REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.98 OF 2013 (0.S)

SHADRACK K. KIMOSE & 148 OTHERS…….PLAINTIFFS

VERSUS

LOMOLO LIMITED 1962……..DEFENDANT

JUDGMENT

Introduction

1. The plaintiffs took up the summons dated **30th October, 2013** for determination of the following questions:-

(i) Whether they have become lawful owners of the 3500 acres of land in **LR NO.10939** (hereinafter referred to as "the suit property,"), by virtue of adverse possession?

(ii) Whether the applicants have been in open, uninterrupted and adverse occupation of 3500 acres of the suit property for more than twelve (12) years?

(iii) Whether a declaration should issue to the effect that the plaintiffs have become lawful owners of the 3500 acres of the suit property?

(iv) Whether the defendants by themselves, their agents and or servants should be restrained by way of injunction from entering, alienating, selling, trespassing, or in any other way whatsoever interfering with the applicants' quiet and peaceful enjoyment of 3500 acres of the suit property?

Background and pleadings

2. The application is supported by the affidavit of the 1st applicant, **Shadrack K. Kimose**, sworn on **30th October, 2013**. In that affidavit the deponent has, *inter alia,* deposed:-

(a) That he has the consent and authority of his co-applicants to swear the affidavit;

(b) That his co-applicants and himself are a group of people residing in the suit property owned by the defendant and that they have been residing in the said land since 1964;

(c) That prior to the coming of the white settlers, the suit property was occupied by their forefathers;

(d) That their forefathers were evicted for purposes of settling the white settlers;

(e) That after independence, in 1964, they managed to claim back their ancestral land and have since been in occupation;

(f) That they were born and bred on the suit land and have born and raised their children thereon;

(g) That their occupation of the suit property has been open and adverse.

(h) Further, that they have made various developments on approximately 3500 acres of land being part of the suit property. The developments include homes, schools and agricultural activities;

(i) That the suit property is their only known home;

(j) That they have given birth to their children on the suit land and buried their dead thereon;

(k) That the suit property is their only source of livelihood;

(l) That they have never left the suit property;

(m) That unless the orders sought are granted, they risk losing their homes and their source of livelihood.

3. In reply, one of the directors of the defendant, **Harris Horn Junior** swore the replying affidavit filed on **22nd November, 2013** where he contends that since the suit herein is in the nature of a representative suit, the 1st plaintiff (the deponent of the supporting affidavit herein), requires an authority signed by all the parties to the suit.

4. In this regard, he points out that apart from the deposition that the 1st plaintiff/ applicant has consent and authority of all the plaintiffs to file this suit, the deponent of the supporting affidavit has not attached a written authority signed by all the parties to confirm that fact.

5. The deponent of the supporting affidavit is also faulted for having failed to attach affidavits by all the plaintiffs verifying the contents of the plaint (read the originating summons) or an authority to verify the contents of the supporting affidavit on their behalf.

6. It is also contended that some of the plaintiffs had filed another case which is pending for judgment.

7. Owing to the aforementioned procedural lapse (failure to file a written authority to appear, plead or act), plaintiffs No.2 through to and inclusive of plaintiff No.148 cannot be said to have instituted any suit against the defendant. That being the case, it is contended that, any pleading claiming to advance the rights of those plaintiffs cannot stand.

8. It is the respondent's case that the suit property has at all times been held in the name of the defendant since 1963 and that it has, at all material times, been used by the defendant as a sisal estate. It is explained that within the sisal estate, there are quarters for workers and a school for the children of the employees, a fact which is well known to the deponent of the supporting affidavit and which fact, he deliberately failed to disclose.

9. The allegation that the suit property was at some point in time occupied by the plaintiffs' forefathers is said to be factually inaccurate. Contrary to the said contention, it is deposed that the plaintiffs on various times have been given grazing rights over the defendants parcels of land (parcels where sisal had not been planted). That notwithstanding, it is explained that even in those area they would occasionally give way for planting of sisal.

10. Concerning the allegation that the suit property is the only known home for the plaintiffs, it is

contended that most of the plaintiffs live elsewhere, outside the suit property. A schedule of the residences and/ statuses of the plaintiffs is given.

11. From the schedule of residences and statuses of the plaintiffs aforementioned, it is contended that the plaintiffs are either employees of the defendant and occupying the company premises pursuant to and as a consequence of the employment contract or persons who have residence elsewhere outside the company premises or persons given limited permission to graze within the defendant's land. For that reason, it is argued that there is no occupation of the land *nec vic, nec clam, nec precario* which are necessary ingredients for prove of ownership by way of adverse possession.

12.Without prejudice to the foregoing, the deponent argues that the prayer for injunction in respect of 3500 acres is calculated to mislead the court as the area occupied by the plaintiffs is not more than (20) acres.

13. Pursuant to an order of the court made on 2nd December, 2013, a court bailiff (Martha Wangare) visited the suit property and filed a report. The report of the court bailiff is as follows:-

> **Settlement**
>
> **The farm is a large scale sisal farm. Over 90% of the land is a sisal plantation.**
>
> **The plaintiffs are settled on hilly and unarable land. They confirmed that they settled there with permission of the defendant. Further there has been an arrangement where if the defendant wants to utilize some land, the plaintiff would move the temporary structures to other areas. For the last two years some of the plaintiffs have been resisting the instructions to move.**
>
> **There are also churches and a school which were constructed with full authority of the defendant as social responsibilit**y.
>
> **Finding**
>
> **The plaintiffs live on the farm but they settled there with full consent of the defendant.**
>
> **The plaintiff also do graze their livestock and undertake some subsistent farming on the land. This was done with consent of defendant. However for the last two years the plaintiffs and defendant have developed some disagreements. The plaintiffs do not want to move out of the areas which defendant want to clear and plant sisal on.**
>
> **I have attached photographs I took during the visit showing the temporary houses. The defendant is cultivating over 90% of the land which is under sisal plantation."**

14. In a further affidavit sworn by a manager of the defendant, **Moses Kabergey**, and filed in court on **2nd May, 2014** it is reiterated that some of the plaintiffs in this matter had earlier on filed another suit **(Nakuru HCCC No.152 of 2006** (0.S)) claiming that they were entitled to the parcel of land herein by adverse possession. That suit was consolidated with Nakuru **HCCC No.36 of 2007** between Deans Estates and Philip Sok Sok and 99 others wherein some of the plaintiffs herein had been sued for trespass.

15. It is pointed out that after the suits were heard and determined, the trial judge dismissed the plaintiffs claim for adverse possession. The deponent has singled out 10 persons enjoined in the current suit as plaintiffs who were plaintiffs in Nakuru HCCC NO.152 OF 2006.

16. The defendant argues that the finding of the court in respect of the use and occupation of the suit property is a finding in rem and that in view of the finding of the court in HCCC NO.152 of 2006 consolidated with HCCC No.*36 of 2007,* which was not appealed from, the current suit is *res judicata* and an abuse of the process of the court.

Submissions

17. On **11th February, 2014** directions were taken to the effect that the suit herein be dismissed by way of written submissions. Subsequently, counsels for the parties filed their respective submissions which I have read and considered.

Analysis and determination

18. From the pleadings herein and the submissions filed by counsels for the respective parties, the issues for determination are:-

> *(i) Whether the current suit is res judicata Nakuru HCCC NO.36 of 2007 as consolidated with Nakuru HCCC NO.152 of 2006?*
>
> *(ii) Whether the plaintiffs have made up a case for issuance of all or any of the orders sought?*
>
> *(iii) What is the order as to costs?*

19. With regard to the first question it is submitted, on behalf of the defendant, that the findings of the trial judge in Nakuru HCCC NO. 36 OF 2007, consolidated with Nakuru HCCC NO.152 OF 2006, was a finding in rem concerning the status of the suit property.

20. From the judgment in Nakuru HCCC NO.36 OF 2007, which is annexed to the defendant's further affidavit, it is clear that a group of some 108 individuals, calling itself Korinytich Farmers Group sought answers to the following four questions?

> *1. Whether they had become lawful owners of the 2500 acres of L.R. Nos.10939 and 6581 by virtue of adverse possession?*
>
> *2. Whether they had been in open, uninterrupted and adverse occupation of 2500 acres of the aforesaid two parcels of land?*
>
> *3. Whether a declaration should issue to the effect that they have become lawful owners of the 2,500 acres in question; and*
>
> *4. Whether the defendants, Lemolo (1962) Ltd and Deans Estate Ltd should be restricted by an order of injunction from entering, alienating, selling, trespassing, or interfering with the group's quiet and peaceful enjoyment of the 2500 acres of land comprised in LR Nos.10939 and 6581?*

21. In his judgment the trial judge, **Ouko J.,** (as he then was) observed: -

> **"....It must be noted right away that no mention throughout the trial was made of No.6581 and no document of title produced to show its ownership by either the company or Lomolo (1962) Ltd. Yet, it is now firmly settled that a claim of adverse possession to land must be against a registered owner. That leaves, in this consideration only, LR No.10939/1.**
>
> **From the certificate of title issued on 13th December, 2002, that property is registered in the name of the company. It is also not in dispute that the company purchased it from Lomolo (1962) Ltd in 2002. Its size, according to the certificate of title is 1007 hectares (approximately 2500 acres). The certificate was issued for a term of 936 years from 1st October 1963.**
>
> **The two opposing contentions are that the company's purported acquisition of the title to the property from Lomolo (1962) Ltd in 2002, was of no effect as the title was long lost to the group that had been in quiet, open and adverse possession from time immemorial. On the other hand, it is asserted by the company that the group members were mere licensees who**

never lived on the suit property but were, with the owner's permission, allowed to graze their cattle on the suit property; that after they abused the company's generosity their licence was withdrawn and their status converted to that of trespassers……..

The group in this suit claim that some of them were born in the suit property in the 1960's; that they have over the years developed the suit property; in particular that they have constructed homes, a cattle dip, that they have schools, dispensary and a dam on the suit property; that they have been using the entire 2500 acres of the suit property; and that they have buried their dead on the property.

The company on its part insists that there are no schools on the suit property but in the neighbouring property; that the schools are public schools and not owned or developed by the group; that the dip was constructed by the original owners of the property, Lomolo (1962) Ltd for its use and the benefit of the neighbouring land owners; that the dam which was similarly sunk by Lomolo (1962) Ltd was no longer in use.

I am satisfied on the basis of this evidence that the group did not carry any development on the suit land. They have not provided any evidence of how much they spent in those developments or when they were put up. Although they claim the entire suit property, Philip Sok Sok in his testimony could not prove this claim……..

There are also affidavits sworn by some of those listed as claimants in the originating summons to the effect that they only gave their names to Philip Sok Sok to facilitate the proposed purchase from Lomolo (1962) Ltd of the property neighbouring the suit property by local residents, and not to claim the suit property by adverse possession…….

From the totality of the evidence presented and summarized above at the trial, affidavit depositions, the law and the case law, I have no doubt in my mind that the company and Lomolo (1962) Ltd, its predecessor in title were never dispossessed by the group. Lomolo (1962) Ltd, it is admitted, had all along planted sisal on the entire parcel of land. Their title was acknowledged throughout as the group would seek permission to graze their cattle on the suit property. There were no acts by the group on the suit property that were inconsistent with the company's or its predecessor in title's enjoyment of the soil. The groups intermittent use of the land with the owners permission does not give them the right to a claim of adverse possession……. "

22. I have endevoured to reproduce the above judgment in extensor because it raises important questions of fact and law relating to the current suit. Firstly, the judgment relates to no other property but the suit property herein. The only difference in that claim and the current claim is that the acreage claimed in the former suit was less (2500 acres as opposed to the acreage claimed under the current suit, 3,500 acres); Secondly the basis of the plaintiffs' claim in the former suit is similar to the basis for the claim in the instant suit, namely some of the plaintiffs were born in the suit property; that they have over the years developed the suit property; in particular that they have constructed homes, schools, they carry agricultural activities thereon and have buried their dead on the suit property. Thirdly, the question of law which the court was called upon to determine is basically the same as the question of law in the current suit, to wit, whether the occupants of the suit property had gained proprietory rights over the property by operation of law.

23. **Section 7** of the Civil Procedure Act prohibits a court from trying any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

24. In applying the foregoing provisions of law to the instant suit, there is no doubt that the matter directly and substantially in issue, in the current suit has been directly and substantially in issue in a former suit. The parties in the former suit were basically the same. The title under which they litigated was also basically the same, the plaintiffs alleged to have been occupying the property quietly and without interruption since 1964. The defendants, on the other hand, denied the plaintiffs claim and contended that their entry and occupation of the suit land was not adverse as they occupied the suit property pursuant to permission donated by the registered owner.

25.That being the case, the only question that needs to be answered in order to determine whether the current suit is *res judicata* is, whether the trial judge was competent to try and determine the dispute between the parties.

26. In determining this question, it is important to point out that the former suits were filed in 2006 and 2007 respectively, way before the Environment and Land Court was established. However, they were determined at a time when the Environment & Land Court Act, had come into force. As such the suit were subject to **Section 30** of the Act (transitional clause) which provides as follows:-

> **"All proceedings relating to the environment or to the use or occupation and title to land pending before any court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court or as may be directed by the Chief Justice or the Chief Registrar."**

27. Pursuant to the powers given to the Chief Justice under the above section, the Chief Justice has so far issued 3 practice directions the latest one being the practice directions contained in **Gazette Notice No. 16268,** dated **9th November, 2012**. That practice Direction, *inter alia*, provides:-

> **"All part heard cases relating to the environment and the use and occupation of, and title to land pending before the High Court shall continue to be heard and determined by the same court."**

28. From the foregoing cited provisions of the law, it is clear that the former suits were heard and determined by a competent court for purposes of **Section 7** of the Civil Procedure Act. That is so because they were part heard as at the time the Environment and Land Court Act was established.

29. The upshot of the foregoing is that the status of the plaintiffs in the current suit and any other person claiming to be entitled to the suit property, to wit plot No.10939 was determined in the former suits when the trial judge held:-

> **"From the totality of the evidence presented and summarized above at the trial, affidavit depositions, the law and the case law, I have no doubt <u>in my mind that the company and Lomolo (1962) Ltd, its predecessor in title were never dispossessed by the group. Lomolo (1962) Ltd, it is admitted, had all along planted sisal on the entire parcel of land. Their title was acknowledged throughout as the group would seek permission to graze their cattle on the suit property. There were no acts by the group on the suit property that were inconsistent with the company's or its predecessor in title's enjoyment of the soil. The groups intermittent use of the land with the owners permission does not give them the right to a claim of adverse possession</u>….."**(emphasis supplied).

30. Although the foregoing finding suffices to put to rest the plaintiffs claim, I wish to point out that even if the current suit was not *res judicata*, from the evidence on record, and in particular the report of the court bailiff, this court would, nevertheless have reached the same conclusion as the trial court in the former suits.

31. In the end, I find the plaintiffs suit to have no merits and I dismiss it with costs to the defendant.

Dated, signed and delivered in open court at Nakuru this 10th day of December 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr Githui for the defendant

N/A for the Plaintiffs

Emmanuel Maelo: Court Assistant

L N WAITHAKA

JUDGE