



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CASE NO. 295 OF 2014

GEORGE MUKORA KABENA MARK WERU MWAI...PLAINTIFFS

- VERSUS -

MARTIN KALUME THOMA.....DEFENDANT

JUDGMENT

1. The Plaintiffs have filed this suit against the Defendant seeking;
 - a. A mandatory injunction compelling the Defendant to demolish, pull down the structures erected on the suit property and to give vacant possession to the Plaintiffs.
 - b. General damages for trespass to the land.
 - c. Costs of this suit and other incidental thereon.
2. Together with the plaint there is a verifying affidavit sworn by Mark Weru Mwai on the 25th November, 2014. A witness statement dated 25th November, 2014 and the Plaintiff's list of documents which include;
 1. Power of attorney.
 2. Agreement dated 19th May, 2012.
 3. Agreement dated 28th May, 2012.
 4. Agreement dated 21st June, 2012.
 5. Copy of Title deed for Land Parcel No. Kwale/Diani Beach Block/672.
 6. Copy of Title deed for Land Parcel No. Kwale/Diani Beach Block/1782, 1784, 1785, 1786 and 1787.

They also filed a supplementary list of witnesses dated 16th November, 2015.

3. The Defendant entered appearance and filed a statement of defence and counterclaim dated 19th January, 2015. In his statement of defence he denied each and every allegation in the plaint.
4. In his counterclaim he states that he was entitled to possession, occupation and use of the suit properties being Kwale/Diani Beach Block 1782, 1784, 1785, 1786 and 1787 pursuant to the provisions of the Limitation of Actions Act.
5. That the interest of Joseph Wamuturi Kigathi on the suit properties has been extinguished by operation of law. The interest of Alfred Mwaniki Ndungongi on Kwale/Diani Beach Block/672 had been extinguished by operation of the law and therefore he had no interest to pass to Joseph Wamuturi Kigathi. The Defendant has overriding interests over the suit having been in occupation, possession and use of Kwale Diani Beach Block/672 for over twelve years before the same was subdivided.

6. He prays that the Plaintiffs suit dismissed with costs and that;

- a. The interest of Joseph Wamuturi Kigathi over the suit properties being Kwale/Diani Beach Block 1782, 1784, 1785, 1786 and 1787 measuring 0.516 hectares, 0.096 hectares and 0.0965 hectares respectively has been extinguished and that the Defendant is entitled to the suit properties by adverse possession.
- b. The Defendant be registered as the proprietor of the suit properties and the Registrar of Titles Kwale County do delete the entry in respect of Joseph Wamuturi Kigathi's proprietorship of the suit properties and register the Defendant as the proprietor of the suit properties.
- c. The orders prayed for in (a) and (b) above be registered against the title Numbers Kwale/Diani Beach Block 1782, 1784, 1785, 1786 and 1787.
- d. The Plaintiffs and Joseph Wamuturi Kigathi be permanently barred from having any dealings and interfering with the Defendants peaceful enjoyment, possession, occupation and use of the suit properties.
- e. Costs be awarded to the Defendant.

7. P.W.1 Mark Weru Mwai, the 2nd Plaintiff testified on 7th March 2017. He told the court that the Defendant agreed to move out of the suit properties upon being paid Kshs.100,000. He was paid he refused to vacate.

8. P.W.1 produced the power of attorney to him by Joseph Wamuturi Kigathi dated 31st August 2012 and registered on 10th September 2012. The power of attorney was produced as exhibit P1. He produced the agreement dated 19th May, 2012 as exhibit P2 Agreement dated 28th May, 2012 as exhibit P3.

Mpesa statement exhibit P4.

Agreement to vacate exhibit P5.

A copy of title deed for land parcel number Kwale/Diani Beach Block/672 as exhibit P6.

Copies of title deeds for Kwale/Diani Beach Block 1782, 1784, 1785, 1786 and 1787 as exhibits P7, 8, 9, 10, 11 respectively.

A copy of certificate of official search exhibit P12.

He prayed that the Defendant be compelled to vacate the suit properties.

9. P.W.2 Laban Njagi Kinuthia told the court that he witnessed an agreement between the Plaintiffs and the Defendant. The Defendant agreed to vacate upon being paid Kshs.100,000/=. He was to vacate after two weeks.

10. P.W.3, Suleiman Yussuf Mwadzoyo the assistant chief Gombato sub-location told the court that in June 2012, the 2nd Plaintiff visited his office. He wanted the Defendant to be summoned because he had received Kshs100,000 but had refused to vacate.

P.W.3 said he summoned the Defendant who appeared with the village elder. The 2nd Plaintiff was accompanied by George Kabena.

The agreement was reduced into writing. The Defendant agreed to vacate after being paid Kshs100,000. He also requested for time to harvest his aloe vera crop. The agreement was produced as exhibit P5. He told the court that the Defendant has not given vacant possession to date.

11. The Defendant Martin Kalume Themos told the court that he does not know Joseph Wamuturi nor did he sign any agreement with him. He told the court that he met Alfred Ndungongi in 2012. He said Alfred Ndungongi was not the owner of the plot. That he last saw the real owner of plot in 1991. He denied that he had been asked to vacate the property. He said that P.W.1 asked him to write on a piece of paper. He said the words were inserted. He prays that the Plaintiffs case be dismissed and he be declared the owner of the said land.

12. I have considered the pleadings and the evidence on record. I have also considered the written submissions. The issues for determination are;

- i. Whether or not the Plaintiffs have established a case on a balance of probabilities as against the Defendant.
- ii. Whether the Defendant is entitled to be declared as the proprietor of the parcel of land Kwale/Diani Beach Block 1782, 1784, 1785, 1786 and 1787.
- iii. Whether the Defendant is entitled to be registered as the owner of the suit properties known as Kwale/Diani Beach Block 1782, 1784, 1785, 1786 and 1787.

13. There is no doubt that the suit property was originally known as Kwale/Diani Beach Block/672 which was later subdivided into Kwale/Diani Beach Block 1782, 1784, 1785, 1786 and 1787. The 2nd Plaintiff Mark Weru Mwai produced the power of attorney as exhibit

P1. The said power of attorney was donated to George Mukora Kabena (1st Plaintiff) on 31st August, 2012. The same was registered on 10th September 2012. He also produced the agreement dated 19th May, 2012 in which the Defendant agreed to move out of the suit premises upon being paid Kshs100,000=/. The agreement was produced as exhibit P2. There is another agreement produced as exhibit P3. An Mpesa transaction statement showing that Alfred Ndungongi transferred money to the account of Martin Themom amounting to Kshs100,000. It was produced as exhibit P4. There is an agreement to vacate signed before the chief. It was produced as exhibit P5.

The 2nd Plaintiff also produced a copy of title deed for Kwale/Diani Beach Block /672 before sub divisions exhibit P6. The same is in the name of Alfred Mwaniki Ndungongi issued on 6th September 1991. He also produced the title deeds for the parcels after sub division as exhibits P7-11 respectively. They are all issued on 27th March and are in the names of Joseph Wamuturi Kigathi. A certified copy of official search dated 9th July 2012 produced as exhibit P12.

14. From the exhibits produced there is no doubt that Joseph Wamuturi Kigathi must have acquired the land parcel number Kwale/Diani Beach Block /672 from Alfred Mwaniki Ndungongi. The same was subdivided into four plots 1782, 1784, 1785, 1786 and 1787.

15. It appears later it became necessary for the said Joseph Wamuturi Kigathi to donate a power of attorney to the Plaintiffs herein for purposes of filing this suit and ensuring all the squatters vacated the land. The timing is of no consequence here as the intention of Joseph Wamuturi Kigathi was for the Plaintiffs to act for him in respect of the said parcel of land.

The fact that the power of attorney is dated 31st August, 2012 is of no consequence. The Defendant has not produced any material to the contrary to show that the said Joseph Wamuturi did not donate the said power of attorney.

16. The 2nd Plaintiff told the court on cross examination that they first entered into a verbal agreement with the defendant to vacate before they put it in writing.

P.W.2 Laban Ngugi told the court that he witnessed an agreement between the Plaintiff and the Defendant. The Defendant agreed to be paid Kshs100,000/= in order to vacate.

17. P.W.3 Suleiman Yussuf Mwadzayo Assistant Chief Gombato subdivision told the court that he witnessed the agreement between the Plaintiffs and the Defendants. He confirmed the agreement was reduced into writing. The Defendant sought for time to vacate. The agreement was produced as exhibit P5.

18. At the close of the Plaintiff's case, the Plaintiffs have proved that suit properties are in the names of Joseph Wamuturi Kigathi. No evidence was adduced by the Defendant to show that the title deeds were not issued by the land registrar, Kwale Land Registry.

The burden was on the Defendant to show that the transfer from Alfred Mwaniki Ndungongi to Joseph Wamuturi was un-procedural and/or illegal. No such evidence was placed before the court.

The Defendant ought to have called the land Registrar Kwale to dispute the sub-division of Plot number 672 into five titles.

19. The Defendant denies that he agreed to vacate the suit properties. He however admitted that he wrote on a piece of paper and gave it to the 1st Plaintiff to take it to Alfred Mwaniki Ndungongi. He claims that the words were inserted. When he was re-examined by his Advocate he admitted he signed the agreement to vacate under duress. He however called no witness to confirm this.

20. I find that the Defendant accepted Kshs100,000 because he had no claim to the suit properties. I find that the Plaintiffs have proved their case against the Defendant on a balance of probabilities.

21. In his counterclaim he claims he is entitled to possession occupation and use of the suit properties pursuant to the Limitation of Actions Act and the Land Registration Act.

That he was in occupation possession and use of Kwale/Diani Beach Bloc/672 before the same was given as a gift to Joseph Wamuturi Kigathi by Alfred Mwaniki Ndungongi.

22. I have gone through the prayers in his counterclaim. Under Section 38 of the Limitation of Actions Act and Order 37 Rule 7 of the Civil Procedure Rules, 2010 the Defendant ought to make his claim by filing an originating summons. Order 37 Rule 7 of the Civil Procedure Rules is set in mandatory terms.

The Defendant ought to have annexed a certified extract of title to the land he is claiming. The Defendant has not complied with these provisions.

A claim under this rule is not an ordinary suit.

23. I find that the Defendant has failed to comply with the provisions which entitle him to claim the suit properties under adverse possession. In the case of

Kasuve –versus- Mwaani Investments Limited and 4 Others (2004) eKLR 184 at page 188 it was held;

“in order to be entitled to land by adverse possession the claimant must prove that he has been exclusive possession of land openly and as of right and without interruption for a period of 12 years either after disposing the owner by discontinuation of possession by the owner on his own volition.”

I find that this is not the case with the Defendant herein.

24. The agreement to vacate is binding on him. I find that he signed it willingly knowing that he had no claim to the suit properties.

25. He failed to call any witness to confirm that he has been on the land over twelve years. His claim is unsupported.

26. I find that he has failed to prove his claim against the Plaintiffs and the counterclaim must fail.

27. All in all I find that the Plaintiffs have proved their case against the Defendant on a balance of probabilities. I enter judgment in their favour as follows;

a. That a mandatory injunction do and is hereby issued compelling the Defendant and to demolish, pull down the structures erected on the suit property and to give vacant possession to the Plaintiffs.

b. As the court was not guided on what damage had been occasioned to the Plaintiffs, I decline to award any damage for trespass.

c. That costs of the suit and interest are awarded to the Plaintiffs.

It is so ordered.

DATED, SIGNED and DELIVERED at Mombasa on the 19th day of December, 2017.

L. KOMINGOI

JUDGE

19/12/2017