



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 68 OF 2013

HADIJA BILALI SALIM.....PLAINTIFF

VERSUS

1. HAMISI JUMA

2. OMAR JUMA

3. YAKUTI ABDULRAHMAN

4. ABDUL ABDULRAHMAN

5. ISMAEL SALIM

6. JEREMIAH KAMBI.....DEFENDANTS

J U D G M E N T

Introduction

1. In his Complaint dated 24th April, 2013, the Plaintiff has averred that he was the registered owner of a parcel of land known as Kilifi/Mbaraka Chembe/155 which was subsequently sub-divided into four (4) portions including parcel of land known as Kilifi/Mbaraka Chembe/404 (the suit property).

2. The Plaintiff has averred in her Complaint that in the early 1980's, she allowed her late brother, Juma Bilal, to occupy a portion of her land on a temporary basis; that upon sub-division of plot number 155, the portion that was occupied by the late Juma Bilali ended up being Plot No.404 and that in breach of the permission granted to him to occupy the said portion of land, the said Juma Bilali invited the 5th Defendant to occupy the said land.

3. It is the Plaintiff's case that by the time Juma Bilali died in March, 2010, he left the 1-4th Defendants still occupying the land and that the said Defendants subsequently sold a portion of the suit land to the 6th Defendant.

4. The Plaintiff is seeking for vacant possession of the suit property.

The Plaintiff's case:

5. The Plaintiff, PW1, informed the court that the 1st and 2nd Defendants are her nephews; that they are the sons of her late brother, Juma Bilali and that the said Juma Bilali used to stay on her land before he died.
6. It was the evidence of PW1 that she is the one who invited the late Bilali on the suit property and that he lived on the land for more than 30 years and when he died, he was buried on the land.
7. According to PW1, her late brother is the one who invited the 5th Defendant on the suit property while the 1st and 2nd defendants invited the 6th Defendant.
8. PW1 informed the court that the Defendants have put up a mosque on the suit property against her wish and that they should be evicted from the suit premises. The Plaintiff produced in evidence the Title Deed and the official search which shows her as the registered proprietor of the land.
9. It was the evidence of PW1 that she neither sold the suit property nor transferred it to her late brother.
10. In cross-examination, PW1 informed the court that he only allowed her late brother to occupy six (6) acres of the suit land and that she was not given money for the land.
11. It was the evidence of PW1 that she sold the portion that she was in occupation to a Mr. Saudi Lali; that she has sued the Defendants because they took her to the Chief and that she never had any dispute with her late brother over the suit property.
12. It was the evidence of PW1 that the suit property was registered in her favour on 13th February, 1995.
13. The Plaintiff's daughter, PW2, informed the court that her mother allowed her uncle to occupy a portion of the suit property on temporary basis in 1980; that her late uncle sold a portion of the land to the 5th Defendant and that upon the demise of his uncle, his children sold the remaining portion to the 6th Defendant.

Defence case:

14. A retired Agricultural Technical Officer, DW1, informed the court that the Plaintiff requested him to carve a piece of land out of her land measuring four (4) acres and have it transferred to her late brother, Mr. Juma Bilali.
15. According to DW1, he was informed by Mr. Juma whom he knew in 1961 that he had purchased the four acres from the Plaintiff and that the Plaintiff confirmed that he had sold the said land to her brother.
16. After sub-dividing the land as instructed by the late Juma and the Plaintiff, it was the evidence of DW1 that he was paid Kshs.50 by the late Mr. Juma; that it was the Plaintiff who showed Mr. Juma how he should subdivide the land and that she would not have allowed him to plant permanent crops if indeed she only wanted him to occupy the land on a temporary basis.
17. DW2 informed the court that the late Mr. Juma was his uncle while the Plaintiff is his aunt; that by the time he went to live in Watamu in 1977, the Plaintiff was already living in the area and that in 1982, he accompanied Suleiman, the Plaintiff's son, to the suit property whereupon they found DW1 sub-dividing the land belonging to the Plaintiff.
18. When the Plaintiff's son inquired as to why the Plaintiff was subdividing the land, he was informed that the Plaintiff's brother had purchased a portion thereof.
19. It was the evidence of DW2 that Suleiman was annoyed and that he accompanied him to the Chief to report about the alleged sale.

20. DW2 informed the court that when the Plaintiff and the late Juma were summoned by the Chief, the Plaintiff informed the Chief that she had indeed sold the land to the late Juma Bilali.

21. It was the evidence of DW2 that the boundary that was set up then is still intact and that it is the children of Juma who are occupying the land.

Submissions:

22. The Plaintiff's advocate submitted that the late Juma Bilali, who is the father of the 1st and 2nd Defendants and the grandfather of the 3rd and 4th Defendants, was allowed on the suit property by the Plaintiff on condition that he would vacate the land once he acquires his land.

23. Counsel submitted that although DW1 testified that the late Bilali bought the suit property from the Plaintiff, there was no evidence of the purported purchase; that there was no evidence if the consent of the Board was ever obtained and that even if there was an agreement of sale, there is no evidence to show when the said agreement was repudiated to enable the court determine if indeed the Defendants are entitled to the land under the doctrine of adverse possession.

24. The Plaintiff's counsel submitted that there is no evidence to show when the Defendants took possession of the land; and that the evidence of DW1 contradicted the Defendants' averments in the Defence on the date of entry on the suit land.

25. Counsel submitted that the deceased took possession of the suit land in the late 1970's and that the Plaintiff testified that the deceased lived on the suit land together with the Defendants peacefully and without any interference from the Plaintiff.

26. The Defendants' counsel submitted that although the deceased entered on the suit land with the Plaintiff's permission, the said permission was brought to an end when the Defendants' activities became inconsistent with his recognition of the Plaintiff's title.

27. The Defendants' counsel submitted that the Defendants' mother is in the process of filing a claim for adverse possession and that the Defendants still have a recourse to file a suit for adverse possession.

Analysis and findings:

28. The evidence before the court shows that the Plaintiff, who is the sister to the late Juma Bilali, allowed the said Juma Bilali on the suit property. The said Bilali went ahead to put up structures on the land and also planted permanent crops like coconuts, amongst others.

29. The 1st and 2nd Defendants are the children of the late Bilali while the 3rd and 4th Defendants are his grandchildren. The 5th and 6th Defendants were allowed on the land by the late Bilali and the 1st -4th Defendants respectively.

30. The evidence of the Plaintiff was that her late brother occupied the suit property in the year 1980 with her permission.

31. It was the evidence of PW1 that by the time she allowed the late Juma Bilali to occupy the land, the land was known as Kilifi/Mbaraka Chembe/155. She however sub-divided the land and the Defendants found themselves on land known as Kilifi/Mbaraka Chembe/404 measuring 4 acres. She wants the Defendants to be evicted from the land.

32. The evidence produced by the Plaintiff shows that she was registered as the proprietor of the suit property on 13th February, 1995. It is not clear from the documents that were produced in court when parcel of land known as Kilifi/Mbaraka Chembe/155 was registered before it was subdivided in 1995.

33. In their statement of Defence, the 1st – 4th Defendants averred that the late Bilali Juma bought 4 acres (the suit property) from the Plaintiff in 1974 for Kshs.9800; that they occupy the land as of right because they have acquired it by adverse possession and that an appropriate suit it is in the offing to declare the Plaintiff's title extinguished.

34. Indeed, the Defendants were entitled to raise the Defence of statute of limitation by filing a defence. They need not file a counter claim or an Originating Summons as submitted by the Plaintiff's counsel to plead the doctrine of adverse possession. In the case of **Gulam Mariam Nordin Vs Julius Charo Karisa, Malindi Civil Appeal No. 26 of 2015**, the Court of Appeal held as follows:-

“Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counterclaim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by Originating Summons.”

35. Although the defendants averred in the Defence that “they claim the land as of right because they have acquired the suit parcel of land by adverse possession.....” the Defendants did not testify in this matter to support that assertion.

36. Having stated in the Defence that their father purchased the suit property, the Defendants were under an obligation to testify and explain to this court how that sale was done and whether the same was ever invalidated for them to claim the land by way of adverse possession.

37. Although DW1 informed the court that he is the one who assisted the Plaintiff and the late Juma Bilali to demarcate the suit land in 1982, DW1 informed the court that he did not witness any form of sale between the two.

38. The evidence by DW2 was that he found the Plaintiff and the deceased demarcating the land. However, DW2 did not witness the sale of the land by the Plaintiff to his brother, the deceased.

39. In view of the fact that the Defendants did not adduce any evidence to show that the Plaintiff sold the suit property to their late father, and considering that it is not clear to this court whether the Defendants claim is based on the fact that there exists a valid sale or that they are entitled to the land by virtue of the doctrine of adverse possession, I am unable to decide the case in favour of the Defendants on any of those two grounds.

40. The Plaintiff has produced in evidence the register to show that she was registered as the proprietor of the suit property in 1995.

41. In the absence of evidence to show that the land was fraudulently registered in her favour, or that her claim to the suit property is time barred by virtue of the provisions of Section 7 of the Limitation of Actions Act, or that she sold the suit property to the late Juma Bilali, I find and hold that the Plaintiff is entitled to the suit property.

42. I say so because pursuant to the provisions of section 27 of the Registered Land Act (repealed), the registration of a person as the proprietor of land vests in the person the absolute ownership of that land.

43. It is for those reasons that I allow the Plaintiff's claim dated 24th April 2013 as prayed.

Dated, signed and delivered in Malindi this 4th day of **November** 2016.

O. A. Angote

Judge