



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO.29 OF 2008**

**CHEVRON KENYA LIMITED**

*(formerly known as CALTEX OIL KENYA LTD)*.....**PLAINTIFF**

**=VERSUS=**

**HARRISON CHARO SHUTU**.....**DEFENDANT**

**J U D G M E N T**

1. In its Complaint dated 2<sup>nd</sup> April 2008, the Plaintiff is seeking for a mandatory injunction compelling the Defendant to demolish all the structures from L.R. No.8897 Malindi (the suit property) and a permanent injunction restraining the Defendant from trespassing or occupying the suit property.
2. In the Complaint, the Plaintiff has averred that it is the sole proprietor of the suit property; that in the year 2008, it discovered that the Defendant had trespassed on its land and that the Defendant reacted violently by chasing the Plaintiff's officers from the suit property.
3. In the Defence, the Defendant averred that he has been occupying the suit premises for over 45 years; that his entry on the suit property has been without the permission of the Plaintiff or any body's else and that the said stay has been openly, continuously, publicly, uninterrupted, exclusively and adverse to the Plaintiff's title and hence he has acquired adverse possession of the suit property.
4. The Defendant has further averred in the Defence that he has developed the plot and has permanent houses thereon.

**The Plaintiff's evidence:**

5. The Plaintiff's Network Development Manager, (PW1), informed the court that the Plaintiff is now known as Total (K) Limited.
6. It was the evidence of PW1 that the Plaintiff is the registered proprietor of L.R. No.8897 Malindi and that it has a valid title as proof of ownership.
7. According to PW1, on or about the beginning of the year 2008, the Plaintiff discovered that the Defendant had trespassed and commenced erecting both temporary and permanent structures on the suit land without the Plaintiff's consent.
8. It was the evidence of PW1 that the Plaintiff lodged a formal complaint on 11<sup>th</sup> May 2008 asking the police to assist in evicting the Defendant.
9. PW1 produced in evidence a grant which shows that the use of the land was for petroleum services.
10. According to PW1, the Plaintiff purchased the suit land when it was vacant.
11. PW1 informed the court that when the Plaintiff filed the suit, it annexed photographs showing the

- status on the ground.
12. In cross-examination, PW1 stated that the encroachment by the Defendant on the suit property was in February, 2008. It was the evidence of PW1 that when the Plaintiff's sales representative noticed the construction that was going on, he informed the head office in Nairobi.
  13. PW1 stated that the structures indicated in the valuation report were already there when the valuation report was done.
  14. It was the evidence of PW1 that although he was not in Malindi when the Plaintiff bought the suit property, it is the policy of the Plaintiff not to buy any land that is occupied by squatters; that the Plaintiff bought the suit property in 1994 and that the Plaintiff has a policy of buying land and keeping it for future use.

#### **The Defendant's case:**

15. The Defendant, DW1, relied on his statement dated and filed on 19<sup>th</sup> May 2015.
16. According to DW1, he has lived on the suit land since he was born. It was his evidence that the suit land initially belonged to his late father, Charo Shutu, that he is married and he lives on the land with his entire family and that they do not have any other place they can call home other than the suit property.
17. DW1 produced in evidence a photograph showing the structures which are on the suit property. According to DW1, he does not know the Plaintiff and does not know why the Plaintiff is claiming the suit property.
18. In cross-examination, DW1 stated that his late father had 38 wives and he allocated to each wife land. It was the evidence of the Defendant that his mother was allocated 1 ¼ acres of land, which is the suit land and that his mother has six children.
19. According to DW1, he lives on the suit property with his twelve children together with his sister who has six children.
20. The Defendant's mother, DW2, informed the court that she has been staying on the suit property since she was married to Charo Shutu, now deceased.
21. It was the evidence of DW2 that the late Charo Shutu had 38 wives and that she was the third wife; that her late husband apportioned her the suit property after which she divided it further and allocated it to her children.

#### **Submissions:**

22. The Plaintiff's advocate submitted that the Plaintiff's claim is one of trespass by the Defendant on the suit property in 2008.
23. Counsel submitted that if the Defendant wished to rely on the defence of long occupation, he should have filed a suit for adverse possession; that without a counter-claim for adverse possession, this court cannot allow the defence of adverse possession and that the said defence should fail.
24. Counsel submitted that DW2 was not specific as to which portion of land was given to the Defendant and that the Defendant did not produce any evidence to show the attempt he made to acquire the suit property.
25. The Plaintiff's counsel relied on numerous authorities which I have considered.
26. The Defendant's advocate submitted that PW1 admitted in his evidence that he could not tell when the structures on the suit property were put up; that the evidence of PW1 contradicts the pleadings where it was pleaded that the entry of the Defendant on the suit property was discovered in the beginning of 2008 and that the Plaintiff did not know what was happening on the land from the time it was acquired until 2008.
27. Counsel submitted that the change of the Plaintiff's name happened one year after the institution of this suit and yet no attempt was made to amend pleadings to bring on board the current presumed owner of the land; that the Plaintiff never filed a company resolution sanctioning the filing of this suit and that suit should be dismissed on that ground alone.
28. Counsel relied on authorities which I have considered.

#### **Analysis and findings:**

29. In the Plaintiff dated 2<sup>nd</sup> April 2008, it averred that on or about the beginning of the year 2008, the Plaintiff discovered that the Defendant had without any colour of right whatsoever entered into, trespassed and commenced erecting both temporary and permanent structures on its land being L.R.NO.8897 Malindi.
30. The Plaintiff has described itself as a limited liability company. The Verifying Affidavit in support of the Plaintiff was sworn by the Plaintiff's Assistant Corporate Counsel who does not state if he had the authority of the Plaintiff to swear the said Affidavit, contrary to the provisions of Order 4 rule 1(4) of the Civil Procedure Rules. The Plaintiff's witness did not produce any resolutions by the company sanctioning the filing of the suit.
31. As has been held in numerous decisions of this court and the Court of Appeal, when companies authorise the commencement of civil proceedings, a resolution or resolutions have to be passed either at the company's or Board of Directors meeting and recorded. (**see Bugerere Coffee Growers Ltd Vs Sabaduka & Another (1970) EA 147**). In the absence of authority of the company and resolution(s), this suit should fail.
32. I shall however look at the merits of the suit.
33. PW1 informed the court that the Plaintiff was allocated the suit property in 1994. A grant in respect of L.R. No.8897 was provided in evidence by PW1.
34. It was the evidence of PW1 that he joined the Plaintiff's company in February 1998 although he has never worked in Malindi.
35. PW1 informed the court that the Plaintiff discovered that the Defendant had encroached on the suit property in the year 2008. It was the evidence of PW1 that by the time the discovery of the entry on the suit property by the Defendant was made, there were already structures on the land.
36. PW1 was categorical that it was the policy of the Plaintiff to acquire land without squatters.
37. However, PW1 admitted that he was not working for the Plaintiff when the suit property was allocated to its predecessor, Caltex Oil (K) Limited, in 1994. PW1 was also not sure when temporary structures constructed by the Defendant on the suit property were built.
38. The evidence of PW1 clearly shows that between 1994 and the year 2008, the Plaintiff was not utilizing the suit property. Indeed, PW1 informed the court that the Plaintiff never took possession of the suit property after purchasing it. It was his evidence that the policy of the Plaintiff is to acquire land and then develop it in future.
39. In the absence of evidence by the Plaintiff to show that the Defendant was not on the suit property between 1994 and 2008, and in view of the Defendant's evidence that he has always lived on the suit property, I am convinced that by the time the Plaintiff was issued with a grant in 1994, the Defendant was living on the suit property until the year 2008 when this suit was filed.
40. The above finding is further grounded by the fact that PW1 did not inform the court how the Plaintiff's predecessor was allocated the land by the government.
41. There is no evidence before this court to show whether the grant in respect to L.R.No.8897 was issued to the Plaintiff's predecessor after the land had been planned by the issuance of a Part Development Plan and a letter of allotment.
42. In the absence of the PDP and a letter of allotment, which are pre-requisite documents in the allocation of unalienated Government land, the grant could have been issued without the concerned parties visiting the land to ascertain the existing interests on the land.
43. The Defence of limitation of time pursuant to the provisions of Section 7 and 17 of the Limitation of Actions is valid in the circumstances of this case.
44. Section 7 and 17 of the Limitation of Actions Act prohibits a title holder from instituting an action to recover his land after the end of twelve years.
45. It therefore follows that an adverse possessor can raise a defence of adverse possession without necessarily filing a suit or a counter-claim. The only thing the adverse possessor cannot get in a situation where he has not filed a cross suit is an order for a title to be issued in his favour.
46. Considering that the Plaintiff's witness admitted in evidence that they only discovered in the year 2008 the entry of the Defendant on the suit land, and the fact that he could not tell the exact date, month or year when the Defendant put up the temporary structures on the suit property, I find and hold that the Defendant has proved that the Plaintiff's suit is time barred pursuant to the provisions of Section 7 of the Limitation of Actions.
47. As I have already stated, the absence of a PDP and in view of the admission by PW1 that the Plaintiff never took possession of the land contrary to special condition number 2 of the grant, I

am satisfied that the Defendant was living on the suit property with his family by 1994 and the Plaintiff's suit is time barred.

48. For those reasons, I dismiss the Plaintiff's Plaint dated 2<sup>nd</sup> April 2008 with costs.

Dated and delivered in Malindi this **9<sup>th</sup>** day of **October** 2015.

**O. A. Angote**

**Judge**