REPUBLIC OF KENYA

IN ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 19 OF 2013

(Consolidated with HCCC NO. 8 of 2009)

MOMBASA AUTOCARE LTD.....PLAINTIFF

=VERSUS=

JAPHET PASI KILONGA.....1ST DEFENDANT

ONESMUS MBOGO KIMERA.....2ND DEFENDANT

IN HCCC NO. 8 OF 2009

MOMBASA AUTOCARE LTD.....PLAINTIFF

=VERSUS=

JUMA KIPANGA.....1ST DEFENDANT

SHARRIF KIPANGA.....2ND DEFENDANT

NDAHE NDAZE.....3RD DEFENDANT

MZEE MWANGONDE.....4TH DEFENDANT

ZOMOLO WANJE.....5TH DEFENDANT

NZAI KAZUNGU MBUZI.....6TH DEFENDANT

MAJANI RAJABU.....7TH DEFENDANT

MZEE MDARIS.....8TH DEFENDANT

JUDGMENT

Introduction

1. This matter was consolidated with HCCC No. 8 of 2009. The common denominator in both matters is

the Plaintiff and the suit property. However, the Defendants are different in the two matters.

H.C.C.C. No. 8 of 2009

2. In HCCC NO. 8 of 2009, the Plaintiff sued eight Defendants. In the Plaint, the Plaintiff averred that it is the beneficial and legal owner of the land known as portion number 123 Mtangani within Malindi (the suit property) having purchased it vide an indenture dated 29th September, 2008.

3. According to the Plaintiff's averment, the eight Defendants have trespassed onto the suit property and destroyed the fence surrounding the suit property and that the said trespass has caused the Plaintiff irreparable loss, harm and damage.

4. The Plaintiff's claim is for a permanent order of injunction restraining the Defendants from trespassing into the suit property.

5. The Defendants filed their Defence and Counter claim and averred that the Plaintiff is not the legal owner of portion number 123 Malindi; that they have always lived and worked in the suit property with their families for over sixty (60) years until in 1989 when somebody purporting to be the owner of the land forced them out of the land for a period of four years. Consequently, it is was deponed, they have acquired a title over the suit property by adverse possession.

6. In the Counter claim, the Defendants have deponed that they are entitled to their portions of land by way of adverse possession. The Defendants have also prayed for an order of permanent injunction against the Plaintiff.

H.C.C.C. No. 19 of 2013

7. The Plaintiff's claim against the Defendant's in HCCC NO. 19 of 2013, which is the lead file, is the same as in HCCC No. 8 of 2009, save that the two Defendants in HCCC No. 19 of 2013 are said to have encroached on the suit property in the year 2012.

8. The Plaintiff averred in the Plaint that the two Defendants went ahead and put up shanties all over the Plaintiff's parcel of land and started felling indigenous trees on the land thus making it impossible for the Plaintiff to carry out its activities effectively. In the suit, the Plaintiff is seeking for a permanent injunction and for an eviction order.

9. The firm of Omagwa Angima & Co. Advocates entered appearance for both Defendants. However it is the firm of Richard O. & Co. Advocates which filed a Defence on behalf of the 2nd Defendant while the firm of Omagwa Angima & Advocates filed a Defence on behalf of the 1st Defendant.

10. The Defendants averred that although they are not the registered proprietor of the suit property, by dint of there long history of possession of the land, they have acquired title to the land by adverse possession.

The Plaintiff's case:

11. This matter proceeded for hearing on 3rd March, 2014. On that day, the Plaintiff's director, Pw1, informed the court that the Plaintiff had authorized him to represent it in the proceedings. The resolution by the two Directors of the Plaintiff was produced by Pw1 as PEXB1.

12. It was the evidence of Pw1 that the Plaintiff is the registered owner of Plot Number 123 Malindi having purchased it from Mohamed Saif, Ahmed Ali and Salim Mustafa. Pw1 produced the original Indenture dated 29th September, 1987 as PEXB2 and the Indenture showing the transfer of the suit property to the Plaintiff dated 29th September 2008 as PEXB3. The witness also produced the Indenture dated 9th July 1979 which shows the previous owners of the suit property.

13. It was the evidence of Pw1 that before the Plaintiff bought the suit property measuring 96 acres, he visited the property and saw six families at one of the corners of the land measuring three (3) acres. The said families were introduced to Pw1. Pw 1 stated that the Plaintiff agreed to allow the six families to continue occupying the three acres and to have the three acres surveyed and registered in their names.

14. Pw1 informed the court that the six families entered into written agreements with the Plaintiff. The Agreements were produced by Pw1 as PEXB 6 A, B, C, D, E and F.

15. It was the evidence of Pw1 that after agreeing with the six families who were already occupying part of the suit property, they started fencing the suit property using concrete pillars in November, 2008 and completed the fencing in December, 2008. The Plaintiff also fenced for the six families the three acres that they had been allowed to occupy. It was the evidence of Pw1 that while fencing the suit property, there was no resistance from anybody until February, 2009 when the whole fence was brought down.

16. Pw1 stated that Onesmus Mbogo Kimera, who is a Defendant in this suit is from the family of Japheth Kimera who was settled in the three acres.

17. It was the evidence of Pw1 that by the time the Plaintiff purchased the suit property, the previous owner had sub-divided it in the year 2000 into 117 portions. The witness produced the approved deed plans for all the sub-division numbers 123/1 -123/117 as PEXB 8 and the sub-division scheme as PEXB 9.

18. When the fence was brought down, Pw1 stated that he reported the incident to the police and the Defendants in HCCC No. 8 of 2009 were arrested.

19. According to Pw1, after the fence was brought down, the Plaintiff was unable to carry out any further development because the Defendants and other people in the neighbourhood would whistle and threaten them with violence. It was his evidence that other than the occupation of the three acres by the six families, there was nobody else living on the land and that every time the Defendants attempted to put structures on the land, Pw 1 would report to the police.

20. It was the evidence of Pw1 that they cannot put up the rental houses that they had intended to do because of the threats from the Defendants.

21. Pw1 produced in evidence certificates of postal searches for the suit property as PEXB 10 A, B and C. It was the evidence of Pw1 that the Defendants have not taken possession of the suit property for a period of twelve years as claimed and that the Plaintiff was still willing to release the three acres that it had already agreed to release to the occupants and that the criminal case against some of the Defendants for forceful detainer is still going on.

22. Pw1 finally produced in evidence the initial title document and deed plan of the suit property before it was sub-divided in the year 2000 as PEXB 11 and 12 respectively.

23.In cross-examination, Pw1 stated that the company's resolution does not authorize him to commence the suit in the name of the company and that there are two signatures on the Indenture that was produced as PEXB2. It was the evidence of Pw1 that the Indenture was executed by the vendor.

24. As for the Indenture that was produced as PEXB3, Pw1 stated that the same was executed by the Plaintiff and the vendor’s Attorney. The vendor’s Attorney’s signature was witnessed by K.C Kinyanjui and while the Plaintiff’s directors’ signed the Indenture for the company.

25. On the issue of the power of attorney that was produced as PXB4, Pw1 stated that the same was signed in a language different from English. It was the evidence of Pw1 that the Plaintiff's signature in the agreements that were produced as PEXB 7 B, 7 and 7 c was not witnessed but the signatures of the families that were staying on part of the suit property were duly witnessed by Mr. Aziz.

26. In further cross-examination, Pw1 stated the vendors do not stay in Kenya and that before he purchased the suit property, he inspected it while in the company of the Chief of the area. Pw1 was then shown the boundaries of the land and the 117 sub-divisions. Pw1 also saw the houses of the six families whom they allowed to stay on the three acres that they were already occupying.

27. Pw1 denied that the said six families were using the remaining portions of the suit property for cultivation and that each family was using half an acre of the three acres.

28. It was the evidence of Pw 1 that the suit property has had a title document since 1916; that he was not aware of the evictions that had been done in 1989 and that the agreements were signed by the six families in Mombasa.

The Defendants' case:

29. When the two matters came up for hearing on 3rd April, 2014, the Defence was not ready although the date had been taken by consent. The matter was adjourned to the following day. On the following day, the Defendants' advocates were not in court. Instead, they sent a counsel to hold their brief counsel informed the court that the Defendants' advocates were before the Court of Appeal in Mombasa. The court declined to adjourn the matter because the date had been taken by consent and there was no evidence that both counsels were before the court of Appeal on that day. The court proceeded to close the Defence case and directed parties to file written submissions.

Submissions

30. The Plaintiff's advocates filed their submissions on 17th April 2014.

31. The Plaintiff's advocate submitted that the Plaintiff is the registered owner of the suit property which he fenced off. It was the Plaintiff's advocate's submissions that Pw1 pointed out to the court while at the site the concrete fence that was damaged.

32. Counsel submitted that when Pw1 visited the property in 2008, he found six families in one part of the suit property and they entered into agreements to allow them stay on the three acres. However, it was submitted, some of the families who were settled on the three acres and other people have made attempts to encroach upon the Plaintiff's property. Counsel submitted that Pasi Japheth confirmed this position when the court visited the site.

33. Counsel submitted that when the court visited the site, the Defendants were putting up new structures; that although the Defendants have averred in their Defence that they were evicted in 1989, they chose not to go to court for a claim of adverse possession.

34. Counsel relied on the provisions of Article 40 of the Constitution and section 59 of the Registration of Titles Act and submitted that this court should protect the right of the Plaintiff to own property. Counsel submitted that the Defendants did not prove that the Plaintiff's title was procured fraudulently.

35. The Plaintiff's counsel submitted that an adverse possessor in law is different from an invader and that an adverse possessor does not go about damaging fences set up by a known owner.

36. Counsel finally submitted that there is not proof as to when the Defendant's entered the suit property. Counsel relied on the cases of **Mpungu & Sons Transporters Ltd. -vs- Ag. & Another, (2006) EA 212**; **Malindi Hccc. No. 144 of 2011 and Vijay Morjaria -vs- Nansing Madhusing Darbar, Hulashib Nansingh Darbar.**

37. The Defendant's advocates did not file their submissions.

Analysis and findings

38. It is not in dispute that the Plaintiff is the registered proprietor of land known as portion number 123 Malindi measuring 96.01 acres. Certificates of postal searches were produced in evidence by Pw1 as PEXB 10 (a), (b) and (c).

39. According to the Indenture dated 29th September 2008, the Plaintiff purchased the suit property from Mohamed Said Humaid Alkhaled, Ahmed Ali M. Yahya Barhji and Al-Salem Said Moustafa Mohamed El-Sherbini for US$300,000 (approximately Kshs. 25,500,000). The said Indenture referred to an earlier Indenture dated 29th September, 1987 which was also produced in evidence as PEXB2.

40. The Indenture transferring the suit property to the Plaintiff was registered on 31st October 2008 in the Land Registry Mombasa.

41. The Plaintiff also produced in evidence the original title in respect of the suit property. That title was issued on 30th March 1916 pursuant to the provisions of the Land Titles Act (repealed) to Amur bin Suleiman. A deed Plan number 4851 for portion number 123 was also produced in evidence as PEXB11.

42. It is common knowledge that under the repealed Land Titles Act, the transfer of titles used to be done by way of Indentures. The Indenture would be registered in the register held by the Recorder of Titles at Mombasa without noting the same on the title document, as would happen for the titles issued under the Registration of Titles Act.

43. It is only the register held by the Recorder of Titles that would show the transfers that would have been effected on a property from when the title was first issued to when the last Indenture was registered. The Certificate of Postal search issued by the Recorder of Titles would show the person who was the registered proprietor of such land on a particular date.

44. Upon sub-division of land registered under the repealed Land Titles Act, the Deed Plans for the respective sub-divisions duly issued by the Director of Surveys would be registered by the Recorder of Titles in the register. Any subsequent transfer of the sub-division would be done by way of an Indenture accompanied by a copy of the deed plan.

45. Pw1 informed the court that before the Plaintiff purchased the suit property from the last registered proprietors, they went around the suit property in the company of the area Chief. It was his evidence that the whole land measuring 96.01 acres was vacant except a portion of three (3) acres, which was at the corner of the suit property, that was occupied by six families. Pw1 produced in evidence the agreements that the Plaintiff entered into with the six families allowing them to continue occupying the three acres as PEXB7 (a) – (f).

46. PEXB 7a -f are ***"agreements of compensation ex gratia"*** dated 4th December, 2008 which were entered into between the Plaintiff on the one part and Francis Katana Salim, Sulubu Dzombo Mwatsie, Japhet Kimera Thura, Emily Albert Charo, Albert Changawa Kirao and Daniel Kaingu Changawa respectively on the other part.

47. In the agreements, the Plaintiff agreed to curve out the three acres which the six families were already occupying. The three acres were designated in a Deed Plan number 235047 issued by the Directors of Surveys on 15th May 2001 and was attached on all the six agreements.

48. In the agreements, it was agreed that the three acres which were represented in Deed Plan number 235047 was an *ex-gratia* compensation. The said six families agreed not to obstruct the Plaintiff from undertaking any development on the remainder of the suit property as he pleases.

49. All the six agreements were signed by the people who were occupying the three acres before Muzna M.Y. Jin Advocate. Mr. Mohamed Abdul Aziz, the area councilor by then also signed the six agreements.

50. Pw1 informed the court that the Plaintiff put up a fence around the whole suit property between

November 2008 and December 2009. However, the fence was brought down in February, 2009.

51. When the court visited the site on 3rd April, 2014, it observed that indeed the whole property, except the three acres that had mud walled houses, had been fenced using concrete pillars. All the pillars were missing except the "stumps" which remained in the ground and were visible.

52. At the site, the court observed that two of the houses that were initially within the three acres that had been curved out of the suit property had been extended by a few metres (less than five metres) into the suit property.

53. Other than those two houses that were slightly beyond the boundaries of the three acres, the court identified three other structures in the middle of the suit property. The construction of one of the houses which is permanent in nature was going on. The house was said to belong to Japhet Pasi Kilonga, the 1st Defendant in this suit, who was also present during the site visit. Consequently, the owner, who is the 1st Defendant in this suit, cannot be said to have been in occupation of that house for over twelve (12) years or at all.

54. The court also saw two mud walled structures with iron sheets in the middle of the suit property. The iron sheets looked new and there was no indication that the two houses were occupied at all. They both seemed to have been constructed recently and were yet to be occupied.

55. Upon visiting the site, the court concluded that none of the Defendants, or anybody else, was in actual occupation of the suit property except the people who had constructed their houses on the three acres that was curved out of the suit property. It was not possible for the court to ascertain how long the people who were occupying the three acres had stayed there during the site visit. However, the Plaintiff having agreed with those families that they could own the three acres, it was not relevant for this court to establish if indeed the occupants of the three acres have been there for over twelve years.

56. What is relevant however is whether the Defendants can lay a claim over the suit property on the basis that they have possessed it for over twelve years peacefully, continuously, exclusively and with the intention of dispossessing the title holder of the same.

57. Section 38 (1) of the Limitation of Actions Act provides as follows:-

> **"Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land."**

58. On the other hand, Section 13(1) of the Act provides as follows:

> **"A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under section 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of that land."**

59. The simple reading of those two sections of the Act means that if the person in adverse possession (a squatter) continues to occupy land, and the owner does not exercise his right to recover it by the end of twelve years, the owner's remedy as well as his title to the land is extinguished and the squatter becomes the owner.

60. As was held by the House of Lords in **JA Pye (Oxford) Ltd Vs Graham (2000) Ch 676**, two elements are required of the acts needed for possession for one to prove that he is entitled by adverse

possession to land that is registered in another person's name. Firstly, one has to prove that he has taken a sufficient degree of physical custody and control (actual possession) of the land in question and secondly, one has to show that he had intentions to exercise such custody and control for his own benefit (intention to possess/*animus possidendi*). These two elements must be proved by the claimant because the law presumes that the title holder of land is always in possession of his land.

61. In the case of **Powell -Vs- Mc Farlane, (1977) 38 P & CR 452,** Slade L.J at page 470 held as follows:

> **"Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time."**

62. Possession is therefore a question of fact, hinging on all circumstances, especially the nature of the land and the manner in which it is usually enjoyed.

63. It has been held by courts that possession varies with the type of land in question. Enclosure is the strongest possible evidence of adverse possession, but is not necessarily conclusive (see **George Wimpey & Co**. **Ltd. -vs- Sohn (1967) Ch 487**.)

64. Trivial acts have been held not to be sufficient for one to proof factual possession , since exclusive control is essential to establish adverse possession and also because of the presumption that that the owner of land remains in possession of the land at all times. This fact was clearly stated in the *Pye* case (*supra*) as follows:

> **"If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude as best as he can, the court will treat him as not having had the requisite *animus possidendi* and consequently as not having dispossessed the owner."**

65. The seasonal and occasional cultivation of land by a squatter on the land in the absence of the true owner, in my view, cannot amount to dispossessing the true owner of his land or discontinuing his possession if such cultivation is not done on full scale, consistently and continuously with the express intention that the person cultivating the land intends to dispossess the true owner of his land. The intention must be manifested intentionally and unequivocally so that it is clear that the squatter is not just a persistent trespasser who disappears every time the true owner shows up.

66. Whether an act is equivocal or unequivocal depends on the circumstances of the case. S. Nield, the author of **Hong Kong Land Law (Longman, 2nd ed, 1998)** at page169 observes as follows:-

> **"But such acts as fencing, the building of permanent structures, or full scale farming or cultivation of the land by way of ploughing and harvesting are more likely to be regarded as unequivocal than grazing, the harvesting of natural produce of the land, or the erection of temporary structures."**

67. Closer home, the Court of Appeal in the case of **John O. Oyalo Wabala -vs- Corne Lius Otataya Okume Civil Appeal No. 208 of 1997** held that 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.

68. The elements that I have enumerated above for one to prove that he has acquired land by adverse possession are pertinent considering the anguish that the true owner of land has to go through if he loses his land to a squatter due to the lapse of time. Unless the true owner has adequate notice of the likelihood of losing his land to a squatter, it would be unjust and an outright case unjust enrichment to order that

such land should be registered in the name of a person who claims to have been entitled to such land by way of adverse possession. That would be draconian to the owner and a windfall for the squatter.

69. It is for that reason that the person claiming to have acquired land by way of adverse possession has the burden of proving that he has been in occupation of the land openly, continuously and exclusively with the clear intention of dispossessing the true owner of the land.

70. The eight Defendants in HCC No. 8 of 2009 which was consolidated with this matter pleaded in their joint Defence that having lived on the suit property for over sixty (60) years, during which time, no one, including the Plaintiff, claimed the land except in 1989 when the then proprietor of the land forced them out for a period of four years then disappeared.

71. The Defendants have not stated why they never went to court to claim the land for adverse possession when the true owner evicted them in 1989, as alleged in the Defence. It is not clear from the Defence when the Defendants made a re-entry, if at all, on the suit property after they were evicted in 1989.

72. In the case of **Mbira -Vs- Gachuhi (2002) I E.A. 137 Kuloba J**, as he was then, held as follows:-

> **"The fact that nothing has been done to improve or work on a piece of land or a portion of it is not in itself evidence that a person has abandoned possession of it. A person does not necessarily discontinue possession of it merely because he does not use his land, either by himself or by some person claiming through him…… So one must show the mode of repudiation, the knowledge of the true owner of the assertion of the adverse claim, the date and mode in which the adverse claim was brought to the knowledge of the true owner."**

73. I am in agreement with the holding in the above case. The fact that the Plaintiff's predecessor went away in 1989 after evicting the Defendants thus allowing the Defendants to make a re-entry after four years as claimed cannot in itself amount to a claim of adverse possession if the Defendants do not prove that they indeed took factual possession of the suit property after the alleged re-entry and that the true owner of the land is aware of the re-entry. Such evidence was not placed before this court neither was that fact pleaded in the two Defences.

74. When the court visited the suit property, the assertion that the Defendants or anybody else has been in possession of the suit property, except the three acres, was not visible at all. The court did not see anything to show that the Defendants or anybody else has been literally in possession of the 96.01 acres piece of land.

75. The Defendant's intermittent acts of trespass on the suit property and the demolition of the Plaintiff's fence, which was apparent during the site visit, in his absence, can only amount to the tort of trespass and malicious damage to property.

76. The court, while at the site, observed that none of the Defendants had taken a sufficient degree of physical custody and control of the suit property openly for a period of over 12 years. Indeed, none of the Defendants had a house that he was occupying on the suit property with the exception of the six families that were occupying three (3) acres or crops that were under cultivation on the suit property.

77. In any event, even if it was shown that the Defendants were entitled to the suit property by way of adverse possession as claimed, the question that would arise is this: which Defendant or family was entitled to which part of the 96.01 acres considering that the Defendants are not literally on the land? Can a court grant a blanket order in terms of acquisition of land by adverse possession to individuals who have not even stated in their respective Defences the portions of land that each one of them is claiming? Such a claim, in my view, cannot succeed. It is not for the court to apportion land to claimants who have not pleaded how and why the apportionment should be done amongst them.

78. In the circumstances, and for the reasons I have given above, I find that the Plaintiff has proved its case on a balance of probabilities. On the other hand, the Defendants have not proved that they are

entitled to the suit property by continuously and exclusively occupying it in a way that is inconsistent with the right of the Plaintiff or its predecessors for a period of over 12 years.

79. The Plaintiff's claim in this matter, that is H.C.C.C No. 19 of 2013 and in H.C.C.C. No. 8 of 2009 is hereby allowed as against the Defendants in the following terms:

a. A mandatory injunction be, and is hereby issued compelling the Defendants by themselves, servants or agents to demolish and remove all the illegal construction within the Plaintiff's parcel of land number 123, Malindi or the subdivisions thereof <u>except</u> the structures situated on the three (3) acres delineated and described in Deed Plan number 235047 dated 15th May, 2001 being portion number 123/67.

b. The Defendants, their agents, servants or employees or anybody acting through them to be evicted from and give vacant possession of parcel of land number 123, Malindi or the subdivisions thereof <u>except</u> the Defendants or persons occupying the three (3) acres delineated and described in Deed Plan number 235047 dated 15th May, 2001 being portion number 123/67.

c. A permanent injunction be, and is hereby issued restraining the Defendants, their agents, servants or employees or anybody acting through them from interfering, destroying or meddling in any manner whatsoever with the Plaintiff's parcel of land number 123 Malindi, or the subdivisions thereof or denying the Plaintiff's servants or employees access onto the suit property <u>except</u> the three (3) acres delineated and described in Deed Plan number 235047 dated 15th May, 2001 being portion number 123/67.

d. The O.C.P.D, Malindi, or his nominee to enforce the above orders.

e. The Defendants to pay to the Plaintiff the costs of the two suits.

f. The Defendants' Counterclaim in H.C.C.C No. 8 of 2009 is hereby dismissed with costs.

Dated and delivered in Malindi this **25th** day of **July,** 2014.

O. A. Angote

<u>Judge</u>