



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 11 OF 2008

ALBERT CHAUREMBO MUMBA.....PLAINTIFF

VERSUS

1. DAMA THOYA KITI

2. KARISA THOYA

3. KAINGU THOYA.....DEFENDANTS

J U D G M E N T

Introduction:

1. In the Complaint dated 7th March 2008, the Plaintiff has averred that at all material times, he was the legal and registered owner of land known as Kilifi/Mtondia/404 (original no. Kilifi/Mtondia/110) (the suit property).
2. However, on diverse dates in August 2007, the Defendants started excavating building blocks from the suit property; that the suit property is a sub division of Kilifi/Mtondia/110 which was sold to one Philip Mutisya by the 2nd Defendant who then sold it to Silas Mzungu Chitibwi.
3. The Plaintiff has averred that he has a Title Deed for the suit land and the allegations by the Defendants that they have occupied it for over 50 years is not true.
4. In their Defence, the Defendants averred that although the Plaintiff is the registered proprietor of the suit property, the said proprietorship is subject to their adverse right over it; that the Plaintiff has been subjecting them to harassment by the police and that land known as Kilifi/Mtondia/110 was allocated to the 2nd Defendant but was later stolen by one Mzungu Chitibwi.
5. The Defendants finally averred that at no time did the said Mzungu Chitibwi move into the suit land and that they have occupied it for over 50 years, without interference from the Plaintiff or Mzungu Chitibwi and have therefore acquired title by adverse possession.

The Plaintiff's case:

6. The Plaintiff, PW1, informed the court that he bought the suit property being subdivision number Kilifi/Mtondia/404 (original no. Kilifi/Mtondia/110) from Silas Mzungu Chitibwi. Being agricultural

land, it was the evidence of PW1 that he obtained the consent of the Land Control Board after applying for the same on 25th March 1994. PW1 produced the application for consent and the consent of the Board as PEXB1 and 2 respectively.

7. It was the evidence of PW1 that he was issued with the title deed in respect of the suit property on 12th May 1994 which he produced as PEXB 3.

8. According to PW1, the 1st Defendant invaded the suit property in the year 2007 and started excavating stones therefrom. He reported the said incident to the police and the 1st Defendant was arrested and charged in court for stealing building blocks from the suit property. The Plaintiff produced the charge sheet and proceedings as PEXB 5a and b.

9. It was the evidence of PW1 that he withdrew the criminal case after the 1st Defendant agreed to vacate the land. However, after the said withdrawal, the Defendants again invaded the suit property and they were arrested again by the police and charged in criminal case number 311 of 2008.

10. According to PW1, when he bought the land, the seller requested him to allow the 1st Defendant to cultivate the land for food. It was the evidence of PW1 that he allowed the 1st Defendant to cultivate the land and that after three years, she requested him to allow her to stay in the farm house which had been constructed by the seller.

11. PW1 denied that the Defendants have stayed on the land for more than 12 years. According to PW1, when the 2nd Defendant died, he was not buried on the suit property.

12. It was the evidence of PW1 that that the Defendants had sued him for a claim of adverse possession in HCCC No. 36 of 2008 which claim was dismissed.

13. In cross-examination, PW1 stated that when he bought the suit property, there were two mud houses on the land. The seller told him that the houses belonged to his farm worker and that the 1st Defendant had requested him to allow her farm the land. She later requested PW1 to allow her stay in the farm house which he agreed.

14. PW1 stated that the Defendants used to own the land which they later sold.

15. Silas Mzungu Chitibwi, PW2, stated that in 1983, he was informed that a Mr. Philip Mutisia was selling plot number Kilifi Mtondia/110.

16. After ascertaining from the Settlement Fund Trustee that the plot belonged to Mr. Mutisia, it was the testimony of PW2 that he purchased the plot. While the transaction was pending, it was the evidence of PW2, that Mr. Mtisia allowed him to take possession of the suit property and he built two temporary farm houses.

17. It was the evidence of PW2 that he obtained the consent of the Board to have the suit property transferred to him on 26th September 1991 which he produced as PEXB11.

18. PW2 further stated that after purchasing the plot, he applied for the consent to subdivide it, which consent was granted by the Board. The plot he bought was sub-divided into seven (7) portions. The witness produced the mutation form as PEXB12. After the said subdivision, he transferred to the Plaintiff who is his brother in law portion number 404 and a title deed was issued to him.

19. According to PW2, although it is claimed that the land initially belonged to the 2nd Defendant, the records at the Settlement Fund Trustee showed that the same was allocated to Mr. Mutisya. It was his evidence that when he acquired the land, none of the Defendants were staying on the land.

20. It was the evidence of PW2 that the 1st Defendant used to stay near the then cashewnut factory in Kilifi and that she used to work on the land for him. According to PW2, he allowed the 1st Defendant and others to cultivate the land. When his worker left, it was the evidence of PW2 that the 1st Defendant requested him to allow her occupy the farm house which he did. She started claiming ownership of the land by excavating building blocks.

21. PW2 concluded his testimony by stating that the 1st Defendant's late father the 2nd Defendant, was not buried on the suit property and that none of her siblings is staying on the land. It was his evidence that when he purchased plot number 110, there was no objection from anyone.

22. In cross-examination, PW2 stated that the 2nd Defendant was the initial allottee of the suit property. However, before he could be issued with a title deed, he sold the land to Mr. Mutisya who eventually sold it to him.

23. It was the evidence of PW2 that he is the one who built on the land two makuti structures after the house that had been built by Mr. Mutisya collapsed. It was his evidence that the last time he repaired the house on the suit property was in the year 2002 having built them in 1995.

24. PW2 testimony was that he knew the Defendants in 1999 and that the 1st Defendant requested to stay in one of the houses on the suit property in the year 2002; that the 2nd Defendant was allowed by the Plaintiff to cultivate the land since the year 2002 and that she was allowed to occupy the farm house in 2005.

The Defendant's case:

25. The 1st Defendant, DW1 informed the court that the 2nd Defendant, now deceased, is her father.

26. In her written statement and oral evidence, DW1 stated that his late father took possession of the suit property in the 1950's by then known as Kilifi/Mtondia/110. After his retirement from Kilifi Plantation Company, he moved to the suit property and cleared it. Later, they heard that the area had been declared a settlement scheme and that his father was registered by the Settlement officers as the owner of the plot number 110.

27. It was the evidence of DW1 that she used to work at the Kilifi cashew nut factory and when the factory closed down, she started staying with her father on the suit property.

28. DW1 informed the court that they continued staying on the suit property until the year 2007 when the police started harassing them. It is only then that they learnt that Mzungu Chitibwe had been registered as the proprietor of the suit property.

29. According to DW1, his late father was the one who was in possession of the documents from Settlement Fund Trustee in respect of the suit property; that his father handed to Mr. Chitibwi the documents believing that he wanted to assist him and that the said Mr. Chitibwi never physically took over the land.

30. It was the evidence of DW1 that the house Mr. Chitibwi describes as the farm house was always his father's and that when he was secretly subdividing and selling the land, he was aware of their presence on the land.

31. DW1 maintained that although his father was never given a title deed in respect to land known as plot number 110 measuring 15 acres, he had documents in support of ownership of the same, which documents were taken by Dr. Chitibwi.

32. In cross-examination, DW1 stated that his late father had four children; that one of his siblings died while the other two live in Mabueni and that his father was not buried on the suit property but where the

rest of the family members are usually buried.

33. It was the evidence of DW1 that she has four houses on the suit property which were built more than 50 years ago.

Submissions:

34. The Plaintiff's advocate submitted that although the 1st Defendant claim that plot number Kilifi/Mtondia/110 belongs to the 2nd Defendant, the said land does not exist having been sub-divided; that the 1st Defendant did not take any step to stop the said sub-division and that PW2 produced documents to prove that his acquisition of plot number 110 was procedural and lawful.

35. The Plaintiff's advocate finally submitted that the Defendant has no counter-claim against the Plaintiff and that the Defendants' claim is similar to HCCC No. 36 of 2008 which was dismissed.

36. The Defendant's counsel reiterated the evidence of DW1 in her submission. The Defendant's advocate submitted that the 1st Defendant's father was the original documented allottee of the land; that he lost the land because he was outsmarted by the emerging elite and that the fact that the 1st Defendant's father was the original allottee rules out the claim that she was a licensee of PW2.

Analysis and findings:

37. It is not in dispute that the Plaintiff is the registered proprietor of Kilifi/Mtondia/404 having been registered as such on 20th May 1994.

38. The transfer document produced in evidence shows that the Plaintiff purchased the suit property from one Silas Mzungu J. Chitibwi for Kshs.140,000 after the Bahari Land Control Board gave its consent on 31st March 1994.

39. According to the certificate of official search produced by the 1st Defendant dated 8th October 2007, the suit property was initially known as Kilifi/Mtondia/110 measuring 15 acres. The same was registered in the name of Silas Mzungu J. Chitibwi on 22nd November 1993 and on the same day sub-divided into seven (7) portions namely plot numbers 400, 401, 402, 403, 404, 405 and 406. It is plot number 404 that Mr. Chitibwi sold to the Plaintiff. It is not clear what happened to the other six portions.

40. Although the letter dated 20th November 2007 by the District Land Adjudication and Settlement Officer, Kilifi, states that their record showed that plot number 110 was registered in the name of Toya Kiti, the same letter states that "the records and grounds status dont tally". It is not clear what the District Land Adjudication and Settlement Officer meant by those words.

41. Although the 1st Defendant stated in her evidence that the documents in respect to plot number 110 were stolen from her father by Mr. Chitibwi, no evidence was called to show the kind of documents that were in possession of her father before they were stolen.

42. Considering that the Defendants have not sought for the cancellation of the title that was issued to Mr. Chitibwi before he transferred one of the suit property to the Plaintiff on the ground that the same was procured fraudulently, I will not delve in the issue. All I can say is that in the absence of evidence that the Plaintiff's title was fraudulently obtained, the same remain good title.

43. The 1st Defendant informed the court that she is entitled to the suit property because she has been in possession of the same for more than 50 years.

44. On the other hand, the evidence of the Plaintiff and PW2 is that the 1st Defendant was allowed by the Plaintiff to cultivate the suit property in the year 2002 before she was allowed to stay on in of the farm

houses three years later, that is in the year 2005.

45. If indeed the 1st Defendant has been living on the suit property for 50 years with her father, it follows that they should have been aware about the registration of plot number 110 in the name of Mr. Chitibwi and the subdivision of the same to create seven parcels of land.

46. The failure by the Defendants to stop the Land Control Board from giving its consent to sub-divide plot number 110 into seven parcels of land in 1994 shows that the 1st Defendant was aware of the fact that the land in question never belonged to her father.

47. The Plaintiff's evidence was that he permitted the 1st Defendant to till the land in the year 2002. I am inclined to believe the Plaintiff's version because, as I have already stated, the 1st Defendant's father never objected to the sale of the land to the Plaintiff when he discovered in the year 2007 that plot no. 110 had been registered in the name of Mr. Chitibwi and the same had been subdivided.

48. It was the evidence of DW1 that she has three siblings. However she admitted that none of them has ever stayed on the suit property. The said admission discredits her evidence that her father, who was not buried on the suit property when he died, is the one who built the houses on the suit property and that he had lived on it for more than 50 years.

49. From the evidence adduced, what happened is that the 1st Defendant's father who was squatting on the land which initially was registered in the name of Settlement Fund Trustee moved out of the land and the land was allocated to one Mr. Mutisya. The 1st Defendant only laid a claim on the land when she was allowed to occupy it by the Plaintiff after he purchased it.

50. In any event, the Defendants did not deny that they had filed HCCC No. 38 of 2008 seeking for an order of adverse possession in respect to plot number 110. The Defendants did not also deny that the said suit was dismissed. They cannot therefore raise the same issue in the current proceedings.

51. For those reasons, I find and hold that the Plaintiff has proved his case on a balance of probabilities. I therefore allow the Plaint dated 7th March 2008 in terms of prayer (a) and (c).

Dated and delivered in Malindi this **13th** day of **February**, 2015.

O. A. Angote

Judge