



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**ELC CASE NO. 36 OF 2012**

**Consolidated with ELC. Case No. 33 of 2009(O.S)**

**JOHN KAMANDE MWANIKI .....1<sup>ST</sup> PLAINTIFF**

**MOHAMED SALIM AHMED ALAMUDI .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**FESTUS KATANA KAMBI NYABU .....1<sup>ST</sup> DEFENDANT**

**KOMBO OMAR MANGALE.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction:**

1. This suit was consolidated with Malindi ELC No. 33 of 2009 (O.S).
2. In the Plaint in respect to this suit, the Plaintiffs averred that they are the registered proprietors of the plot number 554, Mtangani, measuring approximately 72.77 acres; that after purchasing the land, they sought the help of the Chief of the area to assist them to handle the squatters who were occupying the land and that after holding meetings with the squatters, they agreed to compensate all the squatters who had planted crops on the land.
3. The Plaintiffs pleaded that they also agreed to set aside four (4) acres of the suit land to five (5) different squatter families and that all the people who were living on the land were compensated and they vacated the land, save for the five (5) families.
4. The Plaintiffs averred that the five (5) families have refused to collect their respective documents for the land that was set aside for them.
5. In their Defence, the Defendants pleaded that the Plaintiffs' claim is time barred because the suit was filed way after twelve (12) years had lapsed after the Defendants' entry on the suit land and that they have been on the suit land for more than twelve (12) years without permission, openly, continuously, exclusively and adverse to the title of the registered owners.
6. In ELC Civil Case No. 33 of 2009, the 149 Applicants claim that they are entitled to portion number 554 which they have acquired by adverse possession, having lived and worked on the land for over twelve (12) years since the 1950's.

7. In the Affidavit in support of the Originating Summons, the 123<sup>rd</sup> Applicant deponed that the Applicants have been living on the suit land with their families; that their grandfathers also lived on the suit land and that when they died, they were all buried on the subject land.

8. The Applicants deponed that there are more than 350 families occupying and cultivating the suit land and that the suit land is registered in favour of the 1<sup>st</sup> to 9<sup>th</sup> Respondents.

**The Plaintiffs' case:**

9. The 1<sup>st</sup> Plaintiff, PW1, informed the court that he has lived in Malindi for over forty six (46) years and that the 2<sup>nd</sup> Plaintiff is his partner in the cigarette distributorship business.

10. PW1 informed the court that they bought plot number 554 (*the suit land*) in 1987 from the family of Fidahussein Iqbal for Kshs. 145,540 and that the suit land was thereafter registered in their favour.

11. According to PW1, he visited the land before they purchased it and that the land was bushy with old unattended cashew nut trees.

12. According to PW1, the seller informed him that he had allowed some people to plant trees on the land and to till it.

13. PW1 informed the court that the land had seven (7) huts occupied by Rodgers Karisa, Charo Gude, Kitsao Gude, Shilingi Hamisi, Tabu Hamisi, Safari Mgumba and Kenga Shume and that seven (7) huts were located in the middle of the land.

14. PW1 stated that the seller, Fidahussein, told him that he is the one who gave permission to the persons living in the huts to enter the land and build the said huts; that he informed the seven people to relocate the huts to the edge of the land and that he compensated the people who were claiming that they are the ones who usually harvest cashew nuts and mangoes from the land.

15. It was the evidence of PW1 that the agricultural officer prepared a report valuing the crops, which he produced in evidence, whereafter he compensated those claiming that they usually harvest the cashew nuts and mangoes.

16. PW1 informed the court that in 1991, and after paying off those claiming to have been harvesting the fruits and relocating those with huts, he decided to sub-divide the land into 324 residential plots; that they obtained the consent of the Land Control Board on 22<sup>nd</sup> March, 1991 and that on 7<sup>th</sup> January, 1992, the then Municipal Council of Malindi approved the sub-divisions and change of user of the suit land.

17. The evidence of PW1 was that they later consolidated the 324 plots into 84 plots and that on 21<sup>st</sup> June, 1993, he sold 40 plots to Trilogy Company for Kshs. 19,546,000.

18. As for the five homesteads, PW1 stated that he relocated them on a piece of land measuring four (4) acres and that each hut that had been constructed on the land was assessed whereafter he compensated them.

19. After relocating the people who had huts, it was the evidence of PW1 that he settled them on sub-division numbers 7900, 7901, 7896 and 7897 and that until the year 2009, the land remained vacant except for the seven individuals he allowed on the land.

20. In the year 2009, it was the evidence of PW1 that four individuals invaded the land and that another group of four invaded the land and started constructing huts in the year 2011.

21. PW1 informed the court that when the Municipal Council issued to the eight an enforcement notice, they vacated the land and that in the year 2011 and 2012, he sold more sub-divisions to third parties.

22. PW1 produced in evidence a bundle of exhibits which I shall refer to later.

23. In cross-examination, PW1 stated that they sold 33.7 acres of the suit land and that by 1994, they were remaining with 39 acres; that they sold more plots in the year 2011 and 2012 and that there are only seven squatters on the land.

24. The area Chief, PW2, informed the court that he oversaw the agreement between PW1 and his partner on one part and the people who had been permitted by Mr. Fidahusseini to utilize the suit land.

25. PW1 stated that he chaired most of the meetings in which it was agreed that the Plaintiffs would compensate the people who claimed to be harvesting crops or trees on plot number 554 and the people who had five (5) homesteads on the land.

26. According to PW2, the five families who had houses on the land agreed to be relocated on a designated parcel of land and that they were represented by seven (7) individuals.

27. After the meetings, the land was sub-divided and those who were to be compensated as agreed were compensated.

28. It was the evidence of PW2 that the people claiming land now were not on the land and that the 1<sup>st</sup> Applicant in the Originating Summons has since died; that 24 people were compensated for the trees and that all those people acknowledged receipt of the compensation.

29. PW3 informed the court that he worked as a police officer in Malindi between the years 2008 until 2015; that he was gazetted as a scene of crime officer on 18<sup>th</sup> January, 2010 and that after the Plaintiffs reported about the invasion of the suit land by some of the Defendants/Applicants, he took photographs of the ongoing construction and prepared a report dated 15<sup>th</sup> September, 2012 which he produced in evidence.

30. It was the evidence of PW3 that most of the houses were still under construction and that he visited the scene again on 8<sup>th</sup> August, 2014 and prepared a second report.

**The Defence case:**

31. The 2<sup>nd</sup> Defendant, DW1, informed the court that he only knew the suit as being plot number 554 in the year 2009 when he was arrested; that he was charged in court for forceful detainer and that the trees which are on the suit land were planted by his grandfather.

32. According to DW1, they have cashew nuts and mango trees on the land and that they also cultivate seasonal crops on the land.

33. DW1 informed the court that the family's homestead is not on plot 554 but that they have always cultivated the land; that his homestead is about 300 metres away from the land and that every family knew its trees.

34. It was the evidence of DW1 that the trees that are on the land were planted by their grandfathers and that their occupation was interrupted by the police in the year 2009.

35. According to the Affidavit of DW1, their grandfathers lived on the land and that when they died, they were buried on the land. According to DW1, there are more than 350 families occupying the land.

36. DW1 stated that he was not aware of the meetings that have been alluded to by PW1 and PW2 and that all the people who acknowledged that they were compensated for the trees have since died.

37. In cross-examination, DW1 stated that under Giriama customs, they leave in one homestead for

security reasons but cultivate on a separate piece of land.

38. Although DW1 stated that his parents were buried on the suit land and that they used to sell the harvested cashew nuts to the factory, he stated that he did not have any evidence to that effect.

39. It was the evidence of DW1 that the families who are claiming the land are 149 and not 350 and that he has never been evicted from the suit land.

40. DW2 informed the court that he was born on the suit land 41 years ago; that his parents were born on the suit land and that they inherited the suit land from their parents.

41. According to DW2, he used the suit land until the year 2009 when all their houses were burned down by police officers thus living them homeless.

42. In cross-examination, DW2 stated that he has a small structure on the land which he uses while guarding the crops and that his house is about 300 metres away from the suit land.

43. DW3 stated that he met PW1 on 17<sup>th</sup> January, 1994 in the Assistant Chief's office; that they were then informed that the suit land belongs to PW1 and that the chief wanted them to allow the surveyor to survey the land.

44. According to DW3, by that time, they were living on the land and that they never agreed on anything with PW1.

#### **The visit of locus quo:**

45. The court, in the company of the Plaintiffs' and the Defendants' advocates, visited the locus quo on 6<sup>th</sup> November, 2015.

46. The court went around the entire suit land and noted the number of houses that were on the suit land.

#### **Submissions:**

47. In an unusually long submissions, the Plaintiffs' counsel narrated the evidence of the Plaintiffs and their witnesses which I have already enumerated above.

48. Counsel submitted that the Defendants have not proved that they have held physical control of any specific portion of the suit land to the exclusion of the Plaintiffs and the previous owner of the land and that Plot No. 554 has been sub-divided into many different sub-divisions.

49. The Plaintiffs' counsel submitted that the possession by the unidentified individuals constructing structures on the edge of the suit land started in the year 2009 and that since then the possession has been interrupted in 2009 and in 2011.

50. It was submitted that none of the Defendants has proved that he has held physical control of a defined portion of the land openly, without violence, without permission and without interruption for the statutory period of twelve (12) years. Counsel relied on several authorities which I have considered.

51. The Defendants' advocate submitted that the Defendants have been in possession of their respective portions of land by virtue of cultivation; that most of the Defendants have not build on the suit land because the same has been left for cultivation and that some Defendants have actually build on the suit land.

52. The Defendants' counsel submitted that it is not a must for a party to plead the exact sub-division of the land he claims and that the Defendants had been in possession of the suit land long before the Plaintiffs purchased it.

### **Analysis and findings:**

53. According to the Indenture dated 18<sup>th</sup> August, 1987 and registered on 25<sup>th</sup> September, 1987, the Plaintiffs purchased land known as portion number 554 from the Fidahusseini family for Kshs. 145,540.

54. After the said purchase, the Malindi Land Control Board gave its consent for the sub-division and change of user from agricultural to residential and commercial user on 22<sup>nd</sup> March, 1991.

55. PW1 informed the court that after the said consent was granted, the suit property was sub-divided into several portions.

56. PW1 produced in evidence the letter dated 11<sup>th</sup> May, 1992 showing the consent of the Ministry of Lands to have the suit land sub-divided into 324 sub-plots, which were later consolidated to 84. The approved sub-division scheme was produced in evidence.

57. It is not in dispute that the Plaintiffs entered into an agreement with five families who were living on the suit land and re-located them to the Western side of the suit land.

58. According to the letter dated 15<sup>th</sup> March, 1995, the Plaintiffs agreed to set aside 4 acres of the suit land and allocated it to the five individuals whose names and national identity cards have been indicated in the letter.

59. The evidence before the court shows that the five families were allocated plot numbers 7896, 7897, 7900 and 7901 and they were paid for the relocation. Indeed, the Plaintiffs have maintained that the five families are entitled to the said land.

60. The evidence of PW1 was that when they purchased the suit land in 1987, it is only those five individuals who had been allowed by the Vendor to occupy the suit land and that they were no other persons who were occupying the land.

61. According to the evidence of PW1, there were other 24 people who were claiming that they are entitled to the mature cashew nuts and mango trees that were on the suit land.

62. The Chief of the area, PW2, informed the court that the Plaintiffs compensated all the people who were claiming that they were entitled to the cashew nuts and mango trees.

63. According to the Minutes of 29<sup>th</sup> January, 1994, each of the 24 squatters who had a tree on Plot No. 554 was compensated. DW1 informed the court that all the people who were compensated, except one, have since died.

64. In their Originating Summons, the 149 Applicants have claimed that they are entitled to the suit land by way of adverse possession. However, only three Applicants, DW1, DW2 and DW3 testified.

65. None of the Applicants/Defendants who testified informed the court that they have a house within the confines of what was known as portion number 554, before the same was sub-divided.

66. According to the evidence of DW1 and DW2, their homesteads are approximately 300 metres away from the suit.

67. It was the evidence of DW1 and DW2 that although their homes are outside the boundaries of portion number 554, they have always cultivated the suit land before retreating back to their homes.

68. On the other hand, it was the evidence of DW3 that he used to live on the suit land with his parents until the year 2009 when their houses were burnt down by police officers.

69. As correctly submitted by the Plaintiffs' advocate, a person claiming land by adverse possession must specifically prove the date he took possession of the land or dispossessed the owner; the fact of actual possession; knowledge of the true owner; openness of the possession and non-interruption of the possession for a period of twelve (12) years.

70. In their Originating Summons, the Applicants have pleaded that they have acquired "*their respective portions within portion No. 554 Malindi*" by way of adverse possession.

71. The fact that the 147 Applicants have acquired "*their respective portions*" within portion No. 554 which measures 77 acres placed a burden on them to plead and prove the portions that each of them, or their families are entitled to.

72. From the pleadings and the evidence of the three Applicants in the Originating Summons, it is not possible to determine which specific part of the land the 147 Applicants are entitled to, either having lived there or cultivated.

73. The Applicants/Defendants neither produced a sketch map to enable the court identify the specific part of the land that they were claiming.

74. The Plaintiffs produced in evidence the approved sub-division scheme which shows the 84 sub-divisions that were created when portion number 554 was sub-divided.

75. Indeed, the court used the said sub-division plan when it visited the locus quo on 6<sup>th</sup> November, 2015 to identify the people who were in possession of the land.

76. While at the site, the court visited the four plots which the Plaintiffs had set aside for the relocation of the five families that had been allowed on the land. The court observed that on the said four plots, there existed houses, some of which were semi permanent in nature and others permanent. The said houses were on Plot Nos. 7896, 7897, 7900 and 7901. The court also noticed several temporary houses which were outside the beacons of what was originally portion no. 554 but a few metres from the above mentioned sub-divisions.

77. On the Southern side of the suit land, the court observed that there were visible new settlements with houses under construction. The court noted that sub-division no. 7918 had one incomplete house and a permanent new house while sub-division number 7919 had an incomplete permanent house.

78. Sub-division number 7920 on the other hand had incomplete houses.

79. The rest of the suit land, the court observed, was not inhabited by people, save for the over grown cashew nuts and mango trees.

80. Having visited the site, and on the basis of the evidence by DW1, DW2 and DW3, I am convinced that the issue of the Applicants in the Originating Summons and the Defendants in this suit having been in possession of the suit land for twelve (12) years has not been proved.

81. Indeed, the circumstances surrounding these two suits are on all "*fours*" with the facts in the case of ***Wilson Kazungu Katana & 101 others vs. Salim Abdalla Bakshwein & Another, Malindi Civil Appeal No. 11 of 2014 [2015] eKLR*** where the Court of Appeal held as follows:

***"Even if the Plaintiffs claim were found to be proved, on what basis would the entire land parcel be distributed among the claimants? A court of law would be loath to issuing orders that are certain to cause fresh friction between the claimants themselves and possible breach of peace."***

82. There was no evidence before the court to show the relationship that exists amongst the 149 Applicants, or how each of them has utilized the suit land for twelve (12) years.

83. Consequently, the court cannot determine which of the 149 Applicants is the Originating Summons specifically occupies or is entitled to adversely possess which, if any, of the few houses which were on the edge of the suit land.

84. In any event, when the court visited the locus quo, it was not convinced that any of the 149 Applicants had been in possession of the suit land, either by way of cultivation or otherwise, for twelve (12) years.

85. Indeed, instead of proving that any particular individual is in possession of any specific house or a portion of the land, DW1 and DW2 were categorical that they do not have houses on the land.

86. The Applicants' version that they usually cultivate the suit land and then return to their homes cannot be a ground to claim the land by way of adverse possession. In the case of ***Robert Shume & 3 others vs. Samson Kazungu Kalama, Malindi Civil Appeal; No. 32 of 2015 [2015] eKLR***, the Court of Appeal held as follows:

***“...the use of the property was not hostile to the true owner’s title as demonstrated by the temporary structures constructed on the property and its transient and periodic cultivation.”***

87. The transient and periodic cultivation of the suit land by the Applicants/Defendants, if at all, cannot be a ground to dispossess the true owner of the suit land.

88. Indeed, this transient and periodic trespass on the suit land by the Defendants was captured in the two reports that were prepared by PW3 who took photos of the upcoming structures on the suit land in the year 2009 and 2011.

89. Considering that the Plaintiffs are the registered proprietors of the suit land, and in the absence of evidence to show that the Applicants (*in the Originating Summons*) and the Defendants are entitled to the land by way of adverse possession, I allow the Plaintiffs' Plaint dated 15<sup>th</sup> October, 2012 as prayed and dismiss the Applicants' Originating Summons dated 6<sup>th</sup> April, 2009 in Civil Suit No. 33 of 2009 with costs.

**DATED AND SIGNED AT MACHAKOS THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2017.**

**O.A. ANGOTE**

**JUDGE**

**DATED, DELIVERED AND SIGNED AT MALINDI THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2017.**

**J.O. OLOLA**

**JUDGE**