



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 20 OF 2012 (OS)

ROBERT MUHAMBI KATANA & 15 OTHERS.....PLAINTIFFS

-VERSUS-

MOMBASA TEACHERS SACCO LTD.....DEFENDANT

JUDGEMENT

1. The 16 plaintiffs filed their suit against Mombasa Teachers Co – operative SACCO vide their originating summons No 20 of 2012 dated 17th February 2012 seeking to be registered as proprietors in common of land title No 3634/MN/11 – CR No 24635 having acquired the same by way of adverse possession. The plaintiffs also sought for an order of injunction restraining the defendant from interfering with their peaceful occupation of the suit premises together with costs of the suit.

2. The defendant also sued the plaintiffs vide the plaint filed as land case No. 240 of 2012 and dated 26th October 2012. In this suit, the defendant prayed for judgement against the plaintiffs:

(i) A declaration that the plaintiffs are trespassers.

(ii) For an order of permanent injunction restraining the plaintiffs from interfering in any manner with the defendant (plaintiff) possession of the plot No 3634/II/MN.

(iii) An order of eviction.

(iv) An order directing the Coast Provincial Commissioner & O.C.S Bamburi Police Station to supervise and provide security during the eviction.

(v) Costs of the suit & interests.

3. The two suits were consolidated on 15th August 2013 by consent with the Originating summons case No 20 of 2012 being the lead file hence the reason I have referred to the plaintiffs in that suit as the plaintiffs in this judgement. The hearing commenced on 3rd October 2013 before Mukunya J. The Court was informed that the 16 plaintiffs have brought this suit on their own behalf and on behalf of all the squatters living on the suit parcel of land.

4. Mr Robert Muhambi Katana testified as PW 1. He said he was born in 1948 in Kilifi County and came to Mombasa before independence. That he lives on the suit land with his family. He continued that he knew this was government land and they lived peacefully with others. That in 1997 he was informed the

land belonged to the defendant. He could not tell how many people are on the land but he knows they have structures on it as shown by the photographs. The witness stated further that they did a search and learnt the defendant became owner of the land from 21st January 2009. He urged the Court to award them the land which they have lived on since independence and no one had asked them to leave.

5. In cross – examination, he stated that he was born in Kilifi and has his father’s inheritance which has not been sub – divided. That when he entered the crown land, a portion was on the side of the defendant’s land. He had neighbours and one of them was Omari Ali who was the clan elder. That he has lived here since 1962 and that there are more than 200 people on this land. When he learnt the land belonged to the teachers, they had many sittings with them. The witness said the defendant does not know their land. That there are new houses being built. That they have sued the defendant because they allege they own this land. He does not know Jane Marete. In cross – examination, the witness said they entered the land with nobody’s permission and that they have never seen anyone coming to claim the land. He learnt the defendant owned this land when he was shown the title.

6. Bahati Hamisi testified as PW 2. He stated that he was born in 1973 in Utange – Bamburi ward on the suit land. His father is Hamisi Juma – deceased. PW 2 said he is married with children. That he uses the suit land for building, farming and planting of trees. That he has lived on the suit land since birth to date. PW 2 continued that his father was also born in 1927 on this land and lived on it until 2007 when he died and was buried here. He avers that even his grandfather lived on this land. When they tried to process title is when they discovered the defendant was claiming the land. He urged the Court to allow their prayer for a claim of adverse possession.

7. In cross – examination, he confirmed he was born on the suit land in 1973. That when he came of age, there were many people living on the land. Some portions of this land are not built. He admitted that as per the title, the defendant is the owner of the land. The witness said there are nice houses on the land belonging to people who bought. He also admitted having sold a portion for over Kshs 500,000= . That he sold to several people. That they have shared the land amongst the people living there and sold as per their needs.

8. On further cross – examination by Mr Mokaya advocate for the interested party, he said he has not brought anything to show he is living on the land. That he went to Utange primary school. He has cousins such as Mawari Bakari Juma, Bidala Mohamed who are also plaintiffs in this case. In re – examination, he said he had not seen the defendant’s title before. That they sold the land but some owners have not developed their portions.

9. PW 3 is Suleiman Kibwana Juma who said he lives on the suit land with his family of eight children. That he buried his deceased parents on this land. He told Court that the suit land is big and there are many families living there. That he has lived on the land since 1962 with his brothers and their families. PW 3 continued that he heard about the defendant in 2004. That they have no title but they have lived on the land and have old trees, graves, houses. He asked the Court to order Hon. Swazuri to give them the land as he has nowhere else to go. The witness said he has 3 houses on the land.

10. In cross – examination, he said he was born in 1953 in Mombasa. That his parents were also born here but his great grandfather came from Tiwi. That the defendant came on the land in 2004 and from then on they have not lived in peace. That he sued the defendant because he wanted to trespass on their land. PW 3 admits there are nice houses on the land and some are still being built by people who bought from them. He denied there were beacons placed by the defendant. He does not remember the person who sold to the defendant and that when the defendant bought this land, there were many people already living on it. He knows the 1st plaintiff’s house is on this land as well as his house.

11. In cross – examination by the interested party’s advocate, he stated he has lived on the suit land since birth in 1953. That he inherited this land from his father. That he has a brother called Fatuma who lives with him on the suit land. His portion is about 2 acres and he has built 3 houses. That he knew where the lands office is but he has not gone to obtain title. That they have not lived in peace since 2004 when the defendant came to the land to survey it.

12. PW 4 was Katana Kombe Kiti. He lives on the suit land. He states that he was not born here but he came when he was young. That he came from Kadzonzo in Mariakani. That he lives on the land with his family. He is a neighbor to Erickson Levi. He does not know Mwinyiusi Mwidadi. He came to Court because he heard the defendant wanted their land. His portion is 2 acres which he is using for farming and his home.

13. He said in cross – examination that he used to work in Mtwapa as a watchman but his home is in Utange. He also sold a portion of this land and the people have built houses. That there are many people living on the suit property including the purchasers. He knows the defendant is planning to evict them.

14. PW 5 is Bidala Wa Jumaa. The witness states that he lives in Bombo with his family. He said he was born and got married on the suit land. Where he lives belongs to his parents but he could not state the size. PW 5 says he uses his portion for farming food crops. That he has been on the land since colonial times. He knew Levi as a buyer of a neighbouring plot measuring 1 ½ acres. He also knew Mwidadi whose land is down at Baya wa Kwicha. That the suit land does not belong to the defendant. They were told from long ago the land is theirs. He has not sold any land because they were a large family of 12 people.

15. In cross – examination, he said he could not tell whether Levi & Mwidadi sold the land to the defendant. That his land has no relation to the defendant’s land. He has only heard about the defendant but never seen them. That the defendant’s land is at Baya wa Kwicha. There are 6 houses in his home. Lastly that he is living in peace. With this evidence, the plaintiffs closed their case.

16. The defendant called two witnesses in effort to prove their case. The first one was JONA MAKAU MUTUKU. He lives in Changamwe & is a retired teacher and currently a director of C.I.C. DW 1 is the chairman of the defendant which changed the name to Mafanikio Sacco. DW 1 said the land was bought in 1996 through contributions from sixty (60) members. He stated that the suit land is 14 acres and when they bought it, it was in vacant possession from Mwinyusi Mwidadi.

17. DW 1 continued that the transfer was done in 1997 and they received a title deed which he produced as Dex 1. That the land was not distributed to the sixty members as sub – division took some time. DW 1 said the sub – division was done on paper. He stated further that the beacons were there when they bought the land but when they went back again they had been uprooted. Later when they went with the surveyor to put the new beacons in 2000 they were chased away. That there were some young & old men who had put up the initial structures. It is his evidence that the plaintiffs were not on the land when they bought it. DW1 states further that in the middle of this year; he passed by and saw some new structures built on the suit land. That it is incorrect to say they have not attempted to go to the land.

18. The defendant stated that the houses are built anyhowly on the land and that these people have been selling to others. DW 1 averred that it is difficult to say that the squatters are on the suit land only. That they went to the DC’s place to agree on how the squatters should move out since they had no title. They could not give the names of the people living on the land as they did not know them. He urged the Court to give them an order to remove them. He produced the demand letter done as Dex 3.

19. In cross – examination, he said he did not have minutes to testify on behalf of the defendant. That the Sacco purchased the land for Kshs 1,980,000= . He admitted not producing the sale agreement & transfer documents. That they did not fence the land because they did not have any money. That the letter dated 1.8.2012 produced as Dex 3 was not the first demand letter. That they sold the land but they have not received any money because the buyer wants vacant possession. That they have visited the land many times but they are always chased away.

20. Cross – examined by Kato for 1st plaintiff, the witness said they instructed a surveyor long time ago but the survey was never done. According to DW 1 the 1st plaintiff is not on their land. That they were taken around the plot before buying it. In re – examination DW 1 said they would not have got the title without paying government dues. That the SACCO is the owner that is why they have been sued. That fencing was not a priority.

21. DW 2 is SAMUEL SANG KALAMA who is a farmer living in Dogo kundu. He said he previously worked as a manager of the defendant from 1981 until 2009. He also said he is a member No 916 and withdrew his membership when he retired. DW 2 confirmed that the land was sold to the defendant by Mwinyusi Mwidadi. That the arrangement was that those who had bought would build their houses. DW 2 also confirmed that the land is 14 acres. He denied the plaintiffs claim and asked the Court to grant the eviction orders.

22. In cross – examination, he said that he was the manager from inception upto 2009. That there was only one family on the land and he visited the land thrice after it was bought. That the board never told him to write to this family to vacate. DW 2 said the seller was paid Kshs 2 Million in two instalments; but he had no proof of payment in Court. He only saw a tree but not a kaya tree. That this suit was filed after he retired. He never asked the name of the person living on the land. Shown photographs he said the tree is on land while the house is outside. The interested party on her part stated through her advocate that her interest was well taken care of by the evidence of DW 1. She therefore opted not to adduce any evidence. However she urged the Court to look at her documents filed.

23. The 2nd – 16th plaintiffs, the defendant and the interested party filed written submissions. The plaintiffs in summary submitted that they have proved they have been in unconsented, uninterrupted occupation of the suit land for a period over 12 years. In support of their submissions, they cited the following cases:

- i) John Owiti Ochung vs Sajun Ltd (2016) eKLR**
- ii) Ann Itumbi Kiseli vs James Muriuki Mureithi (2013) eKLR.**
- iii) Kimaro Macharia & Another vs Daniel Karegwa & 2 others (2014) eKLR.**

24. The defendant on his submissions gave a summary of the evidence adduced. He points out that the plaintiffs' originating summons must fail

- i) For annexing a copy of title certified by their advocate Siocha Okemwa who did not see the original title.**
- ii) The list of the 200 persons said to be on the land was not annexed neither authority to bring a representative suit filed as is required under the rules.**
- iii) That the plaintiffs failed to specify the size of land they were claiming.**
- iv) That the plaintiffs did not annex any documents to show they are on the land.**

Consequently the defendant's case should be allowed as they had proved ownership of the suit property and that when they bought the land, it was in vacant possession. The defendant relied on the following decisions:

- a) Titus Kasuve vs Mwaani Investments Ltd & 4 others (2004) eKLR.**
- b) Joseph M. Mwangi vs Jonah Kabiru (2008) eKLR.**
- c) Daniel Mutisya & Another vs Katelemu A. Muputi Farming & Ranching Sacco NBI C. A No 151, 167 & 168 of 1989.**

25. The interested party also submitted that the plaintiffs did not prove occupation/possession of the suit land. That no evidence was led to show that the defendant had ever been dispossessed or that the Sacco discontinued its possession as was held in the case of **Wambugu vs Njuguna (1983) 180 at page 187**. It is the Interested Party's submission that the plaintiffs' case was not proved to the required standards of law and therefore should be dismissed with costs.

26. From the pleadings and submissions rendered the twin issues for determination is as put by the defendant i.e.

a) Whether the plaintiffs have proved a case for adverse possession against the defendant

OR

b) If the defendant is entitled to the prayers sought in MSA HCC No 240 of 2012.

c) Who should pay the costs of the suit?

27. For a party to prove his claim for adverse possession, the law requires he/she to show that he has dispossessed the registered owner of the suit land for the intention to which he intended to use the land (**Wambugu vs Njuguna**). The possession must also have been open & uninterrupted for a period not less than twelve (12) years. In this suit, the defendant has shown that it is the registered owner of the suit land from 1997 when it secured the registration into its name. This is evidenced by the certificate of title produced as Dex 1

28. Have the plaintiffs dispossessed the defendant of the land for the purpose for which they intended to use it? DW 1 stated that after they purchased this plot they intended to sub – divide it and give it to their members who contributed money for the purchase price. However they have been unable to do so because each time they went to the ground, they were chased away by people who were living on the land at the time. These people turn out to be some of the plaintiffs herein. The defendant went further to refer to photographs in which they stated that the plaintiffs had sparsely constructed temporary and some semi – permanent houses on the suit land. Although the defendant alleged a large portion of this land was unoccupied at the time they filed their suit (paragraph 4 of the supporting affidavit) but DW 1 said when he passed there recently there were some new structures. The defendant could not however state the size of the unoccupied land since they cannot access the place due to hostility of the people residing on the land.

29. The plaintiffs on their part narrated to Court the different years they got on to this land which has been more than 12 years. The plaintiffs have also stated that they have even sold portions of this land to third parties as their need arose which 3rd parties have also constructed on the land. DW 1 said the last time they went to the land was in the year 2000 when they wanted to replace the uprooted beacons. The evidence adduced by both sides show the defendant never took possession from the time they purchased this land. Accordingly I am convinced that their rights have been extinguished by operation of the law in favour of the plaintiffs who dispossessed them.

30. Did the defendant have any title to pass on to the Interested Party when they entered into the sale agreement on 27th June 2011? I don't think so because time did not stop running against the defendant. The defendant only took steps to claim their land after the plaintiffs had filed their suit for adverse possession. Therefore the sale agreement does not add any value to the defendant's case that they have sold neither can the interested party claim any rights over the land since such rights if any had been extinguished by the provisions of section 7 of the Limitation of Actions Act Cap 22. The interested party's claim must also collapse.

31. In light of the foregoing I do safely conclude that the plaintiffs have proved their case on a standard of probabilities as is required under the law. Accordingly I do enter judgement in their favour as prayed in their originating summons dated 17th February 2012 and make the following orders:

1) That the plaintiffs be registered as the proprietors in common of the land comprised in the title No 3634/MN/II – CR No 24635 in place of the defendant.

2) That the defendant and his servants and or agents be restrained by way of permanent injunction from entering the suit land or demolishing the plaintiffs' houses and structures and or evicting the plaintiffs, their families & tenants and or interfering with the plaintiffs'

peaceful occupation of the suit land.

32. The defendant's claim as brought in the plaint HCC No 240 of 2014 fails and is hereby dismissed. Given the circumstances of this case, I make an order that each party shall bear the costs of both suits.

Judgment dated & signed at Mombasa this 28th day of June 2017.

A. OMOLLO

JUDGE

Delivered this 29th Day of June 2017 at Mombasa by

C.YANO

JUDGE