REPUBLIC OF KENYA

High Court at Mombasa

Civil Suit 246 of 2012

HUSEIN SAID MBARAK & ABDELSAID MBARAK.....PLAINTIFFS

VERSUS

YOGANDRA RAMANLAL RAWAL.....DEFENDANT

RULING

This matter was listed for mention on 20th February, 2013. The mention was to confirm service by way of substituted service by advertising in the local dailies as was ordered by the court on 5th December 2012. The case had earlier come to court on 19th December, 2012 when the advocate for the applicant asked for a mention on 20th February, 2013 to confirm service.

When the case came before me on 20th February, 2013, Mr. Ratemo learned counsel for the applicant and Mr. Litoro learned counsel for the respondent appeared. Mr. Ratemo informed the court that he had effected service and requested for directions. The court on its own motion, asked the counsels to address it on the issue of Mombasa High Court Civil Case No. 133 of 2003 which had been annexed to the proceedings by counsel for the respondent. That case was between Yogandra Ramanlal Rawal, the plaintiff and Said Mbarak the defendant.

In the Mombasa HCCC 153 of 2003 aforesaid the plaintiff prayed for the following orders:-

(a) **A declaration that the defendant is wrongfully occupying a portion of the plaintiff's parcel of land.**

(b) **A permanent injunction restraining the defendant by himself, servants and/or agents from trespassing onto and/or continuing to trespass onto the said premises.**

(c) A mandatory injunction compelling the defendant to remove and demolish the building structures built and/or erected on the suit premises without the plaintiff's permission.

(d) General damages for trespass.

(e) **Costs of the suit.**

The land in HCC 153 of 2003 is named as Mombasa/Mainland South Block 1 286 measuring 1.03 acres. The suit was filed in Mombasa High Court on 16th June 2003. On 26th December, 2012 one Said Mbarak, the defendant in HCC 133/2003 (now pending in court) together with Abdel Said Mbarak came to this court and filed this case.

Their Originating Summons was supported by an affidavit sworn and dated 26th October, 2012. In that Originating Summons they raise an issue to be determined by the court as follows:

(a) **Whether the applicant/plaintiff's are beneficiaries by virtue of adverse possession of the remainder portion LR No. MSA/MS/BLOCK 1/286 situated at Likoni which they are on occupation thereof.**

(b)Whether the applicants/plaintiff's are entitled by virtue of adverse possession to be registered as the owner of LR No. MSA/MS/BLOCK 1/286.

(c) **Costs be in the cause.**

In the supporting affidavit sworn by Husni Said Mbarak and Adell Said Mbarak on para(3) they state as follows:

"That we have occupied the land openly without any interruption and have been using the same exclusively since 1998."

It is worth to note that Husni Said Mbarak and Yogandra Ramanlal are the same parties in Mombasa HCCC 153 of 2003 (now pending in court) and this Originating Summons. The subject matter in both cases is the same land parcel MSA/MS/BLOCK 1/286. HCCC 153 of 2003 is the older case having been filed 9 years earlier. The determination of that case will determine the issues raised in the originating summons herein.

It is against that backdrop that the court asked the parties to address it on that suit (HCCC 153/2003) to enable the court to give directions sought by Mr. Ratemo, learned counsel for the applicant in this case.

Mr. Litoro learned counsel for the respondent argued interalia, that the originating summons is misconceived and fatally defective. That the orders sought in court cannot be granted. That from 1998 to year 2003 is barely 5 years. That he had annexed HCCC 133 of 2003 which is pending in court between the same parties and in respect of the same land. He prayed for the suit to be struck out. Mr. Ratemo then immediately instructed Mr. Mogaka to lead him. Mr. Mogaka argued that today was a mention date. That they were not ready to proceed. He cited article 50(1) of the Constitution and argued that parties must be given a fair hearing. He argued that the court lacks jurisdiction to entertain arguments at a mention date. He asked for adjournment to another date.

The court declined to adjourn the matter and asked Mr. Mogaka if he had anything else to say. He said he had none. Mr. Litoro in reply said that the plaintiff's submissions were an after thought. That Mr. Ratemo when he was addressing the court never applied for adjournment. Mr. Litoro relied on article 159(2) (d) of the Constitution that requires that justice be dispensed with without undue regard to technicalities. He relied on Section 1(a) and 1 (b) of CPA and Section 3A of the Civil Procedure Act. He referred the court to its overriding objectives that requires the court to determine matters expeditiously. He said that, what had been argued here is a point of law and it will serve no purpose to adjourn the matter.

Section 159 (2) (d) states as follows:

"Justice shall be administered without undue regard to procedural technicalities"

Section 19 (1) of the Environment and Land Court Act states:

1. *In any proceedings to which this Act applies, the court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence."*

"Provided that the court may inform itself on any matter as it thinks just and may take into account

opinion evidence and such facts as it considers relevant and material."

The overriding interest of the court is administer justice and to facilitate just, expeditious resolution of civil disputes. To administer the same expeditiously. It is obvious that the applicant in this case states on oath that they acquired the land in dispute herein in 1998. It is also obvious from the pleadings annexed to the reply as to the originating summons filed herein that the first applicant herein was sued by the registered owner the respondent herein on 16th June 2003. This a period of barely 5 years.

The determination of HCCC 133 of 2003 will surely determine this originating summons. Proceeding with the originating summons herein when there is another case between the same parties on the same subject in the same court is an abuse of the process of the court. It has been argued that this court moved itself to ask the parties to address it on HCCC 133 of 2003 and its bearing to this originating summons. That is so. The court is mandated to do that under Section 159 (2) (d) above quoted and Section 19 (1) of the Environment and Land Act and the Civil Procedure Act by sections quoted by Mr. Litoro, learned counsel for the defendant. To argue that the court has no jurisdiction to make the inquiries it made is to misunderstand the law and the courts overriding objective.

A matter in court is adjourned to enable the parties to achieve a certain purpose. What purpose will be achieved here, where an applicant brings an originating summons to court to ask for prayers that are the same with an earlier suit by the same parties? What instructions can counsel possibly obtain from his client in such circumstances? In my view, I am afraid none. An adjournment in such an instance will be to clog the courts diary for no apparent reason and is an abuse of the process of the court.

There is no way in which an occupation of five (5) years by any stretch of imagination can be said to be adverse to a registered owner. This court cannot proceed with this suit when there is a similar suit between the same parties on the same subject matter now pending in the civil division of the same court.

Striking out is a serious step for any court to take. But the court will not hesitate to strike out a matter when it positively demonstrated that the suit is an abuse of the process of the court.

The suit herein is struck out with costs to the respondents.

It is so ordered.

Dated and delivered in Mombasa this 20th day of February, 2013.

S. MUKUNYA
JUDGE

Mr. Mogaka: We seek leave to appeal against the orders granted herein.

Leave granted.