



REPUBLIC OF KENYA

High Court at Malindi

Civil Case 36 of 2012

1. JOHN KAMANDE MWANEKI

2. MOHAMED SALIM AHMED ALAMUDI.....PLAINTIFFS

=VERSUS=

1. FESTUS KATANA KAMBI NYAMBU

2. KOMBO OMAR MANGALE.....DEFENDANTS

RULING

1. The Plaintiff has filed the Notice of Motion dated 15th October 2012 seeking for the following reliefs;

(a) This application be certified as urgent and service be dispensed with in the first instance due to reasons of urgency.

(b) Pending the hearing and determination of this application, a temporary injunction do issue against the Defendants either by themselves, servants, agents, employees, legal representatives or any other person claiming interest through them from planting or cultivating, trespassing, entering, remaining, selling, alienating, constructing, undertaking any development or dealing with the suit property plot no.554 Mtangani in any manner whatsoever.

(c) Pending the hearing and determination of this suit, an injunction do issue against the Defendants either by themselves, servants, agents, employees, legal representatives or any other person claiming interest through them from planting or cultivating, trespassing, entering, remaining, selling, alienating, constructing, undertaking any development or dealing with the suit property plot 554 Mtangani in any manner whatsoever.

(d) The O.C.S Malindi be ordered to ensure compliance of this orders.

2. The Application is supported by the grounds and the Affidavit of the 1st Plaintiff, whose main depositions are that the Plaintiffs are the legal and registered owners of all land measuring 72.77 acres known as plot number 554, Mtangani since 1987, that upon buying plot number 554, Mtangani, the Plaintiff's invited the area chief and sub-chief to help them with the proper and legal handling of squatters who had occupied the property.

3. After several meetings with the squatters, the Plaintiffs have deponed that they agreed to

compensate the squatters who had planted crops on the suit property and erected structures. They further agreed to set aside 5 acres of the suit property to be sub-divided among five different families.

4. The five families were settled on the 5 acres which the rest were compensated as per the agreement.

5. In the meantime, the Plaintiffs have deponed that they were given authority to sub-divide and change the use of plot number 554 by the Ministry of Lands and the Municipal Council of Malindi and that they have been selling the sub-divided plot to interested buyers.

6. The Plaintiffs have finally deponed that without any colour of right or any justifiable cause, the Defendants have entered on some of the sub-divided plots within plot number 554 and are trespassing on the suit property and attempting to erect illegal structures thereon; that they have made reports to the police about the said trespass but the 1st Defendant has continued to construct more temporary mud houses for his other family members on sub plots number 792 and 7918; and that it is in the interest of justice that this court do grant injunctive orders against the Defendants from interfering with the Plaintiff's property.

7. The Defendants filed their Replying Affidavit on 13th December 2012 in which they deponed that there is a pending suit being HCC NO. 33 OF 2009 (OS) by the 2nd Defendant and 148 others against Patric Mwaneki and 8 others. In the said suit, the subject matter is land parcel number 554 and the Patrick Mwaneki Kamande and 8 others have never filed a defence of a Replying Affidavit.

8. The Defendants have further deponed that the 2nd defendant with the others were charged in Criminal case number 294 of 2009 for forcible detainer contrary to section 91 of the Penal Code. The said criminal case was decided in favour of the 2nd defendant with his co-accused.

9. According to the Defendants the suit property is their ancestral property which was passed to them by their fathers and grandfathers and that there exists more than 149 families on the land who are claiming proprietary interest under the title of adverse possession.

10. The Defendants have further deponed that the original owner of the suit property was one Sheikh Salim Bin Khalfen Lawali and that the Defendants are grandsons of the slaves of the said Sheikh Salim Bin Khalfen Liwali who resided on the suit property; that at the time the Plaintiff's purported to purchase the suit property, more than 149 families were already residing on the suit property.

11. The parties agreed to dispose of the application by way of written submissions. The plaintiff's filed their submissions on 1st February 2013 while the Defendants filed theirs on 19th April 2013. I have considered the said submissions.

12. My task at this stage is not to determine the merits of the Plaintiff's case. That will be for the trial court. All I am required to do is to determine if the Plaintiffs have established a prima facie with chances of success and if they will suffer irreparable damage which cannot be compensated by way of damages if the injunctive orders do not issue as prayed.

13. The Plaintiffs have annexed to the Supporting Affidavit an indenture showing that they purchased the suit property in 1987. The Plaintiffs have admitted in their Affidavit that as at the time of the said purchase, they were squatters residing on the land though they paid them off. They have annexed copies of the Minutes dated 17th January 1994 showing the seven squatters who attended the meeting in which the settlement was arrived at. The two Defendants are not amongst the people who are purported to have been compensated by the Plaintiff.

14. On the other hand, the Defendants claim that they have been on the suit property for more than 12 years and that the suit property was bequeathed to them by their father or grandfathers who were the slaves of the original owner of the suit property.

15. The Defendants have annexed on their Replying affidavit a copy of the original owner of the suit property. The said title was issued to one Salim Bin Khalfen Liwali on 3rd April 1916 who is said to have been the “master” of the Defendants fore fathers.

16. I have perused Malindi HCC NO.33 Of 2009 (o.s) in which 149 persons have sued nine people. The two Defendants herein are amongst the Plaintiffs in HCCC NO.33 of 2009.

17. In the said suit, the Plaintiffs are claiming that they should be declared proprietors of their plots within portion number 554 which they have acquired by adverse possession, having lived and worked on the same for over 12 years since the late 1950's. The suit is still pending.

18. Looking at the issues which the Plaintiffs have raised in HCC NO.33 of 2009 (OS), I am of the view that they are the same issues that have been or are likely to be raised in the current suit by the Defendants. The issue as to the ownership of the suit property can only be ventilated fully if the two suits are heard on merit.

19. In Malindi HCCC NO.25 of 2013, Joseph; **JOSEPH NZARO vs SALIM KAYAA AND OTHERS**, I held that the purchaser who buys land without ascertaining the existing interests on the land runs the risk of losing the land. I further held that it is a basic principle of law that a person who has stayed on a parcel of land uninterrupted and without the permission of the owner for over 12 years will be entitled to land.

20. The principle of adverse possession applied to both the previous owner of land and the current title holder. In the case of **Kairu -vs-Gacheru (1986-1989) EA 215**, the Court of Appeal held as follows;

“The law relating to prescription affects not only present holder of title but their predecessors”

21. Consequently, if the Defendants and the other occupants of the suit property show that at the trial that they had acquired proprietary interests in the suit property prior to 1987 when the Plaintiffs are said to have bought it, the Defendants and the other claimants in HCCC NO.33OF 2009 would have acquired a better title. However, it is not for the court to make such a finding at this stage, suffice to say that the plaintiffs have not established a prima facie with chances of success.

22. On the issue as to whether the Plaintiffs will suffer irreparable damage which cannot be compensated by an award of damages, I find and hold that no such damage will be suffered by the Plaintiffs. The Plaintiffs have not taken possession of the suit property. According to the Plaintiffs own affidavit, the land has been sub-divided with a view of selling it to third parties.

23. The effect of an injunctive order as drawn by the Plaintiffs is to evict the Defendants from the suit property before the issue of whether they have proprietary interest in it has been ventilated at full trial. A case like this, with the history dating back to the days of slavery, should be heard, and disposed of through an expansive and thorough ventilation of evidence. The Plaintiffs will not suffer any irreparable damage if the Defendants are to continue occupying the suit.

24. In the circumstances, and for the reasons I have given above, I dismiss the Plaintiff's Application dated 15th October 2010 with costs.

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

O.A.ANGOTE
JUDGE