



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.62 OF 2015 (OS)

IN THE MATTER OF: THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF: THE LAND ACT, ACT NO. 6 OF 2012

BETWEEN

1. BENINA NDUGWA KUNYUMU

2. ELINORA MSHAI MAGHAGA

3. HANNA MUTHONI MWANGI

4. CATHERINE WANJIKU NJOGU

5. EVALINA WANGECI KARUNGU (as the official and trustees of

THE SISTERS OF MARY MOTHER OF GOD-MTWAPA.....APPLICANTS

=VERSUS=

THE NATIONAL LAND COMMISSION.....RESPONDENT

J U D G M E N T

Introduction

1. The officials and Trustees of the Sisters of Mary Mother of God-Mtwapa, commenced their suit by way of an Originating Summons dated 23rd April 2015. In the Originating Summons, the Applicants are seeking for the following orders:-

(a) That this Honourable Court be pleased to declare that Applicants The Sisters of Mary Mother of God-Mtwapa are the owners of Land Reference No. MN/III/644-Mtwapa

(b) That in the alternative to prayer 1 above, this Honourable court be pleased to declare that the Applicants, The Sisters of Mary Mother of God-Mtwapa, have acquired LAND REFERENCE NO. MN/III/644-MTWAPA by way of adverse possession.

(c) That an order do issue compelling the Respondent to issue the Applicant; The Sisters of Mary Mother of God-Mtwapa Land Reference No. MN/III/644-Mtwapa

(d) That a permanent injunction does issue restraining the Respondent or any person purporting to act on his behalf or his office, their servants, workmen, licensees, agents from howsoever offering for sale, allotting, subdividing, taking over, dispossessing, alienating, reclaiming, and or harassing the applicant or interfering with their peaceful entitlement, occupation and possession of LAND REFERENCE NO. MN/III/644 -MTWAPA.

(e) That the costs of the summons be provided for.

2. The Summons are based on the grounds that the Applicants have been in occupation of Land Reference No. MN/III/644-Mtwapa (the suit property) since 1991 without interruption or interference from anyone; that the Applicants have fenced and developed the suit property; that the Applicants do not have title document and that the Applicants are apprehensive that someone may one day claim ownership of the land.

3. Although the Respondent was served with the Originating Summons on 27th April 2015, It never filed a Replying Affidavit in opposition to the Application.

4. The matter proceeded for formal proof by way of viva voce evidence on 15th July 2015.

The Applicants' case:

5. Sister Benina Ndungwa Kinyumu, PW1, informed the court that the Applicant is registered as a society and as a public charitable trust.

6. It was the evidence of PW1 that the Applicants have been on the suit property since 1991 where they have been farming several crops like sorghum, maize among others.

7. According to PW1, the suit property neighbours their land which is L.R.NO.MN/III/2639 where they have permanent structures, including the Convent. It was her evidence that they have a title document in respect of L.R. No.MN/III/2639.

8. PW1 informed the court that other than farming on the suit property, they have also constructed a school on the land. It was her evidence that they have been unable to get the file in respect of the suit property at the lands office.

9. PW1 produced the map showing the location of the suit property.

10. According to PW1, they have written to the Respondent requesting to be issued with a title document which they have not done.

11. PW1 informed the court that once the Applicants are issued with the title document, they shall develop the land for charitable purposes.

Submissions:

12. The Applicants' advocate submitted that his clients' claim is brought under the doctrine of prescription; that the Respondent has been mandated to alienate public land and that the Applicants are deserving to be allocated the suit property.

13. Counsel, submitted that prescription is recognised as one way of acquiring title to land and that there is no person who has claimed the land in question.

Analysis and findings:

14. The Applicants herein are the officials and Trustees of the Sisters of Mary Mother of God-Mtwapa. PW1 produced in evidence the Certificate of Registration of the Society and the Declaration of Trust by the Applicants.
15. The evidence of PW1 that they have been using the suit property, which borders land reference number MN/III/2639 where the Convent is situated since 1991 has not been challenged.
16. Section 7 (d) of the Land Act provides that land may be acquired through prescription, while Section 28(h) of the Land Registration Act provides that all registered land shall be subject to rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.
17. It is therefore true that from the provisions of Section 7(d) of the Land Act and Section 28(h) of the Land Registration Act, the doctrine of prescription is applicable in this country in respect to acquisition of title to land.
18. There is a difference between acquiring a title to land by way of adverse possession and prescription. Of course, it has been said that the similarities between the doctrine of adverse possession and prescriptive easements far outweigh the differences because both result from the operation of the statute of limitation for trespass.
19. The difference between the two doctrines lie primarily in determining what is accomplished. With adverse possession the goal is to acquire title to real property.
20. Acquiring an easement by prescription however, is not directed towards the goal of acquiring title to property. Rather, it is directed towards acquiring an easement. So, if one uses, rather than possesses, the land of another, and the use is open and notorious, adverse, continuous and uninterrupted, for the statutory period, then one acquires an easement and can continue to use that land.
21. Unlike adverse possession, prescription is a non possessory interest in land through the long, continuous use of the land.
22. The law now provides that one can acquire title to land even when he has not been in possession of such land if he can show that he has used the land for a long period of time.
23. The statutory period for one to acquire land by prescription, which is an easement, is twenty years.
24. Section 32(1)(c) of the Limitation of Actions Act provides that where an easement has been enjoyed, peaceably and openly as of right, and without interruption, for twenty years, the right to such access is absolute and indefeasible.
25. The Applicants herein have proved that they have used the suit property for more than 20 years as a charitable organization.
26. The Defendant did not defend the suit meaning that they do not object to the issuance of a Certificate of Title to the Applicants who have acquired it by prescription.
27. For those reasons, I allow the Originating Summons dated 23rd April 2015 in the following terms:

(a) A declaration be and is hereby issued that the Applicants, the Sisters of Mary Mother of God-Mtwapa are the owners of L.R. No.MN/III/644-Mtwapa.

(b) The Respondent be and is hereby ordered to issue to the Applicants, the Sisters of Mary Mother of God-Mtwapa with a title document in respect of L. R. NO. MN/III/644 Mtwapa.

(c) A permanent injunction be and is hereby issued restraining the Respondent or any person

purporting to act on his behalf or his office, servants, workmen, licensees or agents from howsoever offering for sale, allotting, sub-dividing, taking over, dispossessing, alienating, reclaiming and or harassing the Applicants or interfering with their peaceful entitlement, occupation and possession of L.R.No.MN/III/644-Mtwapa.

(e) Each party to bear its own costs.

Dated and delivered in Malindi this 2nd day of October 2015.

O. A. Angote

Judge