



REPUBLIC OF KENYA

High Court at Malindi

Environmental & Land Case 53 of 2012

SWAFIYA SWALEH MAHDI (aka SWAFIYA ABDALLA)

FATUMA SWALEH MAHDI (ADMINISTRATORS & LEGAL

REPRESENTATIVES OF SWALEH MAHDI(DECEASED).....PLAINTIFFS

VERSUS

CHARLES CHARO

JANE(akaROSEPONDA).....DEFENDANTS

RULING

1. The Plaintiff moved this court by way of a Plaint which was filed on 22nd November 2012. Contemporaneously with the said Plaint, the Plaintiff filed a Notice of Motion dated 22nd November 2012 seeking for the following orders:

(a) At the first instance, service on the defendants of this application is dispensed with as otherwise the object of seeking interposition of the court will be defeated by delay, occasioning serious and irreparable mischief;

(b) The court is pleased to issue ex parte an injunction barring the defendants by themselves, or through their agents, servants, employees or otherwise dealing with the said land by undertaking any development, waste, damage, planting of crops, sinking of wells or constructing temporary or permanent residential or commercial shelters however described, pending the hearing and determination of this application;

(c) In the alternative, the court is pleased to issue an order against the defendants requiring the preservation of that part of the Plot 358 Malindi measuring about 2 acres so that none of the defendants can enter upon, remain or undertake any activities on the land pending the hearing and determination of this application; and ultimate determination of the suit; on the written undertaking of the plaintiffs to pay damages to the defendants or any of them, if the injunction or preservation of property order is ultimately found to have been wrongly issued;

(d) Directions of service and hearing of this application are given.

2. The application is premised on the grounds that, Swaleh Mahdi Swaleh was at his death on

3rd December 1994 the registered owner of Plot Number 358 Malindi; that the suit property was subject of HCCC No. 155 of 1993 (O.S.) in which the first defendant herein was Defendant number 7. The said suit was decided in favour of the Plaintiff and the Defendants have not preferred an appeal against the said decision. Consequently, the Defendant's entry upon the suit property is wrongful.

3. The application is supported by the affidavit of Swafiya Abdalla (AKA Swafiya Swaleh Mahdi) and Fatuma Swaleh Mahdi (AKA Fatuma Swaleh Mahdi Swaleh), the legal representatives of the estate of Swaleh Mahdi (deceased).

4. The main deposition of the Applicants is that their late father, Swaleh Mahdi Swaleh owned the suit property which originally measured 112 acres. He later sold part of the land to investors.

5. The Applicants have deponed that during his lifetime, their father instituted several suits against some people who were attempting to forcefully and wrongfully enter upon the suit property. The late Swaleh Mahdi Swaleh was sued in Mombasa Miscellaneous Civil Suit No. 155 of 1993 (O.S) by some people to vindicate their alleged rights acquired by adverse possession to some part of the suit land. The said case was dismissed.

6. It was the Applicants deposition that Charles Charo, the 1st Defendant herein was the 7th Plaintiff in Mombasa Miscellaneous Civil Application number 155 of 1993 (O.S). The 1st Defendant has however refused to give up the part of plot number 358 to the detriment of the Plaintiffs.

7. The Applicants have further deponed that they have learnt from 2nd Defendant that she purchased two acres of the suit property from the 1st Defendant for a consideration of Kshs. 300,000/= and they observed the 2nd Defendant cultivating land with another person; that the 2nd Defendant was sinking either a pit latrine or a well and she had started to enclose the parcel of two acres allegedly sold to her.

8. It is the Applicants' case that the 1st and the 2nd Defendants have deliberately entered into a null and void agreement for sale of land that neither belongs to the 1st Defendant nor the 2nd Defendant.

9. The Applicants have further deponed that the estate of the late Swaleh Mahdi is likely to suffer irreparably as the suit property is due for distribution to the heirs of the estate of the deceased and that the acts being undertaken by the Defendants in the suit property is to wrongful encumbrance and waste of the suit property, which encumbrance and acts of waste cannot be atoned for or compensated by damages.

10. The Applicants finally stated that the estate has cash crops on the land and the Defendants have threatened to damage such crops thereby intermeddling with the estates assets. This actions by the Defendants can only be stopped by an injunction in order to maintain the status quo ante.

11. The 1st Defendant, Charles Charo, filed his Replying Affidavit on 11th December 2012. The 2nd Defendant did not file any response.

12. The 1st Defendant has deponed that in Mombasa Miscellaneous Civil Application number 155 of 1993 (O.S.), the court ordered that the Plaintiffs in that case should be paid by the Defendant (now the Plaintiff) reasonable compensation of their residential houses, cash crops and other developments which were on the suit property.

13. According to the 1st Defendant, the Plaintiffs to the current suit have not complied with the Judgement of the court to date. On the issue of the sale of part of the suit property to the 2nd Defendant, the 1st Defendant denies having sold any land to the 2nd Defendant.

14. The 1st Defendant finally depones that he has lived on the suit property with his family

members for over 20 years and they have developed the land by putting up residential houses, cash crops among other development; that the Plaintiffs have not demonstrated how they will suffer irreparably by the 1st Defendant's continued occupation of the suit property and that the Plaintiffs' have not established a prima facie case with chances of success.

15. The parties agreed to dispose of the application by way of written submissions. The Plaintiffs filed their submissions on 17th December 2012 while the 1st Defendant filed his submissions on 10th January 2012 which I wish to summarise as follows:-

16. Mr. Kimani, counsel for the Plaintiff, reiterated the contents of the Plaintiff's Supporting Affidavit in his submissions. Counsel submitted that since the judgement of the court in Mombasa Miscellaneous Civil Application number 155 of 1993 (O.S.) has not been perfected or executed by the removal of the unsuccessful Plaintiffs from the suit land, the asset the subject of that suit has not been realised for distribution and it forms part of the estate's free assets.

17. The current suit, counsel submitted, is an action to protect the suit property from waste, alienation, damage or any other dealings which may adversely prejudice the interests of the estate of Swaleh Mahdi (the deceased), or otherwise fritter the cash and other crops on the land.

18. The Plaintiffs' counsel further submitted that the acts of trespass complained of are the digging of a well or pit latrine, fencing off of the portion of two (2) acres purportedly sold by the 1st Defendant to the 2nd Defendant and the planting of subsistence crops. The Plaintiffs' notices requiring the defendants to desist from their wrongful acts have not been heeded, instead, counsel submitted, the 1st Defendant has taken to issuing veiled threats to the Plaintiffs that they will be killed if they visit the land at all.

19. The Plaintiff's counsel submitted that the 2nd Defendant has not filed any papers despite having been served with Summons to Enter Appearance, the Complaint and the Notice of Motion; that the Defendants have no right in or over the suit land or any part thereof and that the 1st Defendant's attempts to acquire part of the land by adverse possession was rejected by a court of competent jurisdiction after a full hearing in which the 1st Defendant participated as the sixth Defendant.

20. The Plaintiff's counsel relied on the case of **Noormohamed Jan Mohamed - Vs- Kassamali Virji Madhani (1953) Vol. 20 EACA 8** and **Jones -Vs- Pacaya Rubber & Produce Co. Ltd (1910) 1 KB 455** which I have considered. Counsel also relied on the provisions of section 45 of the Law of Succession Act, Cap. 160 which provides as follows:

“Except so far as expressly authorized by this Act, or any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with any free property of a deceased person.”

21. The Plaintiffs' counsel finally submitted that the threats made to the deponent of the second affidavit must be taken seriously, more so because the deceased whose estate the Plaintiffs represent met his untimely death on the same farm and that some of the Plaintiffs in the Mombasa High court case were charged with the murder of the owner of the suit land.

22. On his part, Mr. Otara, counsel for the 1st Defendant submitted that according to the judgement in Mombasa Miscellaneous Civil Application number 155 of 1993, the Plaintiffs herein were required to compensate the applicants in HCCC No. 15 of 1993 for their houses and developments to enable them leave the said land. The said compensation, counsel urged, has never been effected thus the continued occupation of the suit land by the 1st Defendant. The said occupation, counsel submitted, does not amount to trespass.

23. The 1st Defendant's counsel further submitted that there is no evidence that the 1st Defendant

sold to the 2nd Defendant part of the suit land for Kshs. 300,000 as alleged by the Plaintiffs.

24. On the issue of the death threats that were issued by the Defendants to the Plaintiffs, counsel submitted that the Plaintiffs have not proved the allegations and that the claims are meant to prejudice the 1st Defendant's defense and arguments.

25. The 1st Defendant's counsel finally submitted that his client has been living on the suit property for over 30 years together with his family members; that the 1st Defendant does not have any other home or land and that he depends on the cash and perennial crops on the said land for survival. Consequently, counsel submitted that the Plaintiffs have not shown that they have a *prima facie* case with a probability of success. In any event, it was submitted, the Plaintiffs have not demonstrated that they will suffer irreparable loss that cannot be compensated by way of monetary compensation.

26. I have considered and deeply reflected on the affidavits and the submissions filed by both parties in this matter. My task at this stage is to determine whether the Applicants have established a *prima facie* case with a probability of success to warrant the grant of a temporary injunction pending the hearing and determination of the suit.

27. I will also determine whether, even if such a case exists, the Applicants have shown that they will suffer loss that is incapable of compensation by an award of damages. If in doubt about the two, I will make my determination on a balance of convenience. These are the well-known principles in the **Giella -Vs- Cassman Brown (1973) EA 358** case.

28. It is not in dispute that on 12th November 2002, Justice Waki, as he then was, made a determination as to the ownership of the suit property in Mombasa Miscellaneous Civil Application number 155 of 1993. It is also not in dispute that the 1st Defendant herein was the 7th Plaintiff in Mombasa Misc. Civil Application number 155 of 1993.

29. The Plaintiffs' case in Miscellaneous Application number 155 of 1993 was that they had all been born on the disputed parcel of land and had since lived and worked on it. For the period that they lived on the suit property, they established homes and farming activities in seasonal and cash crops. They were in continuous and uninterrupted occupation of the land until the Defendant (now the Plaintiffs) started claiming an interest in the land in the year 1990 when he sued them and their fathers claiming that he had bought the land in 1978.

30. Consequently, the Plaintiffs in Miscellaneous Application number 155 of 1993 argued that if there was any title claimable by the Defendant, now the Plaintiffs, the same was extinguished after the expiry of 12 years and that they had acquired new title through adverse possession.

31. After hearing all the parties, Justice Waki, as he then was, dismissed the Plaintiffs' Originating Summons in the following words.

“Whether the time began running in 1978 or 1987, no interest had been acquired by the Plaintiffs in adverse possession.”

32. The above holding by the court determined the interest of the Plaintiffs herein as against the 1st Defendant in the suit property. The question as to who between the Plaintiffs and the 1st Defendant owned the suit property or part of the suit property was determined in favour of the Plaintiffs. I need not revisit that issue in these proceedings.

33. The 1st Defendant's only defense is that the court in Mombasa Miscellaneous Civil application number 155 of 1993 allowed him to continue staying on the suit property until he has been compensated for the development of the structures on the suit property.

34. I have looked at the Judgement of Justice Waki and at page 20 of the said Judgement, the

Judge held as follows:

“It is plain evidence from the proceedings and the exhibits on previous cases that the Plaintiffs have residential structures of whatever nature and commercial plants on the small portions they occupy. These ordinarily would be by definition go with the land. But the Land Titles Act under which the land is registered recognizes, and the peculiar phenomenon of “houses without land” which I take judicial notice of dictates, those properties belongs to the plaintiffs. Accordingly reasonable compensation therefore shall be paid to the Plaintiffs.”

35. My reading of the above holding is that the 1st Defendant, who was the 7th Plaintiff in Miscellaneous Civil Application number 155 of 1993 was only entitled to the structures and the cash crops on the portion which he was occupying as at 12th November 2002.

36. The 1st Defendant does not have any other known legal entitlements on the suit land other than the structure (s) he had as at the time the judgement in Misc. Civil Application Number 155 of 1993 was read. He cannot use the suit property in a manner that is intended to waste, alienate or to damage the suit property whose effect would be to adversely prejudice the interest of the estate of the late Swaleh Mahdi.

37. Any dealing in the land by the Defendant herein is void in view of the Judgement by Justice Waki in Miscellaneous Civil Application number 155 of 1993.

38. The breaking and entry upon the land by the 2nd Defendant has not been disputed. The 2nd Defendant's actions are an illegality and if indeed it turns out that the 2nd Defendant purchased the suit property from the 1st Defendant, the said transaction shall be void for all intents and purposes. It is only the Plaintiffs, in compliance with the law of succession Act, Cap 160, who can transfer any part of the suit property to third parties. The 2nd Defendants activities as evidenced in the photographs amount to trespass for which the Plaintiffs have a remedy at law.

39. In the circumstances, and for the reasons which I have given above, I find and hold that the Plaintiffs have established a *prima facie* case with high chances of success as against the Defendants.

40. Any dealing in the suit property contrary to the Judgement in Miscellaneous Civil Application number 155 of 1993 will prejudice the Plaintiff's interest in the suit property and cause them irreparable damage which cannot be compensated by way of damages.

41. The Plaintiffs have demonstrated by way of photographs that the 2nd Defendant is cultivating the suit property. The Applicants have further deponed that the 2nd Defendant was sinking either a pit latrine or a well on the suit property and that she had started enclosing the part of the suit property. These are actions which are meant to waste the suit property then causing irreparable damage.

42. I allow the Plaintiff's application dated 22nd November 2012 in terms of prayer number 3.

Dated and Delivered at Malindi this 18th day of April, 2013.

O. A. Angote
JUDGE