



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 60 OF 2019

MOUNT ELGON BEACH PROPERTIES LIMITED.....PLAINTIFF

VERSUS

ISSA MWANONGO MWAJIMA.....DEFENDANT

RULING

1. By a Notice of Motion application dated and filed contemporaneously with the suit herein on 29th July 2019, Mount Elgon Beach Properties Ltd (the Plaintiff) prays for orders that: -

3. The Court be pleased to grant an injunction restraining the Respondent/Defendant whether by himself, his agents and/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the Plaintiff's property known as LR No. 18664 (CR No. 25183) pending the hearing and determination of this suit;

4. The Officer Commanding Kilifi Police Station do enforce compliance of the orders above;

5. The costs of this application be provided for;

6. The Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

2. The application which is supported by an affidavit sworn by the Plaintiff's Manager Mohamed Hamoud Mbarak is premised on the grounds: -

i) That the Plaintiff/Applicant is the legal owner of the said parcel of land;

ii) That the Respondent/Defendant has trespassed upon the property and now occupies part of the same after damaging the boundary perimeter and erecting a structure thereon;

iii) That unless restrained, the Respondent will continue interfering with the Plaintiff's enjoyment of the said parcel of land thereby causing the Plaintiff irreparable damage.

3. The Defendant Issa Mwanongo Mwajima is however opposed to both the suit and the Motion. By a Notice of Preliminary Objection dated 19th August 2019, he urges the Court to strike out the suit and the application on the grounds: -

1. That the Plaintiff's claim against the Defendant is time barred by virtue of Section 7 of the Limitation of Actions Act;

2. That the Court has no jurisdiction to grant any orders on a claim which is time barred; and

3. That the Plaintiff's application dated 29th July 2019 and the suit herein is an abuse of the process of the Court.

4. In further response to the application and by a Replying Affidavit sworn and filed herein on 9th October 2019, the Defendant avers that sometimes in the early 1950s, his grandfather Mwanongo Mwangoro (now deceased) resided with his seven (7) wives on all that undermarked and unregistered land now forming and registered as LR No. 18564 (Cr. 25183), Plot No. Yoka Uyombo Settlement Scheme 517 and LR No. 20824 situated in Kilifi.

5. The Defendant further avers that during adjudication, the suitland was sub-divided and much of it is now owned by local indigenous community members under the Roka Uyombo Settlement Scheme.

6. The Defendant avers that he has been in occupation and cultivation of the suitland together with his family members for over 12 years peacefully and uninterrupted and that he has developed the said property by building semi-permanent houses, planting coconut trees and carrying out subsistence farming. It is further his case that he has buried several of his relatives on the land and yet the Plaintiff has not applied for an order to exhume their bodies.

7. On 9th October 2019, the Defendant also filed a Statement of Defence and Counterclaim in which he reiterates inter alia, that he has lived on the suit property for an uninterrupted and continuous period in excess of 12 years and that he is now entitled to the suit property by virtue of adverse possession and should be so registered as the proprietor thereof.

8. In response to that Defence and Counterclaim, the Plaintiff has also taken out a Notice of Preliminary Objection dated 13th November 2019 wherein it urges the Court to strike out the Counterclaim on the grounds: -

1. That the Counterclaim is res judicata, there having been a suit filed by the Defendant's family against the Plaintiff over the same subject matter LR No. 18664 (CR N. 25183) and praying for the same prayer of adverse possession against the Plaintiff's title and the said suit having been decided, first by the Malindi Environment and Land Court No. 85 of 2015, and later on appeal by the Malindi Court of Appeal, Civil Appeal No. 102 of 2018.

2. That the Counterclaim is an abuse of the Court Process and should be struck out with costs.

9. Following directions given herein, it was agreed that the application and the two objections be disposed of together. I have accordingly perused and considered the same together with the submissions and authorities placed before me by the Learned Advocates for the parties.

10. As was stated by Law, JA in **Mukisa Biscuits –vs- West End Distributors Ltd (1969) EA 696:**

“.....So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

11. Arising from the dictum of Law JA in the said **Mukisa Biscuits Case (Supra)** it was apparent to me that the two Preliminary Objections as raised by both the Defendant and the Plaintiff fall within the meaning of what may properly be described as a Preliminary Objection.

12. The first objection I would wish to consider is the second one raised by the Plaintiff against the Defendant's Counterclaim.

13. That Second Preliminary Objection dated 19th August 2019 and is filed by the Plaintiff in response to the Defendant's Defence and Counterclaim filed herein on 9th October 2019. By the said Counterclaim, the Defendant asserts that he and his family have been in occupation of the suit property for an uninterrupted period of 12 years and that he is duly and legally entitled to the suit property by virtue of adverse possession and should be so registered.

14. The Plaintiff however contends that the claim for adverse possession if anything is res judicata as the same claim had been made in another suit filed by the Defendant's family being **Malindi ELC 85 of 2015** and that the same is therefore an abuse of the Court process.

15. The doctrine of res judicata is captured under Section 7 of the Civil Procedure Act as follows: -

"7. Res judicata

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issues in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court."

16. The Defendant does not deny the existence of **Malindi ELC Case No. 85 of 2015; Kalume Mwanongo & Another –vs- Mt. Elgon Beach Properties Ltd.** It is however his case that the said suit and the resultant **Civil Appeal No. 102 of 2018; Mt. Elgon Beach Properties Ltd –vs- Kalume Mwanongo Mwangaro & Another**, were brought by two individuals in their personal capacity and not as representatives of the members of the Defendant's family. The Defendant further submits that he was not even a witness in the said case and had nothing to do with the same.

17. From the material placed before me, the Originating Summons dated 2nd August 2012 which metamorphosed upon transfer into the said **Malindi ELC No 85 of 2015** was initially filed at the High Court at **Mombasa as Civil Suit No. 161 of 2012.** The two applicants whom the Defendant acknowledges to be his relatives sought a determination of the following questions: -

1. Whether the applicants (were) entitled to the parcel of land known as LR No. 18664 (CR No. 25183) by virtue of adverse possession;

2. Whether the Plaintiffs occupants of the parcel of land known as LR No. 18664 (CR 25183) (are) entitled to be duly registered as the proprietor of the said portion of land; and

3. Whether the applicants (are) entitled to the costs of this summons.

18. A perusal of the Counterclaim reveals that that is the same Parcel of land sought by the Defendant on the basis of adverse possession. The issues in question were therefore substantially the same.

19. At Paragraphs 4, 5, and 6 of his Replying Affidavit filed in opposition to the Plaintiff's claim, the Defendant acknowledges that his two relatives had earlier filed a claim for adverse possession against the Plaintiff over the same parcel of land and avers that he is aware their claim was unsuccessful. He does not however state when and how he came into that knowledge even though he has attached to his Replying Affidavit an affidavit filed in the said **Malindi ELC No. 85 of 2015.**

20. A perusal of the Replying Affidavit of Mohamed Hamoud Mbarak sworn on 13th November 2019 on behalf of the Plaintiff however reveals that the family of Mzee Kalume Mwanongo at one time held a meeting at which it was decided that the 1st Plaintiff in **Malindi ELC Case No. 85 of 2015** was designated

by the family to file the suit. From the handwritten minutes of the meeting held on an unclear date in September 2015, it is apparent that the Defendant herein was listed as No. 3 out of a total of 18 family members who attended the meeting.

21. The involvement of the Defendant herein in the said suit can be discerned from paragraphs 6 and 9 of the Judgment of the Honourable Justice Angote delivered herein on 15th October 2017 where the Learned Judge notes in his summary of the Plaintiff's case thus: -

“The Plaintiff's Case

6. The 2nd Applicant, PW1, informed the Court that he lives with his brothers Kalume and Issa in Roka Chumani (the suit land) and that they have coconut trees, maize and cassava on the suit land.

9. According to PW1, the suit property has always been occupied by the family of Mwanongo Mwaro, the 1st Applicant and that he is a grandson of Mr. Kalume. His brother is known as Issa Mwanongo Mwaro.”

22. From a perusal of the entire Judgment it was clear to me that the person referred to invariably as Issa and /or Issa Mwanongo Mwaro is the self-same Defendant herein. That the Learned Judge was also like me clear in his mind that the suit was brought on behalf of the entire Mwanongo family can be discerned at paragraph 72 of his Judgment wherein he delivered himself as follows:

“72. For those reasons, I allow the Applicants' Originating Summons dated 2nd August 2012 as follows:

a) The Applicants on their own behalf and on behalf of their immediate family members, that is their children, brothers and sisters are entitled to land known as LR No. 18664, CR 25183 by virtue of adverse possession.

b) The Applicants to be registered as the proprietors of LR No. 18664 on their behalf and in trust for their immediate family members, that is their children, brothers and sisters.”

23. As fate would have it the Plaintiff herein who was the Respondent in the Originating Summons appealed the above determination and on 25th July 2019, the Court of Appeal in ***Civil Appeal No. 102 of 2018*** overturned the same and dismissed instead the Originating Summons. That notwithstanding, it was clear to me that the issues arising in the said Originating Summons had fully been determined in the said ***Malindi ELC No. 85 of 2015*** and the Defendant's Counterclaim is therefore nothing but a second attempt by the Defendant to lay another claim to the suit property.

24. As the Court of Appeal stated in ***Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others (2017) eKLR:***

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent Court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

25. Arising from the foregoing and taking into account the fact that the issues raised in the Counterclaim have been heard and dealt with as outlined above, I am in agreement with the Plaintiff that the same are res judicata and amount to an abuse of the Court process.

26. Having made the determination, I should have perhaps stopped there. However, out of abundance of caution I think it is proper that this Court makes a determination even at this preliminary stage whether in the event the claim was not res judicata, the Defendant has made a case for adverse possession for consideration by this Court. That enquiry ultimately leads me to the consideration of the Preliminary Objection by the Defendant dated 19th August 2019 in which he faults the Plaintiff's suit on the basis that it is time-barred by virtue of Section 7 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya and that thence this Court has no jurisdiction to deal therewith.

27. In support of that objection, the Defendant submits that there is no dispute that he has been on the suit property continuously and for an uninterrupted period in excess of 12 years. The Defendant asserts that in that period he has developed the suitland by building semi-permanent structures thereon, planting trees and carrying on subsistence farming. It is accordingly the Defendant's case that he has since dispossessed the Plaintiff of the suit property by virtue of the doctrine of adverse possession.

28. By Section 7 of the Limitation of Actions Act, an action to recover land may not be brought after the end of twelve years from the date on which the right of action accrued. Under Section 17 of the Act, if a person does not bring an action to recover land within the stipulated twelve years, his title to the land is extinguished. Section 38(1) of the same Act requires a person who has become entitled to such land (as defined under Section 37 thereof) to apply to this Court for an order that he be registered as the proprietor in place of the person then registered.

29. As was stated by the Court of Appeal in **Kasuve –vs- Mwaani Investment Ltd & 4 Others (2004) 1 KLR: -**

“In order to be entitled to land by adverse possession, the Claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”

30. Accordingly, the key test would appear to be whether the registered owner of the land was dispossessed or has on his own discontinued possession for the period of 12 years. While the Defendant herein contends to have been in such exclusive possession for the requisite period, the Plaintiff denies the same and accuses him of recently trespassing onto the suit property and occupying the same after destroying a perimeter fence.

31. From the material placed before me, there was nothing much from which one would make a deduction that the Defendant had been on the land for 12 years. Instead, what was clear was that the Defendant has for sometime had a run-in with the Plaintiffs that intensified in 2016 when the Defendant is said to have tried to forcefully occupy a section of the suit property after destroying a fence erected thereon by the Plaintiff.

32. As a result of a complaint filed by the Plaintiff and or its agents, the Defendant was arraigned before the Kilifi Senior Principal Magistrates Court in **Criminal Case No. 82 of 2016**. In a Replying Affidavit sworn on behalf of the Plaintiff in response to the Preliminary Objection and filed herein on 19th November 2019, the Plaintiff has annexed extracts of the proceedings from the said Criminal Case as annexure MTBPL 12 and 13.

33. A perusal thereof reveals that the Plaintiff was on 17th February 2016 charged with the offence of malicious damage of the Plaintiff's boundary concrete pillar valued at Kshs 2,000/- after being found by the Plaintiff's guards destroying the fence with a hammer and that once the charge was read and explained to him, the Defendant pleaded guilty. Upon his conviction, the Defendant sought forgiveness in mitigation after telling the Court he was 55 years old and that he would not repeat the offence.

34. A further perusal of the proceedings reveals that after considering the mitigation, the Honourable L.N Wasige SRM sentenced the Defendant as follows: -

“SENTENCE

The accused’s mitigation has been noted. He is also a 1st offender. He seems remorseful. In the circumstances, I discharge the accused under Section 35 (1) (of the) Penal Code with a caution not to repeat the offence again.”

35. Arising from the foregoing, it was evident to me that the Defendant’s claim for adverse possession was rather far-fetched and that even if he had any such claim, the calculation of time for such possession stopped running when the registered owner of the land exercised his rights to possession thereof by causing him to be so charged. By pleading guilty and asking for forgiveness, he acknowledged that his being on the land was not hostile to the owner thereof and that it was instead permissive in nature.

36. As the Court of Appeal stated in ***Wilfred Kegonye Babu –vs- Henry Mose Onuko (1019) eLKR: -***

“The phrase “adverse possession” has a restricted legal meaning. It does not mean that every person in possession of land belonging to another for the statutory period is automatically entitled to the land by adverse possession.

The law prohibits a person to unlawfully occupy private, community or public land and gives a right to the owner to evict such person and also stipulates the procedure for such eviction. For instance, Section 153A of the Land Act, Revised Edition, 2017 provides: -

“A person shall not unlawfully occupy private, community or public land and Section 152B provides:

“An unlawful occupant of private land, community or public land shall be evicted in accordance with this Act.”

37. Arising from the foregoing, I did not find any evidence from which it could be said that the Defendant had dispossessed the Plaintiffs of its property for a period in excess of 12 years and his Preliminary Objection must fail on that account.

38. Accordingly, and in light of the foregoing, it was clear to me that there was no basis upon which the Defendant remains on the suit property. He is clearly a trespasser thereon and the Plaintiff is in my view entitled to the orders of injunction as sought under Prayer No. 3 of the Notice of Motion dated 29th July 2019 which I hereby grant. Given the fact that the Defendant is already in the suit premises, and that he has refused to vacate the premises, those orders shall be enforced by the OCS Kilifi Police Station as sought under Prayer No. 4 upon compliance by the Plaintiff with the procedure set out under Sections 152A, 152C, 152F and 152G of the Land Act 2012.

39. For the avoidance of doubt I hereby strike out the Defendants Defence and Counterclaim with costs to the Plaintiff.

40. The Plaintiff shall also have the costs of the application.

Dated, signed and delivered at Malindi this 15th day of October, 2020.

J.O. OLOLA

JUDGE