



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 182 OF 2012

ATHMAN MWALIMU

MARIAM MWALIMU (As administrators of the

Estate of MWALIMU FADHILI (DECEASED).....PLAINTIFFS

-VERSUS-

SAMINI CHIRINGA

PHILEX K. CHIRINGA.....DEFENDANTS

JUDGEMENT

1. The plaintiffs herein have brought this suit against the defendants in their capacities as the administrators of the estate of Mwalimu Fadhili – deceased who was also their father. In their suit, the plaintiffs are seeking the following reliefs from the Court:

1. That a permanent injunction be issued against the defendants, their servants, agents, representatives, assignees, employees, servants or any person acting through them, from trespassing, constructing, dealing, continuing to constructing, leasing or meddling with land known as MBWAKA/MAERENI/580 (measuring 1.5 Ha).

2. An Eviction order directed against the defendants.

3. An order directed to the Land Registrar – Kilifi to rectify the land registry to reflect the plaintiffs as the owners of Plot No. 580 MBWAKA/MAERENI.

4. Any other suitable relief, plus cost of this suit.

2. The plaintiffs pleaded that their late father bought the suit parcel of land Mbwaka/Maereni/580 measuring 1.5 ha from the defendants' father Kahindi Chiringa Dena – deceased on 13th March 1980 and paid the agreed purchase price in full. That subsequently upon the payment, the plaintiff's father moved on the land and built a house awaiting issuance of a title deed. The plaintiffs stated that instead the late Kahindi Chiringa Dena fraudulently procured a title in his name. They reported him to the police and he was charged in Kaloleni Court on 26th January 2005 with the offence of obtaining by false pretences. Unfortunately Mzee Chiringa died before the case was finalized.

3. The plaintiffs pleaded further that now the two defendants have illegally invaded the land and taken possession preventing the plaintiffs from accessing the same and thus necessitating the filing of this suit. The suit is defended via a defence and counter claim filed on behalf of the 1st & 2nd defendants on 26th October 2012. In their defence, the defendants denied there was an agreement to sell and pleaded that if there was any sale, the same was not perfected. Further that there were no conditions to the sale and no consent of the Land Control Board was obtained therefore the sale transaction was null & void abinitio. The defendants have denied that Mwalimu Fadhili – deceased has a house on the land and denied that the title deed was obtained by fraud.

4. The defendants further pleaded that they have lived on the suit land for over 48 years in peace and that the orders sought cannot be granted because the claim is time barred. In their counter-claim, they pleaded that they are the rightful owners of the suit property. Consequently they asked the Court to grant the prayers sought in the counter-claim as follows;

a) An order of permanent injunction against the Plaintiffs whether by themselves, their servants and/or agents or otherwise whosoever from entering or using the suit premises and a declaration that the Plaintiffs be restrained from trespassing into the Defendants' Plot MBWAKA/MAERENI/580.

b) Damages for wrongful entry into, occupation and/or possession onto the suit property of the Defendants.

c) Costs of this suit.

d) Interest on (b) and (c) above at Court rates.

5. After the close of pleadings, parties proceeded to adduce oral evidence. **Athman Mwalimu** testified on behalf of the plaintiffs. He produced a grant of letters of administration dated 15.4.2012 as Pex 1. He also produced a certificate of official search for the suit land showing the land is about 3 acres. PW 1 said he did not know the land had a title deed – Pex 2. He also produced the sale agreement as Pex 3. He continued that they built the house in 1989. Athman said his father was living in Mombasa but would go to visit the suit land over weekends. The witness also produced criminal proceedings that was preferred against Kahindi Chiringa as Pex 4. That the children of the deceased invaded the place and would not allow them to stay there. He reported them to the Chief. He asked the Court to give them the land and costs of the suit.

6. In cross-examination, he said he had documents his father showed him. That the agreement produced is to sell trees. That they have been trying to get the defendants out of the land. He admitted coming to Court after 30 years. This plaintiff did not know whether the consent to sell the land was obtained from the relevant Land Control Board. That he has photographs to show their house on the land which house is still there upto date. In re – examination, Mr Athman referred to the agreement for sale of land in 1980 for Kshs 7000 which was separate from the agreement for sale of trees. That he is not the one who prepared the charge sheet against the defendants' father.

7. The plaintiffs also called **CALISTUS MUTSONGA** as PW 2. He is the Chief of Kambe location in Rabai sub – county, Kilifi County. PW 2 said he became an assistant chief in 1994 and was appointed Chief in 2004. PW 2 said he knew the plaintiff when he went to his office over this dispute but also said that he knew him since he was living on the disputed plot with his father. Mr Mutsonga continued that the plaintiffs' father had been to his office to complain against the defendants for interfering with the suit land. He issued summons for a meeting fixed for 7th February 2011. PW 2 stated that what was sold was a portion and after hearing the parties, he resolved that the land belonged to the plaintiffs. He produced the minutes of that meeting as Pex 5. He continued that from 7.2.2011, the defendants took over the land destroying even trees that were planted.

8. In cross – examination, PW 2 said he was not holding any position in government before 1994. That he became aware of the dispute in 2011 when a complaint was reported to his office. That the people in

dispute before him were not parties to the agreement. PW 2 said adjudication in the area was done in the seventies so No 580 was available as at 1980. He knew the plaintiffs lived on the suit land with their father but he does not know how they were evicted. He confirmed the title is in the name of Kahindi Chiringa. The plaintiffs then closed their case.

9. The defendants opened their case on 17th July 2017. The 2nd defendant, **PHELIX KAHINDI CHIRINGA** testified and said that he is a farmer living at Kaloleni Bondoro stage. PHELIX said he does not know Mwalimu Fadhili or the plaintiffs. His father Kahindi Chiringa Dena died on 10th August 2005 and left behind 6 children comprised of 4 girls and 2 sons. That he was born on the suit plot where he lives upto today. The 1st defendant is his brother and also lives on the suit land with his family. He said the suit land belongs to his late father who was issued with a title deed in 1996. The witness said they have houses on the suit land and have never chased anyone.

10. This defendant stated that he is 35 years old and he has never seen anyone come to claim the land. He produced the title deed, official searches and photographs of their houses as Dex 1, 2 & 3 respectively. He also produced the grant in Cause No 198 of 2011 as Dex 4 and the Criminal Proceedings as Dex 5. Mr Ambwere advocate for the plaintiff cross – examined the witness who answered that as per his ID, he was born in 1982. His father had 3 wives and he lives with his mother on the suit property. He did not agree that the land was sold as the agreement dated 7.6.1981 was for sale of trees. He has never seen the plaintiffs live on the land. That the white house being claimed by the plaintiffs was built by Njagi who was a tenant and he was among the people who painted it. With this evidence, the defendant closed his case.

11. The parties gave summaries of the facts and their analysis of the evidence in their written submissions filed in Court which I spared time to read and consider. I need not paraphrase the contents of the said submissions here. What is clear is that both the parties identified similar issues that arises for determination and which I do borrow. The issues are:

a) Whether there is a valid sale agreement in respect of the suit land

b) Whether this suit is time barred as per the provisions of the Limitation of Actions Act.

c) If answer to (a) is negative and (b) above is positive and vice versa whether judgement should be entered in the favour of the plaintiffs as prayed in the plaint or for the defendants as contained in the counter – claim.

12. The defendants also raised the issue of jurisdiction of this Court. However I have chosen to ignore it as it touches on the geographical jurisdiction of this Court. The suit land is situated in Kaloleni along the Nairobi – Mombasa highway which easily accesses Mombasa than let parties go to Malindi Environment and Land Court that deals with land disputes in Kilifi County under which the suit land is located. Malindi is far in terms of Kilometers. Therefore under article 48 of the Constitution on the right of access to justice, this Court was best suited to handle the dispute in terms of its proximity and easy access to the parties.

13. The second issue is whether there is a valid sale agreement for the purchase of the suit land. The plaintiffs submitted that their father purchased this land, paid the whole purchase price and took possession by building a house on it. That this evidence was not challenged. However the defendants denied the existence of any sale agreement. That if there was any such sale then the same became void for lack of Land Control Board Consent. From the evidence on record, there was no sale of land agreement produced other than the demand letter which made reference to a sale. I am alive to the fact that the provisions of Section 3 (3) of the Law of Contract Act was not applicable at the time when this transaction did take place. The law then allowed for both oral or written agreement. Therefore to the extent that a demand letter was made on 5th August 1993 and on the strength of the agreement for sale of trees dated 7.6.1981, this Court believes the assertion made by the plaintiffs that their father purchased some land from the defendants' father. Unfortunately no evidence was led to show this was not agricultural land to exclude the provisions of Section 6 of Cap 302. Therefore this transaction became

null and void for failing to obtain the Land Control Board Consent within the prescribed time. Secondly the defendants' father was the first registered owner of the land as per the title document. The title of a first (Pex 3) registration cannot be cancelled on grounds of fraud as pleaded in paragraphs 6 and 7 of the plaint.

14. On the aspect of limitation, the plaintiffs pleaded that their father purchased the suit land on 13th March 1980 from Kahindi Chiringa Dena. To demonstrate that the sale took place on this date, the plaintiffs produced a demand letter drawn by Nzamba Kitonga advocates dated 5th August 1993 addressed to Kahindi Chiringa and making reference to a sale for the suit land for a purchase price of Kshs 8,330= which was paid in full. There was a subsequent agreement dated 7th June 1981 for the sale of variety of trees between the same parties. The plaintiffs submitted that this is a claim for trespass which is continuous and therefore limitation does not apply.

15. From the pleadings, the evidence and the prayers sought, I do opine that the claim is two fold. The first limb is trespass. In paragraph 8 of the plaint, the plaintiffs pleaded that **“the two defendants have illegally invaded the land and taken possession and have prevented the plaintiffs from accessing the land.”** The plaintiffs did not specify when the invasion took place but possession is not contested because the defendants have also given evidence that they were born on the suit land and continues to live on it together with their families. Consequently if the possession by the defendants constitute an act of trespass, that possession is still continuing. This action brought to stop the continuing trespass cannot be time barred.

16. For the action of trespass to be sustained however is dependent on whether the plaintiffs have proved that they are entitled to the suit land which introduces the second limb of the claim as **a claim over land**. The plaintiffs are claiming the suit land is theirs by virtue of the purchase made by their father Mwalimu Fadhili – deceased in 1980. The title deed however is in the name of Kahindi Chiringa Dena – deceased who is referred to as the seller. The right over this land if at all then accrued to the plaintiffs from 1980 when the sale is said to have taken place. Section 7 of the Limitation of Actions Act Cap 22 provides thus;

“An action may not be brought by any person to recover land after the end of 12 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.”

17. The pleadings and the evidence clearly show that the plaintiffs' claim was brought after 30 years is thus time barred. PW 1 admitted that they had never sued the defendants and or the defendants' father. Secondly, the 1st plaintiff said his father was living in Mombasa and would visit the suit property only on weekends. Although PW 2 stated the plaintiffs' father lived on the suit land, this evidence was contradictive of the plaintiffs' own evidence. Furthermore, PW 2 only became an Assistant chief in 1994 which was still after 12 years had lapsed (1980 – 1994) and only became aware of the dispute in 2011 when the plaintiffs reported the case to his office. His evidence does not add any value to the plaintiffs' case. On the account of limitation the plaintiffs' suit must fail and I do find so.

18. Having come to the conclusion that the plaintiffs' suit is time barred, it follows that their claim does not lie and hence the prayers sought cannot be granted. The second reason I shall disallow the plaintiffs' claim is lack of Land Control Board Consent as explained in paragraph 13 of this judgement. In the result, it is the defendants' prayers in the counter – claim which succeeds in terms of prayer (a). There was no proof of loss made by the defendants to warrant this Court to award damages. Consequently prayer (b) of the counter claim is dismissed. I direct each party to bear their respective costs of the suit and the counter – claim.

Dated, signed & delivered at Mombasa this 5th December 2017.

A. OMOLLO

JDUGE