



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL SUIT NO.14 OF 2018(OS)

ELIJAH GACHUGI NDEGWA.....PETITIONER

VERSUS

THE COUNTY LANDS REGISTRAR LAMU.....1ST RESPONDENT

ABUBAKAR BWANAHASSAN ASUMAN.....2ND RESPONDENT

SULEIMAN OMAR HAMAD.....3RD RESPONDENT

AHMED OMAR HAMAD.....4TH RESPONDENT

THE COUNTY DIRECTOR OF SURVEY LAMU.....5TH RESPONDENT

RULING

1. By an Originating Summons dated 20th January 2018, Elijah Gachugi Ndegwa (the Applicant) prays for orders against the five named Respondents herein as follows:-

a. An injunction restraining the 1st Respondent from issuing Title Deeds with respect to Land Titles Nos. Lamu West/Ndambwe/Mashambani/349 and Lamu West/Ndambwe/Mashambani/350 and Lamu West/Ndambwe/Mashambani/357 in favour of the 2nd, 3rd and 4th Respondents.

b. The Applicant has become entitled to be registered as proprietor of all the suit premises.

c. A Vesting Order vesting all the suit premises in the Applicant.

2. The application which is supported by an affidavit sworn by the Applicant is premised on the grounds that:-

a. The suit premises were unlawfully allocated to the 2nd, 3rd and 4th Respondents after a flawed process of land survey undertaken by the 5th Respondent in the year 2016;

b. The 1st Respondent has pursuant to the flawed process prepared title deed which it plans to issue to the 2nd, 3rd and 4th Respondents;

c. Having occupied the suit premises for more than 14 years, it was only fair and just that the Applicant be issued with the title deeds by virtue of the doctrine of adverse possession;

d. The Applicant has considerably developed the suit premises and the Respondents are likely to sell, lease or dispose of the same once they are issued with the titles.

3. Abubakar Bwanahassan Asuman, Suleiman Omar Hamad and Ahmed Omar (the 2nd, 3rd and 4th Respondents) are opposed to the application. In a Replying Affidavit jointly sworn by all of them and filed herein on 13th December 2018, the Respondents deny that the Applicant purchased the suit properties and aver that his entry thereon was illegal as the properties belonged to the Respondents and not Mohamed Abdalla from whom the Applicant purports to have bought it.

4. The 2nd, 3rd and 4th Respondents further aver that the said Mohamed Abdalla was merely their caretaker and that the Applicant knew all along that the land he occupied over the years belonged to them and not the caretaker.

5. The County Land Registrar, Lamu and the County Director of Survey (the 1st and 5th Respondents) are equally opposed to the application. In Grounds of Opposition filed herein on their behalf by the Honourable the Attorney General dated 24th January 2014, the two state:-

1. That the Originating Summons seeks orders of injunction against the Government in contravention of Section 16 of the Government Proceedings Act which expressly precludes the grant of injunction against government officers;

2. That the Originating Summons is fatally and incurably defective for failure to comply with the provisions of Order 37 Rule 7(2) of the Civil Procedure Rules in that it is not supported by an Affidavit to which a certified extract of title is annexed;

3. That the Plaintiff has no cause of action (against) the 1st and 5th Defendants;

4. That the Plaintiff has not laid any evidential basis for the grant of the orders sought;

5. That the application is otherwise an abuse of the process of this Honourable Court.

6. I have perused and considered the Originating Summons and the response thereto by the Respondents. I have equally considered the written submissions by the Learned Counsels for the parties.

7. The Applicant is asking this Court to issue orders restraining the Land Registrar Lamu (the 1st Respondent) from issuing title documents in favour of the 2nd, 3rd and 4th Respondents whom he describes as his neighbour's sons. He also prays for orders to be registered as the proprietor of the suit premises on the basis that he has occupied the same for a period in excess of 14 years.

8. Section 16(2) of the Government Proceedings Act provides as follows:-

“The Court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.”

9. In light of the foregoing and given that an order of injunction cannot be granted against the Government under Section 16(1) (i) of the Government Proceedings Act, it was clear to me that the injunction sought herein against the 1st Respondent cannot issue.

10. That said, the substance of the Applicants submissions before me was that he had lived on the suit property for a period in excess of 14 years and that as a result, it was only fair and just that he be deemed to have acquired the same and become entitled thereto under the doctrine of adverse possession.

11. In that respect, Section 38(1) of the Limitation of Actions Act (Cap 22) provides that:-

“Where a person claims to have become entitled by adverse possession to land...he may apply to the High Court for an order that he be registered as proprietor of the land or lease in place of the person then registered as proprietor of the land.”

12. For such an application to be made, Order 37 Rule 7(2) of the Civil Procedure Rules provides that:-

1. An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.

2. The Summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

13. I have perused the Affidavit in support of the Originating Summons herein. While the Applicant describes the suit properties as Lamu West/Ndambwe/Mashambani/349, 350 and 357, no extract of the said titles has been annexed. In the said Affidavit, the Applicant asserts that he has learnt that the suit properties had been secretly allocated to the 2nd, 3rd and 4th Defendants and by this very application, he seeks to stop the 1st and 5th Respondent from proceeding to issue the titles.

14. Given the absence of title or any document to indicate when if at all the 2nd, 3rd and 4th Respondents became entitled to the suit properties, this Court is at a loss as to how to compute time for the claim of adverse possession if any.

15. That aside, at paragraph 2 of the Supporting Affidavit, it is clear that the Applicant traces his entry into the suit properties to an agreement for the sale of the property by one Mohamed Abdalla. He has infact attached a Copy of the Agreement indicating that he bought the land for Kshs 5,000/-

16. That being the case, it would mean that the Applicant entered the suit property not as a trespasser but as a Licensee. It is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in

pursuance of an agreement of sale or lease.

17. Arising from the foregoing, it is my finding that the Originating Summons is premature and misconceived. The same is hereby struck out with costs to the Respondents.

Dated, signed and delivered at Malindi this 13th day of March, 2020.

J.O. OLOLA

JUDGE