



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC LAND CASE NO. 411 OF 2010 (OS)

HASSAN MUSA MWAKUENZA.....PLAINTIFF/APPLICANT

-VERSUS-

JUMA MOHAMED MWACHI.....RESPONDENT

JUDGEMENT

1. This suit was commenced by way of an originating summons taken out on 22nd April 2010 and filed in Court on 8th November 2010. The applicant asked the Court to grant the following reliefs:

- 1. That the applicant be declared the legal owner of plot No. KWALE/UKUNDA/1009.**
- 2. That the applicant be registered as the proprietor of plot No. KWALE/UKUNDA/1009.**
- 3. That the title deed issued to the respondent be revoked.**
- 4. That the costs of this application be costs in the cause.**

2. The Originating Summons is premised on the grounds listed on its face that:

- 1. That the applicant has been in quiet occupation of the said property for over 12 years.**
- 2. The registered owner has all along known the occupation.**
- 3. That the applicant has no other land in Kenya apart from this parcel, which he has greatly improved and developed.**
- 4. The registered owner has never used or occupied the portion occupied by the applicant.**
- 5. The applicant has buried all his kin who have died in the last 10 years on the said plot.**

3. The application is supported further by affidavit of Hassan Musa Mwakuenza and other grounds to be adduced during the hearing. The applicant deposed that his father made some developments on the suit land sometime in the 1960s and after his death he continued with the said developments. The applicant deposes that he built permanent houses on the land and he has planted trees. That he has sired 8 children while living on the land. He continued that he was informed by his father that the suit land was vacant when he moved in and they have lived on it peacefully and quietly in the full view of the local

administration and the land registrar, Kwale.

4. However the applicant learnt that the defendant registered himself as owner in the year 2008. He swore the affidavit in support of his claim for adverse possession. He annexed photographs of buildings on the land and a certificate of official search showing the defendant is the registered owner of the suit land. He also filed list of documents and witnesses statements.

5. The suit is opposed by the defendant vide a replying affidavit dated 25th November 2014 and filed in Court on 27th November 2014. Mr Juma deposed that he is the bonafide registered owner of the suit land and he annexed a copy of his title deed. The defendant deposed that the plaintiff's family land is adjacent to the suit land before they encroached on the suit land in 1990 and this made him to file a suit at the Msambweni Land Disputes Tribunal as per copies of proceedings annexed and marked as "**JMM2**". That on 30th June 2014 he entered into a sale agreement with the trespassers/tenants for them to vacate as per copy annexed as **JMM3**. The Respondent deposed that the plaintiff cannot claim the suit land under adverse possession which property he has illegally leased out and which he does not occupy himself. He is therefore opposing the grant of the orders sought. The defendant also filed his list of documents dated 28th November 2013.

6. The plaintiff testified on 23.11.2016 as PW 1. He lives in Ukunda and does menial jobs. That he is 64 years old and was born on this land. That the land belonged to his late father Mzee Musa Athuman. The witness said he lives on the suit land with his family. He produced a certificate grant issued on the estate of his father as Pex 1. PW 1 continued that dispute began during adjudication that was done in 1974. PW 1 stated the land was adjudicated as theirs but it was later subdivided into 3. PW 1 said the suit land is built with rental houses which they have leased out. He said his father's plot is 651.

7. He continued that when they discovered the suit land was in the name of the defendant, he filed a complaint with the chief who referred him to the D. O Msambweni. The Land Disputes Tribunal found in their favour as per proceedings produced as Pex 2. That they started having a dispute in 1987. PW 1 said he is entitled to the land and asked the Court to revoke the title of the defendant and he be registered as the owner of the land.

8. In cross – examination, pw 1 said that he knew the defendant was the registered owner of the suit land when he did a search on 6.10.2008 and filed a case before the tribunal. That plot 651 is in his name while the owner of plot 647 left them the land. PW 1 said he lives on plot 1009. That the numbers were given in 1974 while the dispute began in 1987. That the defendant has not left him to stay in peace. PW 1 said the defendant began receiving rent from the tenants in the suit premises in the year 2015. He said the defendant's title is not lawful. In re – examination he said he is not lying to Court.

9. Kassim Athman Chaka testified as PW 2. He lives in Ukunda and runs a café. He knew both the plaintiff and the defendant and knew about the dispute. PW 2 said he is the son of Athman Choka who owned plot No 647. That his father gave up his interest on this land to the plaintiff because he felt it was unjust as he knew the plot belonged to the plaintiff's father. PW 2 knew nothing about the suit plot No 1009.

10. Athman Said Rimo testified as PW 3. He is currently a student at Ambassador Makerere High School. He said the disputed plot is situated in Ukunda. That in 1972 he approached the plaintiff's father to give him a place to build a shop for business. He said the land had not been demarcated. PW 3 was given a portion big enough to build a 10 roomed Swahili house. That during demarcation Mzee Musa was given plot No 651. When Mzee Musa later went to Kwale, he discovered that the plot had been subdivided into 3 portions with 1009 given to Hamisi Ali & the defendant.

11. Plot No 647 was given to an ex – councilor and village chairman. According to PW 3, the two plots belong to Mzee Musa as there are no plots in that area with number 1000 series. PW 3 advised Mzee Musa to pursue the case with the authorities. The defendant refused to return the plot. That the defendant lives some kilometers from the suit plot. PW 3 said that the house he built is on plot 1009 and the defendant has never raised any issues. That the plot belongs to the plaintiff's family.

12. In cross – examination, PW 3 said he does not recognize the title given to the defendant as it was not properly given. His house on plot 1009 is a business house. He advised Mzee Musa to challenge the defendant’s title through Msambweni Land Disputes Tribunal. He did not know the outcome of those proceedings. He does not know when the dispute arose. That whoever lives in the house he built pays rent to the plaintiff who collects the rent on his behalf. In re – examination, PW 3 stated that plot No 651 includes plot 647 and 1009. The plaintiff then closed his case.

13. The defendant gave his evidence on 13th July 2017. He said he is a retired graduate teacher. That he owns the suit plot and he has a title deed issued on 17th September 1992 which he produced as Dex 1. The defendant said he was allocated the land together with Hamisi Ali during adjudication. Hamisi Ali died on 4.12.1983 and he took out letters of administration of his estate which grant he produced as Dex 2. He used the grant to register the title to his sole name.

14. The defendant continued that immediately after registration into his name, a misunderstanding arose between him, the plaintiff and the plaintiff’s father. That they wanted to encroach on to his plot. The defendant stated that the plaintiff resides on plot 651. He referred the dispute to Msambweni Land Dispute Tribunal who found in favour of the plaintiff. The defendant appealed the decision vide Mombasa HCC 11 of 1990 and the High Court found in his favour and he produced this judgement as Dex 3. That the structures shown by the plaintiff are on plot 651. The witness said there are trespassers on his plot whom they had an agreement with to buy the plot. He produced the agreement as Dex 4. He denied that the plaintiff has any tenants on the suit plot.

15. The defendant denied that he obtained the land fraudulently. That the land adjudication took place properly and the plaintiff raised no issues. That there has been a lot of disharmony and endless confrontations hence they have had bad relations with the plaintiff although they are related. In cross – examination he conceded he has not lived on the suit land. He knew the plot neighbours 651 and others. That it is the government who knows why he was given the plot No as 1009. He said his co – owner never returned the land to the plaintiff’s father. He then closed his case.

16. The parties filed written submissions which I have read and considered. This is a claim for adverse possession and this Court’s task is to find if the applicant has established the ingredients of adverse possession as laid out in section 38 of Cap 22 and the case of **Wambugu vs Njuguna (1983) eKLR** where it was held that to prove a claim for adverse possession, an **applicant must show that he has dispossessed the owner of the suit land of the intention for which the owner would have used the land for. Secondly that such occupation must be peaceful open and uninteruption for a period over 12 years.** Similarly the Court of Appeal in **Wilson Kazungu Katana & 101 others vs Salim Abdalla Bakshwan & Another Malindi CA No 11 of 22** interrogated what amounts to adverse possession and rendered itself thus, **“First the parcel of land must be registered in the name of a person other than the applicant. The applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title owner. Lastly he must have been in that occupation in excess of 12 years having dispossessed the owner or having been discontinuance of possession by the owner.”**

17. In this case, the defendant is the registered owner of the suit plot. The question is whether the plaintiff has been in peaceful occupation. The plaintiff admitted that there have been disputes over the suit property as between his father and the defendant and later as between himself and the defendant. PW 2’s evidence was not useful to the plaintiff’s claim. PW 3 stated that he advised the plaintiff’s father to file his claim with the authorities to recover this land as he felt the title deed was wrongly issued to the defendant. Consequently a case was filed at the Msambweni Land Disputes Tribunal case No 11 of 1990. The tribunal found in favour of the plaintiff but the award was reversed on appeal.

18. The case before the Land Disputes Tribunal therefore interrupted time from running as it had been if at all from the time the defendant acquired the suit land in 1974. In the case of **Baber Alibahai Manji vs Sultan Lalji & green fields Investments NBICA 269** of 2001, the Court stated thus **“assertion of right involve either the regaining of entry to the land by the owner or the commencement of a suit whose substance is to regain possession and any other suit by the owners in our view be ineffective in stopping time from running.”** The plaintiff submits that litigation ended before the year 1991 and since

then he has never challenged the Respondent's title. He therefore confirms that the litigation before the Land Disputes tribunal interrupted time from running. But it is interesting to note from the plaintiff's own evidence that he admits the defendant has never given him peace. Secondly in cross – examination the plaintiff said he only knew the defendant was the registered owner of the suit property when he conducted a search on 6th October 2008. Thirdly the plaintiff's claim from the evidence adduced is based on the fact that the suit land is part of their plot No 651 which was wrongly partitioned and registered in the name of the defendant.

19.The plaintiff and his witness are thus challenging the validity of the defendant's title. Both PW 1 & PW 3 do not recognize the registration of the defendant as owner of the suit land as they believe the same was fraudulently acquired. I have perused the registry index map attached to the plaintiff's list and what I saw is an entry of subdivision of plot No 651 into Nos 2892 & 2893 on 13.4.1990. There was no proof that the defendant's title or plot number 647 was partitioned out of the plaintiff's number 651. The mere fact that there was no 1000 series of plots in that area is not sufficient proof that it is entitled to the plaintiff to the suit property.

20.The defendant has submitted that the plaintiff's claim fails because the plaintiff does not recognize his title. In support of this, he cited the case of **Haro Yonda Juaje vs Sadaka Dzeno Mbauro & Another (2014) eKLR** where it was held that the Respondent's cannot succeed in a claim of adverse possession where he does not recognize the title of a land owner that it is a nullity. The defendant also stated that the plaintiff is not living on the suit land. According to him, the plaintiff lives on the larger plot as he understood it to include 647, 651 & 1009. That the pictures do not show a particular plot. Further that the plaintiff did not call the purported lessees/tenants to confirm that they have leased plots from the plaintiff which are inside the suit property. That possession is a question of fact which depends on the circumstance of each case and must be proved by evidence. Instead PW 3 claimed the tenants on the land were his.

21.PW 3 stated in his evidence that he was given a portion by the plaintiff's father to build a 10 roomed Swahili house which portion now falls on the suit plot after demarcation. That he has since changed the structures into permanent structures with the plaintiff collecting rents on his behalf. PW 3 also said that the plaintiff's father was given plot 651 during adjudication only to learn later that plot 651 had been partitioned into 3, the suit plot being one of them. He did not give any evidence that PW 1 is living on the suit plot or has structures therein other than saying the plot belongs to the plaintiff's family. This evidence does not aid the plaintiff's claim in proving peaceful user and occupation. In my view, PW 3's evidence corroborates the defendant's position that the plaintiff assumes he is living on the suit land by virtue of his interpretation that plots Nos 651, 647 & 1009 all comprised one plot before the alleged partition after the adjudication exercise.

22.However the plaintiff did not adduce any evidence to explain what was the size of their original land plot No 651 to lend any credence to his claim that plot No 1009 was indeed partitioned from their land. He also did not produce a survey report to verify the fact that his home is located on plot number 1009 and not 651 which they own. Neither did he call evidence of any nature whether from neighbours or his siblings to prove that his home is on the suit plot.

23.The plaintiff's claim is for adverse possession and not nullification of the defendant's title for the reason that it was fraudulently and illegally acquired. It is my finding after analyzing all the facts presented that his evidence fails short of the standard required to prove a claim for adverse possession. It is also my finding that the plaintiff has not had open, quiet, peaceful and actual possession of the suit property. Consequently I dismiss the suit for failing to be proved with an order that each party bear their respective costs of the suit.

Dated, signed & delivered at Mombasa this 2nd day of November 2017.

A. OMOLLO

JUDGE