



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 68 OF 2020 (OS)

SAFARI MWERI MANGI & 2 OTHERS.....1ST APPLICANT

PETER MWERI MANGI.....2ND APPLICANT

CORNEL L. SHISANYA3RD APPLICANT

VERSUS

ESTATE OF HAMISI MWINYIKAI RAMADHAN ALIAS

KHAMISI MWINYIKAI (DECEASED) & 7 OTHERS.....RESPONDENTS

RULING

(Application for injunction; applicants filing suit for adverse possession; difficult to identify what land the applicants claim for the original parcel of land has been subdivided; applicants also having had previous litigation which they failed to disclose to court; applicants guilty of material non-disclosure; litigation being a factor that vitiates quiet and peaceful possession of land; 3rd respondent claimed to be a stranger to the land; no contest to this claim; no prima facie case established; application dismissed with costs)

1. This suit was commenced on 10 June 2020 by way of an Originating Summons brought inter alia under Sections 37 and 38 of the Limitation of Actions Act, Cap 22, Laws of Kenya. It is a suit through which the applicants claim adverse possession of land that they have described as Plot CR No. 4314/1/MN “and any other titles registered in the Lands registry in Mombasa or there about”. I must say that the drafting of the Originating Summons is rather convoluted but that may be because the applicants act in person. I will nevertheless try my best to get to its substance. From what I can see, the Originating Summons claims adverse possession of land that the applicants describe as “Plot No. CR 4314/1/MN and any other titles registered in the Lands registry in Mombasa or there about.” They allege to have been in possession of the suit land for more than 34 years though in their prayers, I have seen that they inter alia seek to have eviction orders against the 1st to 5th respondents, which is certainly a contradiction. They also wish to have an order revoking “all titles issued after 13.1.2014”, though these have not been specifically identified, and subdivision to be done afresh. They wish to be registered as proprietors in common of the said Plot No. CR 4314/1/MN. In the supporting affidavit to the Originating Summons, the applicants aver that they have occupied the land since the year 1986 after paying a “Kajama” of KShs. 60/= to the 1st respondent and that they have taken care and stayed on the land parcel CR No. 4314/1/MN uninterrupted and it is now 34 years standing. It is not explained what this “Kajama” is and I am unable to tell whether it is a sale, lease, or what interest in land it gives. It is said that following the death of the 1st respondent, the beneficiaries transferred the land to individuals. They want an explanation of how subdivision was done yet there were people on the land. They consider the subdivisions unlawful. It is averred that the 2nd, 3rd, 4th and 5th respondents descended on the land and demolished houses and are currently erecting a fence. They state that they complained several times to the area Assistant County Commissioner who wrote a letter of summons to the 2nd respondent on 29 June 2015 and another on 30 April 2015 which letters are annexed. They assert that they have a right of adverse possession over the land.

2. Together with the Originating Summons, the applicants filed an application seeking orders to have the respondents restrained by way of an injunction “from further constructing, fencing, building, destroying vegetation and trees planted thereon, selling, alienating, subdividing, transferring, trespassing, into the applicants’ portion of land on Plot No. 4314/1 and on LR No. MN/33/II Matundura area in Mtwapa”, pending hearing and determination of the suit. The supporting affidavit is sworn by all applicants who have reiterated that they paid a “Kajama” of KShs. 60/= and that the 1st respondent gave them the land permanently. They aver that they have developed the land by building houses, planting bananas, botanical plants, flowers, etc. It is said that they were in good terms with the deceased 1st respondent and problems with his beneficiaries started 5 years following his death, as they have been selling the land and transferring the same, which action they believe to be unlawful. They state that so many subdivisions have been done by the beneficiaries of the estate of the 1st respondent and thereafter more transfers done. They want light shed on how all this happened. It is averred that the 2nd respondent has sold the parcel of land that they occupy to the 5th respondent (one Hassan Hussein) and they have started destroying their houses and vegetation

and digging to erect a fence. They want the 6th respondent (the Land Registrar, Mombasa), to make a fresh survey and issue titles to people on the ground.

3. The 1st – 4th respondents appointed counsel and filed an affidavit sworn by Mariam Mwinyikai, to oppose the motion and the Originating Summons. She has deposed that she knows the 1st and 2nd applicants as they had earlier filed a suit being Kilifi SPMCC No. 304 of 2015 against her and her siblings. The suit was dismissed with costs and she has annexed the pleadings and the ruling dismissing the suit. She has averred that the 3rd respondent is unknown to her and does not stay on the suit land. She has deposed that the suit land belonged to their father Hamisi Mwinyikai Ramadhan, who died on 27 September 1989. Thereafter, the estate was administered by the Public Trustee until they got letters of administration through the suit Mombasa Succession Cause No. 435 of 2012. The original title could not be found and they applied for a provisional title. They then subdivided the land to the beneficiaries some of whom sold to third parties. At this time the land was vacant. She denied that the applicants entered the suit land in the year 1986 as they have alleged. She has deposed that the 1st and 2nd applicants trespassed into the land sometimes in the year 2015 and built temporary mud huts. They wrote to the trespassers demanding that they vacate and that is when the suit Kilifi SPM No. 304 of 2015 was filed. It was later dismissed for want of prosecution.

4. I allowed the applicants to file a supplementary affidavit. One was sworn by the 3rd applicant. He has repeated that the applicants have an issue with the manner that the land was subdivided and reiterated to have been on the land for 34 years.

5. I also allowed the applicants to file written submissions which they did. I have considered the submissions.

6. This is an application for injunction and for the applicants to succeed, they must demonstrate a prima facie case with a probability of success; show that they stand to suffer irreparable loss if the injunction is not granted; and where the court is in doubt, the application will be considered on a balance of convenience.

7. The applicants' suit is for adverse possession. What I cannot tell is what land the applicants claim. The applicants themselves acknowledge in their pleadings and depositions, that the land identified as CR No. 4314/1 has already been subdivided. They have brought a lot of issues over the title of this land but to me these are completely irrelevant. Even how the land was subdivided is irrelevant in a suit for adverse possession. What is important is possession and an identity with precision of what is being possessed and claimed. Since the applicants acknowledge that the land is subdivided, and new titles issued, they need to point out which subdivision they are claiming. If they are claiming all subdivisions, then they need to identify them all. This has not been done and I do not see how it can be said that the applicants have demonstrated a prima facie case with a probability of success if we cannot even tell with precision exactly what land they claim.

8. I have also seen the pleadings in Kilifi SRMCC No. 304 of 2015 annexed by the 1st – 4th respondents. In that suit, the 1st and 2nd applicants, as plaintiffs, sued the 1st to 3rd respondents herein and three other persons (most likely the siblings), claiming that they were threatening to evict them from the Plot No. 33/III/MN. They said that they had been resident on this land for over 20 years. I think given those pleadings, the applicants needed to explain how come they are now claiming a land which they describe as 4314/I/MN which they allege to have been resident for over 34 years. I have seen that the said case was dismissed for want of prosecution. The applicants in their pleadings herein did not disclose the fact of this previous case, which to me, smacks of deliberate non-disclosure. One cannot come to court seeking discretionary orders while hiding some relevant facts. Even in the supplementary affidavit, there is no mention of this previous case. The applicants have chosen to behave as if they never had any previous litigation with the 1st – 4th respondents. Importantly, the fact that the applicants, have been embroiled in litigation there before, casts doubt on whether they have actually been in peaceful occupation. Peaceful occupation is one of the cardinal ingredients in a case of adverse possession; but you cannot allege peaceful occupation when at the same time you are battling cases in court. I am also inclined, at this stage of the proceedings, to believe the 1st – 4th respondents, when they say that the 3rd respondent is a stranger to them and has never been on the land. In his submissions, Mr. Matata, learned counsel for the 1st – 4th respondents, inter alia submitted that the 3rd applicant is a complete stranger who has never been in possession of the land. He stated that he knows that he masquerades as an advocate. This submission has not been contested in any way by the 3rd applicant. The supplementary affidavit, filed after counsel had made these submissions, does not assert any occupation by the 3rd respondent. Even the Chief's letters annexed by the applicants, summoning some of the respondents to discuss the land issue, have no mention of the 3rd respondent. The 3rd defendant has certainly not displayed to me what interest he may have in the land and has not demonstrated any occupation of it.

9. Given the foregoing, I am not persuaded that the applicants have displayed a prima facie case with a probability of success. Not being so persuaded, this application must be dismissed with costs to the 1st – 4th respondents and it is so dismissed. It means that the applicants will need to prove their case without the benefit of an injunction.

10. Orders accordingly.

DATED AND DELIVERED THIS 30TH DAY OF JULY 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA