



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CASE NO. 143 OF 2011

RACHEL WANJALA KILETA.....PLAINTIFF

-VERSUS-

JUMA BAKARI MWADZUMU.....DEFENDANT

JUDGEMENT

The plaintiff Rachael Wanjala Kileta brought this suit on 2nd June 2011 against the defendant. In her plaint dated 31st May 2011 she asked that judgement be entered in her favour on the following terms;

a. A declaration that the plaintiff is the absolute and registered proprietor of the suit premises Plot Number KWALE/DIANI/14 subdivided into portions KWALE/DIANI/2345 – 2356 and that she is entitled to quiet possession of her private property the suit premises without any interference from the defendant, his agents, servants or anyone else claiming or acting through the defendant for a permanent injunction restraining the defendant, his agents and or servants and or any other person claiming and acting through him and jointly and/or severally with him from entering, invading, constructing any kind of structures and from interfering with the plaintiff's quiet possession and enjoyment of the suit premises.

b. For an order of vacant possession of the suit premises in particular Plot Nos. KWALE/DINAI/2351, 2353 & 2354 and that the defendant be ordered to demolish all the illegal structures on the suit premises and remove all the debris thereof and in default the plaintiff be at liberty to demolish the illegal structures and remove the debris at the defendant's costs and that the Officer commanding Kwale Police Division do ensure that security and peace is maintained in the enforcement of these orders.

c. General damages for illegal occupation of the suit premises.

d. Costs of this suit.

2. Together with her plaint, she filed a list of documents and an application seeking temporary orders of injunction upon which she was granted the temporary orders.

3. The defendant was served with the pleadings on 14th July 2011 and he entered appearance on 26th July 2011 and filed a statement of defence on 10th August 2011. The matter was thereafter listed for pre – trial

directions. This file was later consolidated with HC originating summons No 98 of 2010 on 30.10.2014 where the defendant was the claimant. The hearing commenced on 8th June 2015.

4. Ms Rachael Wanjala Kileta testified as PW 1. She lives in Nairobi and is a retired civil servant. She has sued the defendant who she says lives on her plot Kwale/Diani/14. She said that she acquired this plot by exchanging it between Harry Mbui & herself. That they signed the documents and the relevant land control board gave consent to transfer. Subsequently the land was registered in her name in 1987.

5. PW 1 continued that in 2003 she received a letter from the Chief of Diani Location summoning her. She appeared before the Chief where she learnt that the defendant was trying to sell the plot. The witness showed the Chief her documents and that the Chief advised the defendant that this being a settlement scheme, it could not be their ancestral land. PW 1 stated that she knows the defendant's father was allocated plot No 13.

6. The plaintiff continued that the defendant sued her before the Msambweni Land Disputes tribunal but whose proceedings she applied to reverse vide MSA HCC No 1089 of 2006. She at one time decided to sub divide the land and give the defendant the portion where he lives but the defendant was adamant. She therefore filed this suit to obtain eviction orders and seek the government's assistance to execute the order. She also stated that the defendant has continued to sell portions of the land to 3rd parties and has made it difficult for her to access the land and develop it.

7. The plaintiff said that when she bought the land, it was vacant. She produced two sets of bundles of documents as pex 1 & 2. Among her documents is a list from the settlement scheme offices showing the names of allottees and a green card for Plot No 13 indicating Bakari M. Mwamavune as the registered owner. She said that Bakari is the father to the defendant. She also produced copy of title deed for Plot No. 14 in her name and copies of the sub-divided titles Nos 2345 – 2356 all bearing her names.

8. She also produced a certificate of outright purchase Diani Settlement Scheme issued to Harry Kabobia Mbui of ID No 4609525/67 on 6th May 1985 and a transfer by the Ministry of Lands to Harry Mbui. She produced letter of consent from Harry Mbui to herself issued by Msambweni Land Control Board dated 23.7.1987 giving the consent for the land to be transferred to her. Lastly are receipts confirming she is paying rates for the plot.

9. The witness was put to cross – examination by Mr Okanga for the defendant. She said that the houses shown in the photographs are on her plot. That the defendant began selling even when the case was in Court. On humanitarian grounds, she had agreed to give the defendant a portion where he lived but she changed her mind when the defendant took too long to accept the offer. It is her answer that where the defendant lives is plot 14 and not 13.

10. The plaintiff called her 2nd witness Mr Josiah Safari Nzuki who lives in Nairobi and is a pastor cum businessman. He testified that he knew about the dispute as the plaintiff asked him to help her out as the defendant had refused to hand over vacant possession. PW 2 stated that he went to the land in dispute with an officer from Kwale Lands' Office in 2011. They were able to identify all the beacons.

11. PW 2 continued that on the land stood a makuti house and a permanent house under construction. He also enquired about the posho mill that was near an access road and that he also met the defendant. They engaged a surveyor who did the subdivisions. He also confirmed offering the defendant an out of Court settlement which the defendant declined. Later he learnt the house under construction was completed and some materials deposited by another person ready to move in. They got an injunction and placed the order on the plot (houses) to stop further construction. He was asked no questions in cross-examination and the plaintiff closed her case.

12. The defendant Juma Bakari Mwadzumu told Court that he is a trained mason. He does not know the plaintiff but does know plot Kwale/Diani/14. The land was demarcated and given to him. He lives on the land with his family. He was born on the land in 1963 and has lived on it todate. He continued that he has never seen the plaintiff on the plot.

13. The defendant confirmed filing the case at the tribunal in Kwale and later Mombasa HC originating summons No 98 of 2010. He stated that he has cashew nuts, oranges, mangoes and his family house on the land. He gave the names of his neighbours and denied knowing Harry Kirobwa Mbui. He said his name was taken during demarcation but later he learnt the land had been sold therefore he filed the suit before the tribunal. He denied any surveyor has visited the land to subdivide it. He asked the Court to give him the land as he has lived on the land for a long time.

14. On cross - examination, he said his father is called Bakari Mohamed Mwadzoyo. He was born in Ukunda, Diani Settlement Scheme. His father – deceased lived in Ukunda but he does not know on which plot. He stated plot 14 was given to him and he did not know if his father was also given a plot. Out of his 7 brothers he was the one given a plot by the settlement Trustees. He was awarded the land by the tribunal but their decision was quashed vide MSA HCC 1086 of 2006. That they have had dispute over the land with the plaintiff since 2006.

15. The witness confirmed he knew his neighbours have titles to their plots. He has not inherited any land from his father; he has not encroached on the plaintiff's land and he has not sold this land to anybody. In re – examination he said he didn't concern himself with his father's land because he had his. Lastly that he's on the land and he is using it.

16. Both parties filed their written submissions. The plaintiff submitted on the contents of the pleadings, gave summary of the evidence/facts adduced and answered questions on the issues raised by the statement of agreed issues filed on 7.3.2012. He cited the following cases in support of his submissions

1. **Jabber Mose Ali & Another v Priscilla Boat & Another [2014]**
2. **Sisto Wambugu v Kamau Njuguna (1983) eKLR**
3. **James Waigwa Kaireti –v- Kamau Gitau Kamuyu & Others (2001)**

17. Similarly the defendant also gave a summary of the evidence adduced and drew conclusions on the undisputed facts. Based on his analysis of the facts, he urged the Court to dismiss the plaintiff's claim and enter judgement in his favour together with costs of the suit. To support his submissions, he cited the case of

1. **Wambugu Njuguna vs Elijah Mburu & Another (2004) eKLR.**

18. From the evidence adduced, it is not in dispute that the plaintiff is the registered owner of the original parcel of land Kwale/Diani/14 which has subsequently been sub-divided whether on paper or both paper & ground into Kwale/Diani/2345 – 2356. Secondly it is not in dispute that the defendant is in occupation of a portion of this land. Thirdly that the plaintiff has not been able to access and use the land as a result of resistance from the defendant.

19. Consequently the issue for this Court to determine is whether;

- i) **The plaintiff being the registered owner of the suit parcel is entitled to vacant & quiet possession and therefore entitled to orders sought in her plaint**

OR

- ii) **The defendant has been in occupation for a period in excess of 12 years and is thus entitled to the land by virtue of adverse possession therefore entitled to prayers sought in the Originating Summons HC No 98 of 2010.**

20. On the face of it and under the provisions of the law, the plaintiff is indeed entitled to the orders sought in her plaint. I say so because she produced a certificate of outright purchase dated 6th May 1985 issued to Harry Mbui by the Settlement Fund Trustees showing how the land was acquired. This implies

that the defendant could not claim this was ancestral land. Further the certified copy of the records (green card) does show the 1st entry on the register dated 10.3.1992 the proprietor was Settlement Fund Trustees indeed confirming this was not ancestral land.

21. The plaintiff produced a letter of Consent from the Msambweni Land Control Board confirming the exchange between Harry Mbui & herself was approved. She also produced a transfer form from Harry to herself dated 21.8.1986 and subsequently produced a search dated 8th April 2011 and certificate of title issued to her on 2nd December 2005 confirming her as the registered owner. The defendant in his pleadings & evidence has not questioned the authenticity of this documents.

22. It follows therefore that under the provisions of section 27 of the Registered Land Act (repealed) and now section 24 & 25 of the Land Registration Act she is entitled to vacant possession. Section 24 of the Land Registration Act provides thus;

“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

23. In light of these provisions of the law, I would grant the plaintiff her orders as contained in the plaint. However the defendant although not questioning the authenticity of plaintiff’s documents has raised a claim for adverse possession which then disentitles the plaintiff by the statute of limitation to enjoy the rights bestowed under section 24 & 25 of the Land Registration Act. Has the defendant proved this claim? In the case of **Sisto Wambugu supra at page 10** it was held that to prove adverse possession, a party claiming must show

i) Dispossession

ii) Discontinuance of possession

24. What constitutes dispossession was described by Bramwell L.S in **Leigh vs Jack (1879) 5 Ex D 264 at 273** that to defeat a title by dispossessing a former owner *“acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.”* It is not in dispute and the defendant has resisted the plaintiff’s attempt to take possession of the land. Further both PW 1 and PW 2 confirmed that the defendant was living on the land when this suit was filed. PW 2 said he saw a makuti house on the land to confirm that indeed the defendant is in possession.

25. The second aspect is what constitutes discontinuance of possession. In the case of **Wambugu vs Njuguna** the Court of Appeal held:

i) that in assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or discontinued his possession for the statutory period and not whether the claimant has proved that he has been in possession for the requisite number of years.

ii) That a person is in possession in whose favour time can run

26. The green card showed that as at 1992, the land was registered in the name of the Settlement Fund Trustees. The plaintiff only became registered on 5.5.1995. Time could only be presumed to have commenced running from this date (1995) in favour of the defendant as per the provisions of section 41 of Cap 22. The burden shifted on the defendant to prove when he started asserting his claim over the suit property. I state so because being born on the land does not perse confer ownership under a claim adverse possession. It is the time you start doing things that are contrary to the rights of a title holder. The defendant did not specify the year the demarcation exercise was undertaken (when he was given the land). This in my view was important as it would have assisted the Court to probably understand when he began asserting his rights over this suit land.

27. The defendant also stated that *“I did not get the land but learnt it had been sold hence I filed the case*

at the tribunal". He does not say when he learnt the land had been sold and by who. If it is round about the time he filed the case before the tribunal in 2006 then by 2010 when he filed the originating summons, he had not acquired the land by statute of limitation. He did not even adduce evidence when he put structures on the land especially after the plaintiff had stated that when she purchased the land (via exchange) the same was vacant. The only time that it is clear he asserted this right was when the chief summoned the plaintiff presumably on complaint made by the defendant. This is because the plaintiff met him at the chief's office.

28. Since this was a settlement scheme, time could only run from the time the SFT transferred the land to a private citizen. The defendant's claim that he has lived on the land since birth is not supported by his own facts as he said he never lived on the suit plot with his father. He acquired the plot if at all from the STF not by birth. In my opinion and I so hold the defendant failed to discharge the burden that from the time began asserting his rights over the land, 12 years had lapsed by 2010 when he brought the originating summons. Therefore although he is in possession, it is not clear for what duration he has been to be able to extinguish the plaintiff's right over the suit property.

29. For the reasons given above, I do not find for the defendant as prayed in his originating summons dated 31st March 2010 and the same is hereby dismissed. Since these two files were consolidated (HCC 143 of 2011 & originating summons 98 of 2010); Judgement is hereby entered for the plaintiff as prayed in the plaint 143 of 2011 with costs. No costs is awarded in respect to the originating summons No 98 of 2010.

Dated and delivered in Mombasa this 3rd day of February 2017

A. OMOLLO

JUDGE

In the presence of:

Court Assistant Koitamet

Ms Njau holding brief for Mulwa for Plaintiff

No appearance for Okanga for Defendant