



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J)

CIVIL CASE NO. 103 OF 2006

SALEH MUHSIN SHIGOG PLAINTIFF/APPLICANT

-VERSUS-

1. AUGUS M. DISH
2. ALI KAMOZO
3. JACKTON MUTISO
4. THOMAS KAZUNGU
5. RAMA ALI
6. WILFRED WAFULA
7. LABAN NDERO
8. SOPHY JUMA
9. JOSEPH TINGA JANNO
10. RASHI MBETE

.....

DEFENDANTS/RESPONDENTS

11. RAMADHAN NDEGE
12. PETER ONDIEK
13. JUMA KUMBE
14. ANN WAKIO
15. JOSEPH MWANGUDZA
16. KITHI B. WANGA
17. ANTHONY MWANGEKA
18. MUTSANZE BAYA
19. SAMMY NGOI

RULING

The plaintiff's application by Notice of Motion dated **23rd August, 2010** was brought under the earlier edition of the Civil Procedure Rules, Orders **L** (Rule 1) and **VI** (Rule 13 (1) (a), (b), (c), (d)); the Wakf Commissioners Act (Cap. 109); and ss. 1A and 1B of the Civil Procedure Act (Cap. 21, Laws of Kenya). The application carried one substantive prayer: that *"the defendants' defence dated 31st May, 2006 be struck out, and thereafter, the prayers sought in the plaint be allowed"*.

The application is based on the following grounds: the defendants *"have nothing tosupport paragraph 5 of their defence"*; the defendants cannot rely on the Limitation of Actions Act to claim rights

by alleging adverse possession, which claim would be contrary to the Wakf Commissioners Act (Cap. 109, Laws of Kenya); the rest of the statement of defence is a bare denial; the defence is frivolous, no reasonable cause of action having been disclosed.

In support of the application is the affidavit of the holder of the power of attorney (given by the plaintiff), **Anwar Saleh Shigog** sworn on **23rd August, 2010**.

The deponent avers that the applicant had made an application for and received from the Wakf Commissioners, land allotment, upon payment of Kshs. 100,000/=; and a certificate under the Registration of Titles Act was duly issued to the applicant. It is deposed that the certificate of postal search, which search was conducted on **30th May, 2006** shows the applicant as the owner of the suit land, Plot No. 79/II/M.N, C.R. No. 18732, measuring 12.80 acres and held in leasehold for a term of 99 years as from **1st September, 1987**.

The deponent states his awareness of certain disputes which had arisen as to the ownership of the suit land; the same were investigated by the local Chief, and a report, which was favourable to the applicant, made to the District Commissioner. The deponent avers that the applicant pays rent as required by law, to the Wakf Commissioners of Kenya.

Wilfred Wafula, the sixth defendant, swore a replying affidavit, for himself and for his co-defendants, on **10th November, 2010**, deposing that the application lacks merit, because a **consent** had been reached between the parties on **9th October, 2008** which consent is still in force. It is deposed that *“the defendants have permanent structures on the suit property”*. The deponent avers that the plaintiff’s suit is time-barred; on the basis that when the suit was filed, the defendants had already occupied that suit land for more than 12 years. The deponent deposes that the plaintiff has acquiesced in the defendants’ occupation and utilization of the suit land: and that the defendants *“continue to occupy the parcel of land known as Plot No. 79/II/MN [peacefully], continuously and uninterruptedly”* as they have done for more than 12 years.

The deponent pleads that the suit should be allowed to go to full hearing, to enable the defendants to demonstrate their ownership and occupation.

Learned counsel for the plaintiff/applicant urged it to be significant that the defendants have, in their reply, not challenged ownership as inhering in the applicant; counsel also submitted that the defendants, insofar as they have not contested the law relating to Wakf Commissioners, have no valid claim by virtue of adverse possession. In this regard counsel relies on s. 15 of the Wakf Commissioners Act, which provides:

“Notwithstanding anything to the contrary in any Act or law for the time being in force, no title to any property the subject of a Wakf shall, after the commencement of this Act, be acquired by any person by reason of that person having been in adverse possession thereof or by any law of prescription”.

Counsel submitted that, by virtue of s.16(1) of the Wakf Commissioners Act, a leased property remains the property of the Wakf, subject to Muslim law.

Learned counsel, **Mr. Kadima**, for the applicant, submitted that rights of prescription, where a property is subject to a Wakf, are excluded and cannot accrue to anyone; and hence a claim such as that made by the defendants is frivolous.

On a procedural point, counsel categorized the defendants’ replying affidavit as a frivolous one, for lack of authority from all the defendants: the deponent therein (6th defendant) showed no authority from his co-defendants.

Counsel also contested the defendants’ claim that the 5th defendant should have been allocated part of the suit land, for having been a caretaker of the same; in the words of counsel: *“It is our....submission that the plaintiff has no....power to allot Wakf property except by the Wakf Commissioners, [in accordance with] Muslim law as [provided] in s. 16(2) of [the Wakf Commissioners Act].”*

Learned counsel, **Mr. Okanga** for the respondents, submitted that the application had no merits, “*in view of the consent order between the parties entered on the 9th of October, 2008*”. The plank on which the respondents’ case stands is precisely the said **consent** which, in counsel’s submission, “*has rendered the plaintiff’s current application [devoid of].....merit, [and] the only recourse.....would be to list the suit for full hearing*”.

Counsel also urged that “*the plaintiff’s application is time-barred, as the same is brought out of time....., twelve years [having] elapsed*”. It was submitted, however, that the claim by the defendants was **not based on adverse possession**; the defendants were only stating that the suit cannot be prosecuted, “*in view of the fact that it’s brought after the expiry of 12 years and the laws of limitation bar suits relating to land after the expiry of 12 years*”.

Are the defendants claiming **indirectly** by adverse possession? They have not filed a suit in that regard; but they assert that the plaintiff must renounce a right of ownership, because, as much as 12 years (the period required for an adverse possession suit) have elapsed while they have been in possession. The defendants invite the Court to look at an earlier replying affidavit of theirs (dated **13th May, 2008**), “*to see for itself the structures of the defendants which dot the disputed plot [and which plot] is well developed*”.

However, the **prima facie** perception that the defendants miss the objective view of, firstly the law of adverse possession, and secondly the Wakf Commissioners Act, is, in my view, mitigated by their call for a hearing on the merits, of the main cause.

Counsel, on the basis of a letter on file, dated **17th July, 2005** urged that “*the parties to this suit have been in constant talk over the parcel of Land*”.

This Ruling brings out the special facts and circumstances that should weigh in the mind of the Court, in determining the instant application. The plaintiff/applicant has contended that the law mainly stands in his favour; and therefore, this application should be determined in his favour. However, this being only an interlocutory stage in the proceedings, the Court does not gain the full view of the facts, and indeed, even of the applicable law, so as to be able to dispatch the case with conviction. Moreover, it emerges from the facts and circumstances of the case, that there have been **dealings and negotiations between the parties** – and the same could well have led to an accommodation which the Court would have to respect. It follows that it is not **just** for the Court, at this stage, to determine with finality the relationship between the two sides in the cause. If the parties will not, in the very short term, have found a compromise, then the best solution must come from a hearing of the main cause, on the merits. So far as possible, in a contested matter in the form of a suit, the Court’s final judgment should come only when the main cause has been heard.

Therefore, I disallow the application by Notice of Motion of **23rd August, 2010**. Costs shall be in the cause.

I also Order that the parties shall **complete the pre-trial steps within 30 days** of the date hereof; and the matter shall be listed for **mention, for trial directions, within 40 days** of the date hereof.

Orders accordingly.

SIGNED at MOMBASA

.....
J.B. OJWANG
JUDGE

DATED and DELIVERED at MOMBASA this 22nd day of July, 2011.

.....

M.A. ODERO
JUDGE