Majid v Sisters for Justice NGO & 3 others (Environment & Land Case 197 of 2020) [2024] KEELC 974 (KLR) (27 February 2024) (Judgment)

Neutral citation: [2024] KEELC 974 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 197 OF 2020

NA MATHEKA, J

FEBRUARY 27, 2024

BETWEEN

ABDULWAHAB AHMED MAJID .... PLAINTIFF

AND

SISTERS FOR JUSTICE NGO .... 1ST DEFENDANT

NAILA ABDALLA MOHAMED .... 2ND DEFENDANT

ATHMAN MWINYSHEE .... 3RD DEFENDANT

ANTHARI ALI .... 4TH DEFENDANT

JUDGMENT

1. The plaintiff is the registered proprietor of LR. Subdivision 13696 (Original No. 59/2)/I/MN CR. 68680 measuring 1.855ha, as seen from the certificate title dated 5th October 2016 and certificate of postal search dated 9th March 2018. The plaintiff alongside Said Mohamed Said Rashid were appointed as the trustees of the Wakf of Mwanayumbe daughter of Ali Bin Khamis El-Mandri on 15th June 1998 in respect to her half-undivided share of LR Subdivision 59/II/MN. It is the plaintiff's case that part of the suit property is an open field that has been used by the defendants as a football field and recently they have intensified public activities such as protests, dances, and political rallies.

2. The defendants contended that the suit property has been used by the public, particularly Kishada Football Club since time immemorial and no one has come to lay claim to the land. During cross-examination, the 2nd defendant argued that all along she was under the presumption that the suit property was community land owned by the county government. While the 4th defendant, a football coach stated that he has played and coached football on the suit property for decades but had no idea who owned the land. The defendants prayed for the suit property to continue being public land since its use benefited the youth of the area in sports activities that kept them away from drugs and crime and urged the court to direct the county government to purchase the same for community use. The

defendants have used the suit property for community projects long before the plaintiff supposedly granted them a license to do so. The plaintiff as the trustee of the Wakf did not until 2020 complain about the use of the suit property by the defendants or the public. The defendants' frequent use of the suit property was premised on the belief that the suit property was public land and as such they had beneficial interest therein.

3. While the plaintiff admitted to allowing or rather being passive about the presence of the defendants and the rest of the public using the suit property, he now avers that he since formally demanded for them on 15th and 18th September 2020 to desist any further use of the suit property. The current use of the suit property by the defendants is not warranted by the plaintiff and as such amounts to trespass. The defendants have denied the plaintiff from occupying and possessing the suit property as a registered proprietor would, within the meaning of Sections 24 and 25 of the *Land Registration Act*. The defendants did not tender any evidence challenging the plaintiff's title to the suit premises all they did was claim that land was accessible and available to anyone and was used by the public as open grounds.

4. The court in Nakuru Industries Limited vs S S Mehta & Sons (2016) eKLR held;

> "Secondly the mere fact that the Public had formed a habit of using the suit land did not convert the same into public land. The actions of other members of public in accessing and excavating the plaintiff's land was unlawful. The defendant cannot rely on the unlawful actions of others to legitimize their own intrusion into the plaintiff's land. Given that the plaintiff have proved that it was the legal and registered owner of the suit land, the Defendant was obliged to obtain the consent and authorization from the Defendant before entering into and excavating murram from the suit properties."

5. Be that as it may, the defendants testified that the suit land had been long used by the community of Mwandoni residents, Kisauni area and was known as Kishada Grounds. The grounds have been used for political rallies, as a playground for children and a football field since the 1960s. That the grounds are registered by the Football Federation Kenya as well. The plaintiff admits that the suit land was used by passersby and as a football pitch for a long time and this was the position when he moved there in 1999. He was made a trustee in 1998 and no longer consents to their use and occupation of the suit property and as much as their actions on the suit property are unlawful.

6. The defendants in their submissions pleaded the doctrine of adverse possession. The law on adverse possession is provided for under the *Limitation of Actions Act*. Section 7 of the Act provides:

> "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. Section 13
>
> "(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land
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> (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action

is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land".

7. Section 17 extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Section 38 on the other hand provides;

"(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land."

8. The Court of Appeal in Kisumu Civ App. No. 110 of 2016 Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR opined that a person claiming adverse possession must establish the following;

(a) On what date he came into possession.

(b) What was the nature of his possession?

(c) Whether the fact of his possession was known to the other party.

(d) For how long his possession has continued and

(e) That the possession was open and undisturbed for the requisite 12 years.

9. The defendants' counterclaim is based on the doctrine of adverse possession and hence the ingredients that give rise to adverse possession must be proved and demonstrated for one to succeed in such a claim. They must prove that they have been in peaceful continuous, open and uninterrupted possession of the suit property for a period of over 12 years and that during that period they have used the land as owners and that their actions in regard to the land were inconsistent with the interest of the real owner (registered proprietor). In the case of Mtana Lewa vs Kahindi Ngala Mwangandi (2005) eKLR the Court of Appeal stated thus:-

> "Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period in Kenya 12 years"

10. In the case of Mbira vs Gachuhi (2002) IEA 137 the Court held:-

> "—person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non- consensual actual, open notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption."

11. In the case of Wambungu vs Njuguna (1983) KLR 173 the Court of Appeal inter alia held thus:-

1. In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost, his right to the land by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it.

2. The *Limitation of Actions Act*, on adverse possession, contemplates two concepts; dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or had discontinued his possession for the statutory period and not whether or not the claimant had proved that he has been in possession for the requisite number of years.

12. The defendants testified that the community had been using the said suit land for social activities for decades. As at 1998 when the plaintiff was registered as a trustee, the defendants' community were using the land for various activities and this is not disputed. However, these social actives like football, exercises, meetings etc cannot be said to be actual occupation as they were on and off but consistently since the 1960s. I find that they have not established that they had been in peaceful continuous, open and uninterrupted possession of the suit property for a period of over 12 years and periodic use cannot be equated to possession and occupation. I find that the different members of the community use the land for various social activities but do not stay or live on it hence the name Kishada Grounds.

13. Having said that I find that, the defendants' rights and interest over the land are overriding and do not require registration in terms of section 28 (h) of the *Land Registration Act*, 2012 which provides as follows;

28. Overriding interests

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interest as may for the time being subsist and affect the same, without their being noted on the register-

(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.

14. The existence of such a field is an easement, which has been defined by Section 2 of the *Land Act* as a non-possessory interest in another's land that allows the holder to use the land to a particular extent, to require the proprietor to undertake an act relating to the land or to restrict the proprietors use to a particular extent, and shall not include a profit. From this definition the said grounds within the suit property is an easement. From the reading of Sections 25, 26 and 28 of the *Land Registration Act*, an easement is an overriding interest over the title of a registered proprietor whether registered or not on the title of the suit property.

15. The existence of such a field is an easement, as has been defined by Section 2 of the *Land Act* as;

"a non-possessory interest in another's land that allows the holder to use the land to a particular extent, to require the proprietor to undertake an act relating to the land or to restrict the proprietors use to a particular extent, and shall not include a profit."

16. On the issue of easements, Section 32 of the Limitations of Actions Act Chapter 22 of the Laws of Kenya as follows;

" Means by which easements may be acquired

(1) Where –

(a) the access and use of light or air to and for any building have been enjoyed with the building as an easement; or

(b) ....

(c) any other easement has been enjoyed, peaceably and openly as of right, and without interruption, for twenty years, the right to such access and use of light or air, or to such way or watercourse or use of water, or to such other easement, is absolute and indefeasible.

(2) The said period of twenty years is a period (whether commencing before or after the commencement of this Act) ending within the two years immediately preceding the institution of the action in which the claim to which the period relates is contested".

17. The above section provides for the various measures through which easements may be acquired and submitted that an easement crystallizes into an absolute and indefeasible right upon the lapse of twenty years of peaceable, open and uninterrupted enjoyment of the same. This field has been in use by the community for over 20 years. Section 28 of the *Land Registration Act* No. 3 of 2012 creates and categorizes the right of way as overriding interest. Similarly, Sections 28(c) and (h) of the same Act provides that;

> "Unless the contrary is expressed in the register, all registered land shall be subjected to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -
>
> (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act.
>
> (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
>
> (j) any other rights provided under any written law."

18. Sections 98-100 of the *Land Registration Act* provides for a framework for creation of easements through formal instruments and would like to point out that the easement herein is not the type acquired through a formal registrable instrument. Similar provisions are contained in the *Land Act* at Sections 136-141. In the Court of Appeal case of Kamau vs Kamau (1984) eKLR the Court observed as follows;

> "An easement is a convenience to be exercised by one landowner over the land of a neighbour without participation in the profit of that other land. The tenement to which it is attached is the dominant and the other on which it is imposed is the servient tenement. Once an easement is validly created, it is annexed to the land so that the benefit of it passes with the dominant tenement and the burden of it passes with the servient tenement to every person into whose occupation these tenements respectively come. So, also in equity, do restrictive covenants because they are in the nature of negative easements.
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> A licence or dispensation, unless coupled with a grant, does not bind its assignors or assignees because it does not pass any interest in land. A licence not coupled with an interest in land is revocable unless the contract for it contains a term express or implied that it shall not be revoked. A right of way and a right to take water are affirmative easements for they authorise the commission of acts, which are injurious to another and can be the subject of an action if their enjoyment is obstructed.

> How are they created? At common law only by deed or will. Writing under hand or parol grant with or without valuable consideration creates no legal estate or interest in land but only a mere licence personal to the licensor or licensee coupled with an interest or grant if it needs the latter to give effect to the common intention of the parties.
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> At equity, however, if there is an agreement (whether under seal or not) to grant an easement for valuable consideration equity considers it as granted as between the parties and persons taking with notice, and will either decree a legal grant or restrain a disturbance by injunction. Dalton v Angus (1881), 6 App Cas 765, 782."

19. From this definition and authorities cited above, the field that is within the suit property is an easement. From the reading of Section 25, 26 and 28 of the *Land Registration Act*, an easement is an overriding interest over the title of a registered proprietor whether registered or not on the title of the suit property. The Defendants by their regular use of the ½ (half) acre portion for social activities have shown in their evidence it was open to members of public. I find that the Plaintiff has been aware of the existence of the field and the social activities undertaken thereon, which as stated above is overriding his interests as a proprietor of the suit property.

20. Consequently, this court finds that the plaintiff has failed to prove his case on a balance of balance of probabilities and I dismiss the same, I also find that the 1st and 2nd defendants' counterclaim is not merited and is dismissed. Each party to bear its own costs.

21. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF FEBRUARY 2024.

N.A. MATHEKA

JUDGE