



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

HCCC NO. 71 OF 2011

1. CHRISTOPHER MWANDEJE MWAZONGA

2. BIASHA BAYA HAMISI.....PLAINTIFFS

=VERSUS=

REA VIPINGO PLANTATION LTD.....DEFENDANT

J U D G M E N T

1. This suit was commenced by way of an Originating Summons dated 13th June, 2011 which was amended on 11th March, 2014.

2. In the amended Originating Summons dated 11th March, 2014, the Applicants are seeking for the determination of the following issues:-

(a) Whether the Plaintiffs are entitled to all that parcel of land occupied by them and measuring 54 acres out of the land described as Number 29/III/MN CR.No.7314 by virtue of adverse possession?

(b) Whether the Defendant's Title or right to all that portion and/or parcel of land measuring 54 acres out of the plot known as Plot Number 29/III/MN/CR.No.7314 are extinguished and the Defendant's claim on the same time barred by virtue of Section 17 of the Limitation of Actions Act?

(c) And if the answer to paragraph 1 and 2 above are in favour of the Plaintiffs an order be made directing the Director of Survey to cause the subdivision of the entire parcel of land and carve out of the aforesaid 54 acres and a further order be made directing the Registrar of Titles Mombasa to issue a separate Title of the aforesaid portion measuring 54 Acres in favour of the Plaintiffs within fifteen (15) days upon being served.

(d) Who should bear the cost of this suit?

The Applicant's case:

3. According to the Affidavit of the 1st Applicant, him, together with the 2nd Applicant are the rightful owners of a portion of land measuring about 54 acres out of land known as subdivision No.291/III/MN

(the suit property).

4. The 1st Applicant deponed that the suit property was initially owned by a Pokomo lady known as Salita Majipa who was the wife of Albert Victor Itall; that when Ms Salita passed on, she left them in occupation of the suit property and that they have since lived on the land peacefully, openly, continuously and uninterrupted for over forty (40) years.

5. The 1st Applicant deponed that his family together with the 2nd Applicant's family have fully developed the land with permanent dwellings and semi permanent houses; that they have dug a bore-hole and that they have also planted cashew nuts, coconuts and mango trees over the years.

6. It is the deposition of the 1st Applicant that the suit property is clearly marked and that it is surrounded by a sisal plantation and stands out distinctly as a traditional village which has been occupied for generations; that since Mrs. Salita's death, no one has ever claimed the suit premises and that due to their long stay on the land, they are entitled to acquire the same by virtue of adverse possession.

The Respondent's case:

7. The Respondent's Estate Manager informed the court that when the Respondent purchased the suit property on 22nd July, 1952, it was disclosed by the previous owner that Ms Salita Majida lived in a go-down at the Southern corner of the plot; that on 28th March, 1964, it was agreed that Ms Salita should be allowed to stay on the land for her life time and that Ms Salita signed the agreement dated 28th March, 1964 to that effect.

8. It is the Respondent's case that Ms Salita lived and occupied the land under the licence of the registered owner; that in the year 1974, Ms Salita leased part of the land she was occupying and that later, Ms Salita relocated back to her ancestral home in Tana River where she died.

9. It is the deposition of the Respondent's Estate Manager that before Ms Salita's death, her brother negotiated on her behalf the purchase of the developments made by her which was agreed at Kshs.5,000 whereafter the full ownership, occupation and utilization of the land reverted back to the Respondent.

10. The Respondent's Manager has deponed that the Applicants were tenants of Ms Salita; that their tenancy determined upon her demise and that the occupation by the Applicants has not been peaceful and uninterrupted as claimed as evidenced by numerous letters.

When the matter came up for directions, the parties agreed to dispose of the suit by way of affidavit evidence and 11. written submissions.

Submissions:

12. The Applicants' advocate submitted that the Applicants have occupied the suit property for more than 40 years; that they have established their dwellings and residences on the land; that the Replying Affidavit confirms that the Applicants have always been on the land and that in any event, the Replying Affidavit was filed for or on behalf of the Defendant who is a separate entity from REA Vipingo Plantation Ltd.

13. The Respondent's advocate on the other hand deponed that the late Salita only lived on the suit property as a licensee of the registered owner and could not pass title to the Applicants.

14. The Applicant's advocate further deponed that there is no proof of when the Applicants entered the suit property and that the Applicants do not have a right over the suit property.

15. Counsel submitted that the Plaintiffs occupation was interrupted on several occasions as evidenced by numerous letters and minutes attached on the Replying Affidavit and that the Respondent has neither been

dispossessed of its land nor discontinued its possession for a period of more than twelve (12) years.

Analysis and findings:

16. The deposition of the 1st Applicant which I have summarised above was that his parents were invited on the suit property by the late Salita Majipe.

17. According to the 1st Applicant, when the late Salita passed on, she left them on the suit property. The 1st Applicant annexed a typographical map showing where his homestead is situated on plot number MN/III/291/1.

18. It is the 1st Applicant's case that since the death of Ms Salita, no one had interrupted with their occupation of the suit land. However, it was not until the year 2010 that the Respondent's Manager approached him and informed him that the Respondent was entitled to the suit property.

19. The Applicants' deposition that the late Ms Salita Majipe occupied a portion of L.R. No. MN/III/219/1 is supported by the Respondent's Estate Manager.

20. According to the Respondent, Ms. Salita was allowed to stay on the land by the Respondent for her lifetime whereafter the land was to revert to the Respondent. This position was communicated to Ms Salita by the Respondent in its letter dated 28th September, 1964 which has been annexed on the Replying Affidavit.

21. In that letter, the Respondent allowed the late Salita to occupy 20 acres within plot 291 during her life time. The late Salita agreed to this arrangement by way of a letter which has been exhibited.

22. It would appear that by the year 1974, the late Ms Salita allowed some people to utilise the land that she had been allowed to occupy. This is informed by the Respondent's letter to Ms Salita dated 9th July, 1974. In the letter, the Respondent's advocate informed Ms Salita that she had no right to lease out the land that she was occupying.

23. Another letter dated 9th July, 1974 authored by the Respondent's advocate was addressed to a Mr. Rangoma Mtenzi who had occupied a portion of the land that Ms Salita had been allowed to utilize. In this letter, the said Mr. Rangoma Mtenzi was directed to vacate the land by 31st July, 1974.

24. The Respondent has also annexed an agreement dated 7th July, 1993 showing that Ms Salita was compensated for the developments that she had made on the land after she left the land for her ancestral home.

25. Annexed on the Respondent's Affidavit are the copies of the agreement that Christopher Mwandanje entered into with the late Ms Salita in respect to the portion that she was occupying. The Agreements were done in 1984, 1985 and 1986.

26. It is therefore obvious from the documents that were annexed on the Respondent's Affidavit that having allowed Ms Salita on the land, she allowed the Applicants, amongst other people, to occupy the land as early as 1974.

27. Indeed, the evidence before me shows that even after Ms Salita was compensated by the Defendant and left the land that she was occupying in 1993, the Respondent never evicted the people who had already occupied the land.

28. Although it may be true that Ms Salita was allowed by the Defendant to occupy the land during her life time, the entry of the Applicants on the suit land was not with the permission of the Respondent.

29. Indeed, Ms Salita having left the suit property in 1993, time started running in respect of the people

who had been invited on the land by Ms Salita.

30. The Respondent has annexed letters that it authored complaining about the squatters that were occupying its land. Those letters were all authored in the year 2010, by which time twelve years had lapsed from the time that Ms Salita invited the Applicants on the suit property.

31. Being the registered owner of the suit property, the only recognised form of interruption of the Applicants' stay on the land was by filing of a suit for ejectment before the lapse of twelve years.

32. Having not filed a suit for the the ejectment of the Applicants within twelve years, the Respondent's claim that it is entitled to the suit property is time barred (See Section 7 of the Limitation of Actions Act).

33. The Applicants have proved that they have been on the suit property continuously for more than twelve years without the permission of the Respondent. The Applicants are therefore entitled to the portion of land that they have been occupying and utilizing for those years.

34. Although the Applicants are seeking to be declared the owners of 54 acres out of plot number MN/III/291/1, the evidence before me shows that the late Salita was only allowed to occupy 20 acres by the Respondent.

35. Having admitted that it is Ms Salita who allowed them to occupy the land, and in the absence of a surveyor's report showing the acreage of the land that they have been utilising, the court can only presume that they have been utilising the land which Ms Salita was allowed to occupy.

36. In the circumstances, I shall allow the Originating Summons but only in respect of 20 acres of the suit property.

37. For those reasons, I allow the Applicants' Originating Summons dated 13th June, 2011 as follows:-

(a) A declaration be and is hereby issued that the Applicants are entitled to land measuring 20 acres of land described as L.R. No. 291/III/MN CR. NO. 7314 by virtue of adverse possession.

(b) An order be and is hereby made that the Director of Surveys to cause the subdivision of L.R. No. 291/III/MN and curve out 20 acres and the Chief Land Registrar to issue a Certificate of Title in the name of the Applicants as tenants in common within 45 days upon being served with this order.

(c) Each party to bear his/its own costs.

Dated, signed and delivered in Malindi this 24th day of June, 2016.

O. A. Angote

Judge