



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO.155 OF 2014**

**RASHID MOHAMED SALIM**

(Being the Administrator of the Estate of Mgeni Khamis Abdalla

& Amriya Khamisi Rashid).....**PLAINTIFF**

**VERSUS**

**AHMED ABDALLA BAFADHIL.....DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. By a Plaint dated 14<sup>th</sup> August 2014 and filed herein on 18<sup>th</sup> August 2014, Rashid Mohamed Salim suing as the Administrator of the Estates of Mgeni Binti Khamis and Amriya Binti Khamis Bin Abdalla (both deceased) prays for Judgment against the Defendant for orders that:-

*a) An eviction order do issue against the Defendant to remove himself failing which he be forcibly removed to give vacant possession of Plot No. 1513/384 CR 12739/1 Takaungu.*

*b) A permanent injunction (be issued) restraining the Defendant by himself, his agents, servants, representatives and assigns from trespassing upon, encroaching, alienating, disposing off, constructing, and/or dealing in whatsoever manner with Plot No. 1513/383 CR 12739/1 Takaungu*

*c) Mesne profits*

*d) Costs of the suit*

*e) Any other or further relief this Court may deem fit to grant.*

2. The basis of the Plaintiffs claims can be discerned from paragraph 6 to 8 of the Plaint in which he avers that on or about October 2012, the Defendant herein who is the occupant of a Plot adjacent to the suit property, wrongfully and illegally trespassed upon and encroached into the suit property and proceeded to erect a Posho Mill thereon without any colour of right and/or justifiable cause. The Plaintiff thereof demands the immediate removal of the said Posho Mill and any other constructions carried out on the said land as well as delivery of vacant possession by the Defendant.

3. In response to the Plaintiff's claim, the Defendant, Ahmed Abdalla Bafadhil filed a Statement of Defence and Counterclaim herein on 4<sup>th</sup> September 2014 in which he denies that he wrongfully and/or illegally trespassed into the suit property in October 2012 as alleged by the Plaintiff. On the contrary the Defendant states that his father Sheikh Abdalla Mohamed Bin Ahmed Bafadhil purchased the suitland from Mgeni Khamis Abdalla and Amriya Khamisi Abdalla Rashid (both deceased) on or about 12<sup>th</sup> August 1958 after which his father took possession of the land. It is therefore the Defendant's case that the Administrators of the Estate of the two deceased persons has no proprietary interest in the suit property.

4. In the alternative, the Defendant avers that he and his father (also deceased) have had continuous and uninterrupted possession of the suit property since 1958 with the Defendant himself having solely had possession thereof since 1971. It is his contention that he has since carried out his own developments on the land including building a concrete house and planting several coconut trees which trees he continues to

harvest to-date. In addition, the Defendant avers that he purchased the Posho Mill referred to by the Plaintiff in 1967 and that his wife has ever since been running the business of a Posho Mill on the suit premises contrary to the Plaintiff's averments.

5. In support of his Counterclaim, the Defendant avers that by a Sale Agreement dated 12<sup>th</sup> August 1958, his father bought the parcel of land from the two deceased persons whose estate the Plaintiff represents herein. The Defendant's father passed away on 2<sup>nd</sup> June 1966 and in or about 1971 after the Defendant's sisters got married, he took over sole possession of the land and developed the same. It is the Defendant's case that he has since continuously been in possession of the land peacefully and without any interruption.

6. The Defendant therefore contends that he should be declared to be entitled to the suit property by way of adverse possession having been in possession thereof for a period exceeding 12 years. In the alternative, the Defendant prays for a declaration that the Estate of Mgeni Khamis Abdalla & Amriya Khamis Abdalla Rashid holds the suit property measuring 0.1303 acres in trust and for the sole benefit of the Defendant.

#### **THE PLAINTIFF'S CASE**

7. In support of his case, the Plaintiff called three witnesses.

8. PW1-Rashid Mohamed (the Plaintiff) told the Court that Mgeni Binti Hamisi and Amriya Khamis Abdalla are his grandmothers. His father died in 1962 and he is the administrator of the estate of his grandmothers. PW1 told the Court that the Defendant stopped his family from entering their Plot on the claim that he had bought it. That was sometime in the year 2011-2012. His family had inherited the parcel of land number 1534/384 from his grandmothers who are registered owners of the land.

9. PW1 testified that one of this grandmothers died in 1956 while the other died in 1959. The Defendant claimed that he had bought the land from the two grandmothers and showed them a Sale Agreement that was in Arabic. PW1's grandmothers however only spoke Swahili and could not talk Arabic. PW1's father used to work with the Defendant's father. The Defendant's father is now deceased and it is the Defendant who had denied PW1 access to the land.

10. PW1 told the Court that if indeed his grandmothers sold the land, his father who was then around would have been involved. His father never told them about the sale. When the Defendant denied them access to the land, they traced the title documents which had been kept with their uncle Rashid Abdalla. PW1 told the Court that previously they would harvest coconuts from the land. When he was away, a wall was done combining the parcel of land with the Defendant's original parcel of land.

11. PW2- Khamis Mohamed told the Court that PW1 is his elder brother. He reiterated the averments made in the Plaintiff as well as PW1's testimony. It was PW2's case that the Plot in dispute belongs to their grandmothers.

12. PW3-Umu Kulthum Mohamed also told the Court that he was a brother of PW1. PW3 also reiterated the testimony of PW1.

#### **THE DEFENCE CASE**

13. The Defendant called four witnesses in support of their case. Testifying as DW1, the Defendant told the Court that his father Abdalla Ahmed bought the suit property in 1958. They signed an agreement which was in Arabic with the Plaintiff's grandmothers. His father who died in 1966 took immediate possession of the land and they have been on the land for over 50 years. They have erected a wall around the property on which he had earlier registered a caveat. Since he placed the caveat on the land, no one else had claimed it. They have a Posho Mill on the land which was being operated by DW1's wife.

14. DW2- Bakari Ali Nassir testified that he had known the Defendant for about 50 years. He told the Court that the Defendant lives in the land which was previously occupied by the Defendant's father. The home is surrounded by a wall which was built a long time back. The wall was erected when the Defendant's father was still alive.

15. DW3- Karisa Ali Baya also told the Court that he knew the Defendant's father. They were previously neighbours in Takaungu. The Defendant's home has an old fence which was probably erected before independence.

16. DW4-Rajab Ali Mantaza also stated that he has known the Defendant and they have lived on the same parcel of land since their childhood.

#### **ANALYSIS AND DETERMINATION**

17. I have considered the evidence adduced before me by both the Plaintiff and the Defendant. I have equally considered the testimonies of various witnesses who testified for either party as well as the submissions placed before me by the Learned Advocates for the parties.

18. The Plaintiff's suit herein is largely premised on the averments contained at paragraphs 6 to 8 of the Plaintiff filed herein on 18<sup>th</sup> August 2016. For the full tenor and purport thereof, I reproduce below the averments as contained in the Plaintiff:-

***"6. The Plaintiff avers that on or about the October 2012, the Defendant herein who is the occupant of a Plot adjacent to Plot No. 1513/384 CR 12739/1 Takaungu without any colour of right and/or justifiable cause wrongfully and illegally trespassed upon and encroached on Plot No. 1513/384 and has erected a Posho Mill thereon.***

***7. The Plaintiff maintains that the Defendant's action is wrongful and illegal and unless restrained by the orders of this***

*Honourable Court the heirs of the estate stands (sic) to suffer irreparably.*

**8. The Plaintiff claims from the Defendant vacant possession of the premises and the immediate removal of the Posho Mill and any other constructions on the said land and to desist from any further dealing in anyway howsoever and whatsoever with LR No. 1513/384 CR 12739/1 Takaungu.**

19. In his Defence and Counterclaim, the Defendant denies the Plaintiff's contentions and avers that on or about 12<sup>th</sup> August 1958, his father one Sheikh Abdalla Mohamed Bafadhil lawfully purchased and took possession of the suit property which possession they have maintained to-date.

20. Both sides called a number of witnesses in support of their various contentions. At the trial, it did emerge from the testimony adduced by both sides in Court that the parties herein and some of their now deceased relatives have interacted over the said parcel of land since the 1960s. It was thus of essence for this Court to establish the proper cause of action and when the same accrued especially after the Defendant pleaded at paragraph 7 of his Statement of Defence that the Plaintiff's suit is incompetent and incapable of being maintained on account of the provisions of Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya. The said Section provides as follows:-

***"7. Actions to recover land***

***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 Plaintiff has a power of attorney from his brothers (PW2, PW3, and PW4) and he brings this suit on behalf of the Estates of his deceased grandmothers Mgeni Khamis Abdalla and Amriya Khamis Rashid. From the Plaintiff's testimony before the Court, the two grandmothers died between 1956 and 1959. In this regard, it is equally significant to note the provisions of the Limitation of Actions Act in respect of matters in regard to the Administration of the deceased's estate. Section 16 of the Act provides that:-

***"For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration."***

22. Arising from the above, if indeed the Defendant has been in possession of the land since the alleged purchase by his father on 12<sup>th</sup> August 1958, then this suit is clearly time-barred. But the Plaintiff contends that they were always the owners of the suitland and that it is only sometime in October 2012 that the Defendant wrongfully and illegally trespassed upon the property by erecting a Posho Mill thereon.

23. From the proceedings herein, however, I note that neither the Plaintiff nor his witness mentioned anything to do with the alleged trespass and/or establishment of a Posho Mill on the suit property in October 2012 or at all. In his evidence -in -Chief before this Court, the Plaintiff appears to have changed his claim from the accusation of trespass and encroachment to one of denial of access of the suit property to both himself and his siblings between the years 2010 and 2012. Indeed when he mentioned the issue of the Posho Mill under cross-examination, he told this Court, contrary to his pleadings aforesaid, that the Posho Mill was indeed not on the suit property. Upon re-examination by his own Advocate on record, he testified that while there was a Posho Mill in one of the parcels of land, he was unable to ascertain with precision whether it was on the disputed adjacent parcel unless a survey was carried out.

24. Emphasising the importance of pleadings *in Dakiang Distributors (K) Ltd -vs- Kenya Seed Company Ltd (2015)eKLR*, the Court of Appeal held as follows:-

***"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings of the parties as they are themselves. It is not part of the duty of the Court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...."***

***In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."***

25. In the matter before me, the burden of proof was upon the Plaintiff to establish by evidence that the Defendant had trespassed upon his land in October 2012 and constructed thereon a Posho Mill. That was his pleaded claim before this Court. That burden was not, in my view discharged and it is apparent from the evidence placed before me that the date of October 2012 and the reference to the construction of the Posho Mill was merely intended to avoid the hurdles placed by the provisions of the Limitation the Actions Act cited hereinabove.

26. On his part, the Defendant adduced evidence that he has had exclusive, continuous, and open uninterrupted possession of the suit property for several decades. The Defendant indeed produced a bundle of documents (Dexh 1 and 2) showing that they purchased the Posho Mill in 1967 and that his wife was running the same as early as 1976 as per the Licences issued by the relevant authorities from time to time.

27. Arising from the foregoing, I am satisfied that the Defendant has proved his Counterclaim on a balance of probabilities.

28. The upshot is that the Plaintiff's suit is dismissed. The Defendant's Counterclaim is allowed as prayed. The Defendant shall have both the costs of the Plaintiff's suit and the Counterclaim.

**Dated, signed and delivered at Malindi this 31<sup>st</sup> day of October, 2018.**

**J.O. OLOLA**

**JUDGE**