



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL SUIT NO. 9 OF 2021 (OS)**

**SAFARI CHENGO NYAMBU & OTHERS ..... APPLICANTS**

**VERSUS**

**ALPESH KANAHSIH KHIMJI ..... RESPONDENT**

**RULING**

***(Plaintiffs filing suit for adverse possession; defendant filing an application to strike out suit on the basis that the title does not exist; defendant providing evidence that the suit titles were consolidated into one title and later subdivided into 278 plots with individual titles; one cannot claim adverse possession to a title that does not exist; suit struck out with costs)***

1. This suit was commenced by way of an Originating Summons filed on 20 January 2021. The Originating Summons has been filed by 5 persons and they aver that they are representing over three hundred residents residing on the land parcels MN/II/271, 276, 277, 278, and 231 (the suit properties). These three hundred residents are however not named. The applicants (whom I will henceforth refer to as the plaintiffs) contend that they have acquired title by way of adverse possession to the suit properties. Together with the Originating Summons, the plaintiffs filed an application of even date, seeking orders of injunction against the respondent (henceforth referred to as defendant) to stop him from dealing with the suit properties and for an order of prohibition to be registered against the titles pending hearing of the suit. The suit and the application are supported by the affidavit of Safari Chengo Nyambu. He has deposed that they moved into the suit properties about twenty years ago and have been occupying it, and that he and over three hundred others, have erected their residences, rear livestock, and undertake other farming activities. The application first came to court under urgency on 20 January 2021 and ex parte orders were issued in favour of the applicants.

2. On 5 February 2021, the defendant filed an application of even date seeking orders to discharge the interim orders of injunction and to have the Originating Summons struck and the entire suit dismissed, first for not disclosing a reasonable cause of action, and secondly for being sub judice the case Mombasa ELC No. 120 of 2018, *Kahaso Chengo Nyambu & 4 Others vs Alpesh Kanaksinh Khimji* and Mombasa ELC No. 205 of 2018, *Mkala Charo & 3 Others vs Alpesh Kanaksinh Khimji* which are pending between the same parties or parties litigating under the same title. The application is founded on various grounds including the claim that the suit properties do not exist. It is contended that they ceased to exist on 28 February 2020 when they were consolidated to form Plot No. 15870 under Certificate of Title No. 74527. It is added that the Plot No. 15870 was further subdivided into the Plots Nos. 15872 – 16150 and individual titles for the 278 independent plots issued. The supporting affidavit to this application is sworn by the defendant and he has annexed documentation regarding the consolidation and subdivision of the suit properties and documents relating to the other cases mentioned and said to cause this suit to be sub judice.

3. I directed that the plaintiffs' application dated 20 January 2021 and the defendant's application dated 5 February 2021 be heard together. Both Mr. Waziri for the plaintiffs and Mr. Karina for the defendant filed written submissions which I have considered before arriving at my decision.

4. The following issues stand to be determined :-

- (i) Does the case disclose any reasonable cause of action and/or is it an abuse of the court process ?
- (ii) Is the case sub judice ?
- (iii) If the answer to the two above is negative, do the plaintiffs deserve an injunction.

5. If I find that the case is an abuse of the process of court and discloses no reasonable cause of action then it will be struck out *in limine* and I need not address myself on the other two issues for there will be no suit in the first place.

6. The defendant contends that this case is hopeless and an abuse of the process of court as the land claimed does not exist. He avers that it

has been subdivided and the subdivisions sold to other people who are not parties herein. I have seen in his supporting affidavit that the titles to the five suit properties were consolidated into one parcel of land registered as Subdivision No. 15870 (Original Nos. 231, 271, 276, 277 and 278) Section II Mainland North. It is correct therefore to state that the titles to the suit properties do not exist as they were consolidated into the Plot No. 15870. I have also seen evidence that the Plot No. 15870 was approved for subdivision on 28 February 2020 and titles on subdivision were issued on 28 February 2020. These titles are noted to be Subdivision Nos. 15872 to 16150 vide new Certificates of Titles numbers 74528 to 74806. This position has not been challenged by the plaintiffs. It follows that the plaintiffs have filed suit for adverse possession to a title that does not exist. You can only claim adverse possession to a title that exists since the result will be that the said title be registered in your name if you are successful in the litigation. In this case, even assuming that the plaintiffs succeed in proving that they have been in possession of the land for over 12 years they cannot get title to what they claim because that title no longer exists. This litigation is therefore completely misplaced. I agree with the defendant that this suit is an abuse of the court process for the plaintiffs seek to be declared owners of a title that does not exist. For that reason alone this suit must be struck out. With this order it is not necessary for me to address whether the suit is *sub judice*. It is also not necessary to address myself on the application for injunction for there is now no suit upon which to anchor such application.

7. The result is that this suit is hereby struck out with costs to the defendant (respondent in the Originating Summons). Any interim orders issued are hereby vacated.

8. Orders accordingly.

**DATED AND DELIVERED THIS 21ST DAY OF APRIL 2022.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**