



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 231 OF 2017(OS)

IN THE MATTER OF: LAND PARCEL NO. 151/IV/MN-CR 13079, 523/IV/MN, 1524/IV/MN

(AND ANY OTHER SUBDIVISION CREATED FROM 151/IV/MN, THE MOTHER TITLE

IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT THE

PLAINTIFFS HAVE OBTAINED OWNERSHIP OF ALL OF 100 ACRES

OF THE ABOVE PARCELS OF LAND BY WAY OF ADVERSE POSSESSION

BETWEEN

NICHOLAS MKOMA MKALI & 253 OTHERS.....PLAINTIFFS

VERSUS

1. YAHYA MOHAMED SULEIMAN

2. KARISA KITSAO KITI

3. CHAIRMAN, NATIONAL LAND COMMISSION.....DEFENDANTS

RULING

1. I have before me for determination both a Notice of Motion Application dated 23rd November 2017 and a Preliminary Objection dated 8th December 2018. By the said application, the 254 Plaintiffs pray for orders as follows:-

4. That mandatory injunction do issue restraining the Defendants by themselves, servants, workmen and/or agents, or otherwise howsoever from removing/destroying houses/structures, erecting fences, threatening the Plaintiffs with harm and eviction, trespassing onto and/or in any other way dealing with the Plaintiff's property known as Plot/Land Parcel No. 151/IV/MN-CR 13079, 1523/IV/MN, The Mother Title) situated at Mwatundo, Kanamai Kilifi District and to stop interfering in any other way with the Plaintiff's occupation and peaceful enjoyment of the suit property pending the hearing and determination of this matter.

5. That the costs of this application be borne by the Defendants.

2. The said application is supported by an affidavit sworn by the 1st Plaintiff Nicholas Mkomu Mkali and is premised on the grounds that:-

a) The Plaintiffs use the property to live and cultivate crops;

b) The Plaintiffs have been living on the suit property with their families since birth;

c) The Defendants are using the County Commissioners Kilifi County and Policemen from Mtwapa and Kijipwa Police Stations to harass, intimidate and evict the Plaintiffs;

d) The National Land Commission authorized mutation and registration of the suit property without considering the residents who were born and/or raised within the suit property; and

e) The Defendants will not suffer prejudice in any way if the application is allowed.

3. By a Notice to raise a Preliminary Objection filed herein on 8th December 2017, the 1st and 2nd Defendants raise a Preliminary Objection on a point of law and argue

1. (That this Court has no) jurisdiction to hear and determine this matter in light of the orders for Settlement of Squatters given in Kadhi's Court case No. 143 of 2014 which case compromised an adverse possession application;

2. That the issue of Squatters has been heard and determined in Kadhi's Court(Case) No. 143 of 2014 and it is therefore Res-judicata and therefore Section 7 of the Civil Procedure Act is applicable;

3. That the issue of Settling Squatters was an issue agreed and determined with finality and cannot be an issue in this suit;

4. That a competent Court having issued eviction Orders this Court cannot issue injunction orders(and) any aggrieved party can only apply to join the proceedings before the Kadhi's Court and obtain appropriate orders for(the) reason that it is the Court which issued the orders;

5. The Originating Summons is incomplete and incurably defective and should be dismissed with costs.

4. In addition to the Notice of Preliminary Objection, the 1st Defendant Yahya Mohamed Suleiman swore a Replying Affidavit filed herein on 18th December 2017 in which he avers that he is the registered owner of Plot Nos 1523 and 1524/IV/MN and all other sub-divisions emanating from Plot No. Original 151/IV/MN save for the sub-divisions which have been transferred to the respective owners pursuant to a Court Order to give squatters land.

5. It is the 1st Defendant's case that the Plaintiffs invaded his plots sometime this year and since he could not get their details including names, he went to the Court which has been handling the succession matter and obtained an order to evict all the trespassers and that the order has been executed in full.

6. It is the 1st Defendant's case that he came into the property after a successful Petition before the Kadhi's Court of the estate of his late brother Omar Mohammed where the Court found that the property belongs to his late brother and proceeded to vest the entire property in his names. At the time of filing the succession matter, the 1st Defendant was aware of some squatters who were on the land and he decided to offer them 65 acres out of the 100 acre piece of land.

7. Arising from the case, the 1st Defendant and the said Squatters recorded a consent Judgment in Court but the same did not cover the Plaintiffs who had by then not moved onto the suit property. The 1st Defendant avers that the Plaintiffs have not been in possession as alleged or at all and the claim for adverse possession herein is nothing but a mischievous attempt to take away his piece of land.

8. I have considered the application and the response thereto. I have equally considered the submissions and authorities placed before me by the Learned Advocates for the parties.

9. The principal concern of the Preliminary Objection as raised by the 1st and 2nd Defendants is in regard to the issue of res judicata. According to the Defendants this Court has no jurisdiction to hear and determine this matter as the same was the subject of Kadhi's Court Case No. 143 of 2014 in which case it is their contention that the issue of squatters was dealt with.

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

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue 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."

11. That doctrine has been explained in a plethora of decided cases. One such case is the recent decision in The ***Independent Electoral and Boundaries Commission –vs- Maina Kia & 5 Others, Nairobi CA Civil Appeal No. 105 of 2017(2017)eKLR*** where the Court of Appeal held that:-

"Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

a) The suit or issue was directly and substantially in issue in the former suit;

b) The former suit was between the same parties or parties under whom they or any of them claim;

c) Those parties were litigating under the same title;

d) The issue was heard and finally determined in the former suit;

e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

12. That doctrine is meant to lock out from the Court system a party who has had his day in a Court of competent jurisdiction from litigating the same issues against the opponent. From a perusal of the material placed before me, it was clear to me that the parties herein are not the same ones that were engaged in the Mombasa Kadhi's ***Court Succession Cause No. 143 of 2014; In the matter of the Estate of Omar Mohamed (Deceased)***. The Defendants themselves state so at paragraph 8 of the Replying Affidavit of Yahya Mohamed Suleiman. That is the reason they give for the failure to cover the Plaintiffs within the consent Judgment they recorded in Court in which a number of Squatters benefited from 65 acres of the land.

13. That being the case, it is difficult to see how the doctrine of res judicata would apply to the Applicants herein. At any rate, Article 170(5) of the Constitution limits the jurisdiction of the Kadhi's Court to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Court.

14. Nothing was placed before me to demonstrate that this is a matter falling within the restricted ambit of Article 170(5) of the Constitution and it is therefore my finding that the Preliminary Objection as raised by the 1st and 2nd Defendants is misconceived and without any basis in law.

15. Turning to the Application dated 23rd November 2017, the Plaintiffs crave a "mandatory" injunction to issue restraining the defendants from removing, destroying houses/structures, erecting fences or threatening the Plaintiffs with harm and eviction. While the order required from this Court is termed as "mandatory" it was clear to me from a reading of the orders sought that what the Plaintiff craves is in actual sense a prohibitory injunction.

16. As Spry VP stated in regard to prohibitory injunctions in ***Giella –vs- Cassman Brown & Company Ltd(1973) EA 358*** at 360

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

17. That being the case, the first inquiry that this Court must make is to assess whether the Plaintiffs have established a prima facie case with a probability of success. As to what constitutes a prima facie case, the Court of Appeal offered guidance in ***Mrao Limited –vs- First American Bank Ltd & 2 Others(2003)KLR 125*** where Bosire J.A observed as follows:-

“So what is a prima facie case?

I would say that in Civil cases, it is a case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter....But as I earlier endeavored to show, and I cite ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.”

18. In the matter before me, the Applicants claim to be entitled to the suit property having resided thereon for a period of more than 12 years. According to the Plaintiffs, the original owner of the land previously lived with them as residents of Mwatundo area and no information has been given to them by the 1st to 4th Defendants how they acquired their titles without involving the other residents who were born on the land.

19. It is the Plaintiffs case that since their entry into the suit premises was without anybody's permission and/or authority and further, that given that their stay or occupation of the suit premises has been open, continuous and uninterrupted and adverse to the registered owners, they are now entitled to be registered as owners thereof by way of adverse possession.

20. As concerns a claim for adverse possession, Section 38(1) of the Limitation of Actions Act provides as follows:-

“Where a person claims to have become entitled by adverse possession to land.... he may apply to the High Court for an order that he be registered as proprietor of the land or lease in place of the person then registered as proprietor of the land.”

21. The procedure for applying to the Court is given under Order 37 rule 7 of the Civil Procedure Rules which provides as follows:

7(1) An application under Section 38 of the Limitation of Actions shall be made by originating summons.

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

(3) The Court shall direct on whom and in what manner the summons shall be served.

22. I have perused and considered the Affidavit in support of the application. It is the Applicant's case that they have lived on the suit

property for more than 12 years and that they have built their homes thereon. In support of their application, they have attached extracts of the title to the land. While one of the titles shows the 1st Defendant as a registered owner of the suit premises since 4th May 2016, an earlier one in the name of Salmin Khamis Bin Salman shows that there was an earlier Title issued under the Registration of Titles Ordinance on or about 3rd September 1963.

23. In addition, the Plaintiffs have annexed photographs of buildings which they contend were their houses and which they accuse the Defendants of demolishing. The Defendants do not deny that there were such buildings on the suit property. It is however their contention that the Plaintiffs were evicted pursuant to a consent order registered as aforesaid in the Mombasa Kadhi's Succession Cause No. 143 of 2014.

24. I think in the circumstances of this case, the Applicants have demonstrated to a certain degree that they have been residing on the suit property for sometime. Pending an enquiry as to whether by their stay on the land they have acquired rights that entitle them to the land by way of adverse possession, I think it is only fair that the Defendants be restrained in the manner sought herein.

25. Accordingly, I hereby grant a prohibitory injunction in the terms sought at Prayer No. 4 hereof. The Plaintiffs will however not be allowed to construct and/or establish any new houses on the suit properties pending such a time that this matter shall be heard and determined.

26. Orders accordingly.

Dated, signed and delivered at Malindi this 21st day of February, 2019.

J.O. OLOLA

JUDGE