



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 2 OF 2017**

**MOHAMMED BAFFIQ INVESTMENTS LIMITED....PLAINTIFF/APPLICANT**

**VERSUS**

**1. SHELLY HOLIDAY INN**

**2. SALIM BENDERA**

**3. ALI BABU**

**4. RAMA**

**5. KISAKA**

**6. RIZIKI**

**7. ADEM**

**8. REUBEN**

**9. GEORGE**

**10. MOODY.....RESPONDENTS/DEFENDANTS**

**RULING**

1. The application for determination is the Notice of Motion dated 8<sup>th</sup> December 2018 by the Applicant/Plaintiff seeking the following orders:

**1. Spent**

**2. That the respondents be cited for contempt of court order.**

**3. That summary judgment be entered in favour of the plaintiff for vacant possession on Plot No. Mombasa/M.S. Block V/102 and the defendants be evicted and their structures demolished and/or pulled down to the ground level.**

**4. That in addition and/or in the alternative this Honourable court do order that the defence dated 14.2.2017 be struck out.**

**5. That the costs of this suit be provided for.**

2. The application is brought under Section 1A, 1B, 3A and 63 ( e ) of the Civil Procedure Act and Order 2 Rule 15(1) (b), (c ) and (d), Order 51 and Order 40 Rule 3 of the Civil Procedure Rules and is supported by the affidavit of Mohamed Jamil Raffiq, a director of the applicant sworn on 8<sup>th</sup> November, 2017. He has deposed that the Applicant is the owner of PLOT NO.MOMBASA/M.S./BLOCK V/102 (the suit property) and has annexed a copy of the title deed. He has further deposed that on 4<sup>th</sup> February, 2017 when the deponent visited the suit land, he was shocked to find the respondents constructing illegal structures on the said plot without the consent or knowledge of the applicant. That the applicant proceeded to file this suit seeking orders of eviction and vacant possession together with an application for injunction. He

has deposed that on 15<sup>th</sup> June, 2017, the court issued orders of temporary injunction which were duly served upon the respondents on the same date. That the respondents have gone ahead and disobeyed the said court order by continuing to trespass and construct structures on the suit property. It is averred that the respondents continued occupation of the suit premises is unlawful and constitutes a gross affront to the applicant's constitutional right over property guaranteed under Article 40 of the Constitution of Kenya and is a contempt of court. Mr. Raffiq has deposed that on 31<sup>st</sup> May, 2018 he proceeded to offload his 40 ft container on the suit premises and in the process of offloading, the respondents accosted and attacked his employees using crude weapons, forcing them to leave the premises without offloading the container. He has deposed that as a result of the respondents' unlawful and continued occupation, the applicant has been denied the right to use and draw benefit from the suit premises and this has occasioned the applicant loss and damage. The applicant contended that it is in the interest of justice that this court grants the orders sought herein to meet the ends of justice.

3. The defendants were duly served with application through their advocates on record but have not filed any response to it, so the application is not opposed.

4. I have considered all the issues raised in the application. The main issue for determination is whether summary judgment should be entered in favour of the plaintiff as prayed. The principles which guide the courts in determination and application for summary judgment are well settled. In the case of **Gupta –v-Continental Builders Ltd (1978) KLR 83**, the Court of Appeal stated:

**“If no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the court forthwith to enter summary judgment for it is as much against natural justice to shut out a proper litigant from defending himself as it is to keep a plaintiff out of his dues in proper case. Prima facie triable issues ought to be allowed to go to trial as sham or bogus defence ought to be rejected peremptorily.”**

5. In the case of **Continental Butchery Ltd –v- Nthiwa (1989) KLR 573**, Madan JA stated:

**“With a view to eliminate delays in the administration of justice which would help litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim of the plaintiff under the summary procedure provided under Order 35 subject to there being no bona fide triable issues which would entitle a defendant leave to defend. If a bona fide triable issue is raised, the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham.”**

6. In the case of **Delphis Bank Limited –v- Caneland Limited (2014)**, the Court of Appeal stated:

**“Where there is no plausible defence and it is plain that the defence is a sham or cannot be sustained, it would be pointless to put the parties through a trial that would inflate costs to the disadvantage of the debtor and delay delivery of justice to the prejudice of the claimant.”**

7. It is clear from the above decisions that the principles for summary judgment are that where there are no triable issues raised or where the triable issues raised are a sham, the court will grant an application for summary judgment to eliminate delays in the administration of justice and to save on costs. These are the principles that I will use to determine the outcome of the application herein.

8. From the pleadings it is apparent that the plaintiff is the registered owner of the suit property. The plaintiff has exhibited title deed in respect of TITLE NO.MOMBASA/M.S./BLOCK V/102 in its name. I have perused the said title and it is clear that the plaintiff was registered as owner of the suit property on 20<sup>th</sup> January 2015. The plaintiff's case as pleaded is that on 4<sup>th</sup> April 2017, the defendants wrongfully trespassed onto the suit land and took possession by constructing structures thereon. The plaintiff is seeking orders of mandatory injunction and eviction.

9. I have perused the defence filed. In the said defence, the defendants' averred that they have not trespassed into the plaintiff's parcel of land nor have they taken possession of it. In the same breath, the defendants averred that they have been in occupation of the parcel of land which they have been using as their fishing bay for the last twenty (20) years. In their defence, the defendants appear to blow hot and cold. Nonetheless, the question that I need to answer is whether the defence of adverse possession is sustainable.

10. In the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2015)eKLR** the Court of Appeal held as follows:

**“Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of **Wabala –v- Okumu (1997) LLR 609 (CAK)**, which like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in **Bayete Co. Ltd –v- Kosgey (1998)LLR 813** where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted.”**

11. The Court of Appeal in the Mtewa Lewa case (supra) summarized the doctrine of adverse possession as follows:

**“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential**

prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act, which is in these terms:-

**“An Action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him, or if it accrued to some person through whom he claims, to that person.”**

12. It is clear from those principles that the onus lies on the person claiming title by adverse possession to prove the essential elements before an order in his or her favour. In this case, the PLOT NO. MOMBASA/M.S./BLOCK V/102 was registered in the name of the plaintiff on 20<sup>th</sup> January, 2015. The plaintiff's claim is that the defendants trespassed on the land in the year 2016. The plaintiff filed this suit on 5<sup>th</sup> January 2017. Adverse possession is a sui generis process where all the ingredients must be proved. This is because the effect of a successful claim under adverse possession disinherits a registered proprietor of his or her land. The ingredients include, inter alia, quiet, open and interrupted occupation and a threshold of occupation for at least 12 years. There is evidence that the plaintiff obtained title for the suit property on 20<sup>th</sup> January, 2015. It is obvious that twelve years have not elapsed since then and the time this suit was filed on 5<sup>th</sup> January 2017. Only two years had elapsed since the plaintiff became the registered owner. In their defence the defendants have also denied trespassing onto the plaintiff's land. Obviously, one cannot eat his case and still have it.

13. Accordingly, I find that the defence which is based on mere denial and on statute of limitation is unsustainable and is a sham. There is no reason to justify the defendants' continued possession of the plaintiff's land.

14. The upshot is that the Notice of Motion dated 8<sup>th</sup> November, 2018 is merited and the same is allowed in the following terms:

- a. The defendants' defence dated 14<sup>th</sup> February, 2017 is struck out.**
- b. Judgment is hereby entered for the plaintiff against the defendants in terms of prayers (a) and (b) of the plaint.**
- c. Costs of this application and the suit are awarded to the plaintiff.**

15. Orders accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA 24<sup>th</sup> day of September 2020**

---

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**