



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT OF KENYA
AT MALINDI
HCCC NO. 144 OF 2011

SAMSON KAZUNGU KALAMA.....PLAINTIFF

=VERSUS=

1. ROBERT SHUME

2. KAZUNGU DZOMBO (BOYA-BOYA)

3. NICHOLAS NGOLO GONA

4. LUCY BUYA.....DEFENDANTS

J U D G M E N T

Pleadings

1. This suit was commenced by way of a Plaint date 14th September 2011 and filed on the same day. In the Plaint, the Plaintiff has averred that he is the registered owner and entitled to possession of plot portion number 7651/2 (originally number 570/2) measuring 9.976 Ha (the suit property); that he bought the suit property from Mulla Abdullahi in 1972 and that he later on sub-divided it into various portions.
2. When the Plaintiff bought the suit property, there were no squatters on the land until in October 2010 when the Defendants wrongfully entered and took possession of the suit property.
3. The Plaintiff has averred that despite the warning from the District Officer, the 1st and 2nd Defendants continued to build temporary structures on the suit property which still stand on the Plaintiff's farm to date and that the Defendants have persisted in the said trespass and continue with their wrongful occupation of the suit property.
4. The Plaintiff is praying for a declaration that he is entitled to exclusive and unimpeded right of possession and occupation of the suit property; a permanent injunction restraining the Defendants or their agents from remaining on or continuing in occupation of the suit property and for vacant possession.
5. On the other hand, the Defendants have averred in their defence that they have been in possession of the suit property since time immemorial; that they were born and brought up in the suit property and that they are the real owners of the suit property having lived, possessed and occupied the suit

- property for a very long time.
- The Defendants finally deponed that the Plaintiff is not entitled to the property by dint of the Limitation of Actions Act and that the Defendants have acquired title by adverse possession and that the suit property is their ancestral land.

The Plaintiff's case

- The Plaintiff, PW1, informed the court that he bought the suit property from Anverali Mulla Abdullahi and Mohamed Ali Mulla Abdullahi. The Plaintiff stated that he then subdivided the land and the number changed from portion number 570 to 570/2. The Plaintiff produced the indenture dated 27th May 1996 and the certificate of postal search dated 7th June 2011 as P Exhibit 1 and 2 respectively.
- The Plaintiff stated that in the year 2010, he realised some people were clearing the suit property. He reported the incident to the District Officer who intervened but the Defendants were adamant that the issue of ownership can only be solved by the court, thus this suit.
- In cross-examination, PW1 stated that although he bought the suit property in 1972, he only managed to get a title in his name in 1996 after the land was sub-divided. The Plaintiff stated that the previous owners of the land had planted coconut and mango trees on the land.
- It was the evidence of PW1 that he obtained the consent of the Land Control Board before he subdivided the land and that after he bought the land, he planted around 150 mango trees which he harvested occasionally. The Plaintiff stated that it was true that people had constructed houses on the land and that he was not aware that the Defendants were born on the suit property and that they have buried their relatives thereon.
- PW1 reiterated that there were no squatters on the land when he bought it from the previous owners and that he was not aware of any dispute that existed between the previous owner of the land and the Defendants.
- Although he fenced part of the land in 1976, the Plaintiff informed the court that the fence was pulled down after three months.
- PW2 stated that the Plaintiff purchased plot number 570 in 1972. It was the evidence of PW2 that the Plaintiff used to work with the Ministry of Water and he connected piped water on the suit property.
- It was the evidence of PW2 that when the Plaintiff purchased the land, the Defendants were still young and they were not living on the suit property; that they constructed their structures on a portion of the suit property in an area measuring around 2 -2 ½ acres which they started occupying three years ago by force.
- PW2 admitted that the Defendants' parents used to cultivate the suit property although they were not staying on it. However, when the Plaintiff bought the land, the Defendants and their parents stopped cultivating it.
- In cross-examination, PW2 stated that his land which is portion number 127 abuts the Plaintiff's land and that it was the Defendants' parents who planted the cashewnuts on the suit property. The former owner of the suit property allowed the Defendants' parents to harvest the cashewnuts and that each of the Defendants' parents had a portion on the suit property where they used to cultivate. However, none of the Defendants' parents lived on the suit property.
- PW2 stated in re-examination that the Defendants' parents used to cultivate the suit property with the consent of the previous owner and they used to pay to the owner rent on a yearly basis. Although the cashewnuts belonged to the Defendants' parents, PW2 stated that the land belonged to the owner at all times. However, after the Plaintiff purchased the suit property, the Defendants' parents stopped cultivating the land or harvesting the cashewnuts.
- PW3 stated that he stays in Mtangani where the suit property is situated since 1959. It was the evidence of PW3 that the Plaintiff had piped water on the suit property and he used to supply the water to the people in the area since 1962. It was the evidence of the PW3 that he knew the Defendants. The witness stated that the Defendants' parents were known to him and some of them are not alive.
- PW3 informed the court that the Plaintiff bought the suit property and started using it in the year 1973. Before then, people would use the land after paying rent to the previous owners on a yearly basis. However, in 1973, the people who used to cultivate the suit property left although the

- Defendants' parents would occasionally harvest the cashewnuts.
20. It was the evidence of PW3 that the Plaintiff later on paid off the Defendants' parents for the cashewnut trees that were on the land and they never went back to the land. However, the Defendants started going back to the suit property slowly between 2007-2008. PW 3 attended the meetings that were called by the District Officer to solve the dispute in which meetings the 1st Defendant insisted that the Plaintiff should file a suit in court.
 21. It was the evidence of PW3 that the 3rd Defendant has since left the suit property after demolishing his house.
 22. In cross-examination, PW3 stated that the mango trees which are on the suit property were planted by the Plaintiff but the cashewnuts were planted by the Defendants' parents. During those days, people were compelled to plant cashewnuts and then harvest them by the colonial government after paying rent to the owner of the land.
 23. It was the evidence of PW3 that some of the Defendants' parents have since died and for those that have not died, they do not stay on the suit property.
 24. PW3 reiterated that when the Defendants' parents were paid off for the cashewnuts, they stopped harvesting the cashewnuts. The witness was categorical that he knew the 1st Defendant's father although he did not know the other Defendants' parents. The witness stated that he saw the Plaintiff plant the mango trees on the suit property with his wife and that the Defendants invaded the suit property three years ago.
 25. The Plaintiff's last witness, PW5, informed the court that he was an Agricultural Officer working in Malindi. The witness stated that as an agricultural officer, he deals with Agri-business and prepares business plans for farmers in the district. The witness produced a report dated 26th April 1972 which is in respect to plot number 570.
 26. The witness stated that investigations were carried out by the officers in the Ministry of Agriculture in 1972 which showed that twenty five (25) people had planted cashewnut trees on the suit property although they were not living on the land.
 27. PW5 informed the court that the first farmer had 28 cashewnuts which were under five years old while 54 cashewnuts were over six years old giving a total of 82 trees. The witness took the court through the assessment that was done to ascertain the number and age of the trees on the entire land for the respective claimants.
 28. After the assessment of the trees and other crops on the suit property, the Plaintiff was to pay Kshs.3,658 as compensation to the people who had planted the cashewnuts and other crops on the suit property which added up to 794 trees.
 29. According to the witness, the Plaintiff deposited the amount with the District Treasurer's office and the owners of the trees were to collect the money from that office. It was the evidence of PW5 that all the Defendants are not on the list of the 25 claimants, an indication that they were not cultivating the suit property when the Plaintiff purchased it. The report was produced as Plaintiff exhibit 3.

The Defendants' case

30. The 1st Defendant, DW1, stated that he was 44 years old and a Principal of a secondary school. DW1 stated that his father died in the year 2011 and that he has known the Plaintiff since 1978 when he was in primary school.
31. According to the 1st Defendant, he only knew that the suit property was plot number 570 in the year 2010. It was the evidence of DW1 that his late father has trees on the suit property and that he (DW1) has constructed a house on the suit property. It was the evidence of DW1 that by 1978, the suit property belonged to his grandfather and uncles; that each one of them knew the extent of their land and that his grandfather did not build a house on the plot. It was the evidence of DW1 that Giriama's always live in one section of the land as a family and the rest of the area is reserved for cultivation. That is what happened in this particular case.
32. DW1 stated that he knows the extent of his late father's land; that they used to cultivate the land which is part of the suit property and that they had cashewnut trees on the said portion. Before the year 2010, it was the evidence of DW1 that they did not know that the Plaintiff was the owner of the plot number 7651/2. According to DW1, parcels of land numbers 226, 556 and 570 were used

- by his forefathers and that his father never left the suit property as claimed by the Plaintiff.
33. It was the evidence of DW1 that his father never saw the person who purportedly sold the suit property to the Plaintiff and that although he did not know the acreage of plot number 570, his family used the entire land.
 34. In cross-examination, the witness stated that he was born in the year 1969 and that he only knew about the dispute in the year 2010. The Defendant confirmed that his father was listed as number 24 in P exhibit 3 and the compensation that was made to him in respect to the trees that he had on the suit premises. The 1st Defendant stated that when his father died, he was buried on plot number 226 and that his mother who is still alive stays on plot number 226.
 35. Although he had agreed in writing to pull down the house on the suit property, DW1 stated that he did not do so because he was compelled to write the letter agreeing to pull down his house after he was arrested for trespass. It was the evidence of DW1 that he had one house on the suit property.
 36. DW1 stated that the 3rd Defendant was the grandson of one Karisa Katoya; that he did not know the whereabouts of the 3rd Defendant and that the 3rd Defendant's house which was on the suit property fell down. The Defendant confirmed that he has rented the house on the suit property for Kshs.1,500 per month to the 4th Defendant.
 37. In re-examination, the 1st Defendant stated that although his father's name is indicated in P exhibit 4, there is no evidence that he received money as compensation for the trees on the suit property; that they have been harvesting the cashewnuts since 1978 and that plot number 226 where his parents stay and the suit property about each other.
 38. DW2 informed the court that he was 57 years old; that his father's name is Karisa Katoyo and that he was born on the suit property. According to the witness, although they do not live on the suit property, they all cultivate on it; that he has been shown his portion of land on the suit property and that he knew the Plaintiff as a water officer.
 39. The witness stated that he did not know the previous owner of the suit property; that his elder brother and grandmother were buried on the suit property and that he owns three acres of the land.
 40. In cross-examination, DW2 stated that his father is not on the list of P exhibit 3; that although they used to live on the suit property, they were moved by the Government in 1970 and that they still continue using the land.
 41. DW3 was born in the year 1927. The witness stated that they have planted mango trees on the suit property and have since been cultivating the land ever since.
 42. DW3 stated that he knew the Plaintiff as a water officer and that the Plaintiff never used the suit property. Although they were moved from the suit property by the Government, they continued cultivating it.
 43. In cross-examination, the witness stated that although he was aware that people used to pay rent (ijara) for using the land, he never paid the rent. It was the evidence of the witness that they previously had houses on the suit property which were removed by the government for reasons not known to him. The witness could not remember when they were moved from the suit property.
 44. DW4 stated that he was born on the suit property 53 years ago; that the Plaintiff has never done anything on the suit property although he had a small kiosk for selling water and that his father's land was about 2 acres.
 45. In cross-examination, the witness stated that his father's name is not on the list of the people who are said to have been compensated for the trees they had on the land as per the P exhibit no. 3; that his grandfather is alive and he is on the list of the people who are said to have been compensated for the trees on the land by the Plaintiff and that it was his father and not grandfather who showed him his share of land on the suit premises.
 46. When asked by the court the whereabouts of his grandparents, the witness stated that they moved to Madzangoni with the rest of the family, including his father.

Submissions

47. The Plaintiff's advocate filed her submissions on 26th February 2014.
48. Counsel submitted that evidence had been adduced to show that the Plaintiff purchased portion number 570 in 1972; that he sub-divided the property into two portions and that the suit property was registered in his name.

49. Counsel submitted that the Defendants have no lawful right or interest in the suit property and that the Plaintiff's claim against the Defendants is for trespass.
50. The Plaintiff's counsel further submitted that although there were squatters on the property in 1972, evidence has been produced to show the list of the squatters as at that time and the compensation that was made by the Plaintiff in respect to the trespass which they had planted on the land for them to vacate the land. It was submitted that none of the squatters who are on the list were called by the Defence to dispute the payments that were made to them.
51. Counsel finally submitted that the Defendants have not proved the elements of adverse possession and that the Plaintiff as a bona fide proprietor of the suit property enjoys constitutional protection.
52. The Defendants' advocate filed his submissions on 3rd April 2014 and submitted that the Defendants have proved that they are entitled to the suit property by adverse possession. Counsel submitted that the Defendants pointed to the court the developments on the suit property and the trees which were planted by their parents. According to counsel, the Defendants and their parents were evicted from the suit property but they re-entered the suit property with the intention of dispossessing the title holder. Consequently, it was submitted, that the Defendants have been in possession of the suit property for more than 12 years since they re-entered the land.

Analysis and findings

53. It is not in dispute that the Plaintiff is the registered proprietor of plot number 7651 (originally number 570/2) Malindi. The Plaintiff produced as P exhibit 2 the certificate of postal search as on 7th June 2011 to prove that fact.
54. The Plaintiff produced in evidence the Indenture dated 14th July 1972 between Anverali Mulla Abdullahi and Mohamedali Mulla Abdulali on the one part and himself on the other part. The said indenture shows that the Plaintiff purchased portion number 570 measuring 36.29 acres for Kshs.5,000.00. The said land was sub-divided to create the suit property.
55. When the Plaintiff bought the property in 1972, there were people who had cashewnut trees, amongst other fruits, on the property. The evidence by the Plaintiff's witnesses was that although the suit property was private land and was duly registered in the names of the Plaintiff's predecessors, people were allowed by the owner of the land and the government to plant cashewnuts on other people's land and pay the rent (ijara) to the land owner.
56. The Plaintiff produced as P exhibit 3 the list of people who had cashewnut trees on the suit property in 1972 and the payments that were made to them, through the District treasury's office.
57. P exhibit 3 is a letter dated 26th April 1972 authored by the Divisional Agricultural Assistant, Malindi and addressed to the District Agricultural Officer. The letter was copied to the Plaintiff and it is titled as follows:

“Plot no. 570-15.69 Hacters, proposed buyer- Samson Kazungu Kalama. Herewith the following of the investigations carried out of the above plot.”

58. The letter then enumerates the names of the farmers and the number of the cashewnuts that each farmer on plot number 570. There is a separate sheet attached on the letter showing the amount payable, depending on the age and the number of cashewnuts trees each farmer had. The letter also indicates that the proposed buyer (the Plaintiff) had deposited Kshs.3,658 with the District Treasury, Malindi for collection by the people who were claiming that the trees belonged to them.
59. DW1 admitted that his father was on the list of the people who are said to have been compensated for the cashewnuts that they had on the suit property. DW4 also stated that his grandfather is one of the people who are on the list.
60. No evidence was called by the Defence to show that the twenty five people on the list of the exhibit that was produced by the Plaintiff were never paid. Indeed, the grandfather of DW4 is still alive and should have been called to deny that although he is on the list of the people who had cashewnuts on the suit property, he was not paid any money for the trees as claimed by the Plaintiff.
61. The suit property is registered under the repealed Land Titles Act which recognises, by implication, the concept of an individual owning a house or coconut trees without owning the land (See section 21). Indeed this is an accepted concept in the coastal region whose parcels of land are

- governed by the repealed Land Titles Act. It was normal for people to have houses, cashewnuts, coconuts, mango trees and other crops on other persons pieces of land and pay rent (ijara) on a yearly basis. The evidence by the Plaintiff's witnesses in this case shows that that is what happened until 26th April 1972 when the Plaintiff purchased the suit property from the previous land owners and paid off the people who owned cashewnut tress on the land.
62. In view of the fact that the letter by the Agricultural Officer dated 26th April 1972 shows that investigations were conducted and established the people who were in possession by owning tress on the suit property as at that date and the compensation that was made thereof before the Plaintiff purchased the property on 14th July 1972 has convinced me that the Plaintiff bought the suit property after having paid the people who claimed to have had an interest in the suit property by virtue of having grown cashew-nuts and other crops on the land.
 63. That position is fortified by the testimony of DW4 who informed the court his grandfather, who happens to be on the list of the people who were compensated for the trees that were on the suit property, moved to another area called Matsangoni with the entire family.
 64. DW1 also confirmed that his father who died in the year 2011 was on the list of the people who were compensated in 1972. DW1 was only 3 years old in 1972 when his father was paid off for the cashewnuts that he had on the suit property and he never complained. Indeed, the father of DW1 was buried on parcel of land number 226 and not on the suit property. DW1, who is the 1st Defendant, did not call his mother who is still alive to testify on what actually happened before and after 1972.
 65. Although DW3 is aged 85 years, he is not amongst the people who were identified by the Agricultural Officer in 1972 as having planted cashewnuts or any other tree on the suit property. His evidence that he has been using the suit property since time immemorial cannot therefore be true in view of the said report.
 66. DW3 also informed the court that they used to have houses on the suit property before the Government moved them. This assertion was confirmed by DW2 who stated that they were moved from the suit property in 1970 by the Government. The witnesses did not state the circumstances under which they were moved out of the suit property and where they settled after they were moved.
 67. The only conclusion I can arrive at as to why the Defendants' parents were moved from the suit property by the Government in 1970 or thereabout are because they were squatting on land which never belonged to them in the first place. The suit property was private property and the same was not available for allocation.
 68. The repealed Constitution and the current Constitution recognises the rights of every person to own property in any part of the country. The right to own property can only be defeated if a party shows that a person has acquired the property unlawfully (**see article 40 (6) of the Constitution**). In the case of **JAJ Super Power Cash & Carry Ltd Vs Nairobi City Council & 2 others, Civil Appeal NO. 111 of 2002**, the Court of Appeal held as follows:

“It would be a violent affront to our land tenure systems, with all their perceived imperfections, unless there is a lawful challenge to an existing title or policy change by Parliament to uphold the right of a temporary allottee of land or a trespasser over those of registered proprietor.”
 69. The Defendants have not proved on a balance of probability that the title that was produced as Plaintiff exhibit number 1 was unlawfully issued to the Plaintiff.
 70. The Defendants have raised the defence of adverse possession pursuant to the provisions of section 7 as read together with Sections 13 and 38 of the Limitation of Actions Act.
 71. For one to succeed in a claim of adverse possession, the land must have been in possession of the Plaintiff or his predecessor in the first place. As was held by the Court of Appeal in the case of **Wambugu Vs Njuguna (1983) KLR 173**, it is not enough for the Defendants to show that they have been in possession of the suit property for more than 12 years. The **Halsbury's Laws of England, 4th Edition, Vol. 28, paragraph 768** states that time for the purpose of a claim of adverse possession begins to run when the true owner ceases to be in possession of his land.
 72. The Defendants stated in their evidence that the Plaintiff or his predecessor in title has never taken possession of the suit property. It follows therefore that the Plaintiff or his predecessor in title

- could therefore not have been dispossessed of the land or discontinued his possession.
73. In any event, the Plaintiff produced evidence to show that the people who were in actual possession of the suit property in 1972 were compensated and they stopped harvesting the cashewnuts. DW2 and DW4 stated that although they used to occupy the land, they were moved by the Government in 1970. This was an interruption of the Defendants' and their parents' possession of the suit property. No evidence was placed before the court to show that the Defendants or their parents re-entered the land after they were removed or paid off by the Plaintiff.
74. The court visited the suit property. Although the 1st Defendant has a semi-permanent house, which he has rented out to the 4th Defendant, he does not live in the house. In fact, the 1st Defendant acknowledged that he lives in a different property all together. His mother lives on plot number 226, the same plot that his father was buried.
75. While on the suit property, I was informed that although the 3rd Defendant initially had a house on the suit property, he demolished it and his whereabouts are not known. This position was confirmed by the evidence of DW 1. The 2nd and 4th defendants never testified in this court and their claim over the suit property is therefore not ascertainable. In fact, DW1 stated that the 4th Defendant was his tenant.
76. As I have already stated, the Defendants have not proved that they have been in continuous uninterrupted occupation of the suit property for 12 years and cannot therefore succeed in a claim of adverse possession. The Defendants have also not shown that they had the *animus possidendi* to acquire the suit property by way of adverse possession or that they were in actual possession of the property for more than 12 years. As was stated by the Court of Appeal in **John O. Oyalo Wabala Vs Corne Lius Otataya Okumu, Civil Appeal No. 208 of 1997, to be able to acquire a title to land registered in the name of another person, one has to be literally in occupation of the land, and the mere fact that crop is present on the land may not necessarily mean that the grower of such crops is asserting a claim of ownership to the land. The occupation must be *nec vic neclam nec precario*.**
77. From the evidence before me, I am convinced that the 1st and 2nd Defendants only put up their structures on the suit property on or about the year 2010 before the Plaintiff took the dispute to the District Officer. The 4th Defendant is a tenant of the 1st Defendant and the 3rd Defendant is no longer on the suit property and even if he was, he only put up his structure also in the year 2010.
78. The Defendants having failed to prove that they are entitled to the suit property by way of adverse possession can only be said to be trespassers, which has been defined to be **any unjustifiable intrusion by one person upon land in the possession of another**. The Plaintiff is the proprietor of the suit property and he has been in possession of the same since 1972. The Plaintiff has neither been dispossessed of the land nor discontinued his possession for a period of more than twelve (12) years.
79. In the circumstance, and for the reasons I have given above, I allow the Plaintiff's claim in the following terms:-

(a) A declaration be and is hereby issued that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit property.

(b) A declaration be and is hereby issued that the Defendants, whether by themselves or their servants or agents or otherwise howsoever, are wrongfully in occupation of the suit property.

(c) A permanent injunction be and is hereby issued restraining the Defendants, whether by themselves or their servants or agents or otherwise howsoever from remaining on or continuing remaining on the suit property.

(d) The Defendants to give vacant possession of the property.

(e) The Defendants to pay the costs of the suit.

O. A. Angote

Judge