



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 3 (O.S) OF 2006

KASIMU SHARIFU MOHAMED.....PLAINTIFF

VERSUS

TIMBI LIMITED.....DEFENDANT

R U L I N G

The Defendant's Counsel (Mr. Ghalia) has filed a Notice of Preliminary Objection dated 7th December 2010 stating that the entire suit and claim is based on an unconstitutional provisions of the law as:

- (1) The claim and the entire suit is premised on section 38 of the Limitation of Actions Act and Order XXXVI Rule 3D of the Civil Procedure, which are acts of Parliament.
- (2) Section 40(2) of the Constitution of Kenya 2010, expressly prohibits parliament from enacting any law that permits the State or any person to arbitrary deprive a person of property of any description.
- (3) The body of the prayer in the Originating Summons and paragraph 2 of Mr. Kassimu's supporting affidavit admit that the defendant is, at the date hereof, the registered proprietor of the suit property.
- (4) Section 7(1) of the Sixth Schedule (Transition and consequential provisions) of the Constitution of Kenya 2010, provides that all laws in force immediately before the effective date continue in force and shall be construed with all alterations adoptions, qualifications and exceptions necessary to bring it into conformity with the Constitution of Kenya 2010.

(5) The suit property, is such property as is protected by section 40 of the Constitutional from arbitrary deprivation

(6) Section 40(3) of the Constitution of Kenya 2010, provides that the State shall not deprive a person of any right over property of any description unless the deprivation is in the manner provided in sub-section 40(3) (a) and (b) thereof.

(7) A claim under section 38 of the Limitation of Actions Act is not recognized by section 40(b) as a Constitutional way of depriving the respondent of his right to property.

(8) Deprivation of property under section 38 of the Limitation of Actions Act was hitherto provided for under section 75(4) (a) (vi) of the repealed Constitution as an express Limitation to protection from deprivation of property.

(9) Accordingly section 38 of the Limitations of Actions Act is unconstitutional to the extent that it purports to deprive or provide for deprivation of a right to property outside the parameters permitted by section 40(3) of the 2010 Constitution.

(10) Section 38 of the Limitation of Actions Act cannot therefore be a legal basis for a claim in a court of law.

(11) In addition the said provision does not satisfy the express constitutional conditions set out by section 24(1) and (2) for any Statute that seeks to limit fundamental right or freedom because section 38 purports to provide for limiting the right to property to another, which is a fundamental right to an extent of derogating from the core or essential content of the right to property in that, section 38 of Cap 22 purports to provide for registration to plaintiff as the registered owner of the defendant's property.

(12) Section 159(1) of the Constitution provides that one in exercising judicial authority, the courts shall be guided by the principles inter alia.

(a) That the purpose and principles of the Constitution shall be protected and promoted

(b) Justice shall be administered without undue regard to procedural technicalities.

(13) Section 165 (3) (d) (ii) of the Constitution expressly grants jurisdiction to this court to hear the question whether anything said to be done under the authority of this contribution or of law is inconsistent with or in contravention of the Constitution.

He therefore urges the court to declare section 38 of the Limitation of Actions Act unconstitutional and strike out and dismiss the Originating Summons dated 16th January 2007 with costs.

Parties were directed by this court to dispose of the matter by way of written submissions. Mr. Ghalia's submissions, with all due respect, did not argue the preliminary objection or analyse any issues, it is a reproduction of the notice of preliminary objection in a larger print.

Mr. Maosa for the plaintiff, filed his written submissions out of time but sought leave from this court to

admit them as properly filed explaining the delay as being due to the fact that he was out of town since late December 2010 and only returned to his office on 18th January 2011 – he apologized for the delay. I find the explanation reasonable, being fully aware of the activities that catch up with many during the December festivities and I accept his explanation and apology. I allow the written submissions filed herein to form part of the court record.

Mr. Maosa submits that the preliminary objection is misplaced, because once a suit has been fixed and set down for hearing the same cannot be struck out or dismissed by way of filing a preliminary objection of the nature filed by the defendant and the defendant ought to have followed the procedure under Order VI Rule 13 Civil Procedure Rules (now Order 2 rule 14 of the Civil Procedure Rules 2010).

He further points out that a party is bound by its pleadings placed before court and the preliminary objection raised here is not covered anywhere in the replying affidavit of GIANFRANCO VITALI sworn on 4th January 2009 and which had been ordered by this court to be deemed as defendant's defence in this matter. Since the defendant failed to plead this point of law, it should not be allowed to raise the same now, and it ought to be dismissed.

Mr. Maosa points out that since the matter raised touches on section 40 of the present constitution of Kenya, then, it is unprocedural to have the same raised by way of notice of preliminary objection and the right path which the defendant would have taken is to file Constitutional Reference seeking to declare section 38 of Cap 22 as read with Order XXXVI of the Civil Procedure Rules (never Order 37) as unconstitutional.

It is also his argument that section 40(2) of the Constitution of Kenya simply prohibited parliament from enacting law that permits the State or any other person to arbitrarily deprive a person of property or interest therein but the Constitution has not defined what constitutes "Arbitrary" nor has Counsel given this court instances or definition of such acts. It is the plaintiff's contention that the doctrine of "Adverse Possession" has been in operation over many centuries and remains good and continues to serve a good purpose and in any event the plaintiff has to strictly establish that he has occupied the suit premises **ne vi, nec claim** and **nec precario**, - this doctrine is recognized in all Commonwealth countries and there is nothing arbitrary in what plaintiff seeks in this suit.

He urges this court to dismiss the preliminary objection.

With regard to procedure, I think section 159 (1) (d) offers refuge to the defendant – that regard should be paid more to the substantive issues raised in a matter rather than procedural technicalities so as to avoid delay in matters. I think unless the procedural defect impacts on the substance of an application or the court process then the court should not pay undue regard to such technicalities. My view here is that whether raised as a preliminary objection or filed as a Constitutional Reference, the defendant seeks this court to declare section 38 of Cap 22 and therefore by extension Order XXXVI Rule 3(d) Civil Procedure Rules unconstitutional in the light of section 40(2) and (3) of the Constitution of Kenya 2010.

To insist on some recognized procedural technicalities will not change the content of what the defendant has raised, and will in my view result in only delaying this matter further.

This originating summons is based on the doctrine of adverse possession, which is a legal principle recognized in law. The plaintiff recognizes that the defendant is the legally registered owner of the suit property herein and seeks to justify their occupation of the plaintiff's property under section 38

(1) of the Limitation of Actions Act (Cap 22) which provides that:

“where a person claims to have become entitled by adverse possession to land registered...or land comprised in a lease...he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as the proprietor of the land”

The basis of this doctrine is the recognition that persons may own land which, they never intend to put

into use and that other persons have taken advantage of that vacant non use of land and moved into uninterrupted occupation and use of the land over a period of time of 12 years or more without permission of the registered owner, and such activity has resulted in creating a superior interest in respect of the person who would otherwise be considered a trespasser. Is there a conflict with the Constitution of Kenya regarding Protection of Right to Property under section (40)

“(1) Subject to Article 65, every person has the right either individually or in association with others, to acquire and own property

(a) Of any description

(b) In any part of Kenya

(2) Parliament shall not enact a law that permits the State or any person –

(a) to arbitrarily deprive a person of property or any description or of any interest in, or right over, any property of any description or

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over property of any description, unless the deprivation

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land or title to land, in accordance with Chapter five or

It is to be noted that Chapter 5 addresses the principles of land policy and classification of land. It is also not lost to me that under Article 68 of the Constitution, Parliament shall inter alia

(c) (ii) enact legislation to regulate the manner in which any land may be converted from one category to another.”

It is Mr. Ghalia’s position that deprivation of property under section 38 of limitation of Actions Act was hitherto provided for under section 75(4) (a) (vi) of the repealed Constitution of Kenya as an express Limitation to protection from deprivation of property, and that the 2010 Constitution makes no such provision. Actually section 4 of the former Constitution Revised Edition 2009, section 4 was deleted by Legal Act No. 13 of 1997 section 3, the appropriate provision is section 75 subsection 6(a) of the former Constitution which stated that:

“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention to the extent that the law in question makes provision for the taking of possession or acquisition of property.”

The issue to consider is whether the doctrine of adverse possession is tantamount to arbitrary acquisition and whether the fact that adverse possession is not specifically mentioned in the current Constitution, makes it an unconditional process.

I note that Chapter 5 of the 2010 Constitution addresses the principles of land policy and classification of

land.

It is also not lost to me that under Article 68 of the Constitution, Parliament shall inter alia enact regulation

(d) (ii) to regulate the manner in which land may be converted from one category to another.

This must also be considered alongside what amounts to security of land rights under Article 60 of the Constitution. My view is that security of land right is not simply limited or restricted to persons who are title holders, it contemplates persons who have acquired certain rights over land due to prolonged use, and which rights must also be taken into consideration – if the courts were to ignore this, then the country will end up with persons and families who will be eternal squatters, even where the proprietor of the property is not eternally inclined to make use of the land.

Secondly, the term arbitrary in the ordinary English language means an action or decision not seeming to be based on a reason, system and sometimes, seeming unfair (see Oxford Advanced Learner's Dictionary A. S. Hornby Sixth Edition Edited by Sally Wehmeiner). Going by this definition the doctrine of Adverse Possession is not an arbitrary acquisition – there are certain thresholds that the person making claims based on that doctrine must meet and therefore does not fall within the arbitrariness referred to by Article 40(2) of the Constitution of Kenya 2010. My finding is that section 38 of Cap 22 is not unconstitutional and the preliminary objection has no merit. It is thus dismissed with costs to be borne by the defendant.

Delivered and dated this 16th day of **May 2011** at Malindi.

Mr. Ndegwa holding brief Ghalia

Mr. Mwandilo holding brief Maosa for plaintiff

H. A. Omondi

JUDGE