



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 88 OF 2013(OS)

IN THE MATTER OF: PLOT NO. KILIFI/MTWAPA/II

AND

IN THE MATTER OF: APPLICATION FOR DECLARATION

THAT THE APPLICANT/PLAINTIFFS HAVE OBTAINED OWNERSHIP

OF THE ABOVE SAID LAND BY WAY OF ADVERSE POSSESSION

BETWEEN

MBIGO KADZO TEMBO

ARNOLD KARISA MUHAMBI.....PLAINTIFFS

VERSUS

VINCENT SABASTIAN D’COSTA.....DEFENDANT

RULING

1. By this Notice of Motion dated 5th March 2018 one Leonard Da Costa, claiming to be the Administrator of the Estate of Vincent Sabastian D’Costa (the Defendant) prays for an order that the orders issued herein on 3rd January 2017 be reviewed and set aside.

2. The application which is supported by an affidavit sworn by the said Leonard Da Costa is based on the grounds that:

A. There are various mistakes and errors apparent on the face of the record in that:

i) Leonard Da Costa (the Administrator) is the administrator of the estate of the Defendant.

ii) The Defendant was the duly registered owner of the parcel of land known as Kilifi/Mtwapa/11

iii) On 8th January 2018, the Administrator learnt that the Plaintiffs had been fraudulently registered as the owners of the said property with effect from 24th April 2017 after purportedly obtaining rights under the doctrine of adverse possession in this suit.

iv) This suit was filed six years after the Defendant had passed on and thus was void.

v) The Administrator was not made a party to this suit and therefore no order should have been made adverse to the estate of the Defendant without giving the Administrator an opportunity to be heard.

B. The Administrator has learnt that the Plaintiffs wish to dispose of the property by sale to a third party.

C. The Administrator and the beneficiaries of the deceased stand to suffer substantial and irreparable loss which cannot be

compensated by damages; and

D. It is in the interest of justice that the prayers sought be granted.

3. The Plaintiff- Mbigo Kadzo Tembo and Arnold Karisa Muhambi are however opposed to the grant of the orders sought. In their Affidavit in Reply jointly sworn and filed herein on 19th June 2018, the two dispute the averments made by the Administrator and assert that he is a stranger unknown to them and these proceedings.

4. The Plaintiffs aver that it is inexplicable how the Defendant could have acquired the suitland by an instrument of transfer from the Settlement Fund Trustees (SFT) yet he is also said to have purchased the same for value from the original allottee one Nyale Mwingo Diya. They further aver that prior to the present application, they had sold the suitland to one John Nyagaka Osoro who now holds a valid instrument of transfer.

5. The Plaintiffs assert that all steps taken by the Administrator and his Advocates including the institution of the present application are tainted and legally ineffectual for being in contravention of the Law of Succession Act. The Plaintiffs aver that they came to Court in broad day light, just like they occupied and worked the property openly and the attempt to challenge their title now is too late and is in any case made after the original title was extinguished.

6. The Plaintiffs further contend that the Applicant and his son have not shown that they are the beneficiaries of the estate of the allegedly deceased title owner, and that even if they are, time has ran in their favour as against the estate of the allegedly deceased title owner and any beneficiary claiming under his title.

7. I have perused and considered the application and the response thereto. I have similarly perused and considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

8. Section 80 of the Civil Procedure Act permits this Court to review its own previously concluded decision, re-open the same and to re-determine it. That power of review grants the Courts an opportunity to correct certain errors that may have been made in a decision within certain limits. Order 45 Rule 1 of the Civil Procedure Rules on the other hand sets out the grounds upon which an application for review may be made.

9. Those Rules lay down the jurisdiction and scope of review limiting it to the following grounds:

a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made, or;

b) On account of some mistake or error apparent on the face of the record, or;

c) For any other sufficient reason.

10. By an Originating Summons dated 4th June 2013, the two Plaintiffs herein had asked this Court to determine the following questions as against the Defendant- Vincent Sabastian D'Costa:

a) Whether the Plaintiffs/Applicants were entitled to be declared as the proprietors of the parcel of land known as Kilifi/Mtwapa/11 which they have acquired by adverse possession after staying/residing on the parcel of land for an uninterrupted period in excess of 12 years.

b) Whether the Plaintiffs/Applicants are entitled to be registered as the owners of the parcel of land Kilifi/Mtwapa/II; and

c) Whether the Defendants title or right to all that piece of land Kilifi/Mtwapa/II is extinguished and the Defendant claiming the same is time-barred by virtue of Section 17 of the Limitation of Actions Act.

11. The Originating Summons was served upon the Defendant/Respondent by way of an advertisement in the Daily Nation Newspaper of 12th December 2014 but the Defendant neither entered appearance nor did he respond to the claim. Accordingly, and upon hearing the Plaintiffs /Applicants evidence, the Honourable Justice Angote then seized of the matter delivered a Judgment herein on 3rd February 2017 in which he allowed the Originating Summons as follows:

a) The Applicants be and are hereby declared to be the proprietors of the parcel of land known as Kilifi/Mtwapa/II having acquired it by adverse possession;

b) The Applicants to be registered as the owners of the parcel of land known as Kilifi/Mtwapa/II forthwith;

c) Each party to bear his own costs.

12. The present application before me seeks a review of the said orders of 3rd February 2017 principally on the basis that when the suit was filed, the Defendant/Respondent named therein had long passed away and that therefore no order ought to have been made adverse to his estate without giving the Administrator of his estate an opportunity to be heard.

13. From the material placed before me it is self-evident that Vincent Sabastian D'Costa named as the Defendant/Respondent in the Originating Summons indeed passed away on 16th June 2007. That was some six (6) years before this suit would be filed in June 2013.

14. As was stated in *Lawrence Kwatsima –vs- Tania Mutakale Shilama & Another (2006) eKLR*, it is now well-settled that where the suit is filed against a dead person, that suit is bad in law because it is filed against nobody and there is simply no valid suit. Accordingly and given that the Applicant herein as the Administrator of the Estate was not made a party to the Originating Summons, no orders ought to have been made adverse to the estate without his participation.

15. From a perusal of the Judgment that was delivered on 3rd February 2017, it was clear that the Court was not notified at any time in the course of the proceedings that the Defendant had died before the suit was filed. The institution of the suit as it were against a dead person was an act that was in my view void and of no effect.

16. As Lord Denning stated along time back in the famous case of *Mac Foy –vs- United Africa Co. Ltd (1961) All ER 1169*:

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

17. Accordingly, the Judgment delivered herein on 3rd February 2017 must collapse given that the Originating Summons was filed against a person who had been dead for six years and was therefore for all intents and purposes, a nullity. That Judgment was issued in error and there would be a great miscarriage of justice if that error were not corrected.

18. As a consequence of the foregoing, it follows that the Plaintiffs did not hold a good title since that title was acquired by either misrepresentation of facts and or a gross omission on their part upon the institution of the suit. Since the Plaintiffs did not acquire a good title, they could not transfer any good title to anyone.

19. In the premises, I allow the Motion dated 5th March 2018 and set aside the orders issued herein on 3rd February 2018.

20. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 5th day of November, 2020.

J.O. OLOLA

JUDGE