



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**ELC NO. 139 OF 2019 (OS)**

**STEPHEN MWADORO & 56 OTHERS.....APPLICANTS**

**VERSUS**

**ALHAD MOHAMED HATIMY.....RESPONDENT**

**RULING**

*(Application seeking to strike out suit; suit being one of adverse possession over a described title; defendant pointing out that the title no longer exists as the same has been subdivided; suit struck out for claiming a title that does not exist)*

1. This ruling is in respect of an application dated 26 August 2019 filed by the respondent. The application seeks orders to have this suit struck out on the following grounds :-

*(a) That the claim of the plaintiffs is scandalous and brought in abuse of the Court process as the property described in the suit is long subdivided and now reposes in different sub-titles held by different parties, a fact capable of being established by a routine scrutiny of the registry record.*

*(b) That in any event as against the respondent the suit by the claimants number 2, 5, 6, 9, 14, 21, 27, 34 and 42 would be res judicata the suit in ELC 227 of 2014 (former HCCC 327 of 2008).*

*(c) That the suit offends the law regarding claims for adverse possession especially Rule 7 of Order 37.*

2. The application is supported by the affidavit of the respondent (who for ease of reference, I will refer to as the defendant).

3. To put matters into context, this suit was commenced through an Originating Summons filed on 26 July 2019 by various persons seeking orders that they have acquired, by way of adverse possession, title to the land identified as Subdivision No. 8826 (Original Number 143/2) Section I Mainland North (the suit land). The applicants (who for ease of reference I will refer to as the plaintiffs) claimed to have been in possession of the suit land for more than 12 years and that they had built their residences on the land. The supporting affidavit to the Originating Summons is sworn by Stephen Mwadoro.

4. The defendant came into the suit and immediately filed this application. The supporting affidavit is sworn by the defendant himself. He has deposed inter alia that the suit land ceased to exist long ago as it was subdivided into 18 different titles. He has annexed a copy of the title. He deposed that some of the plaintiffs had sued him in the suit ELC No. 227 of 2014 (formerly HCCC 327 of 2008) for injunctive relief and made no mention of any interest adverse to the registered holders but freely admitted to being tenants willing to remit ground rent to the appropriate land owners. He annexed copies of the pleadings and judgment in that case. He deposed that several other plaintiffs have been remitting ground rent including the plaintiffs number 6 and 19. He deposed that they are tenants of houses without land and this would disentitle them to claim the land under adverse possession. He deposed that the title Subdivision No. 8826 was itself created from a Plot No. 143 which was the subject of litigation in the suit Mombasa High Court Miscellaneous Suit No. 71 of 1988 where the court ordered its subdivision.

5. A replying affidavit to oppose the motion was sworn by Stephen Mwadoro. He has deposed that this suit is not res judicata since the previous suit sought injunctive orders whereas this suit seeks orders for title to land through adverse possession. He has deposed that the suit property has not changed hands because there are small portions which have been subdivided but that the area that the plaintiffs claim is in the bigger portion of the land which was not subdivided and for which the parcel number has never changed.

6. There is a supplementary affidavit sworn by the defendant. He has annexed the certified copy of title showing subdivision of the parcel No. 8826 and stated that the sole subdivision that would have remained in his name is subdivision No. 17655 (Original No. 8826/1) Section I MN, which is entry 26 in the mother title. He further annexed proceedings in HCCC No. 327 of 2008 where he contended that the plaintiffs

had told the court that they were tenants of houses without land and willing to pay rent to the rightful owner.

7. I invited counsel to file written submissions but only Mr. Mwakisha, learned counsel for the defendant, filed submissions. None were filed by Ms. Chala for the plaintiffs though she did make brief submissions at the inter partes hearing of the application. I have taken note of the submissions of counsel.

8. The basis upon which this application is founded is that firstly, the land that the plaintiffs claim does not exist. Secondly, it is the contention of the defendant that the plaintiffs cannot sustain a suit for adverse possession, for they themselves, did acknowledge in the suit HCCC No. 227 of 2014 that they were tenants and the suit is res judicata.

9. On the first issue, it is clear to me that the land that the plaintiffs claim does not exist as described. I have seen the Certificate of Title annexed by the defendant and it is very clear that the land described as LR No. 8826 (Original 143/2), which is what the plaintiffs seek title to by way of adverse possession, has been subdivided into several plots, and therefore that title no longer exists. These subdivisions are now owned by various people who are not parties to this suit. One cannot seek adverse possession against a title that does not exist. It is upon any claimant seeking land by adverse possession to be very precise on what title he seeks to be registered as proprietor. That is why you have the provision of Rule 7 (2) in Order 37 which requires an applicant in a case of adverse possession to annex an extract of the title that is the subject of the suit. It is pointless having this suit proceed on a title that does not exist. There is no need of wasting the court's time on a case where the order sought is incapable of being granted for the non-existence of the subject matter. I cannot order the plaintiffs to be registered as owners of the title LR No. 8826 (Original 143/2) because that title is non-existent. I am aware that Ms. Chala submitted that this can be amended and that the issue can be handled at the hearing of the main suit. There are about 26 subdivisions with separate titles. No one knows what the plaintiffs claim out of the 26 subdivisions. It was upon the plaintiffs to be precise on what they claim and what they have mentioned is a title that does not exist. On the ground that the title being sought does not exist, this application must succeed, and this suit is struck out. It is really not necessary for me to interrogate the other grounds but there is one issue that I must address.

10. I am rather disturbed by the conduct of the plaintiffs. When they filed this suit, they never disclosed that they had previous litigation with the defendant. They never disclosed that they had litigated with the defendant in the suit Mombasa ELC No. 227 of 2014. In fact, after this suit was filed, the plaintiffs sought orders to serve the defendant by substituted service claiming that his whereabouts are unknown. The supporting affidavit to that application was sworn by Ms. Chala, who is counsel on record for the plaintiffs. In that application she deposed that the plaintiffs have made several attempts to trace the whereabouts of the defendant, but are not able to trace him, and that his last known address was picked from an affidavit that the defendant swore in Civil Suit No. 29 of 1994. That cannot be entirely true. Ms. Chala is the same counsel who appeared for the plaintiffs in the Suit Mombasa ELC No. 227 of 2014 and she must have been aware that the defendant had entered appearance in that case through M/s Moses Mwakisha & Company Advocates. The whereabouts of the defendant must have been known when he was served with the pleadings in that case, which is either in the year 2008 or after. It cannot be said that the last known whereabouts of the defendant was in the year 1994.

11. It is also interesting that in that suit, the plaintiffs asserted that the defendant herein is not the owner of the land, but here, they wish to have title by adverse possession, and now acknowledge that title is with the defendant. All this is however besides the point. The point is that the plaintiffs are litigating on land that does not exist and that being the position, this case has no legs upon which to stand on, and it is hereby struck out with costs.

12. Orders accordingly.

**DATED AND DELIVERED THIS 21ST DAY OF OCTOBER 2020**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**