



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 8 OF 2013

IN THE MATTER OF: LAND KNOWN AS PLOT NO. 506/ROKA UYOMBO

BETWEEN

TAURA BAYA MTSANGANYIKO.....PLAINTIFF

=VERSUS=

JULIUS JUMBALE MUNDU.....DEFENDANT

J U D G M E N T

Introduction:

1. This suit was commenced by way of an Originating Summons dated 21st January 2013. In the Originating Summons, the Plaintiff is seeking for the determination of the following issues:-

(i) Whether the Applicant is entitled to the parcel of land known as Plot Number 506/Roka/Uyomba by virtue of adverse possession.

(ii) Whether the Plaintiff's occupant of parcel of land known as Plot number 506/Roka/Uyomba is entitled to be duly registered as the proprietor of the said portion.

(iii) Whether the Applicant is entitled to the costs of this summons.

2. The Originating Summons is premised on the grounds that the Applicant has been in occupation of the suit property uninterrupted for more than twelve (12) years; that the Applicant has duly developed the said parcel of land by planting trees, building houses/and carrying out subsistence farming and that the Applicant is duly and legally entitled to the said land by virtue of adverse possession and that the Applicant should be registered as such.

3. In his Supporting Affidavit, the Plaintiff deponed that he has been in occupation of the suit property for over twenty years and no one has ever claimed ownership of the suit property.

4. The Plaintiff has further deponed that at one point, he followed up with the adjudication office so as to obtain a title deed and a ground report was made by the surveyor; that he should be declared the owner of the property and that he should be declared to have lawfully acquired the suit property instead of the Defendant.

5. In response, the Defendant deponed that he is the registered owner of the suit property; that he constructed a perimeter wall fence on the suit property sometimes in 1978; that since then, he has been leasing the land to tenants who do periodic farming and that the Plaintiff trespassed on to the land from a neighbouring parcel of land.

6. The Defendant further deponed that the Plaintiff has all along been residing on the neighbouring plot number 500 until the year 2012 when he trespassed on his land.

7. According to the Defendant's Affidavit, the suit property has only one coconut tree that he planted five years ago and that this court's duty is to protect the sanctity of private rights as enshrined in the Constitution.

8. The parties proceeded with the hearing of the suit by way of viva voce evidence.

The Plaintiff's case:

9. The Plaintiff, PW1, informed the court that he entered plot number 506, Uyomba in the year 1981.

10. It was the evidence of PW1 that when he entered plot number 506, it was bushy and he had to clear it first before he started cultivating it.

11. According to PW1, when the adjudication process commenced in 1987, he was not around. He however continued staying on the land with his wife and planted thirteen (13) coconut trees and kept on the land goats and sheep.

12. PW1 produced photographs which showed his two houses and two houses belonging to his sons together with a pen for goats.

13. PW1 informed the court that a title deed was issued to the Defendant in 1991 but he continued staying on the land.

14. PW1 produced in evidence the ground report that was prepared by the land's official dated 2nd June, 2012.

15. PW1 stated that the neighbouring plot, which is plot number 505, belongs to Yawa Konde who is known to him. However, the Defendant is not known to him.

16. PW1 further stated that plot number 507 belongs to another neighbour of his known as Pasia. According to PW1, Mr. Pasia found him already occupying plot number 506.

17. In cross-examination, PW1 informed the court that he knew all his neighbours including Mr. Mohamed Juma, the owner of plot number 500.

18. PW1 stated that when he entered the land in the year 1981, he was never shown the boundaries of his land; that people came up with their own boundaries which the adjudication officers used and that he is not using plot number 505.

19. PW1 informed the court that some of the houses in the photographs have since fallen down and that he constructed new houses next to the ones that had fallen down.

20. On the issue of an existing stone wall, PW1 stated that the wall was put up by a Mr. Rotich who is the owner of plot number 511.

21. PW1 informed the court that part of his activities of cultivation extends into another neighbouring plot being plot number 505. According to PW1, he married his current wife, Kadzo in 1976 and moved with her on the land in 1981.

The Defendant's case

22. The Defendant, DW1, informed the court that he lives in Kwale and that he saw the Plaintiff in the year 2014 when he visited the suit property.

23. According to the Defendant, he bought plot number 506 from his father and that he settled and used the land between 1968 and 1978.

24. DW1 stated that the adjudication process commenced in 1978 and that his neighbours by then were Mr. Rotich, Pasia, Chibero (the owner of plot 507), Mwarome (the owner of plot 505) and Kandori (the owner of plot 500).

25. DW1 informed the court that all along, he never saw the Plaintiff and that he continued cultivating the land until the year 1991 when the adjudication process was completed.

26. The evidence of DW1 is that he cultivated the land until 1998 when he left the land to Chibego Pasia to cultivate it and look after it.

27. DW1 stated that in the year 2009, a widow by the name Kenze Keya started cultivating plot number 505 and lived in the house of Mpamba which was on plot number 500.

29. The evidence of DW1 was that he had never seen the Plaintiff for all the years that he had owned the suit property; that there are sisal boundaries separating the suit property from the other neighbouring plots and that the Plaintiff found Chibero Pasia and Pricila Mwakalama on the suit property.

29. According to DW1, Ms Kenze lived on plot number 500 and that the Plaintiff's house was on plot number 500 and not plot number 506.

30. The evidence of DW1 was that when the Plaintiff and Ms Kenza were living on plot number 500, he never bothered them; that the Plaintiff entered the suit property in the year 2012 and that the Plaintiff is not a resident of Uyombo.

31. DW1 stated that he was not present when the Settlement Officer visited the suit property.

32. DW1 informed the court that Mr. Mwarome is his nephew while Kandoro, the owner of plot number 500 is his brother. The owner of plot number 507 on the other hand is his in law.

33. According to DW1, the Plaintiff is currently using three plots, namely plot numbers 500, 505 and 506.

34. In cross-examination, DW1 stated that his family used to live in Uyombo and that currently his family lives in Lunga Lunga.

35. According to DW1, the suit property was given to him by his father in 1968 and his seven children were born on the land.

36. According to DW1, the Plaintiff's first house which has seen been demolished was on plot number 500 and he proceeded to built a new house on the suit property in the year 2014.

37. Pazia Cheberu, DW2, informed the court that he knew the Plaintiff in the year 2011 and that the Defendant is his uncle.

38. According to DW2, during the adjudication process, his father, Pazia Tsuma, was allocated plot number 507 while the Defendant was allocated plot number 506.

39. DW2 informed the court that plot number 500 belongs to Mr. Kadoro Munyu, while plot number 505 belongs to Mr. Mwarobe.

40. DW2 informed the court that he started using plot number 506 in the year 2008 and that before then, it is the Defendant who was using the plot.

41. DW2 stated that Ms Kanze Keya was previously married to the Plaintiff's brother, Mr. Karisa Baya.

42. The evidence of DW2 was that in the year 2008, he allowed Mr. Yawa Konde to use the suit plot to graze his cattle, which he did until the year 2010.

43. DW2 stated that in the year 2008, Ms Kanze, who was by then staying in Ngarenye, started cultivating plot number 505 and also started living in an abandoned house on plot number 500 in the year 2009. By that time, according to DW2, the Plaintiff was no where in the picture.

44. DW2 informed the court that the Plaintiff started staying with Ms Kenze in the house she had put up on plot no. 500 in the year 2011 and in the same year, the Plaintiff put up a house on plot number 506, the suit property.

45. DW2 informed the court that none of the Plaintiff's in-law or sons are living on the suit property.

46. According to DW2, the Plaintiff has been cultivating plot numbers 500, 505 and 506 and that the Plaintiff is not entitled to plot number 506.

47. In cross -examination, DW2 stated that the Defendant had a house on the suit property which fell down in the year 2007; that the Plaintiff started living with Ms Kenze in the year 2011 and that there are now six houses on plot number 506 which were built in the year 2013.

Site visit:

48. This court visited the disputed land on 15th September 2014 and noted the features that were on plot number 506.

Submissions:

49. The Plaintiff's advocate submitted that the evidence before this court, including the surveyors report, shows that all the developments on plot number Roka/Uyombo/506 are owned by the Plaintiff; that the surveyor did not see any evidence of the Defendant's presence on the suit property and that the Defendant failed to produce evidence of any developments he had done on the suit property.

50. Counsel submitted that the Defendant has failed to controvert the Plaintiff's categorical, credible and strong claim to the effect that for more than 12 years, the Plaintiff has been in occupation of the entire land to the exclusion of the other persons, including the registered owner, to wit, the Defendant.

51. The Defendant's counsel submitted that the only person who was licenced to use the suit property was one Yawa Konde who was authorized to utilize the property for herding cattle since the year 2008 and one Kanze Kea Goshi, a widow.

52. Counsel submitted that even if the Plaintiff was to ride on the back of Ms Kanze, by the time of filing the suit, she had only utilized the land with the permission of the owner.

53. Counsel submitted that the said widow should have been called to testify.

54. Counsel submitted that from the pleadings, the Plaintiff admitted that by the time he was filing the suit, he only had one house on the land and that the surveyors report contradicts the Plaintiff's evidence.

Analysis and findings:

55. It is not in dispute that the Defendant is the registered proprietor of parcel of land known as

Roka/Uyombo/506 having been issued with a Title Deed for the same on 18th October 1991.

56. The Plaintiff is seeking for a declaration that having lived and utilised the suit property for more than 12 years, he is entitled to be registered as the proprietor of the same instead of the registered proprietor.

57. It is trite law that for one to be registered as a proprietor of land by virtue of the doctrine of adverse possession, he has to prove that his occupation of the land has been open, continuous and without interruption and with the knowledge of the registered owner for a period of twelve years.

58. The evidence by the Plaintiff, DW1 and DW2 is that the Plaintiff has structures on plot number 506. Indeed, in his report dated 3rd July 2015, the Kilifi County Surveyor confirmed that all the developments on parcel of land number Kilifi/Uyombo/506 are owned by the Plaintiff.

59. The developments in the suit property, which the court confirmed when it visited the site, were five temporary houses, an animal shed and two coconut trees.

60. The court further observed a house which had been demolished in a neighbouring parcel of land, which, in the absence of a surveyor, the court could not conclusively decide the plot number that the house used to stand on.

61. Having ascertained, on the basis of the evidence on record and the site visit, that the Plaintiff's homestead is on the suit property, and that the Plaintiff is indeed cultivating the suit property, the only issue for determination is whether the Plaintiff has been utilizing plot number 506 for twelve years continuously, exclusively and without the owner's permission.

62. The Plaintiff, PW1, informed the court that he moved on the suit property in the year 1981, cleared it and settled on it.

63. According to PW1, he moved on the suit property with his current wife, Ms Kenze and that all his children were born on the land.

64. It was the evidence of PW1 that when the adjudication process commenced in the year 1987, he was not around and that is why the Defendant was recorded as the owner of plot number 506.

65. Although the Plaintiff stated that he did not know the Defendant, he knew the owner of plot number 507, Mr. Pasia, and the owner of plot number 505 as Yawa Konde.

66. The evidence of DW1 and DW2 was that the Plaintiff started living with Ms Kenze, a widow who was staying in a disused house on plot number 500 in the year 2011. According to DW2, Ms Kenze was the wife of the Plaintiff's late brother.

67. DW2 confirmed the evidence of DW1 that indeed DW1 had lived on plot number 506 since 1968 until 1978, and that he continued cultivating the land until the year 2008 when he left it into the hands of his nephew, Pasia Chiberu, as a caretaker.

68. The evidence of DW2, Pasia Chiberu was that when DW1 left plot number 506 in his hands, he allowed Mr. Yawa Konde to use the land to graze his cattle, which he did until the year 2010.

69. In the meantime, according to DW2, Ms Kenze was staying in a disused house on plot number 500 having been allowed to stay there in the year 2008 while cultivating plot number 505.

70. According to DW2, the Plaintiff only joined her in the year 2011 and they started living together in the house that was on plot number 500. It was the evidence of DW2 that in the same year that the Plaintiff moved in with Ms. Kenze, they put up a house on plot number 506 and demolished the house that was on plot number 500.

71. The Plaintiff did not call Ms Kenze to dispute the Defendant's claim that he (the Plaintiff) never moved on the suit property with her in 1981 and that she was not his wife in the first place.

72. Indeed, this case turns on the fact that having failed to call Ms Kenze, who is said to be the wife of the Plaintiff's late brother, and who only sought shelter on plot number 500 while cultivating plot number 505 and probably plot number 506 in the year 2009, the Plaintiff's case that he moved on the suit property in the year 1981 falls on its face.

73. I say so because all the registered owners of plot numbers 500, 505, 506 and 507, which the Plaintiff and Ms Kenze have been utilizing, are related and would have known if indeed the Plaintiff moved on the suit property in 1981 with Ms Kenze.

74. When the court visited the site, it observed that the five houses on the land were barely three years old and when the court sought from the Plaintiff why the houses looked new, it was informed that it was because of the frequent renovations.

75. The observation by the court of the demolished house in the neighbouring plot reinforces the Defendant's case that Ms Kenze and the Plaintiff were initially living in a disused house on plot number 500, which belongs to the Defendant's brother, before moving to the suit property in the year 2011.

76. It would appear that because the Defendant's siblings do not live on plot numbers 500, 505, 506 and 507, the Plaintiff and his "wife" have had a free hand in using all the parcels of land as indicated in the surveyor's report.

77. However, having failed to call Ms. Kenze, his children or a neighbour to collaborate his evidence that he has been living on the suit property since 1981, I find and hold that the Plaintiff only moved in with Ms Kenze while she was staying in a house on plot number 500 in the year 2009. They later on constructed their houses on the suit property after demolishing the house on plot number 500.

78. The Plaintiff has therefore not proved on a balance of probabilities that before 22nd January 2013 when he filed this suit, he had lived on plot number 506 continuously, exclusively and peacefully and without the permission of the Defendant for a period of twelve years.

79. For those reasons, I dismiss the Originating Summons dated 21st January, 2013 with costs.

Dated and delivered in Malindi this **11th** day of **March**, 2016.

O. A. Angote

Judge