



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 47 OF 2011

JOHN WAWERU.....PLAINTIFF

-VERSUS-

AUGUSTINE MUSAU MUTUA.....1ST DEFENDANT

SELINA MADOLI.....2ND DEFENDANT

JUDGEMENT

1. The plaintiff brought this claim against the two defendants on 9th May 2011. In the plaint he asked the Court to enter judgement against the 1st & 2nd defendants jointly and severally as hereunder;

a) A permanent injunction to remove and/or evict the 1st and 2nd Defendants, their agents, assigns and/or employees from all that piece of land known as L.R NUMBER MN/I/2254.

b) A permanent injunction restraining the 1st and 2nd Defendants by themselves, their agents, assigns and/or employees or otherwise from encroaching on and/or continuing to encroach on all that piece of land known as L.R NUMBER MN/I/2254.

c) That the Defendant gives vacant possession of the suit property to the plaintiff.

d) Damages for trespass.

e) Costs and incidentals to this suit.

f) Interest thereof at Court rates.

2. Together with the plaint he filed his list of witnesses, statement and documents to support the claim. These documents & summons to enter appearance were served on the defendants. The 1st defendant filed a defence and counter-claim on 20th April 2011. The 2nd defendant did not enter appearance.

3. The plaintiff testified as a sole witness on 11th December 2015. He holds national ID No 3070787 which he produced a copy as Pex 1. He said he is a businessman and he lives in Kurende in Lari Constituency. He sued the two defendants who have built on his plot No MN/I/2254 situated in Shanzu. He produced a copy of the title as Pex 2. He also produced receipts for paying rates for the years 2006, 2009 & 2010 as Pex 3.

4. The plaintiff said he did not know when the defendants entered the land/plot but he discovered them in 2008. He investigated and got to know their names. He said that he engaged a surveyor to survey and confirm the two buildings were on his land. The survey report was produced as Pex 4. He also reported the matter to the town clerk, Municipal Council of Mombasa vide his letter dated 10th March 2010. The town clerk acted on his complaint by asking the defendants to remove their illegal structures. He produced the two letters as Pex 6 (a) & (b).

5. The defendants did not comply. He therefore engaged an advocate who wrote to them a demand letter (Pex 7) and later filed this case. The second defendant asked for 4 months to demolish her structures (Pex 8) but the buildings are still on the land. He therefore asked the Court for vacant possession to enable him use his plot. He also asked the Court to dismiss the counter claim brought by the 1st defendant.

6. On cross – examination, the plaintiff said he was born in 1959. He got the suit plot through his father who purchased it in 1974. That between 1992 – 2008 he had never stepped on the land. The defendants entered the land without his permission. He does not live in Mombasa so he does not know if this was a settlement scheme or not. The plaintiff sought an adjournment to call the area chief but later opted to close his case.

7. The 1st defendant testified on 19th April 2016. He said that he lived in Mombasa from 1989 – 2009 in Shanzu. Currently he works in Nairobi. He testified that initially he rented a house but later got a plot in 1992 from the clan elders. He began building a house on this plot in 1993. This is the plot the plaintiff is claiming. He said his plot is measuring 60 feet by 40 feet. He first built 2 rooms but now has 8 rooms, a toilet and a bathroom.

8. The defendant confirmed that no one claimed this plot between 1992 – 2009. In 2009, he received a call from the plaintiff claiming the plot was his. They appeared before the chief who confirmed the plot belongs to me. The witness said there were other people who had also built on the plot. According to him, the plot is his.

9. On cross – examination, he said he began building in 1993. His family and tenants live on the plot todate. He confirmed being given the plot by the clan elders and he paid Ksh 30,000= for it. That he was not issued with a receipt for the payment. There was no plot number given but he fenced it. He admits he does not have a title. That he has lived on the plot for over 12 years. He denies that he is a trespasser. This also marked the close of the 1st defendant's case.

10. The 2nd defendant did not oppose the suit. As a result she has not denied the plaintiff's claim. Consequently judgement is entered for the plaintiff as prayed in the plaint as against the 2nd defendant. He is therefore entitled to an Order for vacant possession as regards this portion of the plot. If there be any structures still on the portion occupied by the 2nd defendant, the plaintiff is at liberty to demolish them and recover the costs of the demolition if any from the 2nd defendant.

11. Both advocates filed written submissions. The plaintiff submitted that the 1st defendant ought to have filed a separate suit for a claim of adverse possession. Secondly that the 1st defendant admitted that he does not continuously live on the land but his family. That the 1st defendant bought his plot from unscrupulous individuals and that he did not know the plaintiff when he entered the land. The plaintiff submits that the right to adverse possession only accrued from when he knew the plaintiff in 2009. On this part, he cited the case of **Haro Yonda Juaje vs Sadaka Mbauro & Another (2014) eKLR** and **Wabala vs Okumu (1997) CAK**.

12. The plaintiff quotes Haro Juaje supra thus; *“The occupation by the claimant must be with clear intention of excluding the owner from the property. One must therefore have the animus possidendi to succeed in a claim for adverse possession”*. That it is the 1st defendant's family living on the land not the defendant himself. Further that he only occupies a portion of this land (60 by 40) not the whole land. In response to the defence that his suit was time barred, the plaintiff submitted that he first discovered the 1st

defendant in 2008 therefore time could only run from 2008. The plaintiff further quoted the provisions of section 9 and 13 of the Limitation of Actions Act. He urged the Court to allow the plaintiff's suit and dismiss the counter-claim.

13. The defendant submitted facts adduced during the trial. He added that since the plaintiff did not file a reply to his counter-claim on limitation the same is thus admitted. He also submitted that the plaintiff did not produce any letter of allotment or receipt of payments of stand premiums. It is the defendant's further submission that the title issued to the plaintiff was not absolute and referred the Court to section 28 of the Land Registration Act.

14. The defendant further submitted that the plaintiff did not comply with the conditions of the title i.e to carry out development within six months. The defendant relies on the case of **Civil Appeal No 227 of 2011 Lucy Mirigo & 550 Others vs Minister for Lands & Others**. He urged the Court to dismiss the plaintiff's claim and give him the plot.

15. From the evidence on record, the plaintiff is the registered owner of the suit plot grant No 22704 for a period of 99 years from 1.1.1974. The grant was issued to him on 8th April 1992. Although the plaintiff stated that he acquired this land from his father in 1974, he did not annex any search to show that there were entries made as early as 1974 in his favour. This Court will therefore adopt the evidence that the plaintiff acquired the land in 1992 since that is what his own title document reveal. He did not have a sale agreement made in 1974 when his father allegedly acquired the land and did not say who sold them the land.

16. The plaintiff went further to state that he only visited the land in 2008 and that is when he discovered there were structures on the land built without his own permission. Upon investigation, he found the structures belonged to the defendants. He issued them with demand to give vacant possession and when they failed, he came to seek the assistance of this Court.

17. It is not in dispute that the 1st defendant has developments on a portion of the suit land. The defendant has challenged the plaintiff's case that the plaintiff is not entitled to the portion he (the defendant) is occupying as he has been in occupation for over 12 years from 1993 to date. I do find the 1st defendant's evidence that he has been on the land truthful because when the plaintiff visited the land in 2008 and investigated, he confirmed the defendant had been on the land.

18. The plaintiff tried to switch this position in his submissions that since the defendant now works in Nairobi he no longer lives on the land but only his family. However they are still one family that submissions holds no water. Secondly the defendant only moved to work in Nairobi in 2009 but his developments are still on the land. So the Court is faced with a situation where the plaintiff is claiming vacant possession as registered owner while the defendant is claiming ownership as an adverse possessor.

19. It is trite law under section 28 of Cap 300 that an adverse possessor can extinguish the rights of a registered owner if he can show that he is in physical possession for the statutory period with the intention of excluding the rightful owner. In **Wambugu vs Njuguna (1983) KLR 173**, the Court of appeal held that *"in assessing proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period."*

20. In quoting Wambugu case above, the plaintiff submitted that the mere fact of possession was not enough but that the claimant must know the true owner against whom time would run. In this case, the defendant only knew the plaintiff in 2008 and therefore that is when time ought to have begun running. In this instance, the defendant said he was given the land by the clan elders in 1992. In my view time began running in 1992 – 1993 when he began asserting his rights over the land even if the clan the elders were not the registered owners then but against the registered owner. I say so because I equate it to a situation where a purchaser who buys land in spite of his recent possession, the change of ownership does not stop the time from running in favour of the adverse possessor.

21. The defendant herein asserted his intention to acquire the land from 1993 when he started putting up

buildings. He was also specific that this was in respect to a portion measuring 60 feet by 40 feet. The plaintiff has never occupied this portion of the land. Payment of rates perse in my view does not amount to possession. The plaintiff said between 1992 – 2008 he had not stepped on this land. I am therefore satisfied that the defendant has made out a case for adverse possession as he carried out acts that disentitled a registered owner. Consequently I do hold that the plaintiff is not entitled to evict him. Instead the plaintiff should execute documents that shall facilitate the defendant's acquisition of the title to the plot he is occupying measuring 60 feet by 40 feet.

22. The issue of whether the claim (adverse possession) should have been made by an originating summons does not make the defendant's claim null. The defendant was sued and therefore while defending himself he was entitled to bring his claim by way of a counter-claim. The resulting orders is that the plaintiff's suit is dismissed and the defendant's counter-claim is allowed with costs.

Dated and delivered in Mombasa this 10TH day of February 2017

A. OMOLLO

JUDGE