



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.155 OF 2011

STEPHEN KIBOBI NJUGUNA.....PLAINTIFF

=VERSUS=

1. MORRIS KADZAGAMBA

2. GARAMA KAINGU

3. KAHINDI CHEA

4. CHARO KADZAGAMBA

5. MARTIN CHARO

6. SALIM ABDALLA.....DEFENDANTS

J U D G M E N T

Introduction:

1. In his Complaint dated 27th September, 2011, the Plaintiff averred that he is the registered proprietor of a parcel of land known as Chembe/Kibabamshe/151 measuring approximately 5.0 Ha; that the 1st Defendant has purported to sell the suit property to unsuspecting members of the public, including the other Defendants and that the Defendants have put up illegal structures on the suit property.

2. The Plaintiff is praying for a declaration that he is the proprietor of the suit property and for a permanent injunction restraining the Defendants and their agents from trespassing on the land.

3. In his Defence and Counterclaim, the 1st Defendant averred that the person who purported to transfer the suit property had no valid title; that he is in possession of the property as a right and that he has utilised the land for a period of over 12 years and has acquired adverse possession of the land.

4. In his Counter Claim, the 1st Defendant is praying for a declaration that he has acquired the suit property by adverse possession and that the Plaintiff's claim is time barred.

5. The 3rd and 5th Defendants filed a Defence in which they averred that they have acquired an overriding

interest over the suit property; that they have been in occupation of the land since 1992 and that the Plaintiff has never lived on the land since he was issued with the title document.

The Plaintiff's case:

6. The Plaintiff, PW1, informed the court that the initial owner of the suit property was Mr. Thomas Ngombo, now deceased.

7. It was the evidence of PW1 that after he exchanged his land with Mr. Ngombo, the Land Control Board gave its consent for the transfer of the said land to him and that a Title Deed was eventually issued in his favour on 17th May, 1996.

8. PW1 informed the court that he was the owner of plot number 746 situated in Gede measuring 11.6 acres; that Thomas Ngombo agreed to exchange his land (the suit property) with the Plaintiff's land and that fresh Title Deeds were issued after the said exchange.

9. It was the evidence of PW1 that as at the time of the exchange of the said land, he visited the land with his brother and it was vacant.

10. According to the Plaintiff, he engaged the services of workers who cleared the suit property and planted trees.

11. PW1 stated that in the year 2007, a neighbour started cultivating the land. That neighbour, according to PW1, is the 1st Defendant. It was the evidence of PW1 that the 1st Defendant chased his workers and threatened to harm them with a panga.

12. After that incident, PW1 informed the court that he reported the incident to the Ministry of Lands officials and also to the Assistant Chief who did letters to the 1st Defendant. Around the same time, PW1 was informed by the Chief that the government had placed an embargo on the parcels of land within the area and that no further dealings were allowed.

13. However, it was the evidence of PW1 that on 12th August, 2010, he saw an advertisement in the newspaper in which the embargo that had been placed on the suit property had been lifted.

14. After the invasion of his land by the Defendants, it was the evidence of PW1 that the Chief summoned the Defendants and directed them to vacate the land; that the 1st Defendant had been evicted by the court from a neighbouring piece of land being Chembe/Kibabamshe/179 on 20th June, 2007 and that is when he moved to the suit property and that he demolished the house that he had put up for his workers.

15. In cross-examination, the Plaintiff stated that when he bought the land, the initial owner had lost the Title Deed and he did an affidavit to that effect; that in addition to his land, he paid the initial owner Kshs.70,000 for the suit land and that he obtained the consent of the Board before the exchange was effected.

16. It was his evidence that when he visited the land for the second time in 1998, the Chief stopped him from clearing the bush because there was an embargo on all the parcels of land in the area.

17. According to PW1, the 1st Defendant invaded his land in the year 2007 and has since put up a temporary house and a new permanent house.

18. PW1 informed the court that it was him who planted eucalyptus and casurina trees around the whole land in 1998; that the trees were cut down by the 1st Defendant in 2007 and that the rest of the Defendants informed him that they had purchased the land from the 1st Defendant.

19. The Plaintiff's wife, PW2, stated that after her husband acquired the land from the late Ngumbao, he

took her to the land in the year 1998 and that there was no one on the land.

20. It was the evidence of PW2 that she witnessed the planting of trees all around the land and also cleared the land which was bushy. However, when they went to the land in the year 2007, the Chief of the area informed them that they could not clear the bush because there was an embargo by the government on all the parcels of land within the area.

21. After the embargo was lifted in the year 2010, it was the evidence of PW2 that they found the Defendants had invaded the land and that the 1st Defendant was very violent.

22. It was the evidence of PW2 in cross-examination that the 1st Defendant had put up one temporary structure on the land in the year 2007. By the year 2010, the 1st Defendant had two houses on the land.

23. It was the evidence of PW2 that they had workers on the land and a house which was later on demolished by the Defendants.

24. According to PW2, the 1st Defendant put up the permanent structure on the land after this court had issued a restraining order.

25. PW3 informed the court that he lives on parcel of land Chembe/Kibabamshe/47 and that in the year 2007, the Plaintiff engaged him with other people to clear the suit property.

26. PW3 informed the court that while in the process of clearing the bush, the Chief stopped them because of the existing embargo.

27. According to PW3, when they tried to clear the land again in the year 2011, more than 100 people threatened them with violence; that the Defendants were not on the land in the year 2007 and that in the year 2012, over 100 people threatened them.

28. The Kilifi County Land Registrar, PW4, stated that the register for plot number 151 was opened in 1978; that the first registered owner was Thomas Ngombo who was issued with a Land Certificate on 14th February, 1979 and that on 7th May, 1996, the land was transferred to the Plaintiff.

29. According to PW4, an embargo was placed on the suit property amongst others, because of the irregularities that had arisen during the demarcation of land in the area. However, the said embargo was lifted.

30. In cross-examination, PW4 stated that the transfer of the suit property to the Plaintiff would not have been effected without the consent of the Board; that he did not have a copy of the consent because the parcel file was missing and that during the transfer of the title, all the documents must have been considered by the Registrar.

The Defence case:

31. The 1st Defendant, DW1, informed the court that he stays on plot number 151; that he cleared the land in 1992 after the Chief announced about the vacant parcels of land in the area and that he did not know the land already had a Title Deed.

32. According to DW1, he has been on the suit property since 1992; that he is the one who planted casurina trees and that he did not know the Plaintiff until when he sued him in this matter.

33. According to DW1, the Government set up a Task-force which established the people who were living on the land in Chembe/Kibabamshe and that there are more than 10 people living on the suit land.

34. It was the evidence of DW1 that the 4th and 5th Defendants are his neighbours and that they were also

notified of the availability of land in the area by the Chief.

35. DW2, stated that he is the 1st Defendant's neighbour; that he found the 1st Defendant already occupying the suit property and that he cleared the land which was bushy and planted mangoes and coconuts on the land. According to DW2, he occupies an area of 2 acres and that he was allowed on the land by the Chief.

36. DW2 stated that he has never seen the Plaintiff before; that the 1st Defendant has two wives and that it was true that the 1st Defendant had been sued for invading another piece of land.

37. In cross-examination, DW2 stated that the land was initially owned by "Kibogo" and that they entered the land in 1992.

38. DW3 stated that he is a school teacher; that in the year 2007, he was appointed a member of Kilifi Jimba and Chembe Kibabamshe Land Committee; that they were to assist the lands office to identify the genuine squatters and that they visited the suit plot in the year 2009.

39. According to DW3, when they visited the suit property, they saw six homesteads, including the 1st Defendant's homestead; that there were mango trees on the land and that they prepared their report dated 19th March, 2012.

40. In cross-examination, DW3 stated that they did two reports, one in the year 2009 and another one in the year 2012; that he was not aware that after the report of the year 2009, the embargo in respect of the suit property was lifted and that the embargo which was placed on the land by the Government in 1986 stopped all transactions in respect to the land.

41. The 3rd Defendant, DW4, stated that he stays on the suit land; that he does not know the Plaintiff; that he built his house on the suit land in the year 1992 and that it is the Chief who told them to occupy the land which was then bushy.

42. According to DW4, he occupies an area of one (1) acre and that the Plaintiff only showed up in the year 2011 and that that is when he did a search and discovered that that the land was registered in favour of the Plaintiff.

Submissions:

43. The Plaintiff's advocate submitted that the government cleared the suit property from any restrictions on 12th August, 2010; that there were no squatters on the land when the Plaintiff purchased it in 1996 and that it was not until the year 2007 that the 1st Defendant chased away PW3 from the land.

44. The Plaintiff's counsel submitted that time for adverse possession could not run against the Plaintiff from the year 1992 because he had no proprietary interest at that time; that time began to run in 1996 when he acquired proprietary interest in the land and that the Defendants proceeded to put up houses on the suit property despite the court having ordered them not to do so.

45. The Defendants' counsel submitted that the original owner of the suit property had been in possession of the suit property before the Defendants entered on the land; that an owner of the land is deemed to be in possession of his land even if he is not physically on the land and that the original owner was dispossessed of the land in the year 1992.

46. Counsel submitted that the Plaintiff acquired the suit property in 1996 subject to the overriding interests on it and that the Defendants adduced evidence showing that the Plaintiff had been lawfully dispossessed the suit property by the Defendants for a continuous period of 12 years by the time this suit was filed.

47. The Defendants' advocate submitted that the 1st Defendant was in exclusive possession of 5 acres while the 3rd Defendant was in possession of 2 acres.

Analysis and findings:

48. It is not in dispute that the Plaintiff, PW1 is the registered proprietor of a parcel of land known as Chembe/Kibabamshe/151. According to the Title Deed that was produced in evidence, the suit property was registered in favour of the Plaintiff on 7th May, 1996.

49. The Land Registrar, PW4, confirmed that indeed the suit property was registered in favour of the Plaintiff. According to a copy of the extract of the register that was produced by PW4, the suit property was initially registered in favour of Thomas Ngombo (deceased) in 1978.

50. According to the evidence of PW1 and PW4, the said Thomas Ngombo transferred the suit property to the Plaintiff after exchanging his land with the Plaintiff's parcel of land measuring 11.5 acres. In addition, the Plaintiff paid to Mr. Thomas Ngombo Kshs.70,000.

51. PW1 produced in evidence the consent of the Land Control Board dated 18th April, 1996 which shows that indeed the Board consented to the transfer of the suit land from Thomas to the Plaintiff by way of exchange and Kshs.70,000.

52. The Plaintiff's case is that after purchasing the land in 1996, he planted eucalyptus and cashew nut trees; that the land was vacant and that the land remained vacant until the year 2007 when the Defendants invaded it.

53. It is the Plaintiff's case that when he went to clear the land for the second time in 1998, the Chief of the area stopped him from doing so because there was an existing embargo which had been placed on all the parcels of land in Chembe Kibabamshe by the government and that the Defendants chased away his workers from the land in the year 2007.

54. The Defendants' case on the other hand is that the Chief informed them of the suit property which was vacant in the year 1992 and that that is when they cleared the land and occupied it.

55. According to the Defendants, they did not know that the land was registered in favour of the late Thomas Ngombo or the Plaintiff until the year 2011 when he sued them.

56. It was the evidence of DW1, DW2 and DW4 that they never knew the Plaintiff and had never seen him until the year 2011.

57. DW3 informed the court that in the year 2007, he was appointed as a member of Kilifi Jimba and Chembe Kibabamshe Land Committee and that their mandate was to identify the genuine squatters who occupy the parcels of land in those two registration section; that they prepared two reports, in the year 2009 and 2012 and that they visited the suit land in the year 2009.

58. It was the evidence of DW3 that when they visited the suit property in the year 2009, they saw six homesteads on the suit property.

59. The evidence that was produced in this court shows that the government lifted the purported embargo that had been placed on the suit property vide a public notice in the newspaper.

60. According to the said publication, the said embargo was lifted on the recommendations of the Task force, meaning that the Task-force did not find any genuine squatters on the land when it visited the land.

61. Although the Defendants informed the court that they entered on the suit property in 1992 after being informed by the Chief that the land was vacant, the Defendants did not inform the court where they came

from or the circumstances under which the Chief informed them to invade the land.

62. There is also no evidence before this court to show that the Defendants were neighbours or that they had a certain claim over the suit property before they entered the land on the Chief's instructions.

63. In a claim for adverse possession, it is paramount for a party to show clearly the circumstances under which he enters the land to enable the court to determine if his entry was open and non permissive and if indeed he took the physical control of the land with the intention of possessing it to the exclusion of the owner.

64. It is trite that time does not run merely because the land is vacant. A claim of adverse possession rests on the de facto use and occupation of land by an entrant.

65. Having failed to explain the circumstances under which the Chief, who they never called to testify, allowed them on the land, and having failed to show with certainty that indeed they moved on the suit land in 1992, I am convinced that the Defendants only entered the land after 1998 when the Chief stopped the Plaintiff from clearing the suit land due to an alleged embargo that had been placed on the land.

66. Indeed, although the members of the Task-force, DW3 informed the court that they visited the land in the year 2009 and saw six homesteads on the land, the same Committee returned a report showing that there were no genuine squatters on the land thus the lifting of the embargo that had been placed on the land in the year 2010. That in itself is an indication of my observations above that the Defendants invaded the land in the year 2007 as claimed by the Plaintiff and probably with the permission of the Chief who had stopped the Plaintiff's workers from clearing the land.

67. The Plaintiff produced in evidence an order that was given by the Court in Malindi PMCC No. 208 of 2006. The order showed that on 24th April, 2007, the 1st Defendant was restrained from trespassing, constructing, and cultivating on parcel of land number Chembe/Kibabamshe/179 pending the hearing of the suit.

68. The said order goes all the way to show that the 1st Defendant is a persistent trespasser, who had invaded the suit property after he was evicted by the Court from plot No.179. The other Defendants are his accomplices in the art of invading other peoples' parcels of land.

69. DW1, DW2 and DW4 informed court that when they entered the land in 1992 (which I have held is not true), they did not know that the land was registered in favour of the late Thomas.

70. According to the Defendants, they only knew that the land was registered in favour of the Plaintiff and Thomas in the year 2011 when he sued them and that before this suit was filed, they had never seen him.

71. For a long time, the position taken by the English courts and the Court of Appeal has been that a right to land is extinguished, in the absence of fraud, after the statutory period, although the registered proprietor is unaware that adverse possession has been taken (**See Rains Vs Buxton (1980) 14 chD 537, Maweu Vs Liu Ranching & Farming Co-operative Society Ltd, (1985) KLR 430 and Ithongo Vs Thindiu (1981) KLR 197.**

72. However, that jurisprudence has changed. According to the recent decision of the Court of Appeal time only starts to run from the time the true owner of the land learns or knows that indeed a stranger has taken possession of his land. This is what the Court of Appeal said in the case of **Titus Kigoro Munyi Vs Peter Mburu Kimani (2015) e KLR.**

“Guided by the dicta as stated by Kneller J herein above and as adopted by this Court in Francis Gicharu Kariri vs Peter Njoroge Mairu -Civil Appeal No. 239 of 2002 (Nairobi), we are of the considered view that in a claim for adverse possession, actual or constructive knowledge of adverse possession by a third party on the part of the registered proprietor

must be proved. The trial court established as a fact that actual knowledge on the part of the registered proprietor that the appellant was in possession of the suit property was established to exist either from the year 2004 or 2010. We see no reason to interfere with this finding of fact by the trial court. We concur with the dicta by Kneller J in Kimani Ruchire Vs Swift Rutherfords & Co. Ltd (Supra) and hold that the trial court did not err in finding that time for adverse possession should be computed from 2004 or 2010 and not from 1978. From the testimony of the appellant, from the year 1970 and for the 40 years he had been in possession of the suit property, he had never seen the respondent. From this evidence, we find no error on the part of the trial court in drawing the inference that the respondent had no actual knowledge that the appellant was in possession of the suit property prior to 25th May, 2010.”

73. The above holding by the Court of Appeal reaffirms the fact that for one to succeed in a claim for adverse possession, he must show that he was aware that the land was registered in the name of a third party for time to start running. Time cannot start running in a situation where a person was not aware that the subject property had an owner in the first place.

74. In the case of **Haro Yonde Juaje Vs Sadaka Nzenzo Mbauro & Another, Malindi ELC No. 106 of 2007 (OS)**, this court held as follows:-

“I do not think prima facie, that the Plaintiff can succeed in a claim of adverse possession where, firstly, he does not recognise the title of the 1st Respondent because according to him, that title is a nullity and secondly when he does not show he dispossessed the 1st Respondent of his land or discontinued the 1st Respondent's possession.”

75. Considering that the Defendants' case is that neither Thomas Ngumbao nor the Plaintiff have ever taken possession of the suit property, and in view of the evidence by DW1, DW2 and DW4 that they only came to learn that that Plaintiff was registered as the proprietor of the suit property in the year 2011, they cannot succeed in their claim that they are entitled to the land by virtue of the doctrine of adverse possession. Twelve years had not lapsed from the time when they realised that the land was initially registered in the name of Thomas Ngumbao before the same was transferred to the Plaintiff.

76. For those reasons, I allow the Plaintiff's Plaint dated 27th September, 2011 in terms of prayers (a) and (b) with costs and dismiss the Defendants' counter-claim with costs.

Dated, signed and delivered in Malindi this 14th day of October, 2016.

O. A. Angote

Judge