



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL SUIT NO. 179 OF 2014**

**1. ARIF KHAMIS KARAMA**

**2. ABUBAKAR KHAMISI SWALEH.....PLAINTIFFS**

**-VERSUS-**

**1. MZEE MWATSUMA**

**2. DANIEL MWATSUMA.....DEFENDANTS**

**JUDGEMENT**

1. The two plaintiffs brought their suit against the defendants asking the Court to grant them the following reliefs:

**(a) A declaration that the Defendants' actions are illegal, null and void *ab initio*.**

**(b) A mandatory injunction to compel the Defendants to pull down to the ground the structures they have illegally erected on the plaintiffs' plot No. 368 Section II Mainland North situated at Utange within Mombasa County and to remove any debris or waste from the suit property.**

**(c) An order to compel the defendants to vacate from the suit property.**

**(d) An order to restrain the defendants from fencing, alienating, wasting, trespassing upon or in any other way interfering or dealing with the plaintiffs' plot No. 368 Section II Mainland North.**

**(e) Damages for trespass.**

**(f) Costs of and/or incidental to this suit.**

2. The defendants have denied the plaintiffs' claim in their statement of defence filed in Court on 22<sup>nd</sup> September 2014. The defendants denied the plaintiffs are registered as owner of plot No 368/II/MN hereinafter referred to as "*the suit property*" pleading instead that they have been in occupation of the same since time immemorial thus claiming to have acquired interest over the suit property. The defendants pleaded further that they shall raise a counter-claim on adverse possession for having lived on the land since 1963.

3. The suit proceeded to full hearing on 5<sup>th</sup> October 2017 before Komingoi J. who was transferred before writing the judgment. So here I am to conclude the matter by penning down this judgment. Arif Khamis Swaleh gave evidence on his behalf and on behalf of the 2<sup>nd</sup> plaintiff. He testified that in June 2011 they jointly purchased the suit property from Farjwala Shadau Ahmed in consideration of a price of Kshs 4,521,000= . That they paid for the price in full and the title was transferred and registered in their names.

4. PW 1 continued that Farjwala told them the plot was vacant. Later when they learnt of the acts of trespass of the defendants, they engaged a surveyor to determine the extent of the encroachment on to the land. The plaintiffs then asked Farjalwa why he did not inform them of the existence of the squatters on the land and he answered that the 1<sup>st</sup> defendant used to work for Ahmed Matano the previous owner of the suit property. That when he was told (1<sup>st</sup> defendant's) that his services was no longer required, the 1<sup>st</sup> defendant agreed to pay rent and did pay rent for some time. PW 1 has stated thus in his written statement, "*if and when the extent of encroachment is determined and defendants found to be in illegal occupation, he is praying for orders of mandatory injunction to issue.*" The witness produced as plaintiffs' documents in the list dated 14/7/2014 (Pex 1 – 7) and the supplementary list dated 2/10/2017 as Pex 8 – 13.

5. PW 1 said the 1<sup>st</sup> defendant was not willing to allow them carry out survey to establish the boundaries of the property instead claiming he (1<sup>st</sup> defendant) owned the plot. That the 2<sup>nd</sup> defendant also claimed he owned the plot. That there are 2 or 3 structures inside the boundary. That the defendants have not lived on the plot for long. PW1 continued that the defendants have filed a claim for adverse possession vide the Originating Summons case No 303 of 2016. According to the witness, the defendants are occupying plot No 369 & 370 (Pex 8). The plaintiffs asked the Court to allow their claim as prayed in the plaint.

6. In cross – examination, PW 1 said the 1<sup>st</sup> defendant passed on early this year. That currently there are other people living on the land besides the two defendants. That they did a search before buying the plot but did not produce a copy in evidence. Secondly the power of attorney donated to Farjalwa was not attached to the sale agreement. That when they visited the land, there were some structures. A survey was done after three years. That the plaintiff was told the 1<sup>st</sup> defendant was a caretaker. PW 1 did not have any document of sale between Farjalwa & the previous owners of the suit property. That the survey report does not indicate who the owner of the plot is.

7. In re – examination, PW 1 said the transaction of sale & transfer was handled by their advocate and they were only called to collect the title deed. That the perimeter wall on the suit property was built in December 2016.

8. The 2<sup>nd</sup> defendant gave his testimony on 8/2/18. Daniel Mwatsuma (2<sup>nd</sup> defendant) testified as DW 1. He said he is 46 years old married with one child living on the suit plot. DW 1 said he is the son of the 1<sup>st</sup> defendant stating that he has other siblings all living on the suit plot. DW 1 continued that he was born & brought up on the suit plot and only knew about the plaintiffs when this case was filed.

9. DW 1 claimed the plot belonged to their father (1<sup>st</sup> defendant). That they have planted many mangoes, coconut trees and cashew nuts. They also plough the land to plant food crops such as maize. That the land is about 2 ½ acres. DW 1 said this is the only home they know.

10. In cross – examination, DW 1 says he lives on plot 368. He did not know if the plaintiffs have a title. That if the surveyor went to the land but he did not see him. He denied there was sitting held before the Assistant County Commissioner in respect of the suit property. That they filed a suit against the plaintiffs before. He did not know how the plaintiffs acquired their title. This marked the close of the defendants' case.

11. Both parties filed their written submissions. The plaintiffs' submissions addressed the following sub-headings:

*(a) Whether the plaintiffs are registered owners of plot 368/II/MN.*

*(b) Whether the defendants acquired any proprietary interests over the suit property.*

*(c) Whether the plaintiffs are entitled to the orders sought in the plaint.*

I wish to adopt these sub-headings as the questions are relevant in determining this suit.

12. As regards registration of the suit property in the names of the plaintiffs, the plaintiffs produced as Pex 3 certificate of ownership showing the title was registered in their names on 30/6/2011. They also produced a transfer of land dated 22/6/2011 bearing government stamps with dates of 29/6/2011 and 30/6/2011. Lastly the plaintiffs have produced a certificate of postal search as at 9<sup>th</sup> December 2011 showing the suit property bears their names. Based on these documents, I am satisfied that the plaintiffs have proved that they are the registered owners of the suit title.

13. The next question is whether the defendants have acquired any interest over the suit property and the effect of registration of the plaintiffs' visa avi that interest. PW 1 in his evidence informed the Court that he was told by Farjalwa that the 1<sup>st</sup> defendant used to work as a caretaker of Ahmed Matano who was the previous owner. That upon the death of Matano, the 1<sup>st</sup> defendant's services were no longer required and he opted to pay rent for his continued stay on the land. That the 1<sup>st</sup> defendant paid rents for some time. However Farjalwa was not called to corroborate this evidence of rent payment stated by the 1<sup>st</sup> plaintiff. There is also no document produced to show that indeed the 1<sup>st</sup> defendant ever paid rent to the beneficiaries of Matano's estate or to Farjalwa.

14. It comes out from the evidence on both sides that before the plaintiffs purchased the land, the two defendants were already living on the suit land. The 1<sup>st</sup> plaintiff confirmed that when he went to do survey of the land, the two defendants claimed they owned the land and the two defendants were uncooperative to allow the survey to be done. The survey report (Pex 13) also stated that there were 8 houses on the inside of the plot with sketch map showing structure marked C to be partly on the boundary and outside of the suit plot. The Surveyor did not give the age of these structures but on the sketch map there are handwritten notes stating that, "A, B, C, E & F are new structures put up after we bought the plot." The Court does interpret this comment was added by the plaintiff.

15. The plaintiffs did not state when they visited the land before buying it. Infact PW 1 himself said he went back to Farjalwa to ask him why he did not tell them about the squatters that were on the land. This in my view is conflicting his own evidence. Secondly besides structures A, B, C, E & F, there are other structures marked as D, G & H which the plaintiffs did not specify when they were put up. On account of the evidence of DW 1 that they have lived on this land (i.e. that DW 1 was born on the land) for over 20 years and in the absence of evidence of employment records of 1<sup>st</sup> defendant or evidence when Ahmed Matano died or any payment of rent by the 1<sup>st</sup> defendant, I am persuaded to find that the defendants stay on the land enabled them acquire interests over the suit land.

16. Was this interest adverse to that of the registered owner? Again the evidence of the plaintiff confirms that Farjalwa was aware of the defendants' occupation of the land. The defendants have shown they lived and utilized the land for farming and burial of their deceased relatives. The Court is not told what Farjalwa or the previous owner was using the land for before transferring the same to the plaintiffs. The

defendants use has dispossessed the owner of the intention they may have wanted to put the land for use. This case in my view meets the principles to be proved for adverse claim as was set out by the Court of appeal in the case of **Titus Kigoro Munyi vs Peter Mburu Kimani (2015) eKLR** page 3. No proof of permission from the previous owner was discharged by the plaintiff (see case of **Benjamin Murina & others vs Gladys Njeri Civil Appeal No 213 of 1996**).

17. Lastly as regards time running for adverse possession to accrue; registration in the decision of **Francis Gitonga vs Muiruri Waitthaka civil appeal No 110 of 1997** in my view refers to when the register for a title is opened and not change of ownership. In this instant transfer from Ahmed Matano to Farjalwa and later the plaintiffs did not stop time from running in favour of the defendants. No evidence was shown to Court that there was disruption of peaceful occupation by the defendants.

18. In light of the above I find that the plaintiffs are not entitled to the orders of vacant possession and or demolition and or mandatory injunction as sought in the plaint since they bought & transferred the parcel subject to existing rights acquired by the defendants. Consequently, I hereby dismiss their claim with costs to the defendants. To avoid a new suit being filed over the same matter, I do exercise my powers under section 1A, 1B & 3A of the Civil Procedure Act and make an order that the plaintiffs shall hand over & execute transfer of the title documents in favour of the defendants forthwith. In default, the Deputy Registrar shall execute the documents to facilitate the registration of the defendants as the owners of the suit property No 368/II/MN.

**Dated, signed & delivered at Mombasa this 23<sup>rd</sup> November 2018**

**A. OMOLLO**

**JUDGE**