



REPUBLIC OF KENYA

High Court at Malindi

Environmental & Land Case 25 of 2013

JOSEPH NZARO T/A SMOKLAND ENTERPRISES.....PLAINTIFF

**VERSUS
SALIM KAYAA**

BAHATI SALIM

MUTAWALI SALIM

TIPIGO SALIM.....DEFENDANTS

RULING

1. What is before me is the Plaintiff's application dated 22nd February 2013 seeking for the following orders:

a) Pending the hearing and determination of this suit, the defendants/respondents, by themselves, their agents, servants, employees and or any persons claiming through them be permanently restrained from burying the body of Furaha Salim Kayaa and any other on the suit property namely LR.1705/79 Kilifi, alienating, developing and/or constructing thereon or in any other wasting the suit property as to change its character thereby frustrating the applicant's plans.

b) The costs of this application be awarded to the applicant.

2. The Application is premised on the ground that the Respondents have no colour of right to threaten or to use the Applicant's private property to inter the remains of Furaha Salim Kayaa or indeed any other unauthorised use; that the threatened use of the land to bury the deceased will fundamentally alter the character of the suit property to the detriment of the applicant and that it is only fair that the suit property is preserved during the pendency of this suit.

3. The Application is supported by the Affidavit of Joseph Nzaro who has described himself as a businessman and proprietor of the land parcel number LR 1705, CR NO. 22257 within Kilifi town.

4. The Applicant has deponed that he bought parcel number LR 1705, CR. NO. 22257 (the suit property) from Kazungu Karisa Tsuma and that he did not have any notice of the interest of the Respondents herein.

5. The Applicant has further deponed that after purchasing the suit property, it came to his

knowledge that there was a pending suit being Kilifi PMCC No. 513 of 2009 in which the seller was the Plaintiff while the Respondents herein were the Defendants.

6. The Applicant's further deposition is that after he discovered about the existence of the suit, he requested to be joined in the suit as an interested party in order to protect his interest. That request was allowed by the court.

7. By the time the Applicant joined in Kilifi PMCC No. 513 of 2009, the Plaintiff had obtained an injunctive order restraining the Defendants from burying Furaha Salim Kayaa, who is their late sister on the suit property. However, the seller, who was the Plaintiff in Kilifi PMCC No. 513 of 2009 has since withdrawn the suit. It is the act of withdrawing the suit by the seller that has necessitated the filing of the current suit .

8. The Applicant has finally deponed that unless the restraining orders are issued, he stands to suffer irreparable loss because the suit property is a commercial property which he has sub-divided with a view of developing residential estates; that the Defendants may resort to alienate, damage or interfere with the property in such a manner as to completely change its character and destroy the dreams he has of developing it.

9. The 2nd Respondent filed his Replying Affidavit on 2nd April 2013. The 2nd Respondent swore the Affidavit on his own behalf and on behalf of the 1st, 3rd and 4th Respondents.

10. The 2nd Respondent has deponed that his late sister, Furaha Salim Kayaa died on 16th March 2011 and her body has not been interred until now due to the injunctive order that was obtained by the Plaintiff in PMCC No. 513 of 2009.

11. The 2nd Respondent has further deponed that the Plaintiff herein was all along aware that there was a dispute between the Plaintiff in PMCC No. 513 of 2009 and the Defendants herein.

12. While the Kilifi PMCC No.513 of 2009 was going on, the 2nd Respondent has deponed that the Plaintiff in Kilifi PMCC No. 513 of 2009 went ahead and sold the parcel of land to the Plaintiff herein thereby making a mockery of the whole court process. After the Plaintiff in PMCC No. 513 of 2009 sold the entire suit property to the Plaintiff herein, he withdrew the suit.

13. According to the 2nd Respondent, the Plaintiff herein is a trader in Kilifi and was aware that the suit property was fully developed by the Defendants; that the suit property is family land and other than the Defendants, other family members including the Defendants' uncles, mothers and sisters are staying on the suit property.

14. The 2nd Respondent deponed further that the Plaintiff in PMCC No. 513 of 2009 had previously sold 2 acres to one Celestine Safari Shehe leaving a balance of 3 acres; that the seller is their brother and that he has lived on the property with the rest of the family members and that he obtained the title documents for the suit property on 1st March 1992 without consulting with the family members.

15. The 2nd Respondent has finally deponed that the suit property has nine graves on it and that the Plaintiff should have done a physical ground search before buying the property; that the property was a gift by Lily White to one Jumwa Mwarua Ndiro who was one of the wives of the vendor's father in trust for the whole family; that the Plaintiff herein colluded with the Plaintiff in Kilifi PMCC NO. 513 of 2009 to withdrew the suit and that the two have a common interest; that the Defendants have lived on the suit property for over 40 years; that they have nowhere else to go and that the transfer is fraudulent because there is no evidence of valuation of Stamp Duty.

16. The Applicant and the Respondents' counsels submitted orally on 16th May 2013. I have considered the submissions which are an amplification of the parties' respective affidavits.

17. When the Application came up for hearing on 9th May 2013, I lamented on the length of time Kilifi PMCC No. 513 of 2009 had taken to be finalised considering that there was in existence an injunctive order barring the burying of the deceased since 16th March 2011 when she died.
18. To worsen, the situation, the Plaintiff in Kilifi PMCC No. 513 of 2009 withdrew the suit vide a notice of withdrawal dated 18th February 2013 and filed on 22nd February 2013 which paved way for the Plaintiff herein to file the current suit on 22nd February 2013, the same day the suit in the lower court was withdrawn, and obtained an injunctive order on the same day.
19. I have been informed that the suit in Kilifi PMCC No. 513 of 2009, in which the current Plaintiff was an interested party, was withdrawn after all the parties had closed their cases and the matter was pending for submission.
20. The Plaintiff, who was an interested party in Kilifi PMCC No. 513 of 2009 now wants to engage the Defendants in another round of litigation while the body of Furaha Salim Kayaa, continues lying in the mortuary. That, in my view is an abuse of the court process by the vendor who sold the suit property to the current Plaintiff.
21. Having said that, it is my task at this stage to ascertain whether the Plaintiff, who purchased the suit property from the Plaintiff in Kilifi PMCC No. 513 of 2009 has shown that he has a *prima facie* case with chances of success and whether he is likely to suffer irreparable loss unless the injunctive orders he is seeking is not issued. If in doubt, I will decide the case on a balance of convenience.
22. The Plaintiff has annexed on his affidavit the official search showing that as at 13th October 2011, he was the registered owner of Plot number L.R. 1705/789, Kilifi Measuring 2.007 Ha (approximately 5 acres).
23. The Plaintiff has also annexed an Agreement of Sale dated 8th March 2010 between himself and Kazungu Karisa Tsuma, the Plaintiff in Kilifi PMCC No. 513 of 2009.
24. Having purchased the said property and a title having being issued in his name, the Plaintiff now wants the court to bar the burial of Furaha Salim Kayaa, the Defendants' sister on the suit property. The Plaintiff wants his proprietary right to be protected as enshrined under Article 40 of the Constitution.
25. On the other hand, the Defendants claim that they have lived on the suit property for over 40 years and that they have built houses and buried their dead on the suit property. The Photographs of the graves and the Defendants' houses, which are both temporary and permanent, have been annexed on the Replying Affidavit.
26. I have looked at the Plaint that was filed in Kilifi PMCC No. 513 of 2009 by the vendor and at paragraph 7, the Vendor averred as follows:
- “In or about the Year 1974 – 1981, the 1st Defendant who is the father to the 2nd, 3rd and 4th Defendants encroached and or trespassed into the Plaintiff’s plot and started to construct some structures therein without the consent and or authority of the Plaintiff”***
27. The Vendor acknowledges that the Defendants have lived on the suit property since 1974 without his consent. This acknowledgement is in effect an admission that the Defendants herein have a good grounding in law to lay a claim over the property under the doctrine of adverse possession.
28. It is trite law that the principle of adverse possession applies to both the previous owner of land and the current title holder.
29. In the case of **Kairu -Vs- Gacheru E.A. (1986-1989) 215**, the Court of Appeal held as follows:

“The law relating to prescription affects not only present holders of the Title but their predecessors.”

30. The Plaintiff herein has not denied that as at the time he bought the suit property, the Defendants were already residing on it. In fact, at paragraph 18 of the Further Affidavit, the Plaintiff has deposed as follows:

“The existence of some graves and houses on the property is a fact that should not influence the future use of the property. The Plaintiff bought it in the state in which it is with the knowledge that there are a few graves thereon.”

31. That deposition by the Plaintiff is a misunderstanding of the law pertaining to land. A purchaser who buys land without ascertaining the existing interests on the land runs the risk of losing the land. 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 the land. That is what the Plaintiff should have ascertained before purchasing the land in 2010. He is not an innocent purchaser without notice. The existence of cemented graves, houses and several families on the land was adequate notice.

32. Having said so, the only conclusion that I can arrive at at this stage is that the Plaintiff has not established a *prima facie* with chances of success. The Plaintiff has also not shown the irreparable damage that he is likely to suffer unless the injunctive orders are granted. In fact, it is the Defendants who are likely to suffer irreparable loss if I were to grant the orders being prayed for by the Plaintiff because they don't have any other land to bury the deceased. The Plaintiff can always recover the purchase price from the vendor if he loses the case or mesne profits from the Defendants if he wins the case.

33. In the circumstances and for the reasons I have given above, I dismiss the Plaintiff's Application dated 22nd February, 2013 with costs to the Defendants.

Dated and delivered at Malindi this **16th** day of **May**, 2013.

O. A. ANGOTE
JUDGE