



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 58 of 2008

BETWEEN

RASHID NGOLO MWAJOHA 1ST PETITIONER
SAMUEL CHEA 2ND PETITIONER
GARAMA N MWAJOHA 3RD PETITIONER
KITSAO NGOLO 4TH PETITIONER
KHAMALI ALI 5TH PETITIONER
DAMA N MUTUNGA 6TH PETITIONER
AHMED M SALIM 7TH PETITIONER
MWAYELE G MWABIRE 8TH PETITIONER
NAOMI M KUNJEKARISA K KALU 9TH PETITIONER
JOSHUA K BAYA 10TH PETITIONER
OMAR NGOLO 11TH PETITIONER
CHARO K BAYA 12TH PETITIONER
JEFWA KADENGA 13TH PETITIONER
NAIL N JUMA 14TH PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT
COMMISSIONER OF LANDS 2ND RESPONDENT
COMMISSIONER OF POLICE 3RD RESPONDENT

MINISTER OF LANDS 4TH RESPONDENT

MUNICIPAL COUNCIL OF MALINDI 5TH RESPONDENT

ALI SWALEH ALI 6TH RESPONDENT

MANSUR NAJI 7TH RESPONDENT

ASHRAF SANDO QUIDARELLI 8TH RESPONDENT

ABBAS ABDALLA OMAR (Also an Administrator

to the Estate of the Late

ABDALLA OMAR MOHAMED) 9TH RESPONDENT

AISAH ABDALLA OMAR 10TH RESPONDENT

OMAR ABDALLA OMAR 11TH RESPONDENT

MOHAMED HABIB 12TH RESPONDENT

GIUSEPPE DIMARIA 13TH RESPONDENT

SAID SWALEH BAHMED 14TH RESPONDENT

SUN COAST INVESTMENT 15TH RESPONDENT

FIRST KENYA PROMOTIONS CO. LTD 16TH RESPONDENT

TAR ROCK ONE LIMITED 17TH RESPONDENT

ABDALLA OMAR MOHAMED 18TH RESPONDENT

BRUNO 19TH RESPONDENT

RULING

1. By a petition dated 30th January 2008, the petitioner moved the court for several orders in respect of 18 plots in Malindi namely; Plot Numbers 5145, 5465, 5466, 5467, 5468, 5598, 7511, 7512, 5735, 4417, 5263, 5264, 5266, 5265, 5267, 5261, 5260 and 5259 which they claim to have occupied since 1968. Their case is that due to their occupation, the rights of the original owners have now been extinguished by adverse possession.

2. The petitioners seek the following reliefs;

(a) *There be a stay in HCCC No. 71 of 2006 (OS) Malindi and HCCC No. 121 of 2001 Malindi pending the hearing and determination of this petition.*

(b) *The Honourable Court do nullify all the 18 titles being Plot Nos. 5145, 5465, 5466, 5467, 5468, 5598, 7511, 7512, 5735, 4417, 5263, 5264, 5266, 5265, 5267, 5261, 5260 and 5259 the same having been issued in clear contravention of the law.*

- (c) *The Honourable Court give a directive that the sub-division carried out on the 16th March 1993 by government Surveyor is valid and as such the Commissioner of Lands issue title deeds as stipulated in the Government Land Act to the Applicants.*
- (d) *The Honourable Court give a directive that the Kenya Police and Administration Police not to be used to harass and intimidate the Applicants when entering the land in question.*
- (e) *The Honourable Court do issue conservatory orders against any respondents or any other person from approving building plants, erecting or continuing to erect a wall or other construction in respect of the land in dispute pending the hearing and determination of this petition.*
- (f) *The Honourable court do issue such other orders as this Honourable Court shall deem fit.*

3. The respondents in this matter have opposed the petition on several grounds but for the purpose of this decision, I asked them to address the court on whether the suit was barred by issue estoppel and/or *res-judicata* as a preliminary issue raised by them.

4. Mr Ngatia, counsel for the 8th, 9th, 10th and 11th respondents, argued that the subject of this matter, that is the suit properties, were the subject of Mombasa **HCCC 513 of 1995** instituted by the petitioners in Mombasa. The petitioners sought orders that they were entitled to the suit properties by way of adverse possession. The suit was transferred to Malindi and consolidated with **HCCC 121 of 2001**. The consolidated suit was struck out by an order of Justice W. Ouko by a ruling dated 20th September 2004.

5. The respondents contend that the petitioners' case raises substantially the same issues as **HCCC 121 of 1994** namely the claim to the suit properties by virtue of adverse possession. Mr Ngatia, supported by Mr Kariuki for the 7th respondent and Mr Billing for the 17th respondent, noted that the present case was debarred by the doctrine of *res judicata* and or issue stopped. Counsel cited several cases to support the respondents position among them ***Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, Kenya Bus Services Ltd and Others v Attorney General & Others Nairobi HC Misc. No. 413 of 2005 (Unreported) [2005]eKLR, Edwin Thuo v Attorney General and Another Nairobi Petition No. 212 of 2011 (Unreported) and Richard Nduati Kariuki v Leonard Nduati Kariuki & Another Nairobi HC Misc. Appl. No. 7 of 2006 (Unreported).**

6. Counsel for the petitioners, Mr Kwengu opposed the application on the ground that the petitioners raise constitutional matters particularly the right and fundamental freedoms of the petitioners to own property. Counsel urged the Court not to exercise the drastic remedy of striking out the petition and instead hear the petitioners on their grievances.

7. I have considered the arguments raised by the parties and I think that in view of the order made by Justice Ouko on 20th September 2004 striking out the previous suit dealing with the subject land and between the same parties cannot be re-litigated in the manner proposed by the petitioners.

8. Justice Ouko in his decision addressed himself to the nature of the petitioner's claim and the manner in which it should be pursued as provided for by the **Civil Procedure Rules**. In summary he clearly stated that a claim for adverse possession ought to be brought by way of originating summons. This petition is an attempt to litigate the issue of adverse possession contrary to "**existing legal framework.**" In the case of ***Joseph Ihugo Mwaura & 82 Others v Attorney General Nairobi Petition No. 498 of 2009 (Unreported)***, I observed that, "**The Constitution and more specifically section 75 [of the former constitution] does not create proprietary interests nor does it allow the court to create such rights by constitutional fiat. It protects proprietary interests acquired through the existing legal framework.**" The proprietary rights of the petitioners are to be addressed within the framework determined by Hon. Justice Ouko and this suit is an attempt to avoid the consequences of the decision. It is a collateral attack on that decision which cannot be permitted.

9. Furthermore the court had the jurisdiction to address any constitutional issues which the petitioners now claim and which were incidental to the matter. A claimant is barred from litigating a claim that has already been adjudicated upon or which could and should have been brought before the court in the earlier proceedings arising out of the same facts. Parties are expected to bring the whole case to the court and will in general not be permitted to re-open the same litigation in respect of a matter which might have been brought forward by did not, whether from negligence, inadvertence or even accident (see *Halsbury's Laws of England, 5th Edition, para. 1167*).

10. The petition is a clear abuse of the court process. Being such a petition, it is hereby struck out with no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 18th day of January 2013

D.S. MAJANJA
JUDGE

Mr Kwengu instructed by Kwengu and Company Advocates for the petitioners.

Mr Ngatia instructed by Ngatia and Associates for the 8th, 9th, 10th and 11th respondent.

Mr Kariuki instructed by Kiarie Kariuki and Company Advocates for the 7th respondent.

Mr Billing instructed by Guram and Company for the 17th respondent.