



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 20 OF 2014 (OS)

IN THE MATTER OF: PLOT NO. 753 (WATAMU)

AND

**IN THE MATTER OF: AN
APPLICATION FOR ISSUANCE OF THE DEED BY WAY OF ADVERSE POSSESSION**

AND

**IN THE MATTER OF: ORDER 37 RULE 7(1) OF THE CIVIL PROCEDURE RULES
AND SECTION 1A, 1B AND 3A OF THE CIVIL PROCEDURE ACT CAP 21 LAWS OF
KENYA AND SECTION 7, 13 AND 38 OF THE LIMITATION OF ACTIONS ACT CAP 22
LAWS OF KENYA**

BETWEEN

THOMAS NYUNDO KARISA.....PLAINTIFF

=VERSUS=

EDWARD KARANI.....DEFEDANDANT

J U D G M E N T

Introduction

1. In his Originating Summons dated 12th February, 2014, the Applicant has raised the following issues for determination:

(a) Whether the Defendant is the registered owner of Land Reference Number 753 Watamu.

(b) Whether the Plaintiff has been in open, quiet, peaceful and uninterrupted possession of a portion measuring 30 X 40 meters out of L.R. No. 753 Watamu.

(c) Whether the Plaintiff is the equitable or beneficial owner of the portion measuring 30 X 50 meters being part of L.R. NO.753 Watamu.

(d) Whether the Defendant's title to the said portion measuring 30 X 50 Meters being part of L.R. No. 753 Watamu has been extinguished through the doctrine of adverse possession.

(e) Whether an order vesting a good title to the aforesaid land should or ought to issue and be registered in favour of the Plaintiff.

(f) Who should bear the costs of the suit.

2. The Application is premised on the grounds that the Plaintiff has been in occupation of a portion measuring 30 X 50 Meters being part of the suit property since 1980 which possession has been quiet, peaceful, continuous and uninterrupted.
3. The Application is supported by an affidavit.
4. The Defendant filed a Replying Affidavit and opposed the suit.
5. When the matter came up for directions, the parties agreed to proceed with the case by way of viva voce evidence.

The Plaintiff's case;

6. The Plaintiff, PW1, relied on his Further Affidavit and Supporting Affidavit.
7. In the Affidavits, the Plaintiff deponed that he has developed a portion of L.R. No. 753 measuring 30 X 50 Meters; that he has been in occupation of the said portion of land since 1980 and that he formalised the ownership of the said portion by purchasing it for a consideration of Kshs.400,000 in the year 2006.
8. According to PW1, the Defendant was aware of his occupation though adverse to him and that he condoned his peaceful occupation and possession.
9. It was the evidence of PW1 that other than developing the land, he has been paying utility bills for water and electricity.
10. According to the Plaintiff, by the year 2006, he was not aware that the Defendant had obtained the title in respect to the suit property.
11. In cross examination, PW1 stated that he is the one who put up the structure on the suit property and that he is staying in the said house.
12. According to PW1, he used to stay on the suit property with his in-law, one Fondo Kunje and that when his in-law moved out of the suit property, he compensated him by paying him Kshs.400,000, thus the agreement annexed on his Supporting Affidavit.
13. According to PW1, before he constructed the current structure in the year 2007, he used to stay in a temporary structure.
14. It was the evidence of PW1 that the suit property is connected with water but not electricity.
15. According to PW1, Sandro and Raffaello Pochintesa wanted to put up a structure on the piece of land in dispute in 2007; that he agreed to enter into partnership with them and that his percentage in the said development was to be 30% while Sandro and Raffaella's share was to be 70%.
16. However, when Sandro died, Raffaella rescinded the oral agreement they had and abandoned the construction.
17. According to PW1, he is a mason by profession and he is the one who put up the structures on the suit property while the Sandros provided the materials for construction.
18. In re-examination, PW1 informed the court that Sandro and Raffaella are the ones who went to him and requested to be shareholders in his land; that they bought the building materials briefly and then stopped and that the construction of the structure was done between the year 2007 and 2008.
19. It was the evidence of PW1 that he stayed with the Fondo family on the suit property as squatters from 1980 until the year 2006 when they left.

Defendant's case:

20. In his Affidavit, DW1, deponed that he was registered as the proprietor of the suit property in 1994; that the Applicant has never been in possession of the suit property and that the structures

- on the land were built but never completed and that the same are not habitable.
21. According to DW1, the Plaintiff was the agent of Sandro and Raffaella and that there was an intention by Raffaella to purchase from him (the Defendant) the portion of land in question which intention was not executed.
 22. The Defendant deponed that on 26th January 2010, the Plaintiff entered into an informal agreement with Safari Ventures Ltd to the effect that the developments on the suit property were initiated by the said company.
 23. According to the Defendant, the Applicant was engaged by one of the Directors of Saraf Ventures Limited as a headman to manage the building of cottages on his property.
 24. When DW1 testified, he informed the court that he knew the Plaintiff in the year 2008 when he retired from the civil service; that after he retired, the Plaintiff told him he had put up structures on his land and that he requested him to sell to him the land.
 25. It was the evidence of DW1 that later on, an Italian lady showed up and informed him that she is the one who had put up the structures on the suit property after the Plaintiff convinced her that it was his land.
 26. In cross examination, DW1 stated that he does not live on the property. DW1 also admitted that he has never developed the suit property since it was allocated to him.
 27. According to DW1, the structures on the land were put up in his absence and without his permission. He only found out about the developments upon his retirement in the year 2008.

Submissions:

28. The Plaintiff's advocate submitted that ever since the Plaintiff moved on the suit property, he has never faced any resistance; that the only people the Plaintiff found on the suit property in 1980 was the family of Fondo Kunje Chondo who were his in-laws and that they lived together as a family until the year 2006.
29. The Plaintiff's counsel submitted that the Kshs.400,000 that the Plaintiff paid the Fondo's was gratuity having ceded their claim in the land to the Plaintiff.
30. Having lived on the suit property for many years, it was submitted that the Plaintiff entered into an agreement with a company known as Saraf ventures Limited and begun developments thereon.
31. The Defendant's advocate submitted that the dilapidated structures on the suit property were put up under the supervision of the late Sandro; that the Plaintiff was only a periodical caretaker to the suit land and that the structures standing on the suit property have never been occupied.
32. The Defendant counsel submitted that the Plaintiff cannot claim to have bought the suit property and at the same time plead that he has acquired the property by adverse possession; that the Defendant has demonstrated where the Plaintiff lives and that the title document attached on the Originating Summons has not been certified as required by the law.

Analysis and findings:

33. It is not in dispute that the Defendant is the registered proprietor of L.R. NO.753. The Plaintiff annexed on his Supporting Affidavit the copy of the grant that was issued to the Defendant on 16th June 1994 and registered as CR25822/1 on 21st June 1994.
34. The issue of the Defendant being the registered proprietor of the suit land was acknowledged by the Defendant in his Replying Affidavit.
35. Having admitted that he is the registered proprieotr of the suit property, it matters not that the grant that was annexed on the Supporting Affidavit has not been certified.
36. Indeed, the requirements that the title document or the extract of title should be certified by the provisions of Order 37 Rule 2 of the Civil Procedure Rules can only apply where the person sued for a claim of adverse possession denies that he is indeed the registered proprietor. Once there is an admission as in this case, the Defendant cannot have the suit dismissed or struck out on the basis that the extract of title has not been certified.
37. According to the evidence by PW1, he entered the suit property in 1980 as a squatter and started staying with his elder brother-in-law until the year 2006 when the inlaws left the suit property.
38. The Plaintiff annexed on his affidavit an agreement that he made with the entire family of Kunde Chundo in respect of the portion of the suit property on 17th December 2006.

39. According to that Agreement, the Chundo family agreed to sell to the Plaintiff land measuring 30 X 50 Metres for Kshs.400,000.
40. PW1 informed the court that the agreement of 17th December 2006 was not an agreement of sale of land *per se* but an arrangement that would not allow the Chundos to come back after vacating the land. Indeed, the agreement authorised the Plaintiff to deal with the plot in any manner he desires.
41. It would appear that with the exit of the Fondo Kunje family from the suit property, the Plaintiff entered into an agreement with Sandro and Raffaella Pochintesa to put up a building on the disputed land. Indeed, the photographs that were produced in evidence shows a massive house was developed on the suit property together with an incomplete swimming pool.
42. PW1 informed the court that he had agreed with the Sandro's that upon completion of the buildings he was to get a 30% share of the property. However, the project was not completed when Sandro died.
43. The evidence of PW1 is that the Sandros agreed to invest on the suit property because it was his land. On the other hand, the Defendant's case is that the Plaintiff was just but an agent of the Estate of the late Sandro and Raffaella Pochintessa.
44. It may be true, as claimed by the Defendant, that the developments on a portion of the suit property was wholly put up by the Sandros and not by the Plaintiff. However, the Defendant did not inform the court why it was not until the year 2008, after his retirement, that he took note of the developments on his land.
45. Indeed, the Defendant informed the court that he had never been on the land since it was allocated to him in 1994 and it was only until the year 2008 that he realised there there was almost a complete structure on the land.
46. According to the letter by the advocate of Ms Raffaella Pochintesa dated 29th May 2012, Raffaella had put up the house on the suit property on the Plaintiff's "misrepresentation of being the lawful owner of the piece of land". This realisation that the Defendant was the rightful owner of the suit property must have come to the attention of Raffaella much later after he had put up the structure.
47. In that case, and considering the development on the suit property, Sandro and Raffaella must have only started putting up the structures on the land after being convinced that the Plaintiff was the owner of the land. That conviction must have been obtained on the basis that as at the time they wanted to develop the land, it is the Plaintiff who was in possession of the suit property and not the Defendant.
48. The circumstances which led Sandro and his wife to heavily invest in the portion of the suit land leads me to conclude that the Plaintiff was in actual possession of the land before the said structure came up.
49. The Defendant has not annexed a photograph of a newly constructed house on a different piece of land which is said to belong to the Plaintiff.
50. Looking at the state of the house, I am convinced that the Plaintiff must have been living in a different house before he moved into the house whose photograph, in its original form, has been exhibited by the Defendant. The former house that the Plaintiff was staying in before giving way to the Developments must have been on a portion of a different piece of land.
51. In fact, the Defendant did not inform the court the circumstances, under which he was allocated the suit property and if he ever visited the land before the same was allocated to him in 1994.
52. Having admitted that he never took possession or occupation of the suit property since 1994 when he was issued with the title, and having admitted that he was not aware when the developments on the suit property commenced, I am convinced that by the year 2008 when the Defendant visited the suit property after his retirement, the Plaintiff had disposed him a portion of L.R. NO. 743 and he was in possession of the land for more than 12 years openly, exclusively and adversely.
53. Consequently, I allow the Originating Summons dated 12th February 2014 as follows:

(a) The Plaintiff be and is hereby declared the equitable and beneficial owner of the portion measuring 30 meters by 50 meters of L. R. No. 753 Watamu and which has a structure.

(b) The Defendant's title in respect of L.R. No. 753 Watamu be and is hereby extinguished by virtue of the doctrine of adverse possession.

- (c) **The County Surveyor, Kilifi, to curve out land measuring 30 meters by 50 meters on which a structure stands of L.R. NO. 753 and prepare a Deed Plan for the said portion with a view of preparing a title deed in the name of the Plaintiff.**
- (d) **The remaining portion after the said sub-division to be registered in the name of the Defendant.**
- (e) **The Defendant to pay the costs of the suit.**

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

O. A. Angote

Judge