



IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 51 OF 2009

ABDUL NASSIR SALIM NAAMAN.....PLAINTIFF

=VERSUS=

KASSIM MAONA.....DEFENDANT

J U D G M E N T

Introduction:

1. The Plaintiff in this matter is seeking for an eviction order to issue against the Defendant from plot subdivision number 4098, CR 29412/16 (Original number 3241/53 Section III MN) (the suit property).
2. The basis of the Plaintiff's claim is that he is the registered owner of the suit property and that on or about 1998, the Defendant entered on the suit property and put up a temporary makuti house structure on the plot.
3. The Defendant filed a Defence and Counter claim in which he stated that he has been living on the suit property with his family since 1950s's to date and consequently he has acquired rights over the suit property by way of adverse possession.

The Plaintiff's case:

4. The Plaintiff, PW1, informed the court that he acquireired the suit property from his mother, Moza Tobana. It was the evidence of PW1 that the Defendant used to live at Kenol in Mtwapa, Kilifi before he moved on the suit property in 1998. By this time, the land had not been subdivided.
5. It was the evidence of PW1 that he told the Defendant to move out of the suit property in the year 2004 but he refused even after being summoned by the District Officer.
6. PW1 stated that he obtained the title document in respect to the suit property in the year 2004 and that when he tried to sell the property, the Defendant chased him away.
7. According to PW1, he came across an agreement between the Defendant and a Mr. Shomari in respect to the suit property for Kshs.50,000 and that neither his mother nor himself know the said person.
8. The Plaintiff denied the Defendant's assertion that he has been staying on the suit property since the 1950's and that the trees which are on the suit property were planted by his mother.
9. In cross-examination, the Plaintiff stated that he was not aware if the Defendant made any payments for the plot to his mother.
10. PW2, the caretaker, informed the court that he is the one who was taking care of the suit property; that the Defendant started putting up his house on the suit property in 1998 and other houses for his children and that by the time the Defendant was putting up the said houses, there were coconut

- and mango trees on the land.
11. It was the evidence of PW2 that when he went to the suit land with a surveyor in the year 2007, the Defendant's son chased them away and threatened to harm them with a panga.
 12. PW2 informed the court that more structures have been built on the suit land at the behest of the Defendant.

The Defendant's case:

13. According to the Defendant, he entered the suit property in 1950 by which time the whole place was bushy and unoccupied. It was his evidence that the suit property was given to him on purchase. It was the evidence of PW1 that he was required to pay Kshs.100,000 for 2 acres to the Plaintiff's mother, who is now deceased.
14. According to DW1, she was required to pay the purchase price by installments which he did in an office in Mtwapa town. It was his evidence that the Plaintiff's mother then allowed him to occupy the suit property. DW1 produced copies of the receipts showing the payments he made as DEXB 1(i) – (xv). The Defendant also produced a copy of the search as DEXB2.
15. DW1 informed the court that he is the one who planted the coconut trees on the land and that he only bought 2 acres and not the whole land.
16. According to DW1, the children of Ms Moza only appeared on site to fix the beacons after their mother died and that although the said children of Ms Moza were summoned by the chief, they refused to appear before him.
17. In cross-examination, the Defendant stated that he was born in 1943 and that he had a house at Kenol in Mtwapa. The Defendant apologized for stating that he went to the suit property in 1950 and stated that he actually entered the suit property in 1980.
18. DW1 stated that he is only interested in the two acres although there are other people occupying the suit property.

Submissions:

19. The Plaintiff's advocate submitted that the Plaintiff has proved that he is the registered proprietor of the suit property. Counsel submitted that the Defendant entered the suit property in the year 1998 and that the Defendant paid money to someone that has never owned the suit property.
20. The Plaintiff's counsel submitted that the Defendant has proved that he is entitled to the suit property and that by the time the counterclaim was filed, the Plaintiff had only been registered as the proprietor of the suit property for six (6) years.
21. The Defendant's counsel submitted that the Defendant entered the suit property in 1950's; that he purchased the land for a sum of Kshs.100,000 after entering into a verbal agreement with Ms Moza and that he has proved his case.

Analysis and findings:

22. The Plaintiff in this matter informed the court that he is the registered proprietor of sub-division number 4098 (original number 3241/53) Section III Mainland North. The Plaintiff produced in evidence the certificate of title showing that the suit property was registered in his favour on 18th May 2004.
23. The Plaintiff's case is that the Defendant invaded the suit property in 1998. On the other hand, the Defendant seems not to be sure when he entered the suit property. In his Defence, the Defendant has stated that he entered the suit property with his family in the 1950's.
24. However, when he was told during cross-examination that he was only 7 years old in 1950, he changed his story and stated that he entered the suit property in 1980. No further evidence was called to show that indeed the Defendant has occupied the suit property for a continuous period of 12 years exclusively and peacefully.
25. At some point, the Defendant abandoned his claim of adverse possession and stated that he purchased the suit property from the Plaintiff's mother.
26. Several receipts were produced by the Defendant which were issued between 1986 until 1991. Although most of the receipts whose amounts varied between Kshs.500 to 2,000 indicated parcel

- number 539/III/MN, the said receipts do not show what the payment was for.
27. One cannot be sure if the receipts that were issued by Mtwapa Properties Ltd were for the ground rent or for the purchase of the suit property. It is not clear as to whether Mtwapa Properties Ltd was ever contracted by the Plaintiff's late mother to collect any money from the Defendant on her behalf.
28. The circumstances of this case and the evidence before me does not support the Defendant's case that he purchased the suit property or that he has acquired the suit property by way of adverse possession.
29. However, the Plaintiff has proved that being the registered proprietor of the suit property, he is entitled to it.
30. For those reasons, I dismiss the Defendant's Counterclaim dated 12th July 2010 and allow the Plaintiff's Plaint dated 14th May 2009 in the following terms:

(a) An eviction order be and is hereby issued against the Defendant, his agents, heirs or workers or anybody authorized by him from plot subdivision number 4098, CR No. 29412/16 (original number 3141/53) Section III Mainland North.

(b) A permanent injunction be and is hereby issued restraining the Defendant by himself, or his agents, servants, heirs or employees or otherwise whoever from continuing to intimidate or harass the Plaintiff or his workers or purchasers.

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

Dated and delivered in Malindi this 31st day of **October**, 2014.

O. A. Angote

Judge