



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 194 OF 2010

KAHINDI CHARO KALUME & 16 OTHERS.....PLAINTIFFS

VERSUS

THE LEGAL REPRESENTATIVE OF CASSAM SULEIMAN

SUMAR & HAJI DADA KUMBER (executors of the estate

of Haji Suleiman Sumar Khamisa).....DEFENDANTS

AND

ABDULHAKIM ABEID KHAMIS & 2 OTHERS.....APPLICANTS

RULING

(Plaintiffs having obtained judgment for adverse possession against the defendants in the year 2014; applicants now filing an application in the year 2020 seeking to review or set aside that judgment and be enjoined in the suit; applicants claiming that they own part of the land under a separate title and that their title was a subdivision of what the plaintiffs claimed thus deserve to be heard; no evidence presented that would make the court conclude that the applicants' titles are a subdivision of what the plaintiffs claimed; in any event applicants acquiring titles after the case of the plaintiffs had already been filed; applicants also having separate on-going litigation with the plaintiffs over the same titles; applicants' remedy, if any, can be canvassed in other litigation; application dismissed)

1. The application before me is that dated 27 August 2020 filed by Abdulhakim Abeid Khamis, Jamal Abeid Khamis, and Mohammed Abeid Khamis (hereinafter referred to as "the applicants"). They seek the following orders :-

(i) Spent (certification of urgency)

(ii) That the applicants be granted leave to join these proceedings as defendants and the pleadings herein be amended to reflect as such.

(iii) That the ex parte proceedings herein, the judgment dated 30 October 2014 and the resultant decree issued on 14 November 2014 be unconditionally reviewed and/or set aside and the applicants be granted unconditional leave to defend this suit.

(iv) That the costs of this application be provided for.

2. By way of background, this suit was commenced through an Originating Summons filed on 18 June 2010 (for ease of reference, I will refer to the applicants in the Originating Summons as the plaintiffs). The Originating Summons as filed was against three parties, The Legal Representatives of Cassam Suleiman Sumar and Haji Dada Kumber (Executors of the Estate of Haji Suleiman Sumar Khamisa), Hakika Transport Services Limited and the Municipal Council of Mombasa. The Originating Summons was later amended on 27 November 2012 to add and remove some plaintiffs, and also to remove Hakika Transport Services Limited and the Municipal Council of Mombasa from being respondents. The sole respondents left after the amendment were therefore the Executors of the estate of Haji Suleiman Sumar Khamisa (who for ease of reference I will refer to as defendants).

3. The case of the plaintiffs was that they had acquired, by way of adverse possession, title to 132 acres of the land parcel No. 387 (Original No. 280/2 V/MN) comprised in the title C.R 8813 (hereinafter referred to as 'suit land'). The title produced shows that the land measured 164.87 acres. I have seen some acquisition of 5.75 acres and later 0.9105 Ha by the Government (together being just slightly above 8 acres). The parties nevertheless litigated on the assumption that the land was 162 acres, though in reality, it ought to have been about 156 or so

acres. Be that as it may, the matter was contested by the defendants and proceeded for full hearing before Mukunya J, who subsequently delivered judgment on 30 October 2014. The Honourable Judge (while under the impression that the land was 162 acres) entered judgment for the plaintiffs for 132 acres, and directed that the remaining 30 acres do remain to the defendants. He also ordered a subdivision of the land within 6 months.

4. The applicants have filed this application pursuant to the provisions of Order 45, and Order 50 Rule 1 of the Civil Procedure Rules, and Section 80 of the Civil Procedure Act. The grounds upon which the application is based, are that the applicants were never served with summons to enter appearance in the proceedings, hence the suit proceeded without their participation; that the applicants are the registered owners of the properties CR 45219, subdivision No. MN/V/2403 and CR No. 59000, L.R No. MN/V/2618 (the applicants' titles); that their titles emanated from the suit land; that the effect of the decree will be to allow for the cancellation of the titles of the applicants yet the applicants were not involved in the proceedings; that the judgment should therefore be set aside and they be granted leave to defend the suit.

5. The application is supported by the affidavit of Abdulhakim Abeid Khamis, one of the applicants. He has reiterated the grounds on the application, and further annexed copies of their titles. He has deposed that he and his brothers only found out about the suit and consequential judgment, when the surveyors visited the suit land as ordered in the decree. He further has deposed that the surveyor has written a letter to the Ministry of Lands, Housing and Urban Development, who he contends have called for all the titles of the subdivisions of the suit land, and cancelled them. He has annexed a letter that is dated 15 February 2015 alluding to the above. He has added that the cancelled titles include titles to their land. He has deposed that he came across a letter by the Ministry, dated 23 December 2015, which discloses that the titles to their land have been affected by the cancellation, and are considered null and void. He avers that their titles have been rendered moot by the proceedings which they never participated in. He contends that the pleadings and judgment disclosed that they were necessary parties in the case, and thus steps should have been taken to enjoin them. He has argued that the plaintiffs had the greater obligation to advertise for all the affected parties to be enjoined in the proceedings. Mr. Abdulhakim deposes that the failure to bring the suit to the attention of the interested parties is evidence of *mala fides*. He has added that the right to be heard is a fundamental constitutional right that cannot be taken away, and that there can never be a fair trial when crucial parties adversely mentioned in the pleadings or affected by the decree are not summoned to participate in the proceedings.

6. In opposing the application, the plaintiffs filed a replying affidavit sworn by Kahindi Charo Kalume, the lead plaintiff. Mr. Kalume has disputed that the titles of the applicants arise from a subdivision of the suit land. He has pointed out that the title to the suit land is a freehold title yet what the applicants hold is a leasehold title. He has averred that at the time the Originating Summons was filed in the year 2010, the suit land was under the name of the defendants and it had not been subdivided at all, and therefore the titles of the applicants were non-existent when the case was filed. He has wondered when exactly the land was subdivided as the applicants claim. He has deposed that a period of six years has lapsed since the judgment and that the judgment has already been executed and therefore this court cannot revisit the matter. He has argued that the lapse of 6 years constitutes inordinate delay. He has further deposed that the applicants have filed suit against them being, **Mombasa CMCC ELC case No. 1 of 2020, Abdulhakim Abeid Khamisi & 2 Others vs. Kahindi Charo Kalume & 16 Others**, seeking orders to permanently restrain them from the land held in the applicants' titles. He has made depositions, generally claiming that the titles held by the applicants are fraudulent and referred to another case, **Mombasa ELC No. 335 of 2017, Harji Govind Ruda vs. Abeid Hakim Abeid & 4 Others**, which is a case touching on the titles of the applicants.

7. The defendants have also opposed the application and have filed a replying affidavit sworn by Nazzir Kassam Suleiman. Mr. Nazzir has deposed that the interested parties are not the registered owners of MN/V/2403 and MN/V/2618, as the same was amalgamated with other parcels, and subdivided into MN/V/2711-15 by the plaintiffs. He has deposed that the applicants are directors of the original 2nd defendant (Hakika Transport Services Limited) and were thus well aware of this suit. He has deposed that the application will prejudice him as he enjoys a restriction on a Plot MN/V/2712 through a ruling made in The case Mombasa ELC No. 41 of 2018. He has further deposed that there is a pending suit over the Plot MN/V/2618 within the case Mombasa ELC No. 335 of 2017. He has added that the applicants are guilty of laches. He has deposed that this court is *functus officio* as the judgment has already been perfected hence cannot be set aside.

8. I invited counsel to canvass the application by way of written submissions and I have gone through the submissions filed by Mr. Malombo for the applicants and Mr. Tindi for the plaintiff. I have considered the application, the affidavits filed, and the submissions made by the counsel as well as the authorities cited.

9. The main issues for determination are whether the applicants should be enjoined in this suit and whether the judgment dated 30 October 2014 and the resultant decree issued on 14 November 2014 should be reviewed, or in the alternative, be set aside. The foundation upon which the application is based is that the applicants hold titles that resulted from a subdivision of the suit land. Thus, as a threshold issue, I need to be satisfied that the applicants have presented me with material that support the claim that their titles resulted from a subdivision of the suit land. I have gone through the affidavit of the applicants and the titles of the applicants to the land parcels MN/V/2403 and MN/V/2618. I am unable to find any evidence that supports the contention that these two titles emanated from a subdivision of the suit land. What I can see is that the title MN/V/2403 is a leasehold title prepared on 13 February 2009 for 99 years with effect from 1 July 1995, with the first grantee being James Singoei of Lessos. Entry No. 2 is transfer to Khamis Lahmar, Abdulhakim Abed Khamis, Jamal Abeid Khamis and Mohamed Abeid Khamis which was registered on 10 March 2003. Entry No. 3 is registered on 18 July 2013, and is transfer to Abdulhakim Abeid, Jamal Abeid, and Mohamed Abeid (the applicants herein). For the Plot MN/V/2618, I can see that it is a leasehold title for 99 years from 1 August 1998, with the first grantee being Zeddy Oluoch Owinoy of Nairobi. The leasehold title was prepared on 14 December 2012. Entry No 4 is transfer to the applicants on 20 May 2013.

10. There is nothing, absolutely nothing, in these two titles to suggest that they resulted from a subdivision of the suit land. The title of the suit land was annexed to the Originating Summons when it was filed in the year 2010 and there is truly no reference to any subdivision of that land to produce the titles MN/V/2403 and MN/V/2618. From what I can see, the only subdivisions are for the two parcels acquired by the Government, which are LR Nos. 387/1 Section V, and 387/3 Section V. There is also nothing in the supporting affidavit, such as a subdivision plan, or any other material, that can sustain the allegation that the two plots are a subdivision of the suit land. I am left in wonder, where the applicants got the idea that what they hold resulted from a subdivision of the suit land. Without any evidence that the titles of the applicants came from the suit land, there is no need of making any further analysis of the application and no point in saying more.

11. This application is clearly devoid of any merit and it is hereby dismissed with costs.

12. Orders accordingly.

DATED AND DELIVERED THIS 17TH DAY OF MAY 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AN LAND COURT

AT MOMBASA