



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND CASE 5 OF 2010

IN THE MATTER OF L.R. NO. 209/9613

AND

IN THE MATTER OF SECTION 37 AND 38 OF THE LIMITATIONS OF ACTIONS ACT (CAP 22 LAWS OF KENYA)

BERNARD MWANGI NDERITU

HESBON OMONDI

FRANCIS RUMANO

PETER WAMBUGU

STEPHEN KAMAU

MARY WAMBU.....PLAINTIFFS/APPLICANT

VERSUS

NDIARA ENTERPRISES LIMITED.....DEFENDANT/RESPONDENT

RULING

The Plaintiffs/Applicants (Applicants) are by way of Notice of Motion brought under Order 28 Rule 7(a) & 15, and Order 50 Rule 1 of the Civil Procedure Rules, 2010, dated 7/7/2012 seeking orders that:

1. The Honorable Court do issue a commission to the Director of the Criminal Investigations Department in conjunction with the commissioner of Lands to investigate and establish the authenticity of the purported Original Grant Title Number IR 44980 L.R. No. 209/9613 (Title) issued on the 24th June 1988 in the name of the Defendant/Respondent NDIARA ENTERPRISES LIMITED, and which is in the custody of the Defendant's Advocates and record and such report be returned within such specified period as the Court shall specify.
2. The said purported Original Grant of Title be surrendered to this Honorable Court to facilitate the commission.
3. That costs be in the cause.

The application is premised on the grounds stated in the application, and reiterated in the Supporting Affidavit sworn by Bernard Mwangi Nderitu dated 28/6/2011, that the Applicants have enjoyed quiet and undisturbed possession of the suit property without any notice of any adverse claim from any person since 1990, and that they have filed this suit seeking to be declared the owners of the suit property by way of adverse possession. That they have doubts in to the authenticity of the Title, and that sufficient independent proof by the proper authorities is necessary as the grant of Title is a matter at the heart of this suit. The Applicants allege that the Original grant of Title was procured through fraud as the Respondent's purported Directors have never any one time interfered with the Applicants' quiet possession for a period of 20years.

In opposition , the Respondent filed a Replying Affidavit sworn on 27/10/2011 by William Kiragu Nguithi, who deponed that he is a director of the Respondent. The Respondent contends the suit property has been vacant and that it is a false allegation by the Applicants to state that they have enjoyed quiet possession for over 20 years. That the Deputy Registrar on 18/1/2011 visited the suit property and confirmed that the pictures attached to the affidavit sworn on 13/5/2010 by the Respondent, shows the true representation of what the suit property looks like. The Respondent maintains that the procedure for authenticating a Title document is by carrying out an official search at the Lands Office, and not through the application herein. Further that the Applicants have not particularized the allegation of fraud, as deponed in their Supporting Affidavit.

I have considered the application, and affidavits filed in Court. I have also considered the oral submissions made by both counsels. The issue for determination is the procedure for determining the authenticity of a Title document, and whether this Court should issue a commission to the Director Criminal Investigation Department, and Commissioner of Lands to investigate and establish the authenticity of the Title referred herein. Counsel for the Applicants brought this application under Order 28 Rule 7(a) which empowers the Court upon an application, or on its own motion to issue a commission to any person to make an investigation and report to the Court, for purposes of ascertaining any matter in dispute in the suit. It is apparent that that applicant has not detailed the fraud alleged. I do agree with the respondent's submission that the applicant should move to the lands registry and do an official search on the title as the same is conclusive. Granting prayer no. 2 would setting a dangerous precedent for parties in land matters wherein a procedure has been laid down on how a document can be authenticated. I therefore find no merit in the application and dismiss it with cost to the respondent.

Orders accordingly.

R. OUGO

JUDGE

Dated , signed and delivered this 26th Day of July 2012.

.....Applicant

.....Respondent

.....Court Clerk.