



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 112 OF 2013

ABDALLA AWADH OMAR.....PLAINTIFF

=VERSUS=

CHANGAWA JULIAS KATANA BOI.....DEFENDANT

J U D G M E N T

Introduction:

1. In his Plaint dated 28th June, 2013, the Plaintiff averred that on 8th August, 2008, he bought 1 acre parcel of land being a portion of L.R. No 622, Mambui; that he took possession of the said land and started erecting a fence and that third parties emerged and claimed the suit property.
2. It is the Plaintiff's averement that on 24th April, 2013, he was duly registered as the proprietor of the land known as portion number 13591 Mambui and that the Defendant has no right to lay a claim on the land.
3. The Plaintiff is seeking for an order of vacant possession and for a permanent injunction restraining the Defendant from trespassing on the suit property.
4. In his Defence, the Defendant averred that the Plaintiff had knowledge of his occupation of the suit property; that he has been on the land for over 30 years and that if any sale occurred, he ought to have been granted the first priority to purchase it.

The Plaintiff's case:

5. The Plaintiff, PW1, informed the court that he purchased the suit property from Mr. Said Yahya Said whereafter he took possession of the same.
6. PW1 informed the court that after the said purchase, the Defendant emerged and claimed to have planted cassava plant on the portion of the suit land and that the Defendant was compensated with an alternative portion elsewhere by the registered owner but he hurriedly planted casuarine trees on the said portion of land.
7. According to PW1, when the surveyor visited the land, he confirmed that the Defendant has 14 mango trees and one casuarine tree on the suit property and that the Defendant does not have a house on the land.

The Defendant's case:

8. The Defendant, DW1, informed the court that he has been staying on the land since he was born; that they are five boys in the family and that Mr. Masoud is the one who gave the suit property to his father.
9. In cross-examination, DW1 stated that he stays in Malindi with his uncle; that he planted the mango and casuarina trees which are on the suit property and that his father was not buried on the suit land.
10. The Defendant's uncle, DW2, informed the court that he started living on the land in 1979; that the Defendant's father was already living on the land and that it is Mr. Sudi Mohamed, who is the father of the Plaintiff, who gave the Defendant's father the suit land.
11. In cross-examination, DW2 stated that he is now staying with the Defendant in Malindi and that he is the one who gave him a place to stay in Malindi.

Submissions:

12. The Plaintiff's advocate submitted that the land on which the Defendant's home is situated is not on the suit land; that no evidence of adverse possession of the suit land has been adduced and that the Defendant planted trees on a portion of land after the Plaintiff had purchased it.
13. The Defendant submitted that he ought to be recognised as the genuine owner of the suit land by way of adverse possession; that the documents that the Plaintiff is relying on are all doctored and that he is the rightful owner of the land.

Analysis and findings:

14. The evidence produced by the Plaintiff shows that he purchased 2 acres of portion number 622 Mambui vide an Agreement of sale dated 8th August, 2008 and 30th November, 2010 for Kshs.750,000 from one Said Yahya Said.
15. The Certificate of Ownership produced by the Plaintiff shows that portion number 622 measuring 24.29 Ha was registered in the name of Said Yahya Said and Masoud Yahya Said Hemed.
16. The Plaintiff produced a copy of the Transfer showing that the land that he had purchased was transferred to him by the two registered owners and Deed Plan for land known as 0.970 Ha was issued to the Plaintiff. A Certificate of Title was subsequently issued and registered on 24th April, 2013.
17. The evidence before me shows that the Defendant is not residing on the suit land. Indeed, DW1 and DW2 informed the court that they are now living in Malindi.
18. The surveyor who visited the plot confirmed that the Defendant planted a few trees on the northern eastern part of the suit property in an area that the Plaintiff has not fenced.
19. From the evidence before me, the Plaintiff is the registered proprietor of the suit land. There is no evidence that was produced to show that the Defendant, or his uncle, DW2, have ever stayed on the suit property.
20. Even if the Defendant and his late father used to live on the land, they moved out of the land at their own volition. The Defendant did not inform the court why his father and DW2 moved out of the land.
21. I am not therefore convinced that the Defendant is entitled to the suit property by virtue of the doctrine of adverse possession, which requires one to prove that he has lived on the land belonging to someone else continuously, peacefully and without the permission of the owner for more than 12 years.
22. The only thing that the Defendant is entitled to are the casuarina trees and the mango trees that he

planted on the suit property. The Plaintiff is at liberty to compensate him for those trees at an agreeable rate. In the alternative, the Defendant should harvest those trees and give to the Plaintiff vacant possession of the land.

23. For those reasons, I allow the Plaintiff's claim in the following terms:-

(a) The Defendant to give to the Plaintiff vacant possession of all that parcel of land known as portion number 13591 Mambrui.

(b) A permanent injunction be and is hereby issued restraining the Defendant by himself, his servants or agents or any other persons claiming through him from trespassing on the land known as portion number 13591 Mambrui.

(c) The Plaintiff is at liberty to compensate the Defendant for the trees captured in the survey report of 2nd April, 2015 and in the alternative the Defendant to harvest those trees under the supervision of an official of Kenya Forest Service and the Chief of the Area.

(d) The Defendant to pay the costs of the suit.

Dated, signed and delivered in Malindi this 3rd day of February, 2017.

O. A. Angote

Judge