several portions; that Amirali Sulemanji was paid Kshs. 750,000 for his share and that on 15th August, 2012, the Defendant forcefully interred the body of his son on the suit land.
9. PW1 produced in evidence the Power of Attorney that gives him authority to appear in the matter, the Indenture and the court proceedings and Judgment in Criminal Case No. 696 of 1997.
10. PW2 informed the court that she is an advocate of the High Court; that the Plaintiff is her sister; that she was involved in drawing up the conveyancing documents in respect to the suit land and that the Plaintiff purchased three plots.

11. It was the evidence of PW2 that the registered proprietor of one of the three plots was deceased and she was involved in obtaining the confirmation of the grant. However, it was the evidence of PW2 that the transfer of the portion of land belonging to the deceased proprietor has not been finalized.

12. PW2 stated that the Defendant was a shamba boy of Amirali Tayabali Sulemanji who owned $\frac{1}{4}$ share of the suit land and that his services were terminated by Mr. Amirali.

13. In cross-examination, PW2 stated that although her sister was born in Kenya, she is not a Kenyan citizen; that her sister was not in the country when the Sale Agreements were signed and that she did not sign the agreements.

The Defence cases:

14. DW1 informed the court that the Defendant is his uncle; that he was raised by the Defendant and that he lives in Takaungu. According to DW1, his father used to work for Mr. Haidar since 1973 and that he has been on the suit land since 1973 when he (DW1) was born.

15. It was the evidence of DW1 that Mr. Amirali died in 1978 and that he did not have a family; that another Asian came on the land and claimed that he was related to the late Amirali and that he also left around 1980 leaving them on the land.

16. It was the evidence of DW1 that even after the Asian left in 1980, they continued living on the land and that the Plaintiff claimed that the land was hers in the year 2011; that she had him and his uncle arrested and charged in Kilifi Criminal Case No. 975 of 2011 and that they were acquitted by the court.

17. DW1 informed the court that they have buried their grandfather and his brother on the suit land; that his nephews have also been buried on the land and that he has been on the suit land since 1973.

18. It was the evidence of DW1 that they have settled on the entire land measuring 29 acres and are therefore entitled to it.

19. In cross-examination, DW1 stated that their houses occupy a portion of land measuring $1\frac{1}{2}$ acres; that they have six (6) houses in total; that his father was already employed by Haidar when he was born in 1973 and that his father was charged after selling the land in Criminal Case No. 690 of 1997.

Submissions:

20. The Plaintiff's advocate submitted that the Plaintiff has proved that she is the legal owner of $\frac{3}{4}$ share of plot number 15 (Group 1 Takaungu) and a beneficial owner of $\frac{1}{4}$ share of the land; that the Defendant was an employee of Amirali Tayabali Sulemanji which employment was limited to $\frac{1}{4}$ share of the suit land and that the said employment was terminated by the said Amirali.

21. Counsel submitted that $\frac{3}{4}$ of the suit property is registered in the Plaintiff's name; that the Plaintiff has already paid for the $\frac{1}{4}$ share vide the agreement dated 12th September, 2009 and that the Defendant should be evicted.

22. Counsel submitted that the Defendant was paid off by Mr. Amirali in 1995 and that between 1997 and 1998, his stay on the suit land was not peaceful because he was facing criminal charges.

23. The Defendant's advocate submitted that the Plaintiff did not produce any documents to show how she acquired the suit property from the registered proprietors; that the Sale Agreement was never signed by the Vendor and the purchaser and that the same was not witnessed.

24. Counsel submitted that the suit property was registered in the names of Amirali Tayabali Sulemanji, Shabbirhusbin Tayabali Abdullhussein and Gulamabass Sulemanji on 22nd September, 1997 and that the other partners should have agreed to the sale of the land to the Plaintiff.

25. The Defendant's counsel submitted that Amirali Tayabali confirmed that the Defendant was employed as a farm worker in 1980 up and until 1995; that PW1 admitted that there were squatters on the land as at the time of purchase and that the suit is caught up by limitation of time.

Analysis and findings:

26. The evidence before me shows that the Plaintiff is the registered proprietor of $\frac{3}{4}$ share in land known as plot number 15 (*Group 1 - Takaungu*) (*the suit land*). According to the agreement of sale dated 12th September, 2009, the Plaintiff purchased the remaining $\frac{1}{4}$ share of land from Kayamali Gulamabbas and Mustansir Gulamabbas.

27. Although the Defendant averred in the Defence that he has been on the land for over thirty (30) years, and that the suit by the Plaintiff is time barred, he did not testify in this matter. Instead, it was Hassan Nderi who testified. Hassan Nderi (DW1) informed the court that the Defendant is his uncle; that he was born on the suit land in 1973 and that his father used to work for one Amirali.

28. This court was not told why the Defendant never testified in this matter. DW1 is not a Defendant. If his claim is that he has been on the land since 1973, then he should have sought to be enjoined in the suit as a party. He cannot purport to testify on behalf of his uncle without a Power of Attorney donating to him powers to do so.

29. To the extent that the Plaintiff has produced Certificates of Searches showing that she is the registered proprietor of the suit land, she is entitled to the land. In my Ruling of 13th December, 2012, I found that the Defendant had not at all shown that he has been on the land for twelve (12) years. Even after being offered an opportunity to testify in this matter, the Defendant never showed up. I take it that after this court issued an order of mandatory injunction on 13th December, 2012 against the Defendant, the Defendant abandoned his claim.

30. In the circumstances, I find that the Plaintiff has proved her case on a balance of probability. I therefore allow the Plaint dated 24th August, 2012 as prayed.

DATED AND SIGNED AT MACHAKOS THIS 12TH DAY OF JULY, 2018.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 19TH DAY OF JULY, 2018.

J.O. OLOLA

JUDGE