



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. E199 OF 2020**

**JUMAA TAKIDIRI MWACHIHI ..... APPLICANT**

**-VERSUS-**

**OMAR WADH MADHESH ..... 1<sup>ST</sup> RESPONDENT**

**ABDALLA BASAWADH ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The suit before me was instituted by way of Originating Summons filed on 3 November 2020. The applicant's case is that he is entitled to be declared the proprietor of Plot No. 50/11/MN by virtue of adverse possession. On 16 February 2021, the applicant filed an application seeking leave to serve the respondents through an advertisement in the daily newspapers. This application was based on the ground that his attempts to physically serve the respondents was unsuccessful because they could not be traced.

2. On 3 May 2021, Awadh Omar Awadh and two others entered appearance as the administrators for the estate of the 1<sup>st</sup> respondent. On 21 May 2021, Abdallah Salim Abdalla Basawad and another entered appearance as the administrators of the estate of the 2<sup>nd</sup> respondent. They both filed their responses to the Originating Summons.

3. In their replying affidavits they deposed that the applicant was well aware of the death of the respondents and the subsequent appointment of the administrators to their estates. In the Replying Affidavit of Swaleh Mohamed Omar, an administrator of the estate of the 1<sup>st</sup> respondent, it was deposed that there is a suit between the same parties being Mombasa Chief Magistrate Case No. 938 of 2012, Mohamed Omar Awadh & Barka Omar Awadh as administrator of the estate of Omar Awadh Madhesh vs. Juma Takdiri, Soud Abdalla and Timi Ali. It will be observed that Juma Takdiri is the 1<sup>st</sup> defendant in that case and is the plaintiff in this Originating Summons.

4. When the matter was mentioned before me on 4 October 2021, I thought it curious that the plaintiff would wish to apply to serve by substituted means yet he is a defendant in the case before the Magistrate's Court and has entered appearance and filed defence. He would certainly be aware of the whereabouts of the persons who had sued him before the Magistrate and would not need to use substituted means. I also wondered why the plaintiff filed a fresh case when he already has a pending dispute before the Magistrate over the same land. He also had not disclosed this previous suit despite being a defendant in it. I thus asked the plaintiff to show cause why his case should not be dismissed for being an abuse of the court process.

5. The applicant has sworn an affidavit to reply to the notice. He has deposed that he is 94 years old and has been in possession and occupation of the suit land since 1954. He added that his occupation has been peaceful and uninterrupted, and he has never been asked to move out. He deposed that he has no recollection of being served for the case before the Magistrate's Court and is unaware of the said case. He deposed that he never instructed any advocate to appear for him in that matter. He deposed that the advocate purporting to appear for him in the case at the Magistrate's Court, that is M/s Mwahunga Mtana & Company Advocates, was never instructed by him. He deposed that the law firm could not represent him as Mr. Mwahunga was suspended from practice years ago and the firm ceased operations. He annexed a screen shot from the website of the Law Society of Kenya (LSK). He deposed that he has been informed that the said case was dismissed. He thus asserts that this suit is not an abuse of the process of court.

6. I have considered the depositions of the applicant. I have also perused the file Mombasa CMCC No. 938 of 2012. The plaintiffs in that case sued the applicant in this Originating Summons for eviction. There is actually filed a defence on behalf of the applicant (sued as 1<sup>st</sup> defendant) by the law firm of M/s Mwahunga Mtana & Company Advocates. There is also filed some documents to be relied upon at trial and a witness statement said to be of the applicant. The matter however never proceeded and was dismissed for want of prosecution on 19 November 2018.

7. In his explanation, the applicant states that he was not aware of this suit and never instructed the law firm of M/s Mwahunga Mtana & Company Advocates. He states that he also never signed the witness statement.

8. It is difficult for me to verify the correctness of the depositions of the applicant. I will give him benefit of doubt especially given that the suit no longer exists as it was dismissed for failure to prosecute.

9. I will allow the applicant to continue with this suit to its logical conclusion.

10. Orders accordingly.

**DATED AND DELIVERED THIS 9<sup>TH</sup> DAY OF FEBRUARY 2022**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**