



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 54 OF 2020 (OS)

IN THE MATTER OF: PLOT NO. 102- MALINDI, LT 37, FOLIO 501, FILE 3420 INCLUDING:

SUBDIVISION NO. 11020- MALINDI, LT 41, FOLIO 253, FILE 11407

SUBDIVISION NO. 102/1- MALINDI, LT 45, FOLIO 57, FILE 13087& SUBDIVISION NO, 11021- MALINDI, LT 45, FOLIO 58, FILE 13088 AND ANY OTHER SUBDIVISION THEREFROM

AND

IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT THE PLAINTIFFS/APPLICANTS HAVE OBTAINED OWNERSHIP OF TWO THIRTY-FOUR DECIMAL FIVE (234.5) ACRES OR NINE FOUR DECIMAL NINE FOUR ONE EIGHT (94.9418) HECTARES OR THEREABOUT OF THE ABOVE SAID PARCELS OF LAND BY WAY OF ADVERSE POSSESSION

BETWEEN

ASAA TABU ASAA &113 OTHERS.....PLAINTIFFS

VERSUS

1. MOHAMED SAID RAJAB

2. NAIMA ABDALLA ISSA

3. JAMAL H. MOHAMED

4. KULTHUM BINTI ABDALLA & 7 OTHERS.....DEFENDANTS

RULING

1. By their Notice of Motion dated 23rd July 2020, the 114 Plaintiffs pray for orders: -

3. That this Honourable Court be pleased to issue (an order of) temporary injunction restraining the Defendants/Respondents and/or any other person(s) acting on their behalf from entering, invading, trespassing, demolishing, sub-dividing, selling, transferring and/or dealing in any manner with the suit premises being Plot No. 102 (including the sub-divisions thereof) situated at Ganda Malindi pending the hearing and determination of this suit.

4. That this Honourable Court be pleased to stay all prosecutions relating to the offence of forcible detainer in respect of the suit premises herein commenced against the following people, namely;

i. Salim Omar Mohamed (the 110th Plaintiff)

ii. Woodgate Karisa Ngumbao (the 111th Plaintiff)

iii. Dissi Charo Kithi (the 112 Plaintiff)

iv. John Ngala Gandhi (the 2nd Plaintiff)

v. Kithi Mwadzombo Runya (the 3rd Plaintiff)

vi. Lemmy Jamal Baya (the 113th Plaintiff)

vii. Thomas Jefwa Lewa (the 114th Plaintiff)

and further restraining any other arrests and prosecutions of any of the Plaintiffs herein based on the same (sic).

5. That this Honourable Court be pleased to grant leave to have the Originating Summons dated 23rd July 2020 be served by way of substituted service through one of the daily newspapers with a wide circulation for the 7 others mentioned in the certified extract of the title whose names are not indicated thereon for them to enter appearance to the summons herein as directed in the said summons.

6. That the costs of this application be provided for.

2. The application which is supported by an affidavit sworn by the 1st Plaintiff- Asaa Tabu Asaa is based on the grounds: -

i. That the Plaintiffs have occupied and lived on the suit premises for more than 12 years having either been born thereon and/or entered the suit premises on diverse dates before the year 2000;

ii. That the Defendants are the registered owners of the suit premises but the Plaintiffs' entry and occupation thereon was without their authority, consent or permission;

iii. That the Plaintiffs have lived on the land for more than 12 years openly, continuously and uninterrupted but on 30th June 2020 the Defendants invaded, trespassed and/or encroached onto the suit premises and cut down the Plaintiffs crops and trees while threatening to demolish their houses and to evict them from the suitland.

iv. That similarly, there have been numerous arrests and/or arraignments of the Plaintiffs in Court being charged with the offence of forcible detainer in respect of the suitland.

v. That the Plaintiffs are now apprehensive that their houses on the suit premises may be demolished and that the Defendants may evict them from the same thereby rendering this suit nugatory.

vi. That an offence of trespass or forcible detainer is ordinarily a civil offence and where a civil suit has been commenced, a criminal charge based on the same facts ought to be stayed pending the determination of the dispute;

vii. That the Plaintiffs are also fearful as there have been threats to their lives and properties as they are aware that one of them was killed on the suit premises in 2016 by being run over intentionally by the Defendants' motor vehicle but no action was taken by the police;

viii. That since the documents obtained from the Land Registry reveal that the suitland is owned by the listed Defendants together with seven others whose names are not given, it is proper that the unnamed others be served through one of the daily newspapers; and

ix. That no prejudice shall be occasioned to the Defendants if the orders are granted but the Plaintiffs will suffer irreparable loss and damage if the orders are not granted.

3. Said Suleiman Said and Jamal Hafidh Mohamed (the 3rd and 4th Defendants respectively) are opposed to the application. In a Replying Affidavit sworn on their behalf by the 4th Defendant and filed herein on 23rd September 2020 they aver that the application is unmerited, incompetent, bad in law and a nullity and urge the Court to strike it out.

4. The 3rd and 4th Defendants aver that the authority given to the 1st, 2nd and 3rd Plaintiffs by the other 111 Plaintiffs to act or plead on their behalf as filed on 27th July 2020 is a nullity and bad in law. They assert that a claim for adverse possession is not a class or representative suit and that it has to be clear and specific where each of the Plaintiffs is laying a claim to.

5. The Defendants aver that Plot No. 102 Malindi has undergone sub-division processes and as a result subsequent portions have resulted from it including Portion Nos 11020, 102/1 and 11021 Malindi and as such the Plaintiffs cannot lay a claim to the original portion as it is non-existent by dint of the sub-divisions. The 3rd and 4th Defendants further aver that they are aware that Portion No. 11020 was sold by the registered owners to the 1st and 2nd Defendants who have fenced off the portion measuring five acres or thereabouts and none of the Plaintiffs is in occupation of the same.

6. The Defendants further aver that Plot No. 11021 is non-existent as it has undergone sub-divisions resulting to Portion Nos 16870, 16872, 16868, 16873, 16876 and 16877 which portions are not occupied by any of the Plaintiffs and hence their claim for adverse possession must fail.

7. The 4th Defendant further avers that he is aware that Kulthum Binti Abdalla alias Kulthum Abdalla Hussein sued herein as the 5th Defendant died on 15th October 2002. As a result, the suit against her is incompetent and cannot be sustained in law.

8. The 4th Defendant asserts that the Plaintiffs herein are professional squatters who are in the habit of unlawfully and illegally invading other people's land. The 114th Plaintiff- Thomas Jefwa Lewa had in the year 2016 together with 20 other Plaintiffs instituted **ELC Case No. 1 of 2016** claiming similar orders of adverse possession in respect of Land Portion No. 161 B Malindi- from the 3rd Defendant herein.

9. The 4th Defendant further avers that Kithi Mwadzombo, Runya (the 3rd Plaintiff) and Sharriff Karisa alias Evans Mweni Karisa (the 26th Plaintiff) also filed **ELC Case No. 225 of 2018** at Malindi claiming adverse possession against one Nassor Said Seif in respect of Plot No. 162 A Malindi. The 4th Defendant thus asserts that it is impossible that the said Plaintiffs and their forefathers also resided in the suit property herein.

10. The 4th Defendant further states that he is aware that by an agreement dated 28th December 2016, the same 26th Plaintiff was compensated by Salim Abdalla Salim and Hussein Abdalla Salim after agreeing to move out of the Plot No. 105 Malindi where he was residing. It is therefore impossible that he entered the suit property before the year 2000.

11. The 4th Defendant further asserts that he is aware that Hafswa Bunal Hobien (the 13th Plaintiff) is the proprietors of Land Portion No. 54 Malindi in which she resides. It is therefore impossible that she also resides on the suit property. The 4th Defendant also asserts that Dama Baya Nyundo (the 109th Plaintiff) resides in Land Portion No. 101 Malindi and not on the suit property as alleged.

12. I have perused and considered the application and the response thereto. I have equally perused and considered the rival submissions as filed by the Learned Advocates for the parties.

13. The Plaintiffs herein pray for a temporary order of injunction to restrain the Defendants from entering, invading, trespassing, selling, subdividing the suit property or demolishing their structures thereon. They also urge this Court to stay the prosecution of some seven Plaintiffs who have been charged with the offence of forcible detainer and to bar any further arrests and prosecutions relating to the suitland which they describe as Plot No. 102 Malindi including sub-divisions Plot Nos 11020, 102/1 and 11021 Malindi.

14. The Plaintiffs have also asked this Court to grant them leave to effect service of their Originating Summons filed herein by way of substituted service upon some seven (7) other unnamed people shown on the extract of the suit property to be the co-owners thereof.

15. In respect of the criminal prosecutions, it is worth noting that all criminal prosecutions are instituted by the State at the behest of a complainant. Contrary to the Plaintiffs contention that it is a civil claim that can be handled in a civil litigation such as this one, forcible detainer is a criminal offence punishable as such under Section 91 of the Penal Code.

16. While it would have been desirable to first establish the ownership of the land before proceeding with the criminal case, a perusal of the material placed before me reveals that the criminal proceedings against the seven (7) Plaintiffs with respect to the offence of forcible detainer and other related offences were instituted in the subordinate Court by the State through the Office of the Director of Public Prosecutions. The Plaintiffs herein have however not enjoined the Director of Public Prosecutions as a party in this suit. I did not think that this Court could make an order against a person who is not a party to the proceedings.

17. I think it was incumbent for the Plaintiffs not only to enjoin the Director of Public Prosecutions but to also demonstrate that he had either exceeded his mandate or acted in contravention of the law. The Plaintiffs have not demonstrated that the prosecution of the seven of them was actuated by an ulterior motive or that the same was done in contravention of the law.

18. As provided under Section 193A of the Criminal Procedure Act, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings is not a ground for any stay or prohibition of the criminal proceedings. Accordingly, I decline to stay the criminal proceedings pending before the Magistrates Court at Malindi.

19. In respect of the plea for a temporary order of injunction, the conditions for the grant thereof were long settled in the celebrated case of **Giella –vs- Cassman Brown & Company Ltd (1973) EA 358** where the Court stated thus: -

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

20. As to what would amount to a prima facie case, the Court of Appeal observed as follows in **Mrao Ltd –vs- First American Bank of Kenya & 2 Others (2003) KLR 125**; -

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

21. In the matter before me, the Plaintiffs have brought this suit seeking a determination that they have acquired the suit property under the doctrine of adverse possession. While the 3rd and 4th Defendants have raised serious doubts as to whether any of the Plaintiffs have continuously occupied the suitland for a cumulative period of 12 years, there was no dispute that some of the Plaintiffs herein are presently occupying portions of the parcel of land originally known as Plot No. 102-Malindi.

22. That much is clear from the 3rd and 4th Defendants Counterclaim filed herein on 14th October 2020 wherein they state as follows at paragraphs 6 and 7 thereof: -

“6. The Plaintiffs are professional squatters without any right who have entered the suitland in the time not required for the prescriptive rights of adverse possession but have attempted to oust the Constitutional and legal rights of the registered owners who are the Defendants herein and as such they are not entitled to the claim of adverse possession.

7. The Defendants now Counterclaim against the Plaintiffs for vacant possession of the 234.5 acres allegedly claimed to be occupied by the Plaintiffs in the portions and the eviction of the Plaintiffs, their servants, agents, employees and any other person claiming interest through them in the suit property.

23. In support of their case, the Plaintiffs have also annexed various photos of what they claim to be their houses on the suitland. Given the circumstances herein, I am of the view that the balance of convenience tilts in favour of the Plaintiffs. The Defendants have not refuted the contention by the Plaintiffs that they intend to demolish the Plaintiffs structures and to evict them from the suitland.

24. That being the case and in recognition of the fact that the Defendants are the registered proprietors of the suit property, I hereby allow Prayer No. 3 of the Plaintiffs application but in the following terms: -

” That this Honourable Court be and is hereby pleased to issue an order of temporary injunction restraining the Defendants/Respondents and/or any other persons acting on their behalf from demolishing the Plaintiffs already existing structures on the suitland, sub-dividing, selling and/or transferring the suitland pending the hearing and determination of this suit.”

25. I also grant leave to the Plaintiffs to serve the seven unnamed Defendants by way of substituted service as sought under Prayer No. 5 of the application.

26. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF JULY, 2021.

J.O. OLOLA

JUDGE