



REPUBLIC OF KENYA

High Court at Malindi

Environmental & Land Case 61 of 2010

IN THE MATTER OF: PARCEL NO. MN/111/2293 KILITI TITLE NO.CR.24472

**IN THE MATTER OF: AN APPLICATION FOR DECLARATON THAT THE
APPLICANTS HAVE OBTAINED OWNERSHIP OF ONE DECIMAL SEVEN SIX ONE (1.761)
HECTARES OF THE ABOVE SAID LAND BY WAY OF ADVERSE POSSESSION**

- 1. ATHMAN JUMA TSOLA**
- 2. ALI JUMA KIWALE**
- 3. JUMA KARISA UGWARE**
- 4. JOSPHINE JUMA KARISA**
- 5. HASSAN KANAO MWANGIRA**
- 6. MWANAPILI RAMADHANI NYIRO**
- 7. KINGI JUMA KIWAI**
- 8. SALIM JUMAA KIWAI**
- 9. MBEYU NYIRO KIWAI**
- 10. JUMAA KINGI KIWAI**
- 11. JUMA SALI JUMA**
- 12. TABU KARABU KOMBE**
- 13. JUNE KIRAGA KARABU**
- 14. KARABU KOMBE NZAI**
- 15. SIDI KARABU KOMBE**
- 16. MARGARET CHAI LEWA**
- 17. JUMA ALI**
- 18. KHADIJA ALI JUMAA**

19. CHONI ZOSI NGUYA

20. HAMISI KARABU KOMBE

21. GILBERT MWAVUNA TEMBO

22. DZAME GILBERT KOMBE

23. DZIZA HAMISI KOMBE

24. LAZIMA JUMA KIWAYI.....PLAINTIFFS/RESPONDENTS

=VERSUS=

1. WILFRED KIPTUM KITUR KIMALAT.....1ST DEFENDANT/RESPONDENT

2. KAAB INVESTMENTS LTD.....2ND DEFENDANT/APPLICANT

R U L I N G

1. What is before me is the Application dated 9th May, 2012 and filed on 10th May, 2012 under a certificate of urgency. The Application seeks for the following reliefs;

(a) THAT this matter be certified urgent and be heard exparte in the first instance

(b) THAT a skeleton file be opened and proceedings to placed using the skeleton file as the original court file is lost.

(c) THAT Ms Kaab Investments Limited and Registrar of Titles, Coast be joined in the proceedings as the 2nd Defendant and Necessary party respectively.

(d) THAT pending the hearing and determination of this application, an injunction be issued restraining the plaintiffs, their servants or agents from entering upon, dealing and interfering with the Applicants' peaceful and quite enjoyment of the suit property known as PLOT NO. 2293/III/MN.

(e) THAT the judgment of the court dated 22/6/2011 be set aside and the matter to proceed for full hearing and the Plaintiffs be ordered to serve all the pleadings on the Defendants as the necessary party.

(f) THAT the Registrar of Titles, Coast, be directed to forthwith expunge the registration of JUMA ALI and 23 others as the owners of Plot No. 2293/III/MN and to reinstate the name of KAAB INVESTMENTS LTD as the owner of Plot no. 2293/III/MN.

(g) THAT the costs of this application be provided for.

2. The application is supported by eight grounds and the Supporting Affidavit of Zein Ahmed Mohamed, the Applicant's director.

3. The Applicants' director has deponed that the 2nd Defendant purchased the suit property, namely Plot number 2293/III/MN from Mr. Kiptum Kitur Kimalat, the 1st Defendant, and he was registered as the owner under presentation number 72 of March, 2010.

4. The deponent has stated that prior to the acquisition thereof there were five trespassers who were

ordered to vacate the suit property in Kilifi Resident Magistrate's Court Miscellaneous Application Number 6 of 2010. The Applicant took physical possession of the suit property in 2010 and that none of the plaintiffs reside on the suit property.

5. However on 15th March 2011, the Applicant's director discovered that the suit property had changed ownership from the Applicant to the Plaintiffs herein as a result of an alleged decree and order. The said decree, the Applicant has deponed does not agree with the judgment that was delivered in the court.

6. The Applicant's director further deponed that he was never served with the pleadings herein and he only came to learn of the suit when he conducted a search at the Ministry of Lands on 15th March 2012; that the Registrar of Titles (the Necessary Party) neither informed the Applicant of the intended action to deregister the Applicant from the ownership of the suit property nor verified whether the orders were valid or not.

7. The Applicant's director filed a further affidavit on 22nd January 2013 in which he deponed that he never appointed the firm to Timamy and Company Advocates to act for it; that the hearing notice of 22nd July 2012 was only served upon Mr. Wilfred Kiptum Kitur Kiplagat, the 1st Defendant and that the gazette notice number 4341 dated 5th April 2012 does not assist the Respondents because of the order of the court of 10th May 2012 that was duly served on the Registrar of Titles on 20th May 2012.

8. The Plaintiffs/Respondents filed their joint Replying Affidavit on 18th December 2012 in which the 3rd Plaintiff/Respondent deponed as follows: that the Plaintiffs filed the present suit for adverse possession and they are still in possession and occupation of the suit property.

9. The Plaintiffs/Respondents further deponed that this matter was heard and determined by a competent court presided over by Honourable Justice H. Omondi and that the learned judge read and delivered a handwritten judgment on 22nd July 2012 which was in favour of the Plaintiffs and it bound all the parties herein including the 2nd Defendant; that the judge delivered a handwritten judgment because of the collusion of the members of staff and the litigants in accessing typed Judgments and Rulings before they could be read.

10. The Plaintiffs have deponed that a court clerk by the mane of Mr. Mungai offered to extract for them a decree from the said Judgment after the payment of the requisite fees, which they paid; that they obtained the signed copy of the decree and order on 19th January 2012 upon payment of Kshs.300 and took the decree to the Mombasa Land Registry which duly registered it against the suit property after the Land Registrar confirmed that the decree was genuine.

11. The Respondents have also deponed that as at the time of the sale of the land by the 1st Defendant to the 2nd Defendant/Applicant, they were still in continuous possession of the suit property and had developed it and that an order of injunction as prayed by the Applicant will essentially have them evicted before the hearing of the suit.

12. The Respondents have finally deponed that the Judgment of the court dated 22nd June 2011 cannot be set aside because the 2nd Defendant does not have a defence and has not attached any draft defence to show the triable issues raised; that the Applicant was aware of this suit because it instructed the firm of Timmamy & Co. Advocates to defend it; and that the suit land is the only land they have and which they have acquired by way of adverse possession.

13. The parties agreed to dispose of the application by written submissions. The 2nd Defendant/Applicant filed its submissions through the firm of Gikandi and Company Advocates while the Plaintiffs/Respondents filed their submissions on 26th February 2013 through the firm of Kenga & Company advocates.

14. I have considered the rival submissions.

15. It is not in dispute that a handwritten Judgment was delivered on 22nd June 2011 by the High Court at Malindi in favour of the Plaintiffs whose effect was to dispossess the Applicant the suit property. The Applicant has annexed on his Supporting Affidavit the Sale Agreement between itself and the 1st Defendant, the Transfer, and the title showing that it was the registered owner of the suit property before 22nd June, 2011.

16. The Applicant has also attached on its Supporting Affidavit a copy of the letter by the then Deputy Registrar of this court which confirmed that the original file could not be traced and a copy of the Judgment which the Deputy Registrar retrieved from the Court's computer. According to the Deputy Registrar's letter, the handwritten Judgment of the Judge could not be traced and the Judgment that was retrieved from the court's computer did not agree with the decree which has been annexed on the Supporting Affidavit. A perusal of the retrieved unsigned Judgement shows only one defendant. The name of the 2nd Defendant is not indicated on the said Judgment.

17. The unsigned Judgment annexed on the Applicant's Affidavit is different from the Decree in content and form.

18. One of the orders been sought in the Application is that a skeleton file be opened as the original court file is lost. However the original court file resurfaced after this application was certified as urgent and while the same was pending for hearing. I have perused the original file and this is what transpired.

19. The Plaintiffs/Respondents filed an Originating Summons against Wilfred Kiptum Kitur Kimalat and Kaab Investment Limited, the Applicant. In the said suit, the Plaintiffs were claiming to be declared as proprietors of the suit property by way of adverse possession.

20. The firm of Ombachi Mirasi & Co. Advocates filed a Memorandum of Appearance on 3rd August 2010. An affidavit of service was filed showing that the firm of Ombachi Mirasi was served with the hearing notice of 21st March 2011. The said hearing notice was also addressed to the firm of Timamy & Company Advocates although there is no evidence of service of the hearing notice on the said firm.

21. There is also on record an application dated 6th July, 2010 for service of the Originating Summons by advertisement. According to the grounds on the face of the Application, the copies of the Originating Summons were returned by the process server unserved because the "Respondents had not been traced." The Application was allowed by Honourable Justice Omondi on 19th July, 2010. The Judge further ordered that the Respondents do enter appearance within 21 days of service.

22. The newspaper cutting of 29th July, 2010 is on record showing that the Originating Summons was served by way of advertisement. However, the advertisement shows the Defendant who was served was Wilfred Kiptum Kitur Kimalat and not the 2nd Defendant. The 2nd Defendant's name does not appear anywhere on the said advertisement.

23. The Originating Summons was set down for directions on 28th February 2011. On that day, the learned Judge directed that the Originating Summons should proceed by way of *viva voce* evidence. The suit was subsequently fixed for hearing on 21st March 2011.

24. The Originating Summons proceeded for hearing on 21st March, 2011, on which day two witnesses testified. The Defendants were not represented. The Judgment was reserved for 22nd June 2011.

25. Other than the unsigned typed Judgment annexed on the Supporting Affidavit of the Applicant and which was retrieved from the court's computer by the Deputy Registrar, there is no handwritten Judgment on record. There is a typed signed Judgment dated 22nd July, 2011 on the original file which the Deputy

Registrar of this court has disowned vide her letter to the Chief Registrar dated 14th May, 2012 as follows:

“The handwritten Judgment of the Judge is missing from the file. There is however a typed Judgment purported to have been signed by HON. Justice H. Omondi. The font and format of the document is different from the ones typed by machines at this station. I managed to retrieve the Judgment written by the Judge and printed by our computer in the matter. I also obtained the Library copy of the same Judgment. I established that the Judgment written by the Judge was interfered with.....The decree and order in question does not tally with the judgment written by Hon. Omondi. ”

26. It would appear from the record that Honourable Justice Omondi proceeded with the hearing of the Originating Summons on the basis that the Originating Summons had been served on the Defendants by way of advertisement dated 29th July 2010.

27. However, as I have stated above, the advertisement did not mention the 2nd Defendant as a party to the suit. As can be discerned from the pleadings, the only reason as to why the Plaintiffs sued the 2nd Defendant was because the suit property was registered in its name. It is therefore strange, if not mischievous for the Plaintiffs not to indicate the 2nd Defendant's name in the advertisement knowing that the final order of the court will affect the 2nd Defendant's proprietary interests in the property.

28. The Plaintiffs have deponed that even though in the newspaper advertisement, the 2nd Defendant's name was not indicated, the 2nd Defendant was aware and was deemed to be participating in the matter when it entered appearance.

29. The 2nd Defendant has denied ever instructing the firm of Timamy & Co. Advocates or any other advocate to enter appearance for it in this matter. I have gone through the original court file and I have noted a Memorandum of Appearance which is purported to have been filed by Timamy & Co. Advocates on 22nd June 2010 for the 2nd Defendant, which position has been denied by the 2nd Defendant.

30. If indeed the firm of Timamy & Co. Advocates were on record for the 2nd Defendant as at 22nd June, 2010, then why would the Plaintiffs file an application dated 6th July 2010 in which they stated that the Defendants could not be traced? Which Defendant could not be traced other than the 2nd Defendant considering that the firm of Ombachi Mirasi was on record for the 1st Defendant?

31. In the circumstances and for the reasons I have stated above, I find and hold that the 2nd Defendant was never served with the Originating Summons either personally or by way of substituted service. The 2nd Defendant did not instruct the firm of Timamy and company advocates to enter appearance for it as alluded by the Plaintiffs.

32. It is common knowledge that if there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular one which the court must set aside *ex debito justitiae* on the application by the Defendant. As was held in **Frigonken Limited vs Value Pak Food Limited; HCCC NO. 424 of 2010**, such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.

33. However, if the default Judgment is a regular one, the court retains the unfettered discretion to set it aside. These principles were long established in the cases of **Patel vs E.A. Cargo Handling Services Limited (1975) EA 75; Shah vs Mbogo (1967) EA 75 and Philip VS Chemwolo & Another VS Augustine Kybende (1982-1988) KAR.**

34. I have found that the 2nd Defendant was never served with the Originating Summons as at the time the matter proceeded for hearing. It is only the 1st Defendant who was served by way of substituted

service on 29th July 2010, and the Judge proceeded with the hearing of the main suit on that basis. The service by substitute service was directed to the 1st Defendant only. Consequently, the Judgment of this court delivered on 22nd June, 2011 is hereby set aside *ex debito justitiae*, for non-service of the Originating Summons on the 2nd Defendant.

35. Having ordered the setting aside of the Judgment of 22nd June 2011, I will not address the issue as to whether the decree extracted by the Plaintiff corresponds with the Judgment of 22nd June 2011 save to state that the then Deputy Registrar of this court vide her letter dated 14th May 2012 to the Chief Registrar has indicated that the decree and order in question does not tally with the Judgment written by Hon. Justice Omondi. I have no reason to disbelieve the position taken by the Deputy Registrar, as she was then.

36. Further the original court file has numerous correspondences purported between the Chief Registrar and then Deputy Registrar of this court which correspondences did not emanate from this court or from the Chief Registrar. All these letters and the Judgment which is purported to have been signed by the Honourable Judge are still under investigations by the police and I will not say any more about the said letters and the Judgment.

37. In the circumstances and for the reasons I have given above, I allow the 2nd Defendant's Notice of Motion dated 9th May, 2012 in the following terms:

- a) **That the Judgment of the court dated 22nd June 2011 be set aside and the matter to proceed for full hearing.**
- b) **The Plaintiffs to serve the 2nd Defendant with all the pleadings herein within 21 days.**
- c) **The Registrar of Titles at Mombasa be and is hereby directed to forthwith expunge the registration of Juma Ali and 23 Others as the owners of Plot number 2293/III/MN and to reinstate the name of KAAB INVESTMENTS LIMITED as the owner of Plot number 2293/III/MN.**
- d) **The costs of this Application to be paid by the Plaintiffs.**

Dated and Delivered at Malindi this 30th day of May, 2013

O. A. Angote

JUDGE