



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.26 OF 2010(O.S.)

IN THE MATTER OF: LIMITATION OF ACTIONS ACT (CAP 2) OF THE LAWS OF KENYA

AND

IN THE MATTER OF: PARCEL OF LAND SITUATE IN MALINDI TOWN BEING SUB DIVISION NUMBERS 591 MALINDI

MOHAMED HASSAN KITIMANGE.....PLAINTIFF

VERSUS

1. MALIPROP LIMITED

2. SABAHI RIVER HOLDINGS LTD

3. THE CHIEF LAND REGISTRAR

4. THE LAND REGISTRAR(TITLES) MOMBASA

5. KIDOGO ESTATE LIMITED.....DEFENDANTS

RULING

1. I have before me for determination a Notice of Motion application dated and filed herein on 23rd April 2019. By the said Motion, Mohammed Hassan Kitimange (the Plaintiff) prays for Orders that:-

(b) Leave be and is hereby granted to enjoin Kidogo Estate Ltd as a party in these proceedings forthwith;

c) That the further amended Originating Summons be deemed as filed and served upon all the defendants upon payment of requisite fees.

d) That leave granted to enjoin Kidogo Estate Ltd be served by way of substituted service through a daily newspaper.

2. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds listed thereon as follows:-

i) That(initially) Kidogo Estate Ltd was the registered owner of the suit property;

ii) That the Applicant's father was the beneficiary of the suit property;

iii) That the deceased's estate was one of the Directors/Shareholders of the new party herein; and

iv) That (in the) interest of justice, it is necessary to enjoin the said company.

3. The application is however opposed by Sabaki River Holdings Ltd (the 2nd Defendant). By Grounds of Opposition dated 24th June 2019, the 2nd Defendant contends that:-

i. *The application is incompetent and (an) abuse of the Court process.*

ii. *There has to be a limit to the number of amendments the Plaintiff may make in these proceedings.*

iii. *The Plaintiff has known of Kidogo Estate Ltd from the commencement of this suit, nine years ago. Kidogo Estate Ltd sold and transferred the property according to the Plaintiff in 1994, 25 years ago. The proposed suit against Kidogo Estate Ltd is time barred and is 13 years out of time and this Court has no jurisdiction to entertain a suit that is time barred.*

iv. *In the proposed amended Originating Summons no determination is sought against Kidogo Estate Ltd.*

v. *Kidogo Estate having sold and transferred the property in 1994 no longer has any interest in the property and cannot be enjoined in the Originating Summons.*

vi. *The Plaintiff claims that he occupied the property as a son of one of the shareholders of the then registered owner, Kidogo Estate Ltd. If the Plaintiff ever occupied the property, he did so with permission and authority of the then owner and cannot claim adverse possession.*

vii. *According to the evidence on record including survey reports the Plaintiff did not occupy any part of the property. The alleged structure(s) were outside the property on a road reserve and those were ordered by the then Municipal Council of Malindi to be demolished.*

viii. *The Plaintiff has no capacity to make any claim or allegations on behalf of Kidogo Estate Ltd. He is not a shareholder or director of that company, has no board resolution of that company to do so and has not obtained permission from the Court to commence a derivative suit on behalf of that company.*

ix. *Without prejudice to the foregoing, there is no reason at all to grant leave of Court to effect service upon a party by substituted service at the very first instance without evidence of any attempts made at service. The party sought to be introduced is a company and it would, by law, have a fixed address.*

4. I have considered the Plaintiff's application and the response thereto by the 2nd Defendant. I have equally considered the oral submissions made before me by the Learned Advocates for the parties.

5. By an Originating Summons dated 23rd March 2010, the Plaintiff herein sought to be declared to have become entitled by virtue of adverse possession to a piece of land known as Sub-division No. 591, Malindi which land is registered in the name of the 1st Defendant. That Originating Summons was amended upon application by the 2nd Defendant to be enjoined therein on 3rd March 2011 and was Further Amended by the Plaintiff on 4th April 2015 to include the 3rd and 4th Defendants.

6. By the present application before me, the Plaintiff desires a further amendment of the Originating Summons to enjoin an entry known as Kidogo Estate Ltd as the 5th Defendant herein. That application is opposed by the 2nd Defendant.

7. Rule 10 (2) of Order 1 of the Civil Procedure Rules provides that:-

“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

8. In law therefore, joinder of parties should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate suits, any common question of law or fact would arise.

9. Be that as it may, joinder of parties may also be refused where it would lead into practical problems of handling the existing cause of action together with the one of the party being joined; where it is simply unnecessary; or where it will just occasion unnecessary delay or costs on the parties in the suit.

10. In the matter before me, the Plaintiff's main prayer in the Originating Summons is to be declared the owner of the suit property by virtue of adverse possession. It is his case that having been fully advised by his Advocate and after wide consultation, the entity known as Kidogo Estates Ltd should be enjoined in this suit as the 5th Defendant.

11. The Plaintiff asserts at Paragraphs 3 to 5 of his supporting affidavit that his father was a shareholder of the intended 5th Defendant and that the father whose estate he is the administrator thereof was entitled to the suit property. The Plaintiff further asserts that a purported transfer between the 1st Defendant and the intended 5th Defendant was suspect and hence the need to join the said Kidogo Estate Ltd.

12. As it were neither the application nor the draft Further amended Originating Summons discloses the relief that the Plaintiff seeks from the intended Defendant and how the joinder of that Defendant would lead to an effectual determination of the issues herein.

13. A perusal of the records reveals that since he filed this suit in March 2010, the Plaintiff was aware of the existence of the Intended Defendant. The suspect transfer he refers to in paragraph 5 of the Supporting Affidavit actually formed the basis of the Originating Summons as filed in the year 2010. At paragraphs 8 to 11 of his Supporting Affidavit sworn on 23rd March 2010 initiating this suit, the Plaintiff avers:-

“8. That the suit land was transferred to the (1st) Defendant on or about 10th August 1994 when I was already in occupation of the same.

9. That by a letter dated 5th October 2009 the office of the Provincial Administration confirmed that the land belonged to Wilson Fred (Deceased) who was my father...

10. That the suit land herein was the late Wilson Fred's shareholding in Kidogo Estate Ltd which was the previous proprietor of the suit land....

11. That the transfer of the suitland to the (1st) defendant was in total disregard of my late father's interest in the suit property....”

14. Arising from the foregoing, it was evident to me that the Plaintiff was aware that the intended 5th Defendant was said to have sold and transferred the suit property some 25 years ago. He has never brought any claim against them and any attempt to enjoin them at this stage will certainly run afoul to the provisions of Section 7 of the Limitation of Actions Act which bar such claims for recovery of land from being brought after 12 years.

15. In any event, it was evident to me that the existence of the Intended 5th Defendant is highly in doubt. That must be the reason the Plaintiff seeks an order even before they are enjoined, for service by way of substituted service. From the Search Certificate annexed to the application presently before me (Annexure M4K 1), it is evident that there is no recent evidence of the company's existence any more. The Certificate attached is dated 30th November 2009 and was produced in response to a request made on 27th October 2009.

16. Arising from the foregoing, it is clear to me that the intended amendment is unnecessary and will only serve to further delay this matter which is already a decade old in our Courts.

17. In the circumstances, I did not find any merit in the Motion dated 23rd April 2019. The same is dismissed with costs to the 2nd Defendant.

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

J.O. OLOLA

JUDGE