



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MOMBASA ELC CASE NO. 145 OF 2012

MWANAISHA NING'ANZI.....PLAINTIFF

VERSUS

DADSON MUGWE WERU..... DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by way of originating summons dated **25th July, 2012** claiming to have acquired **2.0 hectares** of **Land L.R. No. KWALE/DIANI SETTLEMENT SCHEME/330** by Adverse possession. The originating summons is supported by the affidavit of the Plaintiff sworn on **25th July, 2012** in which the Plaintiff avers inter alia, that she has occupied and/or stayed in the suit land for **over 12 years** without the permissions and/or consent or authority from the Defendant herein who is the registered owner of the said land. The Plaintiff avers that she is over **seventy (70) years old** and has been in occupation of the suit land since the year **1972** and that her occupation has been continuous, open, adequate and uninterrupted and adverse to the title of the Defendant. The Plaintiff has annexed copies of the title deed in the Defendant's name and some correspondences.

2. The Defendant filed a Replying Affidavit sworn on **20th September, 2012** and a supplementary Affidavit dated **23rd October, 2012** denying the Plaintiff's claim. The Defendant admitted being the registered owner of the parcel of land comprised in **Title Number KWALE/DIANI/330**. The Defendant avers that he purchased the said land in **August, 1979** from one John Irungu Kigathi who was the initial allottee in respect of the suit property in **April, 1978**, and that at the time of purchase, the property was vacant and was not occupied by the Plaintiff as alleged. The Defendant further states that when he purchased the suit property, the Plaintiff did, and still does occupy the parcel of land comprised in Title Number **KWALE/DIANI/333** registered in the name of Plaintiff's son one Iddi Mwazimbo Yanga which is adjacent to and abuts the suit property. That accordingly, the Plaintiff is the Defendant's neighbour.

3. It is the Defendant's case that when he purchased the suit property, the same was bushy and that he cleared the same, fenced it and planted fruit trees such as mangoes, cashenuts, coconut, avocados, bananas and pawpaws. The Defendant states that the Plaintiff has never been in occupation of the suit property. He however, states that in **1992/1993**, the Plaintiff's son violently invaded the suit property and chased away the Defendant's caretaker, one Peter Wahome by taking advantage of the infamous ethnic clashes in the build-up to the General Election of that year. The Defendant avers that in **1996**, he sought and obtained eviction orders against the said Plaintiff's son and had him evicted and his makuti structure demolished sometime in the year **2001** through the court Bailiff from Mombasa Law Courts, with the assistance of the police from Diani. The Defendant added that he regained possession of the suit property in **2001**.

4. The Defendant further states that in **February, 2002**, the Plaintiff's son reinvaded the suit property, chased away the Defendant's employees and threatened them with death if they returned to the property. That the Plaintiff's son then proceeded to erect yet another semi-permanent structure which he leased out to tenants. That being aggrieved, the Defendant filed a case with Msambweni Land Disputes Tribunal who after hearing the Defendant and the Plaintiff's son delivered **Judgment in 2009** in favour

of the Defendant. A copy of the Judgment dated **25th August, 2009** together with the decree dated **16th September, 2009** from the Principal Magistrate's Court at Kwale have been exhibited. That although the Plaintiff's son challenged the said Judgment vide Judicial Review Proceedings in the High Court at Mombasa Miscellaneous **Application No. 487 of 2009**, the said application was dismissed on **12th March, 2012**. A copy of the said Judgment has also been annexed. It is the Defendant's contention that the present suit is misconceived and ill-advised and is yet another attempt by the Plaintiff's son through the Plaintiff to deny or delay the Defendant's enjoyment of his proprietary rights and privileges attached to the suit property. It is the Defendant's case that the suit herein is devoid of merit and urged the court to dismiss it with costs.

5. The Defendant also filed a counter-claim dated **18th March, 2014**, seeking a declaration that he is the lawfully registered owner of the suit land, Title **Number KWALE/DIANI/330**, permanent injunction against the Plaintiff and her son and an order directing them pay mesne profits as well as costs.

6. The Plaintiff and her son did not attend court during the hearing despite having been duly served and for that reason, the Plaintiff's case was dismissed for non-attendance on **5th February, 2020**. The matter proceeded for hearing of the counter-claim when the Defendant, Dadson Mugwe Weru testified. He adopted the averments in his Replying Affidavit and supplementary Affidavit together with the annexures. He urged the court to grant him the orders sought in the counter-claim.

7. I have considered the pleadings and the evidence adduced. The central issue for determination is whether the Defendant has proved and that he is entitled to the orders sought in the counter-claim. In this case, it is not disputed that the suit property is registered in the Defendant's name. There is a title deed on record confirming that **Title Number KWALE/DIANI/330** is in the name of Dadson Mugwe Weru and the same was issued on **21st April, 1993**. The Defendant has also produced Judgments and decree which were issued in his favour previously. The Defendant's evidence has not been controverted. There was no evidence called to contradict the evidence of the Defendant, and therefore I accept the same as it is not challenged. The law clearly states that a certificate of title is the conclusive evidence of proprietorship. Section 26 of the Land Registration Act provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate...”

8. The Defendant has produced the Title deed of the suit property in his name. The Plaintiff in the originating summons dated **25th July, 2012** has pleaded that she has acquired the suit property by way of adverse possession. However, the Plaintiff's case was dismissed for non-attendance and therefore the Plaintiff did not tender any evidence to support her claim. In addition, the defendant has produced copies of Judgments and decrees confirming that there were previous cases which were decided in favour of the Defendant herein.

9. Based on the provisions of **Section 26** of the Land Registration Act, and in the absence of evidence to prove the contrary, it is conclusive that the Defendant is still the registered owner of **Title No. KWALE/DIANI/330**. **Section 24** of the Land Registration Act provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or appurtenant thereto, and **Section 25** of the same Act provides inter alia, that the rights of a proprietor shall not be liable to be defeated except as provided in the Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to the leases charges, and other encumbrances and to the conditions and restrictions, if any, shown in the register, and to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register unless the contrary is expressed in the register. It has also not been proved that the Defendant acquired his title by fraud or misrepresentation or illegally, unprocedurally and through a corrupt scheme as excepted in **Section 26**.

10. The Defendant has prayed for payment of mesne profits as against the Plaintiff and her son. Mesne profits are profits accruing during the time the rightful owner was excluded from his land and having proved to be the true owner of the suit property, the Defendant is entitled to mesne profits. The burden of proof is on the Defendant to specifically plead and prove what profits he might have received in the ordinary diligence and use of the suit property. The Defendant though entitled to mesne profit has not claimed any specific sum and has not produced any evidence to support any figure that the court could have awarded. In the absence of it, this court refrains from making an award from mesne profit.

11. The upshot is that the Defendant has proved his counter-claim on a balance of probabilities and I enter judgment in his favour

and make the following orders:

- a) A declaration is hereby made that the Defendant is the lawfully registered owner of the Parcel of land comprised in Title Number **KWALE/DIANI/330**.
- b) A permanent injunction be and is hereby issued restraining the Plaintiff, Mwana Asha Rashidi Ning'anzi and her son Iddi Mwazimbo Yanga whether by themselves or through their servants, employees or agents from leasing, interfering with and/or having any dealing of adverse nature with the parcel of land comprised in **Title Number KWALE/DIANI/330**.
- c) The Plaintiff's suit is dismissed.
- d) Costs of the suit are awarded to the Defendant to be borne by the Plaintiff and her son Iddi Mwazimbo Yanga.

DATED, SIGNED AND DELIVERED VIRTUALLY AT CHUKA THIS 7TH DAY OF FEBRUARY, 2022 IN THE PRESENCE OF:

CA: MARTHA

N/A FOR BOTH PARTIES

C. K. YANO,

JUDGE.



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