



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ENVIRONMENT AND LAND COURT
AT MOMBASA
CIVIL SUIT NO. 37 OF 2012

ALFEEN MEHDIMOHAMED SHAMSUDIN.....PLAINTIFF

-VERSUS-

BASIL FERAZ MOHAMED & 223 OTHERS.....DEFENDANT

JUDGEMENT

1. The plaintiff Alfeen Mhedimohamed Shamsudin sued Basil Feroz Mohamed & 223 other defendants claiming vacant possession of land parcel No 148/V/MN measuring 13.5 acres and situated in Changamwe, Mombasa hereinafter referred to as “the suit property”. He also prayed for the costs of the suit and any other relief the Court deems just to grant.
2. The suit is defended. The defendants filed a defence and counter – claim on 30th April 20112 denying the claim in its entirety and counter – claimed for an order that the defendants have acquired the suit property by way of adverse possession. The defendants urged the Court to dismiss the plaintiff's suit with costs to them. Later the defendants filed an amended statement of defence by consent on 27th February 2014. The only new item introduced is paragraph 9 of the defence alleging that the plaintiff's suit is time barred.
3. After pleadings closed, the parties set down the suit for hearing. The plaintiff was the sole witness while the defendants called four (4) witnesses. The plaintiff as PW 1 opened his testimony by stating that he lives in Tudor, Mombasa. He is a businessman and had inherited the suit property from his uncle Azim Shamsudin Esmael – deceased. PW 1 said that the land is situated at Miritini, Changamwe. He went to view it and noted that there were people living on it.
4. PW 1 continued that he obtained a probate in respect of his uncle's estate and produced the certificate of confirmation of grant as Pex 2. He also produced certificate of postal search as Pex 3 which showed the land is registered in his uncle's name and measures 13.5 acres. The plaintiff avers the people who are illegally on the land have also put up semi-permanent structures. PW 1 stated further that he approached the defendants through the D.O.'s office but there was no response. The land had been transferred to him by assent and he produced the title document as Pex 4. PW 1 denied being aware of the defendants being granted the suit land by the Court. He asked the Court to give him an order for vacant possession and award him costs of the suit.

5. In cross – examination by Mr Okanga on behalf of the defendants, he said he knew IRFAN KARA who is his cousin. He denied jointly buying the suit land with his cousin from Sleek Properties Ltd. He also did not know from whom his uncle bought the property. He admitted that he has not visited the land and got the names of the defendants through the D.O. He did not know when the defendants came to the land. He had not written a formal demand to ask the 220 people to leave the land. PW 1 was not aware of any judgement obtained in default of appearance. In re – examination, he stated he was not a party to H.C Originating Summons No 51 of 2010. He closed his case.

6. Peter Ochieng Osir testified as DW 1. He stated that he lives in Owino – Ohuru in Mikindani and is a businessman. He has a permanent and semi permanent house on the suit property. The permanent house has 4 rooms while the 2nd has 3 rooms. DW 1 continued that the first house was built in 1985 by his father and while he built the 2nd in 2001. He was allowed to build by Kenga Tuba who was the gardener of Mr Lalji Maghaji. He was Born on the suit property and Owino – Ohuru in his grandfather. He does not know Mr Shamsudin. DW 1 further testified he had sued Sleek Properties in H.C Originating Summons No 51 of 2010 which file is missing. He denied that he is a trespasser. During cross – examination, DW 1 admitted he did not have the Court order. He was born on the land 40 years ago and thought the land was theirs left to his grandfather by Mr Lalji Maghaji who was the registered owner.

7. DW 2 JACKTON OKUMBA AMBWAYA lives in Owino – Ohuru, Mikindani and works as a mason. He lives on Plot No 148/V/MN since 1980. DW 2 states further that when he came to the land he found elders such as Omondi Rachoda, Cosma Otieno and Kenga Tuba whom he asked for land because he had nowhere to live. Mzee Tuba gave him a place where he built 4 rooms and on the land are 225 landlords. From 1980 to the time the suit was filed no one had come to claim the land. According to DW 2 , the owner of the suit property is Lalji Maghaji who left Mr Kenga Tuba assisted by Owino – Ohuru as caretakers and asked them to be paying rent. It is DW 2's evidence that there are over 10,000 people on this land with social amenities such as schools, churches/mosque built on the plot.

8. DW 2 further stated that he heard about the plaintiff in 2009 at the Chief's office where they met him. They sued him vide HCC 51 of 2010. He urged the Court to issue orders that would allow him to continue staying on the land in peace. In cross – examination, he stated that he is 61 years old. He did not pay Kenga anything for the land. DW 2 denied the plot was leased to him. He pays rates to the municipality under the name of Lalji Maghaji with the last payment made on 30.5.2015. He filed the suit claiming the land by way of adverse possession but he did not have with him Court documents. He heard someone claim this land in 2009 before then, no one had come to evict them. He concluded by stating that he was never told one day he would be required to leave this land.

9. JOSEPH WANJERO OKELLO testified as DW 3. He told Court that he is a resident of Owino – Ohuru in Mikindani. He is a plumber and entered the suit property in 1975. DW 3 stated that his parents used to live on the plot as tenants. Mzee Tuba gave him a portion where he built four (4) rooms where he has lived todate. DW 3 testified that sometime in 2009, he was summoned by the Chief. At the Chief's office he met three (3) young men who he was told were the owners of the plot. They did not agree and left. He knew Elizabeth Mutunga but does not know how she became the owner of the suit property. He was not aware of case No 32 of 1994. DW 3 testified that there are over 200 houses, cemetery, mosque and a school on the land. He continued that when they left the Chief's office, they instituted the suit originating summons No 51 of 2010 which court file has disappeared.

10. During cross – examination, DW 3 stated that he is 63 years old. He came to live on the land with his parents who were tenants in 1975. His parents' landlord was known as Oding'o and he knows they used to pay him rent but later he stopped paying. His house is made of mud comprising of four rooms. DW 3 said Elizabeth was his neighbour. He did not know she owned the land before today.

11. ELIZABETH FRANSISCA MWAILU gave her evidence as DW 4. She said that she came to the land in 1976 as a tenant of Kisau. After four (4) years she bought her house from Gabriel Ochieng. DW 4 states the house built of mud has nine rooms and she lives on the land todate. She continued that in 2009, the area Chief summoned them and were informed the land had been sold and they were required to leave. DW 4 testified that attempts at negotiations failed and therefore they decided to file suit No 51 of

2010 which is still pending. DW 4's evidence is similar to the evidence of her co – defendants on what is on the land. She asked Court to give her the land.

12. In cross – examination, she admitted coming to the land as a tenant. They filed HCC 51 of 2010 after the fruitless meeting with the “Waindis” in the Chief's office. They usually collect money for rates and pay to the municipality. The defence then closed their case at this point.

13. The advocates for the parties filed rival submissions. The plaintiff's counsel filed very detailed submissions with case law to support it. In summary, his submissions discussed the following issues :-

- i) Ownership
- ii) Defective title
- iii) Adverse possession
- iv) Vacant possession

The defendants on their part submitted under the headings :-

- i) adverse possession
- ii) Questioned How plaintiff acquired the title

14. I have analysed the pleadings filed, considered the evidence and submissions rendered and find the following questions arising for my determination

- (a) Does the Plaintiff have a good title therefore entitled to the order of vacant possession ?
- (b) Has the right to a claim for adverse possession accrued to the defendants ?
- (c) Who bears the costs of this suit.

15. The gravamen of the Plaintiff's case is that he is the registered owner of the suit property the same having been bequeathed to him by his deceased uncle, AZIM SHAMSUDIN ESMAEL and that the Defendants do not have a right to be on the land. A copy of the title produced in evidence by the Plaintiff shows the history of the suit property as follows :

- i. It was first registered in the name of HAJI GAHANISH BINTI ALLADAD on 22nd February 1922.
- ii. It was transferred to LADMOHAMED BIN HAJI LAHAG and KHAMIS BIN HAJI LAHAG as tenants in common in equal shares on 21st September 1932.
- iii. On the same date of 21st September 1932, it was transferred to BLANCHE UARIE JAIR.
- iv. It was transferred to ABDULMOHAMED HUSSEIN UAWJI on 7th August 1936.
- v. It was transferred to LALJI MANGALJI on 15th September 1936.
- vi. On 26th April 1995, a Vesting Order was registered on the property vesting the same in ELIZABETH MUTHINI.
- vii. On 3rd June 2009 a Court Order in Civil Application No. 32 of 1994 was registered on the property vesting the same in ELIZABETH MUTUNGA and FAROUK AKSERALI LALJI MANGAJI as tenants in common.

- viii. On 30th October 2009 a transfer was registered in favour of SEIYO KENYA LIMITED.
- ix. On 30th November 2009 a transfer was registered in favour of SLEEK PROPERTIES LIMITED.
- x. On 10TH March 2010, the land was transferred to AZIM SHANSHUDIN ESMAIL.
- xi. On 4th October 2012, an entry was made on the title of Grant of Probate of Written Will in Mombasa High Court Succession Cause No. 241 of 2011 in the Estate of AZIM SHAMSUDIN ESMAIL (Deceased) to ALFEEN MEHDIMOHAMED SHAMSHUDIN.
- xii. Finally on 4th October 2012, the property was transferred by way of assent to ALFEEN MEHDIMOHAMED SHAMSUDIN, the Plaintiff herein.

16. The plaintiff in his submissions quoted Kimaru J. in **Mary Chelangat Chesirsir vs Charles Ruto & 2 Others (2005) eKLR** where it was held that once a party produces a title deed to a parcel in evidence then the said title is prima – facie proof that such party is the owner of the said parcel. The plaintiff also relied on the provisions of section 26 of the Land Registration Act to support his title. It is their case that the defendants had a burden to prove allegations of fraud and misrepresentation on how the plaintiff acquired his title. He cited the cases of **Mutsonga vs Nyati (1984) KLR 425 and Koinange & 13 others vs Koinange (1986) KLR 23** where it was held that allegations of fraud must be strictly proved more than on a balance of probabilities.

17. The defendants in their submissions questioned the plaintiff's title because the plaintiff did not produce sale agreement between Sleek Properties and his uncle or the transfer documents thereof. According to the defence submissions, their interests were not extinguished by the exchange of the property to different persons or companies. It seems to me that the defendants are not challenging the plaintiff's title on the manner it was acquired but that when he acquired it, it did not extinguish the rights of the defendants.

18. Consequently this Court's task is to determine the rights of a title holder as bestowed on him under section 24 and 25 of the Land Registration Act vis-a-vi the defendants' claim. Section 25(1) of the Land Registration Act No 3 of 2012 provides ; *“The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of Court shall not be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever but subject to*

1(b) To such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting in the register unless the contrary is expressed in the register”.

Section 28 provides thus :

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register :-

h) rights acquired or in the process of being acquired by virtue of any written law relating to the limitations of actions or by prescription”.

19. The implication of section 28 is that title of a registered owner is not absolute. The evidence on record shows the defendants are in occupation. The plaintiff is unable to tell when the defendants took over occupation. In essence, there is no evidence to contradict the defendants assertion that they have been in occupation of the land for over 30 years. It is also not disputed that they came into occupation through the permission of Kenga Tuba who is averred to have been the caretaker of Lalji Maghalji. The said Lalji Maghalji was registered owner from 1936 to 1995 when the property vested to Elizabeth Muthini by a Court order. By the time the plaintiff's uncle acquired the property on 10th March 2010, the

defendants were already in occupation for over twelve (12) years.

20. The question arising thus is whether the plaintiff's title to the land is valid has been extinguished by operation of law in accordance with section 28(1) (h) of the Land Registration Act. The defendant in evidence stated that they filed High Court Originating Summons case No 51 of 2010 against Sleek Properties Ltd. In the defendants' list of documents filed in Court on 31.7.2012 is sale agreement dated 23.7.2009 between Sleek Properties Ltd and the Plaintiff which the plaintiff has disowned. However based on the records from the lands registry and the certificate of grant issued this agreement does not have any probative value in evidence. The defendant also annexed the pleadings in Originating Summons No 51 of 2010 and the newspaper cutting of the standard serving the Originating Summons on 23rd April 2010 on the defendant.. The Originating Summons was filed on 25th February 2010 suing as the defendant. By the time the transfer was made to the plaintiff's uncle on 10.3.2010, service of Summons had not been effected however the plaintiff was already aware of the defendants' presence in the land. This is because the plaintiff met the defendants in the Chief's (D.O's) office before the filing of the Originating Summons. The plaintiff also seems to have been aware of the pleadings in case No 51 of 2010. As submitted by Mr Okanga, the list of names of defendants attached to the plaintiff's documents as No 4 being List of trespassers indeed bear the stamp reading **“This is the list marked as “Goa 2” referred in the affidavit of George Osir Agoro sworn before me at Mombasa this 25th day of February 2010”**. George Osir Agoro appears at No 168 on the list and he is a defendant. It may not therefore be true for the plaintiff to state that he got the names of the defendants from the D.O.'s office.

21. The plaintiff thus acquired his title while he was aware of the defendants' interests on the suit property. In the case of **Wasui vs Musomba (2002) IKLR 396** at holding No 4 Ringera J stated that “Prescriptive rights are in the nature of overriding interests and they run with the land irrespective of changes in proprietorship thereof”. In the circumstances of this case, I find the plaintiff got a title that had been extinguished by prescriptive rights as envisioned under section 28(1)(h) of the Land Registration Act and is therefore not entitled to orders for vacant possession.

22. The defendants counter – claimed for adverse possession. Although the procedure for filing a claim of adverse possession is by way of an Originating Summons, the defendants have demonstrated that they did file one and the file is lost. At the time of filing that Originating Summons, the plaintiff was not the title holder. It was thus practical for the defendants to counter – claim once this suit was filed instead of filing a fresh suit to avoid duplicating and multiplicity of suits. In any event article 159 of the Constitution obligates this Court to deal with substantive justice without due regard to rules of procedure.

23. As I have found in the preceding paragraphs that the evidence on record demonstrates that the defendants have been in occupation for over 30 years, I shall not belabor the point on proof of possession of the suit land by the defendants. The plaintiff also admitted possession when he stated in evidence in chief that the defendants have put up semi – permanent structures on the suit land except that their stay on the land is illegal. The plaintiff is claiming the land by virtue of being a title holder. The first time he went to view the land the defendants were already in possession and had been for a long time. The plaintiff did not tell this Court whether his uncle did anything on the land although it is doubtful because the uncle passed on about 2 months after he acquired registration of the suit property into his name.

24. The plaintiff in submission quoted **Halsbury Laws of England, 4th Ed Vol 3 paragraph 768** which I find useful i.e

“No right to recover land accrues unless the land in possession of some person in whose favor the period of limitation can run. What constitute such possession is a question of fact and degree. Time begins to run when the true owner ceased to be in possession of his land.

25. The plaintiff and or the previous owners have never been in possession of the suit property. Besides Lalji Maghalji, the defendants continued stay on the suit property was open and without the consent of the subsequent owners. The activities of the defendants on the land were adverse to those of the plaintiff and those of previous owners. Since the defendants filed their suit to claim that right vide Originating Summons No 51 of 2010, the filing of this suit cannot be said to have stopped time from running in their

favour. Further with the filing of their defence, they also filed a counter – claim for adverse possession. I am thus satisfied that the defendants are entitled to the land by virtue of adverse possession and enter judgement in their favour in terms of prayer (b) of the counter – claim

26. The result of my decision is that the plaintiff's suit is dismissed and judgement entered in favour of the defendants as prayed in paragraph (b). I order each party to bear their respective costs of the suit.

Judgement dated and delivered in Mombasa this **30th** day of **October 2015**.

A. OMOLLO

JUDGE