



Thoya & another v Kitsao & 2 others (Environment & Land Case 38 of 2016) [2022] KEELC 3438 (KLR) (4 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3438 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 38 OF 2016**

M SILA, J

MAY 4, 2022

BETWEEN

BAHATI THOYA 1ST PLAINTIFF

MZUNGU CHENGO 2ND PLAINTIFF

AND

GEORGE KITSAO 1ST DEFENDANT

CHRISTOPHER KARISA 2ND DEFENDANT

RESITRAR OF LANDS, MOMBASA 3RD DEFENDANT

RULING

1. The application before me is that dated 30 April 2021 filed by the 1st and 2nd defendants. They want this suit dismissed for being an abuse of the court process. The application is based on grounds inter alia that the applicants do not own the suit property; that the suit is res judicata; and that the court is functus officio. The application is opposed.
2. To put matters into perspective, this suit was commenced through a Complaint filed on 16 March 2016. In the complaint, the plaintiffs pleaded that they are equitable and beneficial owners of the land Subdivision No. MN/I/368 (Original number 319/1) Section I, Mainland North (hereinafter simply referred to as Plot No. 368). They pleaded that the land is now unlawfully subdivided into the parcels Subdivision No. MN/I/19052 to MN/I/19152. They averred that the father of the 1st defendant, and the plaintiffs and their families, resided on this land since 1985. They pleaded that in 2011, the 1st defendant acquired title to the land to the exclusion of the other family members and sold the land to the 2nd defendant. It is pleaded that the 1st defendant clandestinely filed the suit Mombasa HCCC No. 71 of 2011 and claimed adverse possession. In this suit, the plaintiffs seek orders for a declaration that the 1st defendant, as at 27 July 2011, held the Plot No. 368 in trust for the plaintiffs; an order for revocation of the title



issued to the Plot No.368; an order of nullification of the subdivision of the Plot No. 368 into the Plots Nos. 19052 to 19151; and injunction to stop the 1st and 2nd defendants from evicting the plaintiffs.

3. The 1st and 2nd defendants filed a joint defence. It is pleaded inter alia that the 1st defendant acquired the land after he got judgment in the suit Mombasa HCCC No. 71 of 2011 and that the said suit was not a representative suit. He denied that he held the land in trust. It was also pleaded that the land is now owned by other persons who are not parties to this suit. The 1st and 2nd defendants subsequently filed the current application to have the suit struck out. The 3rd defendant is the Registrar of Lands, Mombasa.
4. The supporting affidavit is sworn by the 2nd defendant. He has deposed that in the year 2011, he purchased the Plot No. 368 from the 1st defendant, after the 1st defendant had obtained judgment in his favour for title to the land through adverse possession. Upon purchase, he subdivided the land further and sold the portions to other persons. He annexed a copy of the title indicating the subdivisions and subsequent transfers to third parties.
5. The plaintiffs have opposed the motion through the replying affidavit of Bahati Thoya, the 1st plaintiff. He deposed inter alia that the land was previously owned by Poultrycare Limited, where he was employed; that the owner of the company left for the United Kingdom and left him and the 2nd plaintiff in charge; that most of the other employees vacated the property and left him, the 2nd plaintiff, and the 1st defendant's father on the land; that they later heard that the owner of the company had died and his only daughter came to the farm and declared that she had no interest in it; that they were advised that they could claim the land by way of adverse possession; that they appointed the 1st defendant to represent them as he was best educated though he never lived on the land; that they trusted the 1st defendant to guide them in the court process; that after several years they started hearing rumours that the land had been subdivided and parts of it sold; that they investigated and found out that the claim for adverse possession was determined in favour of the 1st defendant on 27 July 2011; that the 1st defendant fraudulently misrepresented that he resided on the land.
6. I have taken note of the above and also the submissions of counsel.
7. I will be brief in my delivery because to me it is obvious that this suit is not sustainable. First, this court cannot question a judgment in another matter heard by a court of equal jurisdiction. There is already judgment in favour of the 1st defendant in the suit Mombasa HCCC No. 171 of 2011. There is no indication that the said suit was filed as a representative suit. Within that case, it was held that the 1st defendant is entitled to the Plot No. 368 by way of adverse possession. In this suit, the plaintiffs contend that the 1st defendant was never in occupation of the land and did not deserve the judgment. I have no jurisdiction to make such determination within this suit, and neither can I sit on appeal or review, of that judgment within this suit. I cannot also hold, that as at the time of judgment, the 1st defendant held the land in trust for the plaintiffs. That would be tantamount to interfering with the judgment in the other suit which held that the 1st defendant is in adverse possession of the land. I cannot hold that the judgment was in trust for I will be introducing a new element to the judgment which I have no jurisdiction to do so. I am not aware of a provision where one files suit in trust for another in a suit for adverse possession. To succeed in a suit for adverse possession, one must prove personal actual possession of the land. I am not aware of a position where one can sue for adverse possession in trust for another. If the plaintiffs thought that they were in adverse possession, they had avenue to file suit for adverse possession themselves but they did not do so.
8. Apart from the above, the plaintiffs cannot succeed in their prayers to nullify the subdivisions of the Plot No. 368 without suing the proprietors thereof. I have seen that the Plot No. 368 was subdivided



into the plots numbers 19052 to 19152 and these plots have been sold to other persons. The 1st and 2nd defendants no longer have rights over the land. If the plaintiffs want orders restraining the purchasers from evicting them from the land, then the proper persons to have been sued would have been the purchasers, who are now the ones holding proprietary rights to the land.

9. From the foregoing, I find that this suit, as drawn, is unsustainable against the defendants and is an abuse of the court process. I allow this application and proceed to dismiss the suit with costs.
10. Any interlocutory orders issued herein are hereby vacated.
11. Orders accordingly.

DATED AND DELIVERED THIS 4 DAY OF MAY 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

